UNIT 8

Late 20th Century Government and Politics

45–50-minute classes | 16–18 classes

UNIT PREVIEW

Structure

Why Teach Late 20th Century Government and Politics

Despite ending totalitarian regimes in World War II, many Americans still faced significant forms of legal discrimination and inequality at home even in the latter half of the 20th Century. The civil rights movement sought to address these injustices and to fulfill America's founding principles of equality before the law based on the inherent equal dignity and natural rights of all people. While it remained to the consciences of individual Americans to decide how they would view their fellow man going forward, in the eyes of the law all people's rights would be protected equally. Even as the civil rights movement worked to secure such rights, new political philosophies and movements emerged with different ends for government and politics. At the same time, the Supreme Court adopted a new judicial approach to cases before it. Following from such movements, cultural changes, and judicial decisions, novel debates arose concerning equality and

liberty in America. Students who are approaching the full responsibilities of adult citizens should be familiar with these late twentieth century historical debates, especially surrounding equality. After all, the principle that "all men are created equal" is the central idea upon which the United States was established.

What Teachers Should Consider

America's victory in World War II catapulted her into a promising but strained unknown. America's status on the world stage was initially unrivaled and then overshadowed by the prospect of nuclear annihilation in the Cold War. Her domestic standard of living was unprecedented. And the experience of having stopped totalitarianism in World War II put in stark relief the unequal treatment of African Americans at home.

The Civil Rights Movement came to a head in the 1950s and 1960s to address the scourges of discrimination, segregation, and unequal protection of rights and enforcement of the law, The movement was diverse in its approaches and its voices. The most prominent was that of Martin Luther King, Jr. His view and perhaps that of the majority of the civil rights movement was that America's injustices against minorities were not the result of America's founding but were rather a departure from the principles of America's founding. As King put it, "When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men, yes, black men as well as white men, would be guaranteed the unalienable rights to life, liberty, and the pursuit of happiness."

Through such rhetoric and the sacrifices of thousands of Americans, a bipartisan consensus was reached in the passage of the 1964 Civil Rights Act and subsequent Voting Rights Act in 1965.

Other views also circulated and grew in prominence during the1960s and 1970s, ones that cast racism and prejudice as the founding ideas of America. New political philosophies also emerged to propose different ends and means for government. And the place of protest and political activism reshaped American politics.

Meanwhile, the United States Supreme Court handed down a number of decisions that tended to mirror or give legal standing to these new political philosophies. The tumult surrounding the Vietnam War and the Watergate Scandal embroiling American politics seemed to justify the recasting of America's founding and undermined the argument that America was somehow unique in world history. New debates over equality and liberty also came to restructure American political discourse. As America entered the 21st century, many of these debates were expressed in new ways while the scope of the American government grew to new proportions.

How Teachers Can Learn More

TEXTS

The U.S. Constitution: A Reader, ed. Hillsdale College Politics Faculty	Chapter 11
"A Letter to the New Left," C. Wright Mills	
Taking Rights Seriously, Ronald Dworkin	
American Government and Politics, Joseph Bessette and John Pitney	Chapters 5, 6, 15

ONLINE COURSES | Online.Hillsdale.edu

Constitution 101
Constitution 201
Civil Rights in American History
The U.S. Supreme Court

Primary Sources Studied in This Unit

Plessy v. Ferguson
Brown v. Board of Education
"I Have a Dream," Martin Luther King Jr.
"Letter from Birmingham Jail," Martin Luther King Jr.
Port Huron Statement, Students for a Democratic Society
"Repressive Tolerance," Herbert Marcuse
A Theory of Justice, John Rawls
Commencement address at Howard University, Lyndon Johnson
Regents of the University of California v. Bakke
Roe v. Wade
Planned Parenthood of Southeastern Pennsylvania v. Casey, "Mystery of Life" passage
Griswold v. Connecticut
Abrams v. United States, Dissent by Justice Holmes
Gitlow v. New York, Dissent by Justice Holmes
United States v. Carolene Products Company, Footnote 4
Brandenburg v. Ohio
Everson v. Board of Education
Engel v. Vitale
Cohen v. California
Buckley v. Valeo
District of Columbia v. Heller

LESSON PLANS, ASSIGNMENTS, AND FORMATIVE QUIZ

Lesson 1 — The Civil Rights Movement

5-6 classes

Lesson Objective

Students learn about the various ideas, figures, and accomplishments of the civil rights movement in the 20th century.

Online Courses for Teachers | Online.Hillsdale.edu

Civil Rights in American History	Lectures 7 and 8
The U.S. Supreme Court	Lecture 8

Primary Sources

Students are to read or, if they have previously read, review the following primary sources. While reading, students should annotate these sources. For particularly challenging texts or if the class is offered earlier in high school, the teacher may wish to provide students with guided reading questions to assist with comprehension, clarity, and direction. Using their annotations and any guided reading questions, students should come to class prepared to participate in a seminar conversation on each text.

Plessy v. Ferguson
Brown v. Board of Education
"I Have a Dream," Martin Luther King Jr.
"Letter from Birmingham Jail," Martin Luther King Jr.

Terms and Topics

discrimination	civil rights movement
segregation	"promissory note"
"separate but equal"	color-blind
civil rights	Civil Rights Act of 1964

Questions for the American Mind

- What was the civil rights movement?
- What is the distinction between natural and civil rights?
- How did Chief Justice Earl Warren's opinion in *Brown v. Board of Education* depart from Justice John Marshall Harlan's dissent in *Plessy v. Ferguson*?*
- How did Martin Luther King Jr. justify the civil rights movement with the Declaration of Independence and the principles of the American founding?
- What did King mean by the "promissory note"?
- In what ways and by what means did the civil rights movement seek to change laws?

*A previous version incorrectly attributed Chief Justice Earl Warren's opinion in *Brown v. Board of Education* to Thurgood Marshall.

- In what ways did the civil rights movement seek to change the private consciences of individuals?
- Against which forms of discrimination did the early civil rights movement work?
- What were the different internal disagreements among participants in the civil rights movement?
- How did the civil rights movement address discrimination by businesses?
- Questions from the U.S. Civics Test:
  - Question 112: What did the civil rights movement do?
  - Question 113: Martin Luther King Jr. Is famous for many things. Name one.

KEYS TO THE LESSON

Students should understand the fundamental link between the civil rights movement as presented by Martin Luther King Jr. and the founding principles of the United States, namely, the legal equality of each person and his or her possession of natural rights. King saw the civil rights movement as fulfilling the "promissory note" that the American Founders had set forth in the Declaration of Independence, that the Constitution sought to defend, and that abolitionists and the cause of the Union fought to fulfill in the Civil War era. The civil rights movement ensured that the law would be applied equally in the protection of each person's rights, regardless of skin color. In tandem, King called also for a conversion in the heart of each American, a conversion to color-blindness that only the individual's own free will could ultimately complete.

Teachers might best plan and teach the Civil Rights Movement with emphasis on the following approaches:

- Begin the lesson with a review of the various historical forms of legal discrimination, segregation, and unequal application of the law. This treatment should include vivid descriptions and explanations of the real world and personal effects of such legal actions for millions of Americans, especially African Americans. From this point, the majority of the lesson is spending several class periods engaged in the primary sources, especially the works of Martin Luther King, Jr.
- Explain to students how the Supreme Court argued in *Plessy v. Ferguson* that segregation based on race, so long as facilities were the same, would be considered "equal." Students should think about Justice Harlan's dissent, however, which appealed to the understanding of equality as found in the Declaration in order to critique the ruling, for the government was still making judgments based on a group identified by skin color instead of treating each person equally under the law.
- Help students to understand the significance of *Brown v. Board of Education*, especially once it was gradually enforced in the years following the decision. The court arrived at a judgment that aligned with the founding understanding of equality, even though it did not cite the founding principles but instead social science. Consider whether or not basing the decision on social science instead of the founding principles left open the possibility for government discrimination in different forms going forward.
- Consider with students the goals and means of the civil rights movement in the terms in which Martin Luther King Jr. set them. He argued that the civil rights movement was meant to redeem the "promissory note" of the Declaration of Independence and Reconstruction Amendments that founded America on an idea: that since all men are created equal, justice demands that the rule of law be applied equally to all citizens. The civil rights movement, in King's view, thus carried on the legacy of the founders, Frederick Douglass, and Abraham Lincoln. The two primary sources from King outline this view, its ties to the natural law, and its appeals to the Christian roots of such a political philosophy.

- Spend time outlining what was meant by equality during the civil rights movement, both politically and philosophically. On the civil or political side, the civil rights movement's appeal to equality in the Declaration of Independence demanded the equal application of the rule of law and the end to laws that established and enforced segregation and discrimination. The rights of all citizens were to be protected equally instead of protecting the rights of only some and not others based on the color of their skin. This was the great achievement of the Civil Rights Act of 1964. On the philosophical or moral side, Martin Luther King, Jr. also as a pastor called for a transformation in the heart of each American. For in addition to reforms in law, a color-blind society requires that each person would decide to view all people as equals in their humanity and rights.
- Clarify with students how the civil rights movement largely focused on the government's resolve and ability, based on the principle of equality, to enforce equal treatment as opposed to the creation of equity, that is, to enforcing an equality of results and outcomes.
- Revisit some of the historical debates during the latter part of the civil rights movement. For example, although Martin Luther King, Jr. appealed to the individual conscience and not merely the force of law to bring about a color-blind society, some looked to the force of law to change individual consciences.* In these historical debates, some asserted that the letter or enforcement of the Civil Rights Act with respect to public accommodation, for example, tried to force a change in individual opinions, while others argued that some private businesses operate in the public sphere and are therefore subject to public laws.
- Consider the different approaches to political action taken during the civil rights movement. The majority of the movement changed hearts and minds through nonviolent disobedience to unjust laws. They argued that the law was unjust and therefore did not deserve to be followed, and that they would be willing to suffer the legal consequences for breaking it with the hope that others would see by their imprisonment just how unjust the law was. Another segment of the movement advocated more aggressive and sometimes even violent actions, insisting that the whole American legal system was unjust and that revolutionary tactics were therefore justified.

Strengthening Understanding: Post-Lesson Assignment

Assignment: Explain the relationship between the Civil Rights Movement as led by Martin Luther King Jr. and the principles of the American founding (3–4 paragraphs).

*This sentence has been revised to make it clear to the reader that King believed Civil Rights reform required changing laws as well as hearts and minds.

Lesson 2 — Recent Political Philosophy

4-5 classes

Lesson Objective

Students learn about the new political philosophies that emerged during the later 20th Century and their various views on rights and the purpose of government.

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Civil Rights in American History	Lectures 7, 8, 9
The U.S. Supreme Court	Lecture 8
Constitution 201	Lecture 8

Primary Sources

Students are to read or, if they have previously read, review the following primary sources. While reading, students should annotate these sources. For particularly challenging texts or if the class is offered earlier in high school, the teacher may wish to provide students with guided reading questions to assist with comprehension, clarity, and direction. Using their annotations and any guided reading questions, students should come to class prepared to participate in a seminar conversation on each text.

Port Huron Statement, Students for a Democratic Society
"Repressive Tolerance," Herbert Marcuse
A Theory of Justice, John Rawls
Commencement address at Howard University, Lyndon Johnson
Regents of the University of California v. Bakke

Terms and Topics

personal fulfillment
culture conflict
moral judgments
self-expression
middle class
participatory democracy
social democracy
socialism
the New Left
identity politics
protest movements
feminism
pacifism
environmentalism
political correctness

QUESTIONS FOR THE AMERICAN MIND

- What were the chief characteristics of each of the following in the late 20th century:
  - academia
  - moral and political philosophy
  - student activism
  - critiques of traditional cultural norms
  - feminism
  - environmentalism
- How did the New Left think differently about rights and the ends of government compared to the Founders?
- What was the connection between being accepted in society and one's personal fulfillment?
- How did some believe moral judgments based on tradition, religion, or cultural norms were impediments to personal fulfillment and, therefore, violations of rights?
- What was the role of the middle class in these debates?
- To what extent did ideas developed from the writings of Karl Marx inform these new political philosophies and movements?
- What is the relationship between the class conflict within Marxist thought and the cultural conflicts that emerged in the late 20th century?
- What government policies did some movements support in order to bring about cultural change, liberation, and personal fulfillment?
- What is the significance of protest movements? How did these manifest themselves in the 1960s?
- What roles did pacifism and environmentalism play in the 1960s and in the decades since?
- By the late 20th Century, how had Supreme Court jurisprudence changed since Justice John Marshall Harlan's dissent in *Plessy v. Ferguson*?
- Is there a difference between equality of opportunity and equality of result(s) (or equity)?

KEYS TO THE LESSON

The purpose of this lesson is to canvas briefly some of the political philosophies and movements that emerged in the late 20th century. Many of these philosophies argued for different conceptions of human society, both in its ends and its means. European thinkers who were generally more critical of the ideas of equality, natural rights, consent, and limited government informed many of these movements. They saw traditional morality, self-government, and natural rights largely as artificial constructs used to perpetuate what they considered the injustices of capitalism. In a country like the United States with a large and politically engaged middle class, the approach of radical social revolution based on the traditional class distinctions that dominated Europe was not available: the ever-expanding breadth of America's middle class and relative ease of economic opportunity and mobility made the United States much less susceptible to class-based political warfare. Instead, new philosophies were developed that looked to exploit or create different kinds of group identities within American society. This shift from equal rights of each individual grounded in nature toward unequal rights according to one's group identity (e.g., race or sex) had implications for the role and function of government.

Teachers might best plan and teach Recent Political Philosophy with emphasis on the following approaches:

- Review with students from the beginning of the course the philosophical premises on which America was established. Ask students to consider once more the claims to objective truth and objective morality on which the American regime rests. On one hand, thinkers in the West since

ancient times had seen in nature and in human nature a basic objective reality that the human mind is capable of recognizing and understanding, and upon which government could be based. On the other hand, the founders also argued for the existence of an objective human good, something toward which all human actions should aim and in light of which human beings should act freely in the pursuit of their happiness, but which government had no power to control unless a pursuit violated the natural rights of an individual. It is important to review both of these facets to truth and morality as they relate to establishing self-government and to what a government may and may not do. Many critiques in the late 20th century challenged these presumptions.

- Proceed to reviewing with students the Progressive movement from its philosophical origins through its expression during the Wilson Administration and then through the New Deal.
- The era of progressivism sometimes known as the New Left may best be considered by focusing on the following areas of its thought.
    - First, the New Left argued against assertions of objective truth and morality. Objective reality was inaccessible and such truth claims were replaced by the personal experiences and views of individuals. Truth was understood to be relative to the values of each individual. This held also for truth about the rightness or wrongness of actions, as each person could determine for themselves what was right and wrong. The New Left accounted for historical claims of objectivity as merely constructions put in place by those in power to control those who were not in power. It may be worth exploring that similar critiques are found in the thought of previous European thinkers Jean-Jacques Rousseau, Georg Hegel, and Karl Marx.
    - Second, these arguments meant the New Left understood rights and equality differently than the founding generation. "Natural" rights meant that rights arose from an objective truth found in man's shared nature, what the founding generation meant by "the Laws of Nature and Nature's God" in the Declaration of Independence. Since objectivity did not exist, the New Left argued, there was no such thing as a "natural" right and equality based on the equal possession of natural rights did not exist. Likewise, if there is no truth in nature, then it makes no sense to say that all men were equal in any meaningful or fundamental way.
    - Third, and conversely, since each person defined their own sense of identity in place of an objective truth, equality exists only among other people who expressed the same identity (forming a group), not among all people on account of their shared humanity.
    - Fourth, therefore, the role of government cannot be, as the founders had asserted, to secure the natural rights of all individuals who are equal by nature, since the idea of such rights and such equality are simply a fabrication meant to uphold the power of oppressors. Instead, government, in order to achieve equity, is to identify and advance—sometimes by treating groups unequally—the various rights claims that arise out of the different groups with which one identifies. This is what is meant by "identity groups" and "identity politics."
- Consider how these positions result in a critique of the American founding. For the New Left, the founding may be reduced to an effort by those who are in power to maintain their power by developing a false system of objectivity on which to base civil society and self-government. Some would advocate for a complete overthrow of this system, but most on the New Left sought to modify and use the existing government and political system to protect rights, but group rights as opposed to natural rights.

- Explain how many individuals within the New Left and its various causes argued that the ultimate purpose of government was not to protect fundamental rights and liberties (as in the founding), or even to lift all people economically (as in early and New Deal progressivism). Instead, the role of politics, the government, and bureaucracy was to identify, protect, and expand group rights based on group identity, which were often in flux. The question remained, "To protect group rights from what?" For many thinkers, the main threat to group rights came from those who held views or expressed beliefs that there was an objective moral standard to human behavior, since views or laws based on objective moral standards led to unequal treatment, in the view of this new philosophy, of groups who held otherwise. Inequality, therefore, was not the result of laws failing to protect natural rights, but was born of the prejudices that the oppressor group imposed on the oppressed group when asserting objective standards for moral conduct.
- Consider the extent to which such views were informed by the thought of Karl Marx. Instead of focusing on economics and class conflict, these movements generally focused on the other supports (e.g., family, religious belief, culture, principles of self-government) they believed were utilized by the traditional middle class in their practice of capitalism to oppress the less fortunate.
- Read with students excerpts from the Port Huron Statement and "Repressive Tolerance." The above-mentioned ideas are captured in each work, and the works outline certain practical ideas for adoption. One such action was to outlaw intolerant thought and speech as oppressive to an individual's personal fulfillment.
- Read with students John Rawls's A Theory of Justice. Highlight with students Rawls's argument that if everybody acknowledged their advantages and privileges, they would live so as to prioritize the economically and socially disadvantaged . Note his view that it is the job of government to take away advantages from those who do not recognize their advantages and privileges and redistribute not merely material resources but also societal and cultural honor and respect—the very sources of a human being's sense of dignity and self. Ask students what this means for the American founding's principle of inherent human dignity of each person, as articulated in the words "all men are created equal."
- Help students understand recent debates about affirmative action. Discuss the traditional definition of affirmative action as actions (especially in law and government policy) that treat some groups in a more beneficial way than it does others in order to address real or perceived unequal group outcomes. Attempts to address these injustices are usually well intended, and individuals, groups, or organizations in their personal or private capacities have long worked to correct those injustices, especially concerning those unable to defend themselves. The civic question involves whether assembling the powers of the government to correct the consequences of injustice is an extension of America's founding principles or if it may result in a new injustice. This is a worthwhile historical debate that may arise in this lesson.
- Make clear for students how the ideas of liberation and social justice were important in the modern feminist movement and the sexual revolution. Assertions of new rights to privacy and self-expression against the moral judgments of parents, religious institutions, and established moral codes coalesced into group identity. Liberation and justice for the social group replaced these traditional institutions as individuals expressed their own identities and found community with others who did the same.
- Share with students the role of communal acceptance through activism and protest that took hold during the 1960s, whether it was a later element of the civil rights movement, in opposition to the Vietnam War, or for environmentalism. On the environmentalism point, consider that what was unique about this form of environmentalism was the placement of environmental concerns

always and absolutely above human concerns and the willingness to use government force to carry out such priorities.

Strengthening Understanding: Post-Lesson Assignment

Assignment: Explain the moral and political philosophy of the New Left, particularly as it concerns the understanding of rights and the new realms of government activity necessary to fulfill such an understanding (2–3 paragraphs).

Unit 8 — Formative Quiz

Covering Lessons 1–2
10–15 minutes

DIRECTIONS: Answer each question in at least one complete sentence.

1. How did Martin Luther King Jr. justify the civil rights movement with the Declaration of Independence and the principles of the American founding?

2. In what ways and by what means did the civil rights movement seek to change laws?

3. How did the New Left think differently about rights and the ends of government compared to the Founders?

4. How did some believe moral judgments based on tradition, religion, or cultural norms were impediments to personal fulfillment and, therefore, violations of rights?

5. What government policies did some movements support in order to bring about cultural change, liberation, and personal fulfillment?

Lesson 3 — Major Supreme Court Decisions

4-5 classes

Lesson Objective

Students learn about the major Supreme Court decisions of the late twentieth century and their relationship to civil rights, civil liberties, cultural changes, and the role of the Court itself.

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Constitution 201	Lectures 7 and 8
The U.S. Supreme Court	Lectures 2, 4, 5, 6, 7, 10

Texts

Students are to read or, if they have previously read, review the following primary sources. While reading, students should annotate these sources. For particularly challenging texts or if the class is offered earlier in high school, the teacher may wish to provide students with guided reading questions to assist with comprehension, clarity, and direction. Using their annotations and any guided reading questions, students should come to class prepared to participate in a seminar conversation on each text.

Roe v. Wade
Planned Parenthood of Southeastern Pennsylvania v. Casey, "Mystery of Life" passage
Griswold v. Connecticut
Abrams v. United States, Dissent by Justice Holmes
Gitlow v. New York, Dissent by Justice Holmes
United States v. Carolene Products Company, Footnote 4
Brandenburg v. Ohio
Everson v. Board of Education
Engel v. Vitale
Cohen v. California
Buckley v. Valeo
District of Columbia v. Heller

Students should also read the below texts and come to class prepared to complete a short reading quiz on the contents of the readings. The reading quiz should be based on questions on pages 171–172 of *American Government and Politics.*

American Government and Politics	Chapter 5

Terms and Topics

originalism	"preferred freedoms"
living Constitution	Bill of Rights
judicial activism	14th Amendment

civil rights
Due Process Clause
incorporation doctrine
criminal procedure
rights of criminals and the accused
feminism
sexual revolution
right to privacy
right to abortion
Equal Protection Clause
religious liberty
free exercise of religion
Establishment Clause
freedom of speech
freedom of the press
rights to assembly and petition

Questions for the American Mind

- What kinds of cases did the Supreme Court decide to focus on in the late twentieth century?
- What is the difference between originalism and a living Constitution?
- How has the Supreme Court utilized the incorporation doctrine to apply the Bill of Rights to the states?
- What was the relationship between cultural and moral changes and the Supreme Court's review, discovery, and incorporation of rights?
- How did family structure and supports change with the culture during the 1960s and 1970s?
- On what basis were rights to privacy and to abortion asserted by the Supreme Court?
- What is feminism?
- What have been the arguments and motivations for the liberalization of immigration policy?
- How has freedom of religion been both curtailed and protected by recent Supreme Court decisions?
- How have freedom of speech and freedom of the press been both curtailed and protected by recent Supreme Court decisions?

Keys to the Lesson

In recent decades, the Supreme Court shifted away from understanding the Constitution in its original meaning as intended by those who wrote and ratified the Constitution and relied more on an evolving or "living Constitution" view. It sought to meet the questions and challenges of the day with a degree of doubt concerning both the permanency of the Founders' views and the Court's responsibility to apply them definitively despite contemporary circumstances. The Court has increasingly relied on the latest views of academic thought, contemporary science, and a general pragmatism in deciding cases, rather than attempting to apply the original meaning of the Constitution and its amendments. These novel approaches, moreover, were applied amidst many meaningful cultural changes, both shaping and being influenced by them.

Teachers might best plan and teach Major Supreme Court Decisions with emphasis on the following approaches:

- Review with students the role of the Supreme Court as one branch of government designed to uphold the basic rights and framework of the United States Constitution. The role of the Court in our constitutional system is to adjudicate the cases and controversies that come before the Court in light of the Constitution.

- Set up this lesson by explaining to students the new focus the Supreme Court would have in the second half of the twentieth century as articulated in its fourth footnote in *United States v. Carolene Products Co.* The Supreme Court in this footnote stated that having repeatedly upheld the government's ability to regulate nearly any activity that has an economic effect, the Court would in future years shift away from cases concerning economic activity. Instead, the Court would become more concerned with civil liberties, the democratic process, and questions of discrimination. Rather than simply judging as disputes arise before it, the Court would now choose cases that tacked toward these issues, one component of what some would criticize as "judicial activism."
- Explain how the new direction and what some considered "activism" that the Supreme Court would take led to its reevaluating a host of ideas about rights. The result was that some rights were expanded while others were restricted. Undergirding it all were evolving standards of what is just and what freedom demands. The overall message from the Court was generally that the government cannot judge or base its laws on how people decide to use their freedom. For example, the Court would utilize the 14th Amendment to discover more and greater freedoms. Some argued that this approach challenged the moral philosophy of the founding generation.
- Spend some time with students to consider the changes that the Supreme Court wrought in criminal law. In particular, focus on the incorporation of civil liberties related to criminals by applying the due process clause of the 14th Amendment to expand the rights protected in the 4th, 5th, 6th, and 8th amendments. This would include the exclusionary rule, Miranda rights, and the right to an attorney at the taxpayers' expense. While many rulings make logical sense, their combination, alongside the shift in cultural focus away from protecting the innocent toward rehabilitating the criminal, led some to conclude that the rulings were at least somewhat responsible for higher crime rates during the 1970s and '80s. This challenged the founding view that while rehabilitation is necessary, it must not come at the expense of protecting the innocent.
- Consider with students the Supreme Court's assertion of a new right to privacy. In and of itself, the Constitution, by implication, also guarantees a right to privacy. The shift that the Supreme Court made through *Griswold v. Connecticut*, *Roe v. Wade*, and *Planned Parenthood v. Casey* was that the government did not have power to prevent private activities that might harm others (or society in general) simply by claiming that such activities were untethered from nature. In these instances, preventing or aborting the natural result of a natural biological act—one that normally promotes family life and the procreation of future citizens—was deemed to be legal. The Court indicated that the public interest for family life and the country's population do not constitute a government interest or power to limit practices that inhibit them (e.g., abortion), as such limits on what were judged to be private practices infringed on the individual's personal fulfillment.
- Read with students aloud in class and discuss the paradigmatic statement on not only new understandings of liberty, truth, and justice, but also how the Supreme Court ushered in such moral and political shifts: Justice Kennedy's "Mystery of Life" passage from *Planned Parenthood v. Casey*. Students should consider the extent to which this argument for the relativity of truth is compatible with the American founding. That is, does *liberty* so construed become separated from the nature of things, from truth, and from the prerequisites for a free and just society that respects the inherent human dignity of each person? To what extent is this conception of liberty compatible with reason, logic, justice, and equality, and with the experience of our daily lives?
- Track with students the changes in the right to freedom of speech. Although there was some question regarding the protection of revolutionary speech in the founding generation, the

understanding that political speech and written arguments were permissible was widely held. Indeed, America's history catalogs the remarkable and continuous protection of the freedom of speech as a fundamental component to a free society. The greatest shift in freedom of speech came in the 1960s and afterwards as the Supreme Court in *Cohen v. California* established a new right to freedom of expression. "Expression" was again separate from a moral foundation as the Court accepted expressive speech as another form of the new focus on personal self-fulfillment in the eyes of society. The liberalization of laws curbing obscenity in public and the publication of obscene materials were the immediate conduits for this change.

- Help students to see the changes in the freedom of religion in the last several decades. The First Amendment's free exercise clause and establishment clause capture the Founders' general consensus on religious freedom. It was necessary that individuals be permitted to express their religion so long as it did not infringe on the rights of another. And it was necessary that there not be an official church of the United States at the national level. The question of official churches at the state level varied from the actual existence of official churches to those who argued against them. But what is equally important is the emphasis the Founders placed, as evident in their speeches and writings, on a people practicing religion for free self-government. Review with students the Founders' various statements on this point from Unit 1. They held the general position that government should express a mild support and encouragement of religion, so long as all were free to practice their own religion. Beginning in the New Deal and accelerating in the 1960s, the Supreme Court began to limit government support for religion. The shift first came in requiring schools to become more secular, which tracked with the general secularization of the country and culture. Government could not support, even indirectly, the promotion of religious belief that held to certain moral judgments about others, especially about groups perceived to be oppressed. The Court's strict application of the establishment clause has led some to argue has curtailed the free exercise clause in certain cases.
- Discuss the arguments made in recent cases on marriage, sex, and the family between removing such decisions from state legislatures and localities and concentrating them in the federal courts or leaving them to local legislatures to address.
- Consider with students attempts to limit the right to bear arms but also the Supreme Court's general reluctance to hear cases that infringe on this right. At the founding, the essential natural law purposes of the right to bear arms was both for personal self-defense and for guarding against and preventing tyranny. Some argue that the latter purpose has operated as a deterrence that has slowed attempts to limit other rights in recent decades while others argue for greater limits on this right.
- Consider with students whether the inconsistency in these shifts concerning rights is problematic. For instance, some argue that relativistic views and actions assert as much of a moral claim as views and actions rooted in traditional religion or objective reality and nature, but that the former have generally been advanced at the expense of the latter. When views on liberty that are relativistic thus meet with understandings of liberty rooted in a claim to objective truth, students should consider how the issue can logically be resolved, and whether it has been resolved. In the United States, in light of both its unprecedented achievements for human life and the first principles on which it was founded, can relativism effectively replace the principles on which it was founded? Why or why not? What would be the consequences? Has this been tried before in other times or countries?

- In addition to the cases highlighted above, students may also benefit from summary explanations of the following cases: *Gideon v. Wainright*; *Miranda v. Arizona*; *in re Gault*; *Tinker v. Des Moines*; *Hazelwood v. Kuhlmeier*; *United States v. Nixon*; *Bush v. Gore*; *Texas v. Johnson*; *Mapp v. Ohio*; *Obergefell v. Hodges*; *Dobbs v. Jackson Women's Health Organization*; *Kennedy v. Bremerton School District*; *Carson v. Makin*.

Strengthening Understanding: Post-Lesson Assignment

Assignment: Explain the major Supreme Court rulings of the late twentieth century pertaining to criminal rights, privacy, speech, and religion (2–3 paragraphs).

APPENDIX A

Study Guide

Test

Writing Assignment

Study Guide — Late 20th Century Government and Politics Test

Unit 8

Test on _____

Terms and Topics

Explain each of the following and the context in which it was discussed during this unit's lessons.

discrimination
segregation
separate but equal
civil rights
civil rights movement
promissory note
color-blind
the New Left
Marxism
personal fulfillment
culture conflict
moral judgments
middle class
participatory democracy
social democracy
socialism
identity politics
protest movements
feminism
pacifism
environmentalism
political correctness
originalism
living Constitution
preferred freedoms
Bill of Rights
14th Amendment
Due Process Clause
incorporation doctrine
criminal procedure
rights of criminals
sexual revolution
right to privacy
right to abortion
Equal Protection Clause
religious liberty
free exercise of religion
Establishment Clause
freedom of speech
freedom of the press
rights to assembly and petition

Primary Sources

Explain the main arguments in each of the following sources and their significance to our understanding of late twentieth century government and politics.

Plessy v. Ferguson
Brown v. Board of Education
"I Have a Dream," Martin Luther King Jr.
"Letter from Birmingham Jail," Martin Luther King Jr.
Port Huron Statement, Students for a Democratic Society
"Repressive Tolerance," Herbert Marcuse
A Theory of Justice, John Rawls
Commencement address at Howard University, Lyndon Johnson
Regents of the University of California v. Bakke
Roe v. Wade
Planned Parenthood v. Casey, "Mystery of Life" passage

Questions for the American Mind

Based on notes from lessons and seminar conversations, answer each of the following.

Lesson 1 | The Civil Rights Movement

- ☐ What was the civil rights movement?
- ☐ How did Chief Justice Earl Warren's opinion in *Brown v. Board of Education* depart from Justice John Marshall Harlan's dissent in *Plessy v. Ferguson*?
- ☐ How did Martin Luther King Jr. justify the civil rights movement with the Declaration of Independence and the principles of the American founding?
- ☐ What did King mean by the "promissory note"?
- ☐ In what ways did the civil rights movement seek to change laws?
- ☐ In what ways did the civil rights movement seek to change the private consciences of individuals?
- ☐ Against which forms of discrimination did the early civil rights movement work?
- ☐ What were the differences between the early and late stages of the civil rights movement?
- ☐ How did the civil rights movement address discrimination by businesses?

Lesson 2 | Recent Political Philosophy

- ☐ What were the chief characteristics of each of the following in the late 20th century:
  - academia
  - moral and political philosophy
  - student activism
  - critiques of traditional cultural norms
  - feminism
  - environmentalism
- ☐ To what extent did these various movements make up what came to be called the New Left?
- ☐ What was the connection between being accepted in society and one's personal fulfillment?
- ☐ How did some believe moral judgments based on tradition, religion, or cultural norms were impediments to personal fulfillment and, therefore, violations of rights?
- ☐ What was the role of the middle class in these debates?
- ☐ To what extent did ideas developed from the writings of Karl Marx inform these new political philosophies and movements?
- ☐ What is the relationship between the class conflict within Marxist thought and the cultural conflicts that emerged in the late 20th century?
- ☐ What government policies did some movements support in order to bring about cultural change, liberation, and personal fulfillment?
- ☐ What is the significance of protest movements? How did these manifest themselves in the 1960s?
- ☐ What roles did pacifism and environmentalism play in the 1960s and in the decades since?
- ☐ By the late 20th Century, how had Supreme Court jurisprudence changed since Justice John Marshall Harlan's dissent in *Plessy v. Ferguson*?

Lesson 3 | Major Supreme Court Decisions

- ☐ What kinds of cases did the Supreme Court decide to focus on in the late twentieth century?
- ☐ What is the difference between originalism and a living Constitution?
- ☐ How has the Supreme Court utilized the incorporation doctrine to apply the Bill of Rights to the states?
- ☐ What was the relationship between cultural and moral changes and the Supreme Court's review, discovery, and incorporation of rights?
- ☐ How did family structure and supports change with the culture during the 1960s and 1970s?
- ☐ On what basis were rights to privacy and to abortion asserted by the Supreme Court?
- ☐ What is feminism?
- ☐ What have been the arguments and motivations for the liberalization of immigration policy?
- ☐ How has freedom of religion been both curtailed and protected by recent Supreme Court decisions?
- ☐ How have freedom of speech and freedom of the press been both curtailed and protected by recent Supreme Court decisions?

Name_____ Date_____

Test — Late 20th Century Government and Politics

Unit 8

Terms and Topics

Explain each of the following and the context in which it was discussed during this unit's lessons.

1. discrimination

2. separate but equal

3. civil rights

4. promissory note

5. color-blind

6. Marxism

7. culture conflict

8. political correctness

9. environmentalism

10. living Constitution

11. preferred freedoms

12. right to privacy

Primary Sources

Explain the main arguments in each of the following sources and the significance of each to understanding late twentieth century government and politics.

13. *Brown v. Board of Education*

14. "I Have a Dream," Martin Luther King Jr.

15. *Planned Parenthood v. Casey*, "Mystery of Life" passage

Questions for the American Mind

Answer each of the following. Complete sentences are not necessary, but correct spelling and writing should be employed, and responses must fully answer each question.

16. How did Chief Justice Earl Warren's opinion in *Brown v. Board of Education* depart from Justice John Marshall Harlan's dissent in *Plessy v. Ferguson*?

17. Against what forms of discrimination did the early civil rights movement work?

18. How did Martin Luther King Jr. justify the civil rights movement with the Declaration of Independence and the principles of the American founding?

19. In what ways did the civil rights movement seek to change laws?

20. In what ways did the civil rights movement seek to change the private consciences of individuals?

21. What were the differences between the early and late stages of the civil rights movement?

22. What was the connection between being accepted in society and one's personal fulfillment?

23. How did some believe moral judgments based on tradition, religion, or cultural norms were impediments to personal fulfillment and, therefore, violations of rights?

24. What was the role of the middle class in these debates?

25. What is the relationship between the class conflict of Marxism and the cultural conflicts that emerged in the Late 20th century?

26. What is the difference between originalism and a living Constitution?

27. What government policies did some movements support in order to bring about cultural change, liberation, and personal fulfillment?

28. By the late 20th Century, how had Supreme Court jurisprudence changed since Justice John Marshall Harlan's dissent in *Plessy v. Ferguson*?

29. What kinds of cases did the Supreme Court decide to focus on in the late twentieth century?

30. How has the Supreme Court utilized the incorporation doctrine to apply the Bill of Rights to the states?

31. What was the relationship between cultural and moral changes and the Supreme Court's review, discovery, and incorporation of rights?

32. On what basis were rights to privacy and to abortion asserted by the Supreme Court?

33. How has freedom of religion been both curtailed and protected by recent Supreme Court decisions?

34. How have freedom of speech and freedom of the press been both curtailed and protected by recent Supreme Court decisions?

Writing Assignment — Late 20th Century Government and Politics

Unit 8

Due on _____

DIRECTIONS

Citing primary sources and conversations from class in your argument, write a 500–800-word essay answering the question:

> To what extent and in which ways did the Civil Rights Movement, recent political philosophies, and Supreme Court decisions in the late 20th century engage with the ideas of the Declaration of Independence and Constitution as understood by the founding generation?

APPENDIX B

Primary Sources

The United States Supreme Court

Martin Luther King Jr.

Students for a Democratic Society

Herbert Marcuse

John Rawls

Oliver Wendell Holmes Jr.

Lyndon Johnson

JUSTICE HENRY BILLINGS BROWN AND JUSTICE JOHN MARSHALL HARLAN

Homer A. Plessy v. John H. Ferguson

U.S. SUPREME COURT MAJORITY AND DISSENTING OPINIONS EXCERPTS

May 18, 1896
Supreme Court | Washington, D.C.

BACKGROUND

A majority of the Supreme Court delivered this ruling on a Louisiana law requiring separate railroad cars for African Americans. Justice John Marshall Harlan offered is dissenting view.

GUIDING QUESTIONS

1. On what two constitutional grounds is the law being challenged, and why does the Court say that neither applies?

2. How does Justice Brown respond to the charge that enforced separation "stamps the colored race with a badge of inferiority"?

3. According to Justice Harlan's dissent, what is the relationship between civil rights and race under the Constitution?

4. According to Harlan, what was the original purpose of the Louisiana statute in question?

5. What is the standing of the white race in America, as Harlan sees it?

6. Why is "equal accommodation" of citizens of different races ultimately problematic for Harlan, in terms of freedom?

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

ANNOTATIONS **NOTES & QUESTIONS**

JUSTICE BROWN delivers the opinion of the Court.

[Homer Plessy] was a citizen of the United States and a resident of the State of Louisiana, of mixed descent, in the proportion of seven eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every recognition, right, privilege and immunity secured to the citizens of the United States of the white race by its Constitution and laws; that, on June 7, 1892, he engaged and paid for a first class passage on the East Louisiana Railway from New Orleans to Covington, in the same State, and thereupon entered a passenger train, and took possession of a vacant seat in a coach where passengers of the white race were accommodated; that such railroad company was incorporated by the laws of Louisiana as a common carrier, and was not authorized to distinguish between citizens according to their race. But, notwithstanding this, [Plessy] was required by the conductor, under penalty of ejection from said train and imprisonment, to vacate said coach and occupy another seat in a coach assigned by said company for persons not of the white race, and for no other reason than that petitioner was of the colored race; that, upon petitioner's refusal to comply with such order, he was, with the aid of a police officer, forcibly ejected from said coach and hurried off to and imprisoned in the parish jail of New Orleans, and there held to answer a charge made by such officer to the effect that he was guilty of having criminally violated an act of the General Assembly of the State, approved July 10, 1890,[1] in such case made and provided.

[Plessy] was subsequently brought before the recorder of the city for preliminary examination and committed for trial to the criminal District Court for the parish of Orleans, where an information was filed against him in the matter above set forth, for a violation of the above act, which act [Plessy] affirmed to be null and void, because in conflict with the Constitution of the United States . . . .

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

ANNOTATIONS **NOTES & QUESTIONS**

1. That it does not conflict with the Thirteenth Amendment, which abolished slavery and involuntary servitude, except as a punishment for crime, is too clear for argument. Slavery implies involuntary servitude—a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services. . . .

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

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

   The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.[2] The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced. . . .

ANNOTATIONS **NOTES & QUESTIONS**

. . . [W]e think the enforced separation of the races, as applied to the internal commerce of the State, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws within the meaning of the Fourteenth Amendment. . . .

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals. As was said by the Court of Appeals of New York in *People v. Gallagher*, 93 N. Y. 438, 448, "this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all of the functions respecting social advantages with which it is endowed."

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

. . . The judgment of the court below is, therefore, *Affirmed*.

JUSTICE HARLAN, dissenting.

. . . [W]e have before us a state enactment that compels, under penalties, the separation of the two races in railroad passenger coaches, and makes it a crime for a citizen of either race to enter a coach that has been assigned to citizens of the other race.

Thus, the State regulates the use of a public highway by citizens of the United States solely upon the basis of race.

However apparent the injustice of such legislation may be, we have only to consider whether it is consistent with the Constitution of the United States. . . .

In respect of civil rights common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and, under appropriate circumstances, when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper. But I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved. Indeed, such legislation as that here in question is inconsistent not only with that equality of rights which pertains to citizenship, National and State, but with the personal liberty enjoyed by everyone within the United States.

The Thirteenth Amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country. This court has so adjudged. But that amendment having been found inadequate to the protection of the rights of those who had been in slavery, it was followed by

ANNOTATIONS **NOTES & QUESTIONS**

the Fourteenth Amendment, which added greatly to the dignity and glory of American citizenship and to the security of personal liberty by declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," and that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

These two amendments, if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship. Finally, and to the end that no citizen should be denied, on account of his race, the privilege of participating in the political control of his country, it was declared by the Fifteenth Amendment that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude."

These notable additions to the fundamental law were welcomed by the friends of liberty throughout the world. They removed the race line from our governmental systems. They had, as this court has said, a common purpose, namely to secure "to a race recently emancipated, a race that through many generations have been held in slavery, all the civil rights that the superior race enjoy."

They declared, in legal effect, this court has further said, "that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color." . . .It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Everyone knows that the statute in question had its origin in the purpose not so much to exclude white persons from railroad cars occupied by blacks as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make

discrimination among whites in the matter of accommodation for travelers. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary. The fundamental objection, therefore, to the statute is that it interferes with the personal freedom of citizens. . . .

It is one thing for railroad carriers to furnish, or to be required by law to furnish, equal accommodations for all whom they are under a legal duty to carry. It is quite another thing for government to forbid citizens of the white and black races from traveling in the same public conveyance, and to punish officers of railroad companies for permitting persons of the two races to occupy the same passenger coach. If a State can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street and black citizens to keep on the other? Why may it not, upon like grounds, punish whites and blacks who ride together in streetcars or in open vehicles on a public road or street? Why may it not require sheriffs to assign whites to one side of a courtroom and blacks to the other? And why may it not also prohibit the commingling of the two races in the galleries of legislative halls or in public assemblages convened for the consideration of the political questions of the day? Further, if this statute of Louisiana is consistent with the personal liberty of citizens, why may not the State require the separation in railroad coaches of native and naturalized citizens of the United States, or of Protestants and Roman Catholics? . . .

The white race deems itself to be the dominant race in this country. And so it is in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color

when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott Case*. It was adjudged in that case that the descendants of Africans who were imported into this country and sold as slaves were not included nor intended to be included under the word "citizens" in the Constitution, and could not claim any of the rights and privileges which that instrument provided for and secured to citizens of the United States; that, at the time of the adoption of the Constitution, they were "considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them."

The recent amendments of the Constitution, it was supposed, had eradicated these principles from our institutions. But it seems that we have yet, in some of the States, a dominant race—a superior class of citizens, which assumes to regulate the enjoyment of civil rights, common to all citizens, upon the basis of race. The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution, by one of which the blacks of this country were made citizens of the United States and of the States in which they respectively reside, and whose privileges and immunities, as citizens, the States are forbidden to abridge. Sixty millions of whites are in no danger from the presence here of eight millions of blacks. The destinies of the two races in this country are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust

between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens. That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.

The sure guarantee of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, National and State, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States, without regard to race. State enactments regulating the enjoyment of civil rights upon the basis of race, and cunningly devised to defeat legitimate results of the war under the pretense of recognizing equality of rights, can have no other result than to render permanent peace impossible and to keep alive a conflict of races the continuance of which must do harm to all concerned. This question is not met by the suggestion that social equality cannot exist between the white and black races in this country. That argument, if it can be properly regarded as one, is scarcely worthy of consideration, for social equality no more exists between two races when traveling in a passenger coach or a public highway than when members of the same races sit by each other in a street car or in the jury box, or stand or sit with each other in a political assembly, or when they use in common the street of a city or town, or when they are in the same room for the purpose of having their names placed on the registry of voters, or when they approach the ballot box in order to exercise the high privilege of voting.

There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But, by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union, who are entitled, by law, to participate in the political control of the State and nation, who are not excluded, by law or by reason of their race, from public stations of any kind, and who have all the legal rights that belong to white citizens, are yet declared to be criminals, liable to imprisonment, if they ride in a public

coach occupied by citizens of the white race. It is scarcely just to say that a colored citizen should not object to occupying a public coach assigned to his own race. He does not object, nor, perhaps, would he object to separate coaches for his race if his rights under the law were recognized. But he [is] objecting, and ought never to cease objecting, to the proposition that citizens of the white and black race can be adjudged criminals because they sit, or claim the right to sit, in the same public coach on a public highway.

The arbitrary separation of citizens on the basis of race while they are on a public highway is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds.

If evils will result from the commingling of the two races upon public highways established for the benefit of all, they will be infinitely less than those that will surely come from state legislation regulating the enjoyment of civil rights upon the basis of race. We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow citizens, our equals before the law. The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead anyone, nor atone for the wrong this day done. . . .

I am of opinion that the statute of Louisiana is inconsistent with the personal liberty of citizens, white and black, in that State, and hostile to both the spirit and letter of the Constitution of the United States. If laws of like character should be enacted in the several States of the Union, the effect would be in the highest degree mischievous. Slavery, as an institution tolerated by law would, it is true, have disappeared from our country, but there would remain a power in the States, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom to regulate civil rights, common to all citizens, upon the basis of race, and to place in a condition of legal inferiority a large body of American citizens now constituting a part of the political community called the People of the United States, for whom and by whom, through representatives, our government is administered. Such a sys-

ANNOTATIONS **NOTES & QUESTIONS**

tem is inconsistent with the guarantee given by the Constitution to each State of a republican form of government, and may be stricken down by Congressional action, or by the courts in the discharge of their solemn duty to maintain the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding.

5 For the reasons stated, I am constrained to withhold my assent from the opinion and judgment of the majority.

Chief Justice Earl Warren

Oliver Brown, et al. v. Board of Education of Topeka, et al.

U.S. Supreme Court Majority Opinion

May 17, 1954
Supreme Court | Washington, D.C.

Background

This case was the consolidation of cases arising in Kansas, South Carolina, Virginia, Delaware, and Washington, D.C. relating to the segregation of public schools on the basis of race. In each of the cases, African American students had been denied admittance to certain public schools based on laws allowing public education to be racially segregated. Chief Justice Earl Warren penned this opinion to the Court's ruling.

Guiding Questions

1. What effect do separate schools have on students, according to the decision?
2. What does the court ultimately hold?
3. On what bases does the Court make its decision?

Brown v. Board of Education, 347 US 483 (1954).

ANNOTATIONS **NOTES & QUESTIONS**

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

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

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this Court in *Plessy v. Ferguson*, 163 U. S. 537. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction. Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then-existing practices in racial segregation, and the

views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

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

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. The doctrine of "separate but equal" did not make its appearance in this Court until 1896 in the case of *Plessy v. Ferguson*, supra, involving not education but transportation. American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the "separate but equal" doctrine in

the field of public education. In *Cumming v. County Board of Education*, 175 U. S. 528, and *Gong Lum v. Rice*, 275 U. S. 78, the validity of the doctrine itself was not challenged. In more recent cases, all on the graduate school

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level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. Missouri ex rel. *Gaines v. Canada*, 305 U. S. 337; *Sipuel v. Oklahoma*, 332 U. S. 631; *Sweatt v. Painter*, 339 U. S. 629; M*cLaurin v. Oklahoma State Regents*, 339 U. S. 637. In none of these cases was it necessary to reexamine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt v. Painter*, supra, the Court expressly reserved decision on the question whether *Plessy v. Ferguson* should be held inapplicable to public education.

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

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

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the

armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

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

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

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

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

of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."

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

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

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

It is so ordered.

MARTIN LUTHER KING, JR.

At the March on Washington

SPEECH

August 28, 1963
Lincoln Memorial | Washington, D.C.

I Have a Dream Speech

BACKGROUND

Martin Luther King, Jr., delivered this address at the March on Washington from the steps of the Lincoln Memorial.

GUIDING QUESTIONS

1. What historical documents does King refer to in his speech?
2. What is the "promissory note"?
3. What is King's dream?
4. What is the significance of King's ending the speech quoting "My Country Tis of Thee"?

Martin Luther King, Jr., "I Have A Dream," in *I Have A Dream: Writings and Speeches that Changed the World* (San Francisco: Harper, 1986).

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I am happy to join with you today in what will go down in history as the greatest demonstration for freedom in the history of our nation.

Five score years ago, a great American, in whose symbolic shadow we stand today, signed the Emancipation Proclamation. This momentous decree came as a great beacon light of hope to millions of Negro slaves who had been seared in the flames of withering injustice. It came as a joyous daybreak to end the long night of their captivity.

But one hundred years later, the Negro still is not free; one hundred years later, the life of the Negro is still sadly crippled by the manacles of segregation and the chains of discrimination; one hundred years later, the Negro lives on a lonely island of poverty in the midst of a vast ocean of material prosperity; one hundred years later, the Negro is still languished in the corners of American society and finds himself in exile in his own land.

So we've come here today to dramatize a shameful condition. In a sense we've come to our nation's capital to cash a check. When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was the promise that all men, yes, black men as well as white men, would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness.

It is obvious today that America has defaulted on this promissory note in so far as her citizens of color are concerned. Instead of honoring this sacred obligation, America has given the Negro people a bad check, a check which has come back marked "insufficient funds."

But we refuse to believe that the bank of justice is bankrupt. We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation. And so we have come to cash this check, a check that will give us upon demand the riches of freedom and the security of justice.

We have also come to this hallowed spot to remind America of the fierce urgency of now.

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This is no time to engage in the luxury of cooling off or to take the tranquilizing drug of gradualism.

Now is the time to make real the promises of democracy; now is the time to rise from the dark and desolate valley of segregation to the sunlit path of racial justice; now is the time to lift our nation from the quicksands of racial injustice to the solid rock of brotherhood; now is the time to make justice a reality for all of God's children.

It would be fatal for the nation to overlook the urgency of the moment.

This sweltering summer of the Negro's legitimate discontent will not pass until there is an invigorating autumn of freedom and equality. Nineteen sixty-three is not an end, but a beginning. And those who hope that the Negro needed to blow off steam and will now be content, will have a rude awakening if the nation returns to business as usual. There will be neither rest nor tranquility in America until the Negro is granted his citizenship rights. The whirlwinds of revolt will continue to shake the foundations of our nation until the bright day of justice emerges.

But there is something that I must say to my people, who stand on the worn threshold which leads into the palace of justice. In the process of gaining our rightful place, we must not be guilty of wrongful deeds. Let us not seek to satisfy our thirst for freedom by drinking from the cup of bitterness and hatred.

We must forever conduct our struggle on the high plane of dignity and discipline. We must not allow our creative protests to degenerate into physical violence. Again and again we must rise to the majestic heights of meeting physical force with soul force. The marvelous new militancy, which has engulfed the Negro community, must not lead us to a distrust of all white people. For many of our white brothers, as evidenced by their presence here today, have come to realize that their destiny is tied up with our destiny. And they have come to realize that their freedom is inextricably bound to our freedom.

We cannot walk alone. And as we walk, we must make the pledge that we shall always march ahead. We cannot turn back.

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There are those who are asking the devotees of Civil Rights, "When will you be satisfied?"

We can never be satisfied as long as the Negro is the victim of the unspeakable horrors of police brutality; we can never be satisfied as long as our bodies, heavy with the fatigue of travel, cannot gain lodging in the motels of the highways and the hotels of the cities; we cannot be satisfied as long as the Negro's basic mobility is from a smaller ghetto to a larger one; we can never be satisfied as long as our children are stripped of their selfhood and robbed of their dignity by signs stating "For Whites Only"; we cannot be satisfied as long as the Negro in Mississippi cannot vote, and the Negro in New York believes he has nothing for which to vote.

No! no, we are not satisfied, and we will not be satisfied until "justice rolls down like waters and righteousness like a mighty stream."

I am not unmindful that some of you have come here out of great trials and tribulations. Some of you have come fresh from narrow jail cells. Some of you have come from areas where your quest for freedom left you battered by the storms of persecution and staggered by the winds of police brutality.

You have been the veterans of creative suffering.

Continue to work with the faith that unearned suffering is redemptive.

Go back to Mississippi. Go back to Alabama. Go back to South Carolina. Go back to Georgia. Go back to Louisiana. Go back to the slums and ghettos of our Northern cities, knowing that somehow this situation can and will be changed. Let us not wallow in the valley of despair.

I say to you today, my friends, so even though we face the difficulties of today and tomorrow, I still have a dream.

It is a dream deeply rooted in the American dream.

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I have a dream that one day this nation will rise up and live out the true meaning of its creed, "We hold these truths to be self-evident, that all men are created equal."

I have a dream that one day on the red hills of Georgia, sons of former slaves and the sons of former slaveowners will be able to sit down together at the table of brotherhood.

I have a dream that one day even the state of Mississippi, a state sweltering with the heat of injustice, sweltering with the heat of oppression, will be transformed into an oasis of freedom and justice.

I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.

I have a dream today!

I have a dream that one day down in Alabama — with its vicious racists, with its Governor having his lips dripping with the words of interposition and nullification — one day right there in Alabama, little black boys and black girls will be able to join hands with little white boys and white girls as sisters and brothers.

I have a dream today!

I have a dream that one day every valley shall be exalted, and every hill and mountain shall be made low. The rough places will be plain and the crooked places will be made straight, "and the glory of the Lord shall be revealed, and all flesh shall see it together."

This is our hope. This is the faith that I go back to the South with. With this faith we will be able to hew out of the mountain of despair a stone of hope.

With this faith we will be able to transform the jangling discords of our nation into a beautiful symphony of brother-hood. With this faith we will be able to work together, to pray together, to struggle together, to go to jail together, to stand up for freedom together, knowing that we will be free one day.

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And this will be the day.

This will be the day when all of God's children will be able to sing with new meaning, "My country 'tis of thee, sweet land of liberty, of thee I sing. Land where my father died, land of the pilgrim's pride, from every mountainside, let freedom ring." And if America is to be a great nation, this must become true.

So let freedom ring from the prodigious hilltops of New Hampshire; let freedom ring from the mighty mountains of New York; let freedom ring from the heightening Alleghenies of Pennsylvania; let freedom ring from the snow-capped Rockies of Colorado; let freedom ring from the curvaceous slopes of California.

But not only that.

Let freedom ring from Stone Mountain of Georgia; let freedom ring from Lookout Mountain of Tennessee; let freedom ring from every hill and mole hill of Mississippi. "From every mountainside, let freedom ring."

And when this happens, and when we allow freedom to ring, when we let it ring from every village and every hamlet, from every state and every city, we will be able to speed up that day when all of God's children, black men and white men, Jews and Gentiles, Protestants and Catholics, will be able to join hands and sing in the words of the old Negro spiritual:

"Free at last. Free at last. Thank God Almighty, we are free at last."

Martin Luther King, Jr.

Letter from Birmingham Jail

Open Letter

April 16, 1963
Birmingham Jail | Birmingham, Alabama

Background

While in prison, Martin Luther King, Jr., began this open response to an article by clergymen entitled "A Call For Unity" that had denounced King's methods in the civil rights movement.

Guiding Questions

1. What, according to King, are the four basic steps of a nonviolent campaign?
2. What references does King make to religion and philosophy?
3. How does King differentiate between a just and unjust law?
4. What examples does King give defending extremists?
5. Why is King unable to commend the police? What change does he want to see?

Martin Luther King, Jr., "Letter from Birmingham Jail," in *Milestone Documents in American History: Exploring the Primary Sources that Shaped America*, Vol. 4, ed. Paul Finkelman (Dallas: Schlager Group Inc., 2008), 1719-26.

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My Dear Fellow Clergymen:

While confined here in the Birmingham city jail, I came across your recent statement calling my present activities "unwise and untimely." Seldom do I pause to answer criticism of my work and ideas. If I sought to answer all the criticisms that cross my desk, my secretaries would have little time for anything other than such correspondence in the course of the day, and I would have no time for constructive work. But since I feel that you are men of genuine good will and that your criticisms are sincerely set forth, I want to try to answer your statement in what I hope will be patient and reasonable terms.

I think I should indicate why I am here in Birmingham, since you have been influenced by the view which argues against "outsiders coming in." I have the honor of serving as president of the Southern Christian Leadership Conference, an organization operating in every southern state, with headquarters in Atlanta, Georgia. We have some eighty five affiliated organizations across the South, and one of them is the Alabama Christian Movement for Human Rights. Frequently we share staff, educational and financial resources with our affiliates. Several months ago the affiliate here in Birmingham asked us to be on call to engage in a nonviolent direct action program if such were deemed necessary. We readily consented, and when the hour came we lived up to our promise. So I, along with several members of my staff, am here because I was invited here. I am here because I have organizational ties here.

But more basically, I am in Birmingham because injustice is here. Just as the prophets of the eighth century B.C. left their villages and carried their "thus saith the Lord" far beyond the boundaries of their home towns, and just as the Apostle Paul left his village of Tarsus and carried the gospel of Jesus Christ to the far corners of the Greco Roman world, so am I compelled to carry the gospel of freedom beyond my own home town. Like Paul, I must constantly respond to the Macedonian call for aid.

Moreover, I am cognizant of the interrelatedness of all communities and states. I cannot sit idly by in Atlanta and not be concerned about what happens in Birmingham. Injustice an-

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ywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly. Never again can we afford to live with the narrow, provincial "outside agitator" idea. Anyone who lives inside the United States can never be considered an outsider anywhere within its bounds.

You deplore the demonstrations taking place in Birmingham. But your statement, I am sorry to say, fails to express a similar concern for the conditions that brought about the demonstrations. I am sure that none of you would want to rest content with the superficial kind of social analysis that deals merely with effects and does not grapple with underlying causes. It is unfortunate that demonstrations are taking place in Birmingham, but it is even more unfortunate that the city's white power structure left the Negro community with no alternative.

In any nonviolent campaign there are four basic steps: collection of the facts to determine whether injustices exist; negotiation; self purification; and direct action. We have gone through all these steps in Birmingham. There can be no gainsaying the fact that racial injustice engulfs this community. Birmingham is probably the most thoroughly segregated city in the United States. Its ugly record of brutality is widely known. Negroes have experienced grossly unjust treatment in the courts. There have been more unsolved bombings of Negro homes and churches in Birmingham than in any other city in the nation. These are the hard, brutal facts of the case. On the basis of these conditions, Negro leaders sought to negotiate with the city fathers. But the latter consistently refused to engage in good faith negotiation.

Then, last September, came the opportunity to talk with leaders of Birmingham's economic community. In the course of the negotiations, certain promises were made by the merchants--for example, to remove the stores' humiliating racial signs. On the basis of these promises, the Reverend Fred Shuttlesworth and the leaders of the Alabama Christian Movement for Human Rights agreed to a moratorium on all demonstrations. As the weeks and months went by, we realized that we were the victims of a broken promise. A few signs,

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briefly removed, returned; the others remained. As in so many past experiences, our hopes had been blasted, and the shadow of deep disappointment settled upon us. We had no alternative except to prepare for direct action, whereby we would present our very bodies as a means of laying our case before the conscience of the local and the national community. Mindful of the difficulties involved, we decided to undertake a process of self purification. We began a series of workshops on nonviolence, and we repeatedly asked ourselves: "Are you able to accept blows without retaliating?" "Are you able to endure the ordeal of jail?" We decided to schedule our direct action program for the Easter season, realizing that except for Christmas, this is the main shopping period of the year. Knowing that a strong economic-withdrawal program would be the by product of direct action, we felt that this would be the best time to bring pressure to bear on the merchants for the needed change.

Then it occurred to us that Birmingham's mayoral election was coming up in March, and we speedily decided to postpone action until after election day. When we discovered that the Commissioner of Public Safety, Eugene "Bull" Connor, had piled up enough votes to be in the run off, we decided again to postpone action until the day after the run off so that the demonstrations could not be used to cloud the issues. Like many others, we waited to see Mr. Connor defeated, and to this end we endured postponement after postponement. Having aided in this community need, we felt that our direct action program could be delayed no longer.

You may well ask: "Why direct action? Why sit ins, marches and so forth? Isn't negotiation a better path?" You are quite right in calling for negotiation. Indeed, this is the very purpose of direct action. Nonviolent direct action seeks to create such a crisis and foster such a tension that a community which has constantly refused to negotiate is forced to confront the issue. It seeks so to dramatize the issue that it can no longer be ignored. My citing the creation of tension as part of the work of the nonviolent resister may sound rather shocking. But I must confess that I am not afraid of the word "tension." I have earnestly opposed violent tension, but there is a type of constructive, nonviolent tension which is necessary for growth. Just as Socrates felt that

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it was necessary to create a tension in the mind so that individuals could rise from the bondage of myths and half truths to the unfettered realm of creative analysis and objective appraisal, so must we see the need for nonviolent gadflies to create the kind of tension in society that will help men rise from the dark depths of prejudice and racism to the majestic heights of understanding and brotherhood. The purpose of our direct action program is to create a situation so crisis packed that it will inevitably open the door to negotiation. I therefore concur with you in your call for negotiation. Too long has our beloved Southland been bogged down in a tragic effort to live in monologue rather than dialogue.

One of the basic points in your statement is that the action that I and my associates have taken in Birmingham is untimely. Some have asked: "Why didn't you give the new city administration time to act?" The only answer that I can give to this query is that the new Birmingham administration must be prodded about as much as the outgoing one, before it will act. We are sadly mistaken if we feel that the election of Albert Boutwell as mayor will bring the millennium to Birmingham. While Mr. Boutwell is a much more gentle person than Mr. Connor, they are both segregationists, dedicated to maintenance of the status quo. I have hope that Mr. Boutwell will be reasonable enough to see the futility of massive resistance to desegregation. But he will not see this without pressure from devotees of civil rights. My friends, I must say to you that we have not made a single gain in civil rights without determined legal and nonviolent pressure. Lamentably, it is an historical fact that privileged groups seldom give up their privileges voluntarily. Individuals may see the moral light and voluntarily give up their unjust posture; but, as Reinhold Niebuhr has reminded us, groups tend to be more immoral than individuals.

We know through painful experience that freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed. Frankly, I have yet to engage in a direct action campaign that was "well timed" in the view of those who have not suffered unduly from the disease of segregation. For years now I have heard the word "Wait!" It rings in the ear of every Negro with piercing familiarity. This "Wait" has almost always meant "Never." We must come to see, with one of our distinguished jurists, that "justice too long delayed is justice denied."

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We have waited for more than 340 years for our constitutional and God given rights. The nations of Asia and Africa are moving with jetlike speed toward gaining political independence, but we still creep at horse and buggy pace toward gaining a cup of coffee at a lunch counter. Perhaps it is easy for those who have never felt the stinging darts of segregation to say, "Wait." But when you have seen vicious mobs lynch your mothers and fathers at will and drown your sisters and brothers at whim; when you have seen hate filled policemen curse, kick and even kill your black brothers and sisters; when you see the vast majority of your twenty million Negro brothers smothering in an airtight cage of poverty in the midst of an affluent society; when you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six year old daughter why she can't go to the public amusement park that has just been advertised on television, and see tears welling up in her eyes when she is told that Funtown is closed to colored children, and see ominous clouds of inferiority beginning to form in her little mental sky, and see her beginning to distort her personality by developing an unconscious bitterness toward white people; when you have to concoct an answer for a five year old son who is asking: "Daddy, why do white people treat colored people so mean?"; when you take a cross county drive and find it necessary to sleep night after night in the uncomfortable corners of your automobile because no motel will accept you; when you are humiliated day in and day out by nagging signs reading "white" and "colored"; when your first name becomes "nigger," your middle name becomes "boy" (however old you are) and your last name becomes "John," and your wife and mother are never given the respected title "Mrs."; when you are harried by day and haunted by night by the fact that you are a Negro, living constantly at tiptoe stance, never quite knowing what to expect next, and are plagued with inner fears and outer resentments; when you are forever fighting a degenerating sense of "nobodiness"--then you will understand why we find it difficult to wait. There comes a time when the cup of endurance runs over, and men are no longer willing to be plunged into the abyss of despair. I hope, sirs, you can understand our legitimate and unavoidable impatience. You express a great deal of anxiety over our willingness to break laws. This is certainly a legitimate concern. Since we so diligently urge people to obey the Supreme Court's decision of 1954 outlawing seg-

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regation in the public schools, at first glance it may seem rather paradoxical for us consciously to break laws. One may well ask: "How can you advocate breaking some laws and obeying others?" The answer lies in the fact that there are two types of laws: just and unjust. I would be the first to advocate obeying just laws. One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that "an unjust law is no law at all."

Now, what is the difference between the two? How does one determine whether a law is just or unjust? A just law is a man made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority and the segregated a false sense of inferiority. Segregation, to use the terminology of the Jewish philosopher Martin Buber, substitutes an "I it" relationship for an "I thou" relationship and ends up relegating persons to the status of things. Hence segregation is not only politically, economically and sociologically unsound, it is morally wrong and sinful. Paul Tillich has said that sin is separation. Is not segregation an existential expression of man's tragic separation, his awful estrangement, his terrible sinfulness? Thus it is that I can urge men to obey the 1954 decision of the Supreme Court, for it is morally right; and I can urge them to disobey segregation ordinances, for they are morally wrong.

Let us consider a more concrete example of just and unjust laws. An unjust law is a code that a numerical or power majority group compels a minority group to obey but does not make binding on itself. This is difference made legal. By the same token, a just law is a code that a majority compels a minority to follow and that it is willing to follow itself. This is sameness made legal. Let me give another explanation. A law is unjust if it is inflicted on a minority that, as a result of being denied the right to vote, had no part in enacting or devising the law. Who can say that the legislature of Alabama which set up that state's segregation laws was democratically elected? Throughout Alabama all sorts of devious methods

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are used to prevent Negroes from becoming registered voters, and there are some counties in which, even though Negroes constitute a majority of the population, not a single Negro is registered. Can any law enacted under such circumstances be considered democratically structured?

Sometimes a law is just on its face and unjust in its application. For instance, I have been arrested on a charge of parading without a permit. Now, there is nothing wrong in having an ordinance which requires a permit for a parade. But such an ordinance becomes unjust when it is used to maintain segregation and to deny citizens the First-Amendment privilege of peaceful assembly and protest.

I hope you are able to see the distinction I am trying to point out. In no sense do I advocate evading or defying the law, as would the rabid segregationist. That would lead to anarchy. One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.

Of course, there is nothing new about this kind of civil disobedience. It was evidenced sublimely in the refusal of Shadrach, Meshach and Abednego to obey the laws of Nebuchadnezzar, on the ground that a higher moral law was at stake. It was practiced superbly by the early Christians, who were willing to face hungry lions and the excruciating pain of chopping blocks rather than submit to certain unjust laws of the Roman Empire. To a degree, academic freedom is a reality today because Socrates practiced civil disobedience. In our own nation, the Boston Tea Party represented a massive act of civil disobedience.

We should never forget that everything Adolf Hitler did in Germany was "legal" and everything the Hungarian freedom fighters did in Hungary was "illegal." It was "illegal" to aid and comfort a Jew in Hitler's Germany. Even so, I am sure that, had I lived in Germany at the time, I would have aided and comforted my Jewish brothers. If today I lived in a Communist country where certain principles dear to the Christian faith are suppressed, I would openly advocate disobeying that country's antireligious laws.

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I must make two honest confessions to you, my Christian and Jewish brothers. First, I must confess that over the past few years I have been gravely disappointed with the white moderate. I have almost reached the regrettable conclusion that the Negro's great stumbling block in his stride toward freedom is not the White Citizen's Counciler or the Ku Klux Klanner, but the white moderate, who is more devoted to "order" than to justice; who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice; who constantly says: "I agree with you in the goal you seek, but I cannot agree with your methods of direct action"; who paternalistically believes he can set the timetable for another man's freedom; who lives by a mythical concept of time and who constantly advises the Negro to wait for a "more convenient season." Shallow understanding from people of good will is more frustrating than absolute misunderstanding from people of ill will. Lukewarm acceptance is much more bewildering than outright rejection.

I had hoped that the white moderate would understand that law and order exist for the purpose of establishing justice and that when they fail in this purpose they become the dangerously structured dams that block the flow of social progress. I had hoped that the white moderate would understand that the present tension in the South is a necessary phase of the transition from an obnoxious negative peace, in which the Negro passively accepted his unjust plight, to a substantive and positive peace, in which all men will respect the dignity and worth of human personality. Actually, we who engage in nonviolent direct action are not the creators of tension. We merely bring to the surface the hidden tension that is already alive. We bring it out in the open, where it can be seen and dealt with. Like a boil that can never be cured so long as it is covered up but must be opened with all its ugliness to the natural medicines of air and light, injustice must be exposed, with all the tension its exposure creates, to the light of human conscience and the air of national opinion before it can be cured.

In your statement you assert that our actions, even though peaceful, must be condemned because they precipitate violence. But is this a logical assertion? Isn't this like condemning a robbed man because his possession of money precipitated the evil act of robbery? Isn't

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this like condemning Socrates because his unswerving commitment to truth and his philosophical inquiries precipitated the act by the misguided populace in which they made him drink hemlock? Isn't this like condemning Jesus because his unique God consciousness and never ceasing devotion to God's will precipitated the evil act of crucifixion? We must come to see that, as the federal courts have consistently affirmed, it is wrong to urge an individual to cease his efforts to gain his basic constitutional rights because the quest may precipitate violence. Society must protect the robbed and punish the robber. I had also hoped that the white moderate would reject the myth concerning time in relation to the struggle for freedom. I have just received a letter from a white brother in Texas. He writes: "All Christians know that the colored people will receive equal rights eventually, but it is possible that you are in too great a religious hurry. It has taken Christianity almost two thousand years to accomplish what it has. The teachings of Christ take time to come to earth." Such an attitude stems from a tragic misconception of time, from the strangely irrational notion that there is something in the very flow of time that will inevitably cure all ills. Actually, time itself is neutral; it can be used either destructively or constructively. More and more I feel that the people of ill will have used time much more effectively than have the people of good will. We will have to repent in this generation not merely for the hateful words and actions of the bad people but for the appalling silence of the good people. Human progress never rolls in on wheels of inevitability; it comes through the tireless efforts of men willing to be co workers with God, and without this hard work, time itself becomes an ally of the forces of social stagnation. We must use time creatively, in the knowledge that the time is always ripe to do right. Now is the time to make real the promise of democracy and transform our pending national elegy into a creative psalm of brotherhood. Now is the time to lift our national policy from the quicksand of racial injustice to the solid rock of human dignity.

You speak of our activity in Birmingham as extreme. At first I was rather disappointed that fellow clergymen would see my nonviolent efforts as those of an extremist. I began thinking about the fact that I stand in the middle of two opposing forces in the Negro community. One is a force of complacency, made up in part of Negroes who, as a result of long years of

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oppression, are so drained of self respect and a sense of "somebodiness" that they have adjusted to segregation; and in part of a few middle-class Negroes who, because of a degree of academic and economic security and because in some ways they profit by segregation, have become insensitive to the problems of the masses. The other force is one of bitterness and hatred, and it comes perilously close to advocating violence. It is expressed in the various black nationalist groups that are springing up across the nation, the largest and best known being Elijah Muhammad's Muslim movement. Nourished by the Negro's frustration over the continued existence of racial discrimination, this movement is made up of people who have lost faith in America, who have absolutely repudiated Christianity, and who have concluded that the white man is an incorrigible "devil."

I have tried to stand between these two forces, saying that we need emulate neither the "do nothingism" of the complacent nor the hatred and despair of the black nationalist. For there is the more excellent way of love and nonviolent protest. I am grateful to God that, through the influence of the Negro church, the way of nonviolence became an integral part of our struggle. If this philosophy had not emerged, by now many streets of the South would, I am convinced, be flowing with blood. And I am further convinced that if our white brothers dismiss as "rabble rousers" and "outside agitators" those of us who employ nonviolent direct action, and if they refuse to support our nonviolent efforts, millions of Negroes will, out of frustration and despair, seek solace and security in black nationalist ideologies--a development that would inevitably lead to a frightening racial nightmare.

Oppressed people cannot remain oppressed forever. The yearning for freedom eventually manifests itself, and that is what has happened to the American Negro. Something within has reminded him of his birthright of freedom, and something without has reminded him that it can be gained. Consciously or unconsciously, he has been caught up by the Zeitgeist, and with his black brothers of Africa and his brown and yellow brothers of Asia, South America and the Caribbean, the United States Negro is moving with a sense of great urgency toward the promised land of racial justice. If one recognizes this vital urge that has engulfed the Negro community, one should readily understand why public demonstrations are taking place. The Negro has many pent up resentments and latent frustrations, and he

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must release them. So let him march; let him make prayer pilgrimages to the city hall; let him go on freedom rides -and try to understand why he must do so. If his repressed emotions are not released in nonviolent ways, they will seek expression through violence; this is not a threat but a fact of history. So I have not said to my people: "Get rid of your discontent." Rather, I have tried to say that this normal and healthy discontent can be channeled into the creative outlet of nonviolent direct action. And now this approach is being termed extremist. But though I was initially disappointed at being categorized as an extremist, as I continued to think about the matter I gradually gained a measure of satisfaction from the label. Was not Jesus an extremist for love: "Love your enemies, bless them that curse you, do good to them that hate you, and pray for them which despitefully use you, and persecute you." Was not Amos an extremist for justice: "Let justice roll down like waters and righteousness like an ever flowing stream." Was not Paul an extremist for the Christian gospel: "I bear in my body the marks of the Lord Jesus." Was not Martin Luther an extremist: "Here I stand; I cannot do otherwise, so help me God." And John Bunyan: "I will stay in jail to the end of my days before I make a butchery of my conscience." And Abraham Lincoln: "This nation cannot survive half slave and half free." And Thomas Jefferson: "We hold these truths to be self evident, that all men are created equal . . ." So the question is not whether we will be extremists, but what kind of extremists we will be. Will we be extremists for hate or for love? Will we be extremists for the preservation of injustice or for the extension of justice? In that dramatic scene on Calvary's hill three men were crucified. We must never forget that all three were crucified for the same crime--the crime of extremism. Two were extremists for immorality, and thus fell below their environment. The other, Jesus Christ, was an extremist for love, truth and goodness, and thereby rose above his environment. Perhaps the South, the nation and the world are in dire need of creative extremists.

I had hoped that the white moderate would see this need. Perhaps I was too optimistic; perhaps I expected too much. I suppose I should have realized that few members of the oppressor race can understand the deep groans and passionate yearnings of the oppressed race, and still fewer have the vision to see that injustice must be rooted out by strong, persistent and determined action. I am thankful, however, that some of our white brothers in

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the South have grasped the meaning of this social revolution and committed themselves to it. They are still all too few in quantity, but they are big in quality. Some -such as Ralph McGill, Lillian Smith, Harry Golden, James McBride Dabbs, Ann Braden and Sarah Patton Boyle--have written about our struggle in eloquent and prophetic terms. Others have marched with us down nameless streets of the South. They have languished in filthy, roach infested jails, suffering the abuse and brutality of policemen who view them as "dirty nigger-lovers." Unlike so many of their moderate brothers and sisters, they have recognized the urgency of the moment and sensed the need for powerful "action" antidotes to combat the disease of segregation. Let me take note of my other major disappointment. I have been so greatly disappointed with the white church and its leadership. Of course, there are some notable exceptions. I am not unmindful of the fact that each of you has taken some significant stands on this issue. I commend you, Reverend Stallings, for your Christian stand on this past Sunday, in welcoming Negroes to your worship service on a nonsegregated basis. I commend the Catholic leaders of this state for integrating Spring Hill College several years ago.

But despite these notable exceptions, I must honestly reiterate that I have been disappointed with the church. I do not say this as one of those negative critics who can always find something wrong with the church. I say this as a minister of the gospel, who loves the church; who was nurtured in its bosom; who has been sustained by its spiritual blessings and who will remain true to it as long as the cord of life shall lengthen.

When I was suddenly catapulted into the leadership of the bus protest in Montgomery, Alabama, a few years ago, I felt we would be supported by the white church. I felt that the white ministers, priests and rabbis of the South would be among our strongest allies. Instead, some have been outright opponents, refusing to understand the freedom movement and misrepresenting its leaders; all too many others have been more cautious than courageous and have remained silent behind the anesthetizing security of stained glass windows.

In spite of my shattered dreams, I came to Birmingham with the hope that the white religious leadership of this community would see the justice of our cause and, with deep moral

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concern, would serve as the channel through which our just grievances could reach the power structure. I had hoped that each of you would understand. But again I have been disappointed.

I have heard numerous southern religious leaders admonish their worshipers to comply with a desegregation decision because it is the law, but I have longed to hear white ministers declare: "Follow this decree because integration is morally right and because the Negro is your brother." In the midst of blatant injustices inflicted upon the Negro, I have watched white churchmen stand on the sideline and mouth pious irrelevancies and sanctimonious trivialities. In the midst of a mighty struggle to rid our nation of racial and economic injustice, I have heard many ministers say: "Those are social issues, with which the gospel has no real concern." And I have watched many churches commit themselves to a completely other worldly religion which makes a strange, un-Biblical distinction between body and soul, between the sacred and the secular.

I have traveled the length and breadth of Alabama, Mississippi and all the other southern states. On sweltering summer days and crisp autumn mornings I have looked at the South's beautiful churches with their lofty spires pointing heavenward. I have beheld the impressive outlines of her massive religious education buildings. Over and over I have found myself asking: "What kind of people worship here? Who is their God? Where were their voices when the lips of Governor Barnett dripped with words of interposition and nullification? Where were they when Governor Wallace gave a clarion call for defiance and hatred? Where were their voices of support when bruised and weary Negro men and women decided to rise from the dark dungeons of complacency to the bright hills of creative protest?"

Yes, these questions are still in my mind. In deep disappointment I have wept over the laxity of the church. But be assured that my tears have been tears of love. There can be no deep disappointment where there is not deep love. Yes, I love the church. How could I do otherwise? I am in the rather unique position of being the son, the grandson and the great grandson of preachers. Yes, I see the church as the body of Christ. But, oh! How we have

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blemished and scarred that body through social neglect and through fear of being nonconformists.

There was a time when the church was very powerful--in the time when the early Christians rejoiced at being deemed worthy to suffer for what they believed. In those days the church was not merely a thermometer that recorded the ideas and principles of popular opinion; it was a thermostat that transformed the mores of society. Whenever the early Christians entered a town, the people in power became disturbed and immediately sought to convict the Christians for being "disturbers of the peace" and "outside agitators.'" But the Christians pressed on, in the conviction that they were "a colony of heaven," called to obey God rather than man. Small in number, they were big in commitment. They were too God-intoxicated to be "astronomically

intimidated." By their effort and example they brought an end to such ancient evils as infanticide and gladiatorial contests. Things are different now. So often the contemporary church is a weak, ineffectual voice with an uncertain sound. So often it is an archdefender of the status quo. Far from being disturbed by the presence of the church, the power structure of the average community is consoled by the church's silent--and often even vocal--sanction of things as they are.

But the judgment of God is upon the church as never before. If today's church does not recapture the sacrificial spirit of the early church, it will lose its authenticity, forfeit the loyalty of millions, and be dismissed as an irrelevant social club with no meaning for the twentieth century. Every day I meet young people whose disappointment with the church has turned into outright disgust.

Perhaps I have once again been too optimistic. Is organized religion too inextricably bound to the status quo to save our nation and the world? Perhaps I must turn my faith to the inner spiritual church, the church within the church, as the true ekklesia and the hope of the world. But again I am thankful to God that some noble souls from the ranks of organized religion have broken loose from the paralyzing chains of conformity and joined us as active partners in the struggle for freedom. They have left their secure congregations and

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walked the streets of Albany, Georgia, with us. They have gone down the highways of the South on tortuous rides for freedom. Yes, they have gone to jail with us. Some have been dismissed from their churches, have lost the support of their bishops and fellow ministers. But they have acted in the faith that right defeated is stronger than evil triumphant. Their witness has been the spiritual salt that has preserved the true meaning of the gospel in these troubled times. They have carved a tunnel of hope through the dark mountain of disappointment. I hope the church as a whole will meet the challenge of this decisive hour. But even if the church does not come to the aid of justice, I have no despair about the future. I have no fear about the outcome of our struggle in Birmingham, even if our motives are at present misunderstood. We will reach the goal of freedom in Birmingham and all over the nation, because the goal of America is freedom. Abused and scorned though we may be, our destiny is tied up with America's destiny. Before the pilgrims landed at Plymouth, we were here. Before the pen of Jefferson etched the majestic words of the Declaration of Independence across the pages of history, we were here. For more than two centuries our forebears labored in this country without wages; they made cotton king; they built the homes of their masters while suffering gross injustice and shameful humiliation -and yet out of a bottomless vitality they continued to thrive and develop. If the inexpressible cruelties of slavery could not stop us, the opposition we now face will surely fail. We will win our freedom because the sacred heritage of our nation and the eternal will of God are embodied in our echoing demands. Before closing I feel impelled to mention one other point in your statement that has troubled me profoundly. You warmly commended the Birmingham police force for keeping "order" and "preventing violence." I doubt that you would have so warmly commended the police force if you had seen its dogs sinking their teeth into unarmed, nonviolent Negroes. I doubt that you would so quickly commend the policemen if you were to observe their ugly and inhumane treatment of Negroes here in the city jail; if you were to watch them push and curse old Negro women and young Negro girls; if you were to see them slap and kick old Negro men and young boys; if you were to observe them, as they did on two occasions, refuse to give us food because we wanted to sing our grace together. I cannot join you in your praise of the Birmingham police department.

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It is true that the police have exercised a degree of discipline in handling the demonstrators. In this sense they have conducted themselves rather "nonviolently" in public. But for what purpose? To preserve the evil system of segregation. Over the past few years I have consistently preached that nonviolence demands that the means we use must be as pure as the ends we seek. I have tried to make clear that it is wrong to use immoral means to attain moral ends. But now I must affirm that it is just as wrong, or perhaps even more so, to use moral means to preserve immoral ends. Perhaps Mr. Connor and his policemen have been rather nonviolent in public, as was Chief Pritchett in Albany, Georgia, but they have used the moral means of nonviolence to maintain the immoral end of racial injustice. As T. S. Eliot has said: "The last temptation is the greatest treason: To do the right deed for the wrong reason."

I wish you had commended the Negro sit inners and demonstrators of Birmingham for their sublime courage, their willingness to suffer and their amazing discipline in the midst of great provocation. One day the South will recognize its real heroes. They will be the James Merediths, with the noble sense of purpose that enables them to face jeering and hostile mobs, and with the agonizing loneliness that characterizes the life of the pioneer. They will be old, oppressed, battered Negro women, symbolized in a seventy two year old woman in Montgomery, Alabama, who rose up with a sense of dignity and with her people decided not to ride segregated buses, and who responded with ungrammatical profundity to one who inquired about her weariness: "My feets is tired, but my soul is at rest." They will be the young high school and college students, the young ministers of the gospel and a host of their elders, courageously and nonviolently sitting in at lunch counters and willingly going to jail for conscience' sake. One day the South will know that when these disinherited children of God sat down at lunch counters, they were in reality standing up for what is best in the American dream and for the most sacred values in our Judaeo Christian heritage, thereby bringing our nation back to those great wells of democracy which were dug deep by the founding fathers in their formulation of the Constitution and the Declaration of Independence.

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Never before have I written so long a letter. I'm afraid it is much too long to take your precious time. I can assure you that it would have been much shorter if I had been writing from a comfortable desk, but what else can one do when he is alone in a narrow jail cell, other than write long letters, think long thoughts and pray long prayers?

If I have said anything in this letter that overstates the truth and indicates an unreasonable impatience, I beg you to forgive me. If I have said anything that understates the truth and indicates my having a patience that allows me to settle for anything less than brotherhood, I beg God to forgive me.

I hope this letter finds you strong in the faith. I also hope that circumstances will soon make it possible for me to meet each of you, not as an integrationist or a civil-rights leader but as a fellow clergyman and a Christian brother. Let us all hope that the dark clouds of racial prejudice will soon pass away and the deep fog of misunderstanding will be lifted from our fear drenched communities, and in some not too distant tomorrow the radiant stars of love and brotherhood will shine over our great nation with all their scintillating beauty.

Yours for the cause of Peace and Brotherhood, Martin Luther King, Jr.

Students for a Democratic Society

The Port Huron Statement

Manifesto Excerpts

June 15, 1962
United Auto Workers Summer Retreat | Port Huron, Michigan

Background

Members of the college student activist group, Students for a Democratic Society (SDS), drafted this political manifesto during a meeting in Port Huron, Michigan. SDS member Tom Hayden was its principal author.

Guiding Questions

1. Who are the authors of the Port Huron Statement and why are they critical of contemporary American society?
2. Why do the authors find little moral guidance from universities and political leaders?
3. Why do the authors say their generation is "plagued by program without vision"?
4. What are the political principles of participatory democracy, according to the authors?
5. What are the economic principles of participatory democracy, according to the authors?
6. What is the agenda the authors set forth for the New Left?

Students for a Democratic Society, *The Port Huron Statement* (New York: The Student Department of the League for Industrial Democracy, 1964).

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We are people of this generation, bred in at least modest comfort, housed now in universities, looking uncomfortably to the world we inherit.

When we were kids the United States was the wealthiest and strongest country in the world; the only one with the atom bomb, the least scarred by modern war, an initiator of the United Nations that we thought would distribute Western influence throughout the world. Freedom and equality for each individual, government of, by, and for the people – these American values we found good, principles by which we could live as men. Many of us began maturing in complacency.

As we grew, however, our comfort was penetrated by events too troubling to dismiss. First, the permeating and victimizing fact of human degradation, symbolized by the Southern struggle against racial bigotry, compelled most of us from silence to activism. Second, the enclosing fact of the Cold War, symbolized by the presence of the Bomb, brought awareness that we ourselves, and our friends, and millions of abstract "others" we knew more directly because of our common peril, might die at any time. We might deliberately ignore, or avoid, or fail to feel all other human problems, but not these two, for these were too immediate and crushing in their impact, too challenging in the demand that we as individuals take the responsibility for encounter and resolution.

While these and other problems either directly oppressed us or rankled our consciences and became our own subjective concerns, we began to see complicated and disturbing paradoxes in our surrounding America. The declaration "all men are created equal . . ." rang hollow before the facts of Negro life in the South and the big cities of the North. The proclaimed peaceful intentions of the United States contradicted its economic and military investments in the Cold War status quo. . . .

Some would have us believe that Americans feel contentment amidst prosperity – but might it not better be called a glaze above deeply felt anxieties about their role in the new world? And if these anxieties produce a developed indifference to human affairs, do they not as well produce a yearning to believe there is an alternative to the present, that some-

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thing can be done to change circumstances in the school, the workplaces, the bureaucracies, the government? It is to this latter yearning, at once the spark and engine of change, that we direct our present appeal. The search for truly democratic alternatives to the present, and a commitment to social experimentation with them, is a worthy and fulfilling human enterprise, one which moves us and, we hope, others today….

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Making values explicit--an initial task in establishing alternatives--is an activity that has been devalued and corrupted. The conventional moral terms of the age, the politician moralities--"free world," "people's democracies"--reflect realities poorly, if at all, and seem to function more as ruling myths than as descriptive principles. But neither has our experience in the universities brought us moral enlightenment. Our professors and administrators sacrifice controversy to public relations; their curriculums change more slowly than the living events of the world; their skills and silence are purchased by investors in the arms race; passion is called unscholastic. The questions we might want raised--what is really important? can we live in a different and better way? if we wanted to change society, how would we do it?--are not thought to be questions of a "fruitful, empirical nature," and thus are brushed aside.

Unlike youth in other countries we are used to moral leadership being exercised and moral dimensions being clarified by our elders. But today, for us, not even the liberal and socialist preachments of the past seem adequate to the forms of the present. Consider the old slogans: Capitalism Cannot Reform Itself, United Front Against Fascism, General Strike, All Out on May Day. Or, more recently, No Cooperation with Commies and Fellow Travelers, Ideologies Are Exhausted, Bipartisanship, No Utopias. These are incomplete, and there are few new prophets. It has been said that our liberal and socialist predecessors were plagued by vision without program, while our own generation is plagued by program without vision. All around us there is astute grasp of method, technique--the committee, the ad hoc group, the lobbyist, the hard and soft sell, the make, the projected image--but, if pressed critically, such expertise in incompetent to explain its implicit ideals. It is highly fashionable

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to identify oneself by old categories, or by naming a respected political figure, or by explaining "how we would vote" on various issues.

Theoretic chaos has replaced the idealistic thinking of old--and, unable to reconstitute theoretic order, men have condemned idealism itself. Doubt has replaced hopefulness--and men act out a defeatism that is labeled realistic. The decline of utopia and hope is in fact one of the defining features of social life today. The reasons are various: the dreams of the older left were perverted by Stalinism and never re-created; the congressional stalemate makes men narrow their view of the possible; the specialization of human activity leaves little room for sweeping thought; the horrors of the twentieth century symbolized in the gas ovens and concentration camps and atom bombs, have blasted hopefulness. To be idealistic is to be considered apocalyptic, deluded. To have no serious aspirations, on the contrary, is to be "tough-minded."

In suggesting social goals and values, therefore, we are aware of entering a sphere of some disrepute. Perhaps matured by the past, we have no formulas, no closed theories--but that does not mean values are beyond discussion and tentative determination. A first task of any social movement is to convince people that the search for orienting theories and the creation of human values is complex but worthwhile. We are aware that to avoid platitudes we must analyze the concrete conditions of social order. But to direct such an analysis we must use the guideposts of basic principles. Our own social values involve conceptions of human beings, human relationships, and social systems.

We regard men as infinitely precious and possessed of unfulfilled capacities for reason, freedom, and love. In affirming these principles we are aware of countering perhaps the dominant conceptions of man in the twentieth century: that he is a thing to be manipulated, and that he is inherently incapable of directing his own affairs. We oppose the depersonalization that reduces human being to the status of things--if anything, the brutalities of the twentieth century teach that means and ends are intimately related, that vague appeals to "posterity" cannot justify the mutilations of the present. We oppose, too, the doctrine of human incompetence because it rests essentially on the modern fact that men have been

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"competently" manipulated into incompetence--we see little reason why men cannot meet with increasing the skill the complexities and responsibilities of their situation, if society is organized not for minority, but for majority, participation in decision-making.

Men have unrealized potential for self-cultivation, self-direction, self-understanding, and creativity. It is this potential that we regard as crucial and to which we appeal, not to the human potentiality for violence, unreason, and submission to authority. The goal of man and society should be human independence: a concern not with image of popularity but with finding a meaning in life that is personally authentic; a quality of mind not compulsively driven by a sense of powerlessness, nor one which unthinkingly adopts status values, nor one which represses all threats to its habits, but one which has full, spontaneous access to present and past experiences, one which easily unites the fragmented parts of personal history, one which openly faces problems which are troubling and unresolved; one with an intuitive awareness of possibilities, an active sense of curiosity, an ability and willingness to learn.

This kind of independence does not mean egotistic individualism--the object is not to have one's way so much as it is to have a way that is one's own. Nor do we deify man--we merely have faith in his potential.

Human relationships should involve fraternity and honesty. Human interdependence is contemporary fact; human brotherhood must be willed, however, as a condition of future survival and as the most appropriate form of social relations. Personal links between man and man are needed, especially to go beyond the partial and fragmentary bonds of function that bind men only as worker to worker, employer to employee, teacher to student, American to Russian.

Loneliness, estrangement, isolation describe the vast distance between man and man today. These dominant tendencies cannot be overcome by better personnel management, nor by improved gadgets, but only when a love of man overcomes the idolatrous worship of things by man. As the individualism we affirm is not egoism, the selflessness we affirm is not self-elimination. On the contrary, we believe in generosity of a kind that imprints one's unique

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individual qualities in the relation to other men, and to all human activity. Further, to dislike isolation is not to favor the abolition of privacy; the latter differs from isolation in that it occurs or is abolished according to individual will.

We would replace power rooted in possession, privilege, or circumstance by power and uniqueness rooted in love, reflectiveness, reason, and creativity. As a social system we seek the establishment of a democracy of individual participation, governed by two central aims: that the individual share in those social decisions determining the quality and direction of his life; that society be organized to encourage independence in men and provide the media for their common participation.

In a participatory democracy, the political life would be based in several root principles: that decision-making of basic social consequence be carried on by public groupings;

that politics be seen positively, as the art of collectively creating an acceptable pattern of social relations;

that politics has the function of bringing people out of isolation and into community, thus being a necessary, though not sufficient, means of finding meaning in personal life;

that the political order should serve to clarify problems in a way instrumental to their solution; it should provide outlets for the expression of personal grievance and aspiration; opposing views should be organized so as to illuminate choices and facilitate the attainment of goals; channels should be commonly available to relate men to knowledge and to power so that private problems--from bad recreation facilities to personal alienation--are formulated as general issues.

The economic sphere would have as its basis the principles:

that work should involve incentives worthier than money or survival. It should be educative, not stultifying; creative, not mechanical; self-directed, not manipulated, encouraging independence, a respect for others, a sense of dignity, and a willingness to accept social responsibility, since it is this experience that has crucial influence on habits, perceptions

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and individual ethics; that the economic experience is so personally decisive that the individual must share in its full determination;

that the economy itself is of such social importance that its major resources and means of production should be open to democratic participation and subject to democratic social regulation.

Like the political and economic ones, major social institutions--cultural, educational, rehabilitative, and others--should be generally organized with the well-being and dignity of man as the essential measure of success.

In social change or interchange, we find violence to be abhorrent because it requires generally the transformation of the target, be it a human being or a community of people, into a depersonalized object of hate. It is imperative that the means of violence be abolished and the institutions--local, national, international--that encourage non-violence as a condition of conflict be developed.

These are our central values, in skeletal form. It remains vital to understand their denial or attainment in the context of the modern world.

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1. Any new left in America must be, in large measure, a left with real intellectual skills, committed to deliberativeness, honesty, reflection as working tools. The university permits the political life to be an adjunct to the academic one, and action to be informed by reason.

2. A new left must be distributed in significant social roles throughout the country. The universities are distributed in such a manner.

3. A new left must consist of younger people who matured in the postwar world, and partially be directed to the recruitment of younger people. The university is an obvious beginning point.

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4. A new left must include liberals and socialists, the former for their relevance, the latter for their sense of thoroughgoing reforms in the system. The university is a more sensible place than a political party for these two traditions to begin to discuss their differences and look for political synthesis.

5. A new left must start controversy across the land, if national policies and national apathy are to be reversed. The ideal university is a community of controversy, within itself and in its effects on communities beyond.

6. A new left must transform modern complexity into issues that can be understood and felt close up by every human being. It must give form to the feelings of helplessness and indifference, so that people may see the political, social, and economic sources of their private troubles, and organize to change society. In a time of supposed prosperity, moral complacency, and political manipulation, a new left cannot rely on only aching stomachs to be the engine force of social reform. The case for change, for alternatives that will involve uncomfortable personal efforts, must be argued as never before. The university is a relevant place for all of these activities.

HERBERT MARCUSE

"Repressive Tolerance"

CHAPTER EXCERPTS FROM *A CRITIQUE OF PURE TOLERANCE*

1965, 1968

BACKGROUND

University of California San Diego professor Herbert Marcuse, a German-American who subscribed to the Frankfurt School of critical theory, contributed this chapter essay to the book *A Critique of Pure Tolerance*.

GUIDING QUESTIONS

1. How does Marcuse define tolerance?
2. Why does true tolerance not exist in modern democracy, according to Marcuse?
3. How does Marcuse distinguish between false and true or liberating tolerance?
4. Are there any real differences between modern democracies and modern dictatorships, according to Marcuse?
5. What does Marcuse think is necessary to establish the conditions necessary for a free society?

Herbert Marcuse, "Repressive Tolerance," in *A Critique of Pure Tolerance,* by Robert Paul Wolff, Barrington Moore, Jr., and Herbert Marcuse (Boston: Beacon Press, 1969), 95-137.

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Tolerance is an end in itself. The elimination of violence, and the reduction of suppression to the extent required for protecting man and animals from cruelty and aggression are preconditions for the creation of a humane society. Such a society does not yet exist; progress toward it is perhaps more than before arrested by violence and suppression on a global scale. As deterrents against nuclear war, as police action against subversion, as technical aid in the fight against imperialism and communism, as methods of pacification in neocolonial massacres, violence and suppression are promulgated, practiced, and defended by democratic and authoritarian governments alike, and the people subjected to these governments are educated to sustain such practices as necessary for the preservation of the status quo. Tolerance is extended to policies, conditions, and modes of behavior which should not be tolerated because they are impeding, if not destroying, the chances of creating an existence without fear and misery….

In the Contemporary period, the democratic argument for abstract tolerance tends to be invalidated by the invalidation of the democratic process itself. The liberating force of democracy was the chance it gave to effective dissent, on the individual as well as social scale, its openness to qualitatively different forms of government, of culture, education, work — of the human existence in general. The toleration of free discussion and the equal right of opposites was to define and clarify the different forms of dissent: their direction, content, prospect. But with the concentration of economic and political power and the integration of opposites in a society which uses technology as an instrument of domination, effective dissent is blocked where it could freely emerge: in the formation of opinion, in information and communication, in speech and assembly. Under the rule of monopolistic media — themselves the mere instruments of economic and political power — a mentality is created for which right and wrong, true and false are predefined wherever they affect the vital interests of the society. This is, prior to all expression and communication, a matter of semantics: the blocking of effective dissent, of the recognition of that which is not of the Establishment which begins in the language that is publicized and administered. The meaning of words is rigidly stabilized. Rational persuasion, persuasion to the opposite is all but precluded. The avenues of entrance are closed to the meaning of words and ideas other than

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the established one — established by the publicity of the powers that be, and verified in their practices. Other words can be spoken and heard, other ideas can be expressed, but, at the massive scale of the conservative majority (outside such enclaves as the intelligentsia), they are immediately "evaluated" (i.e., automatically understood) in terms of the public language — a language which determines a priori the direction in which the thought process moves. Thus the process of reflection ends where it started: in the given conditions and relations. Self-validating, the argument of the discussion repels the contradiction because the antithesis is redefined in terms of the thesis. For example, thesis: we work for peace; antithesis: we prepare for war (or even: we wage war); unification of opposites: preparing for war is working for peace. Peace is redefined as necessarily, in the prevailing situation, including preparation for war (or even war) and in this Orwellian form, the meaning of the word "peace" is stabilized. Thus, the basic vocabulary of the Orwellian language operates as a priori categories of understanding: preforming all content. These conditions invalidate the logic of tolerance which involves the rational development of meaning and precludes the closing of meaning. Consequently, persuasion through discussion and the equal presentation of opposites (even where it is really equal) easily lose their liberating force as factors of understanding and learning; they are far more likely to strengthen the established thesis and to repel the alternatives….

The factual barriers which totalitarian democracy erects against the efficacy of qualitative dissent are weak and pleasant enough compared with the practices of a dictatorship which claims to educate the people in the truth. With all its limitations and distortions, democratic tolerance is under all circumstances more humane than an institutionalized intolerance which sacrifices the rights and liberties of the living generations for the sake of future generations. The question is whether this is the only alternative. I shall presently try to suggest the direction in which an answer may be sought. In any case, the contrast is not between democracy in the abstract and dictatorship in the abstract.

Democracy is a form of government which fits very different types of society (this holds true even for a democracy with universal suffrage and equality before the law), and the human costs of a democracy are always and everywhere those exacted by the society whose

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government it is. Their range extends all the way from normal exploitation, poverty, and insecurity to the victims of wars, police actions, military aid, etc., in which the society is engaged — and not only to the victims within its own frontiers. These considerations can never justify the exacting of different sacrifices and different victims on behalf of a future better society, but they do allow weighing the costs involved in the perpetuation of an existing society against the risk of promoting alternatives which offer a reasonable chance of pacification and liberation. Surely, no government can be expected to foster its own subversion, but in a democracy such a right is vested in the people (i.e., in the majority of the people). This means that the ways should not be blocked on which a subversive majority could develop, and if they are blocked by organized repression and indoctrination, their reopening may require apparently undemocratic means. They would include the withdrawal of toleration of speech and assembly from groups and movements which promote aggressive policies, armament, chauvinism, discrimination on the grounds of race and religion, or which oppose the extension of public services, social security, medical care, etc. Moreover, the restoration of freedom of thought may necessitate new and rigid restrictions on teachings and practices in the educational institutions which, by their very methods and concepts, serve to enclose the mind within the established universe of discourse and behavior — thereby precluding a priori a rational evaluation of the alternatives. And to the degree to which freedom of thought involves the struggle against inhumanity, restoration of such freedom would also imply intolerance toward scientific research in the interest of deadly "deterrents," of abnormal human endurance under inhuman conditions, etc….

The very notion of false tolerance, and the distinction between right and wrong limitations on tolerance, between progressive and regressive indoctrination, revolutionary and reactionary violence demand the statement of criteria for its validity. These standards must be prior to whatever constitutional and legal criteria are set up and applied in an existing society (such as "clear and present danger," and other established definitions of civil rights and liberties), for such definitions themselves presuppose standards of freedom and repression as applicable or not applicable in the respective society: they are specifications of more general concepts. By whom, and according to what standards, can the political distinction

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between true and false, progressive and regressive (for in this sphere, these pairs are equivalent) be made and its validity be justified? At the outset, I propose that the question cannot be answered in terms of the alternative between democracy and dictatorship, according to which, in the latter, one individual or group, without any effective control from below, arrogate to themselves the decision. Historically, even in the most democratic democracies, the vital and final decisions affecting the society as a whole have been made, constitutionally or in fact, by one or several groups without effective control by the people themselves. The ironical question: who educates the educators (i.e. the political leaders) also applies to democracy. The only authentic alternative and negation of dictatorship (with respect to this question) would be a society in which "the people" have become autonomous individuals, freed from the repressive requirements of a struggle for existence in the interest of domination, and as such human beings choosing their government and determining their life. Such a society does not yet exist anywhere. In the meantime, the question must be treated *in abstracto* — abstraction, not from the historical possibilities but from the realities of the prevailing societies.

I suggested that the distinction between true and false tolerance, between progress and regression can be made rationally on empirical grounds. The real possibilities of human freedom are relative to the attained stage of civilization. They depend on the material and intellectual resources available at the respective stage, and they are quantifiable and calculable to a high degree. So are, at the stage of advanced industrial society, the most rational ways of using these resources and distributing the social product with priority on the satisfaction of vital needs and with a minimum of toil and injustice. In other words, it is possible to define the direction in which prevailing institutions, policies, opinions would have to be changed in order to improve the chance of a peace which is not identical with cold war and a little hot war, and a satisfaction of needs which does not feed on poverty, oppression, and exploitation. Consequently, it is also possible to identify policies, opinions, movements which would promote this chance, and those which would do the opposite. Suppression of the regressive ones is a prerequisite for the strengthening of the progressive ones….

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Liberating tolerance, then, would mean intolerance against movements from the Right, and toleration of movements from the Left. As to the scope of this tolerance and intolerance: . . . it would extend to the stage of action as well as of discussion and propaganda, of deed as well as of word. […] Such extreme suspension of the right of free speech and free assembly is indeed justified only if the whole of society is in extreme danger. I maintain that our society is in such an emergency situation, and that it has become the normal state of affairs. Different opinions and "philosophies" can no longer compete peacefully for adherence and persuasion on rational grounds: the "marketplace of ideas" is organized and delimited by those who determine the national and the individual interest. In this society, for which the ideologists have proclaimed the "end of ideology," the false consciousness has become the general consciousness — from the government down to its last objects. The small and powerless minorities which struggle against the false consciousness and its beneficiaries must be helped: their continued existence is more important than the preservation of abused rights and liberties which grant constitutional powers to those who oppress these minorities. It should be evident by now that the exercise of civil rights by those who don't have them presupposes the withdrawal of civil rights from those who prevent their exercise, and that liberation of the Damned of the Earth presupposes suppression not only of their old but also of their new masters.

Withdrawal of tolerance from regressive movements before they can become active; intolerance even toward thought, opinion, and word, and finally, intolerance in the opposite direction, that is, toward the self-styled conservatives, to the political Right — these antidemocratic notions respond to the actual development of the democratic society which has destroyed the basis for universal tolerance. The conditions under which tolerance can again become a liberating and humanizing force have still to be created. When tolerance mainly serves the protection and preservation of a repressive society, when it serves to neutralize opposition and to render men immune against other and better forms of life, then tolerance has been perverted. And when this perversion starts in the mind of the individual, in his consciousness, his needs, when heteronomous interests occupy him before he can experience his servitude, then the efforts to counteract his dehumanization must begin at the

place of entrance, there where the false consciousness takes form (or rather: is systematically formed) — it must begin with stopping the words and images which feed this consciousness. To be sure, this is censorship, even precensorship, but openly directed against the more or less hidden censorship that permeates the free media. Where the false consciousness has become prevalent in national and popular behavior, it translates itself almost immediately into practice: the safe distance between ideology and reality, repressive thought and repressive action, between the word of destruction and the deed of destruction is dangerously shortened. Thus, the break through the false consciousness may provide the Archimedean point for a larger emancipation — at an infinitesimally small spot, to be sure, but it is on the enlargement of such small spots that the chance of change depends.

Postscript, 1968

Under the conditions prevailing in this country, tolerance does not, and cannot, fulfill the civilizing function attributed to it by the liberal protagonists of democracy, namely, protection of dissent. The progressive historical force of tolerance lies in its extension to those modes and forms of dissent which are not committed to the status quo of society, and not confined to the institutional framework of the established society. Consequently, the idea of tolerance implies the necessity, for the dissenting group or individuals, to become illegitimate if and when the established legitimacy prevents and counteracts the development of dissent. This would be the case not only in a totalitarian society, under a dictatorship, in one-party states, but also in a democracy (representative, parliamentary, or "direct") where the majority does not result from the development of independent thought and opinion but rather from the monopolistic or oligopolistic administration of public opinion, without terror and (normally) without censorship. In such cases, the majority is self-perpetuating while perpetuating the vested interests which made it a majority. In its very structure this majority is "closed," petrified; it repels "a priori" any change other than changes within the system. But this means that the majority is no longer justified in claiming the democratic title of the best guardian of the common interest. And such a majority is all but the opposite of Rousseau's "general will": it is composed, not of individuals who, in. their political functions, have made effective "abstraction" from their private interests, but, on the contrary, of

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individuals who have effectively identified their private interests with their political functions. And the representatives of this majority, in ascertaining and executing its will, ascertain and execute the will of the vested interests which have formed the majority. The ideology of democracy hides its lack of substance.

In the United States, this tendency goes hand in hand with the monopolistic or oligopolistic concentration of capital in the formation of public opinion, i.e., of the majority. The chance of influencing, in any effective way, this majority is at a price, in dollars, totally out of reach of the radical opposition. Here too, free competition and exchange of ideas have become a farce. The Left has no equal voice, no equal access to the mass media and their public facilities – not because a conspiracy excludes it, but because, in good old capitalist fashion, it does not have the required purchasing power. And the Left does not have the purchasing power because it is the Left. These conditions impose upon the radical minorities a strategy which is in essence a refusal to allow the continuous functioning of allegedly indiscriminate but in fact discriminate tolerance, for example, a strategy of protesting against the alternate matching of a spokesman for the Right (or Center) with one for the Left. Not "equal" but more representation of the Left would be equalization of the prevailing inequality.

Within the solid framework of preestablished inequality and power, tolerance is practiced indeed. Even outrageous opinions are expressed, outrageous incidents are televised; and the critics of established policies are interrupted by the same number of commercials as the conservative advocates. Are these interludes supposed to counteract the sheer weight, magnitude, and continuity of system-publicity, indoctrination which operates playfully through the endless commercials as well as through the entertainment?

Given this situation, I suggested in "Repressive Tolerance" the practice of discriminating tolerance in an inverse direction, as a means of shifting the balance between Right and Left by restraining the liberty of the Right, thus counteracting the pervasive inequality of freedom (unequal opportunity of access to the means of democratic persuasion) and strengthening the oppressed against the oppressors. Tolerance would be restricted with respect to

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movements of a demonstrably aggressive or destructive character (destructive of the prospects for peace, justice, and freedom for all). Such discrimination would also be applied to movements opposing the extension of social legislation to the poor, weak, disabled. As against the virulent denunciations that such a policy would do away with the sacred liberalistic principle of equality for "the other side," I maintain that there are issues where either there is no "other side" in any more than a formalistic sense, or where "the other side" is demonstrably "regressive" and impedes possible improvement of the human condition. To tolerate propaganda for inhumanity vitiates the goals not only of liberalism but of every progressive political philosophy.

I presupposed the existence of demonstrable criteria for aggressive, regressive, destructive forces. If the final democratic criterion of the declared opinion of the majority no longer (or rather not yet) prevails, if vital ideas, values, and ends of human progress no longer (or rather not yet) enter, as competing equals, the formation of public opinion, if the people are no longer (or rather not yet) sovereign but "made" by the real sovereign powers – is there any alternative other than the dictatorship of an "elite" over the people? For the opinion of people (usually designated as The People) who are unfree in the very faculties in which liberalism saw the roots of freedom: independent thought and independent speech, can carry no overriding validity and authority - even if The People constitute the overwhelming majority.

If the choice were between genuine democracy and dictatorship, democracy would certainly be preferable. But democracy does not prevail. The radical critics of the existing political process are thus readily denounced as advocating an "elitism," a dictatorship of intellectuals as an alternative. What we have in fact is government, representative government by a non-intellectual minority of politicians, generals, and businessmen. The record of this "elite' is not very promising, and political prerogatives for the intelligentsia may not necessarily be worse for the society as a whole….

However, the alternative to the established semi-democratic process is not a dictatorship or elite, no matter how intellectual and intelligent, but the struggle for a real democracy.

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Part of this struggle is the fight against an ideology of tolerance which, in reality, favors and fortifies the conservation of the status quo of inequality and discrimination. For this struggle, I proposed the practice of discriminating tolerance. To be sure, this practice already presupposes the radical goal which it seeks to achieve. I committed this *petitio principia* in order to combat the pernicious ideology that tolerance is already institutionalized in this society. The tolerance which is the life element, the token of a free society, will never be the gift of the powers that be; it can, under the prevailing conditions of tyranny by the majority, only be won in the sustained effort of radical minorities, willing to break this tyranny and to work for the emergence of a free and sovereign majority – minorities intolerant,, militantly intolerant and disobedient to the rules of behavior which tolerate destruction and suppression.

JOHN RAWLS

A Theory of Justice

BOOK EXCERPTS

1971

BACKGROUND

American political philosopher and Harvard University professor John Rawls outlined his new ideas on freedom and equality in his 1971 book *A Theory of Justice*.

GUIDING QUESTIONS

1. What are Rawls's two principles of justice, and why does the first necessarily precede the second, according to his logic?

2. What is the role of distribution in Rawls's general conceptions of justice and injustice?

3. What is the "difference principle," and how does it relate to the "principle of redress"?

4. What is the role of self-respect in Rawls's conception of justice?

John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971).

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Chapter 11: Two Principles of Justice

I shall now state in a provisional form the two principles of justice that I believe would be chosen in the original position. In this section I wish to make only the most general comments, and therefore the first formulation of these principles is tentative. As we go on I shall run through several formulations and approximate step by step the final statement to be given much later. I believe that doing this allows the exposition to proceed in a natural way.

The first statement of the two principles reads as follows.

First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.

Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.

There are two ambiguous phrases in the second principle, namely "everyone's advantage" and "open to all." Determining their sense more exactly will lead to a second formulation of the principle in § 13. The final version of the two principles is given in § 46; § 39 considers the rendering of the first principle.

By way of general comment, these principles primarily apply, as I have said, to the basic structure of society. They are to govern the assignment of rights and duties and to regulate the distribution of social and economic advantages. As their formulation suggests, these principles presuppose that the social structure can be divided into two more or less distinct parts, the first principle applying to the one, the second to the other. They distinguish between those aspects of the social system that define and secure the equal liberties of citizenship and those that specify and establish social and economic inequalities. The basic liberties of citizens are, roughly speaking, political liberty (the right to vote and to be eligible for public office) together with freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold (personal) property;

and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law. These liberties are all required to be equal by the first principle, since citizens of a just society are to have the same basic rights.

The second principle applies, in the first approximation, to the distribution of income and wealth and to the design of organizations that make use of differences in authority and responsibility, or chains of command. While the distribution of wealth and income need not be equal, it must be to everyone's advantage, and at the same time, positions of authority and offices of command must be accessible to all. One applies the second principle by holding positions open, and then, subject to this constraint, arranges social and economic inequalities so that everyone benefits.

These principles are to be arranged in a serial order with the first principle prior to the second. This ordering means that a departure from the institutions of equal liberty required by the first principle cannot be justified by, or compensated for, by greater social and economic advantages. The distribution of wealth and income, and the hierarchies of authority, must be consistent with both the liberties of equal citizenship and equality of opportunity.

It is clear that these principles are rather specific in their content, and their acceptance rests on certain assumptions that I must eventually try to explain and justify. A theory of justice depends upon a theory of society in ways that will become evident as we proceed. For the present, it should be observed that the two principles (and this holds for all formulations) are a special case of a more general conception of justice that can be expressed as follows.

All social values—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage.

Injustice, then, is simply inequalities that are not to the benefit of all. Of course, this conception is extremely vague and requires interpretation.

As a first step, suppose that the basic structure of society distributes certain primary goods, that is, things that every rational man is presumed to want. These goods normally have a

use whatever a person's rational plan of life. For simplicity, assume that the chief primary goods at the disposition of society are rights and liberties, powers and opportunities, income and wealth. (Later on in Part Three the primary good of self-respect has a central place.) These are the social primary goods. Other primary goods such as health and vigor, intelligence and imagination, are natural goods; although their possession is influenced by the basic structure, they are not so directly under its control. Imagine, then, a hypothetical initial arrangement in which all the social primary goods are equally distributed: everyone has similar rights and duties, and income and wealth are evenly shared. This state of affairs provides a benchmark for judging improvements. If certain inequalities of wealth and organizational powers would make everyone better off than in this hypothetical starting situation, then they accord with the general conception.

Now it is possible, at least theoretically, that by giving up some of their fundamental liberties men are sufficiently compensated by the resulting social and economic gains. The general conception of justice imposes no restrictions on what sort of inequalities are permissible; it only requires that everyone's position be improved. We need not suppose anything so drastic as consenting to a condition of slavery. Imagine instead that men forego certain political rights when the economic returns are significant and their capacity to influence the course of policy by the exercise of these rights would be marginal in any case. It is this kind of exchange which the two principles as stated rule out; being arranged in serial order they do not permit exchanges between basic liberties and economic and social gains. The serial ordering of principles expresses and underlying preference among primary social goods. When this preference is rational so likewise is the choice of these principles in this order.

In developing justice as fairness I shall, for the most part, leave aside the general conception of justice and examine instead the special case of the two principles in serial order. The advantage of this procedure is that from the first the matter of priorities is recognized and an effort made to find principles to deal with it. One is led to attend throughout to the conditions under which the acknowledgment of the absolute weight of liberty with respect to social and economic advantages, as defined by the lexical order of the two principles,

would be reasonable. Offhand, this ranking appears extreme and too special a case to be of much interest; but there is more justification for it than would appear at first sight. Or at any rate, so I shall maintain (§ 82). Furthermore, the distinction between fundamental rights and liberties and economic and social benefits marks a difference among primary social goods that one should try to exploit. It suggests an important division in the social system. Of course, the distinctions drawn and the ordering proposed are bound to be at best only approximations. There are surely circumstances in which they fail. But it is essential to depict clearly the main lines of a reasonable conception of justice; and under many conditions anyway, the two principles in serial order may serve well enough. When necessary we can fall back on the more general conception…

Chapter 17: The Tendency to Equality

I wish to conclude this discussion of the two principles by explaining the sense in which they express an egalitarian conception of justice. Also I should like to forestall the objection to the principle of fair opportunity that it leads to a callous meritocratic society. In order to prepare the way for doing this, I note several aspects of the conception of justice I have set out.

First we may observe that the difference principle gives some weight to the considerations singled out by the principle of redress. This is the principle that undeserved inequalities call for redress; and since inequalities of birth and natural endowment are undeserved, these inequalities are to be somehow compensated for. Thus the principle holds that in order to treat all persons equally, to provide genuine equality of opportunity, society must give more attention to those fewer native assets and to those born into the less favorable social positions. The idea is to redress the bias of contingencies in the direction of equality. In pursuit of this principle greater resources might be spent on the education of the less rather than the more intelligent, at least over a certain time of life, say the earlier years of school.

Now the principle of redress has not to my knowledge been proposed as the sole criterion of justice, as the single aim of the social order. It is plausible as most such principles are only as a prima facie principle, one that is to be weighed in the balance with others. For

example, we are to weight it against the principle to improve the average standard of life, or to advance the common good. But whatever other principles we hold, the claims of redress are to be taken into account. It is thought to represent one of the elements in our conception of justice. Now the difference principle is not of course the principle of redress. It does not require society to try to even out handicaps as if all were expected to compete on a fair basis in the same race. But the difference principle would allocate resources in education, say, so as to improve the long-term expectation of the least favored. If this end is attained by giving more attention to the better endowed, it is permissible; otherwise not. And in making this decision, the value of education should not be assessed solely in terms of economic efficiency and social welfare. Equally if not more important is the role of education in enabling a person to enjoy the culture of his society and to take part in its affairs, and in this way to provide for each individual a secure sense of his own worth.

Thus although the difference principle is not the same as that of redress, it does achieve some of the intent of the latter principle. It transforms the aims of the basic structure so that the total scheme of institutions no longer emphasizes social efficiency and technocratic values. We see then that the difference principle represents, in effect, an agreement to regard the distribution of natural talents as a common asset and to share in the benefits of this distribution whatever it turns out to be. Those who have been favored by nature, whoever they are, may gain from their good fortune only on terms that improve the situation of those who have lost out…

Chapter 29: Main Grounds for the Two Principles

…Furthermore, the public recognition of the two principles gives greater support to men's self-respect and this in turn increases the effectiveness of social cooperation. Both effects are reasons for choosing these principles. It is clearly rational for men to secure their self-respect. A sense of their own worth is necessary if they are to pursue their conception of the good with zest and to delight in its fulfillment. Self-respect is not so much a part of any rational plan of life as the sense that one's plan is worth carrying out. Now our self-respect

normally depends upon the respect of others. Unless we feel that our endeavors are honored by them, it is difficult if not impossible for us to maintain the conviction that our ends are worth advancing (§ 67). Hence for this reason the parties would accept the natural duty of mutual respect which asks them to treat one another civilly and to be willing to explain the grounds of their actions, especially when the claims of others are overruled (§ 51). Moreover, one may assume that those who respect themselves are more likely to respect each other and conversely. Self-contempt leads to contempt of others and threatens their good as much as envy does. Self-respect is reciprocally self-supporting.

Thus a desirable feature of a conception of justice is that it should publicly express men's respect for one another. In this way they insure a sense of their own value. Now the two principles achieve this end. For when society follows these principles, everyone's good is included in a scheme of mutual benefit and this public affirmation in institutions of each man's endeavors supports men's self-esteem. The establishment of equal liberty and the operation of the difference principle are bound to have this effect. The two principles are equivalent, as I have remarked, to an undertaking to regard the distribution of natural abilities as a collective asset so that the more fortunate are to benefit only in ways that help those who have lost out. I do not say that the parties are moved by the ethical propriety of this idea. But there are reasons for them to accept this principle. For by arranging inequalities for reciprocal advantage and by abstaining from the exploitation of the contingencies of nature and social circumstance within a framework of equal liberty, persons express their respect for one another in the very constitution of their society. In this way they insure their self-esteem as it is rational for them to do…

JUSTICE HARRY BLACKMUN

Jane Roe, et al. v. Henry Wade, District Attorney of Dallas County

U.S. SUPREME COURT MAJORITY OPINION EXCERPTS

January 22, 1973
Supreme Court | Washington, D.C.

BACKGROUND

Jane Roe (Norma McCorvey) sought an abortion in Texas, which Texas law held as illegal at the time. The Supreme Court handed down this ruling on the constitutionality of states to prohibit abortions within their boundaries.

GUIDING QUESTIONS

1. Why does the court argue that states should have an interest in making abortion legal?
2. How does the court locate the right to privacy within the Constitution?
3. In what ways does the court take into account the life of the baby and the life of the mother?
4. How does the court limit abortion in its opinion?
5. Why does the court argue it need not determine when human life begins?

Roe v. Wade, 410 U.S. 113 (1973).

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MR. JUSTICE BLACKMUN delivered the opinion of the Court.

…When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman. This was particularly true prior to the development of antisepsis. Antiseptic techniques, of course, were based on discoveries by Lister, Pasteur, and others first announced in 1867, but were not generally accepted and employed until about the turn of the century. Abortion mortality was high. Even after 1900, and perhaps until as late as the development of antibiotics in the 1940's, standard modern techniques such as dilation and curettage were not nearly so safe as they are today. Thus, it has been argued that a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy.

Modern medical techniques have altered this situation. Appellants and various amici refer to medical data indicating that abortion in early pregnancy, that is, prior to the end of the first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth. Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared. Of course, important state interests in the areas of health and medical standards do remain. The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise. The prevalence of high mortality rates at illegal "abortion mills" strengthens, rather than weakens, the State's interest in regulating the conditions under which abortions are performed. Moreover, the risk to the woman increases as her pregnancy continues. Thus, the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy.

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The third reason is the State's interest - some phrase it in terms of duty - in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception. The State's interest and general obligation to protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone….

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however…the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right…in the penumbras of the Bill of Rights, *Griswold v. Connecticut*…or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see *Meyer v. Nebraska*. These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," *Palko v. Connecticut*, are included in this guarantee of personal privacy....

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

psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

On the basis of elements such as these, appellant and some amici argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. Appellant's arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, are unpersuasive. The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. *Jacobson v. Massachusetts*, (vaccination); *Buck v. Bell*, (sterilization).

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

In the recent abortion cases, cited above, courts have recognized these principles. Those striking down state laws have generally scrutinized the State's interests in protecting health and potential life, and have concluded that neither interest justified broad limitations on the reasons for which a physician and his pregnant patient might decide that she should have an abortion in the early stages of pregnancy. Courts sustaining state laws have held

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that the State's determinations to protect health or prenatal life are dominant and constitutionally justifiable.

The Constitution does not define "person" in so many words. Section 1 of the Fourteenth Amendment contains three references to "person." The first, in defining "citizens," speaks of "persons born or naturalized in the United States." The word also appears both in the Due Process Clause and in the Equal Protection Clause. "Person" is used in other places in the Constitution… None indicates, with any assurance, that it has any possible pre-natal application.

All this, together with our observation, supra, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word "person," as used in the Fourteenth Amendment, does not include the unborn…

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

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

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It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question….

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

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

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

With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of

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meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.

Measured against these standards, Art. 1196 of the Texas Penal Code, in restricting legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother," sweeps too broadly. The statute makes no distinction between abortions performed early in pregnancy and those performed later, and it limits to a single reason, "saving" the mother's life, the legal justification for the procedure. The statute, therefore, cannot survive the constitutional attack made upon it here.…

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

JUSTICE ANTHONY KENNEDY

Planned Parenthood of Southeastern Pennsylvania, et al. v. Robert P. Casey, et al.

U.S. SUPREME COURT MAJORITY OPINION EXCERPTS

June 29, 1992
Supreme Court | Washington, D.C.

BACKGROUND

The Supreme Court ruled that a Pennsylvania law requiring parental consent for a minor to abort her baby was constitutional but that its requirement that a wife notify her husband before aborting their baby was unconstitutional. In his opinion for the majority, Justice Anthony Kennedy offered his view on liberty and the mystery of life.

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Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Carey v. Population Services Internatio*nal, 431 U. S., at 685. Our cases recognize "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Eisenstadt v. Baird, supra, at 453 (emphasis in original). Our precedents "have respected the private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U. S. 158, 166 (1944). These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Planned Parenthood v. Casey, 505 US 833 (1992).

JUSTICE WILLIAM O. DOUGLAS

Estelle T. Griswold and C. Lee Buxton v. Connecticut

U.S. SUPREME COURT MAJORITY OPINION EXCERPTS

June 7, 1965
Supreme Court | Washington, D.C.

BACKGROUND

"The Executive Director of the Planned Parenthood League of Connecticut, and its medical director, a licensed physician, were convicted as accessories for giving married persons information and medical advice on how to prevent conception…. A Connecticut statute makes it a crime for any person to use any drug or article to prevent conception. Appellants claimed that the accessory statute, as applied, violated the Fourteenth Amendment. An intermediate appellate court and the State's highest court affirmed the judgment…." The Supreme Court issued this ruling on the case.

GUIDING QUESTIONS

1. What right does the Court claim protects the use of contraceptives by married couples?

2. Where in the Bill of Rights does the Court say this right is protected?

Griswold v. Connecticut, 381 US 479 (1965).

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MR. JUSTICE DOUGLAS delivered the opinion of the Court.

….Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment….We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.

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

By *Pierce v. Society of Sisters*, supra, the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer v. Nebraska*, supra, the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read (*Martin v. Struthers*, 319 U. S. 141, 319 U. S. 143) and freedom of inquiry, freedom of thought, and freedom to teach (see *Wiemann v. Updegraff*, 344 U. S. 183, 344 U. S. 195) -- indeed, the freedom of the entire university community….. Without those peripheral rights, the specific rights would be less secure. And so we reaffirm the principle of the Pierce and the Meyer cases.

In *NAACP v. Alabama*, 357 U. S. 449, 357 U. S. 462 we protected the "freedom to associate and privacy in one's associations," noting that freedom of association was a peripheral First Amendment right. Disclosure of membership lists of a constitutionally valid association, we held, was invalid "as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association."

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Ibid. In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected forms of "association" that are not political in the customary sense, but pertain to the social, legal, and economic benefit of the members. *NAACP v. Button*, 371 U. S. 415, 371 U. S. 430-431. In *Schware v. Board of Bar Examiners*, 353 U. S. 232, we held it not permissible to bar a lawyer from practice because he had once been a member of the Communist Party. The man's "association with that Party" was not shown to be "anything more than a political faith in a political party" (id. at 353 U. S. 244), and was not action of a kind proving bad moral character. Id. at 353 U. S. 245-246.

Those cases involved more than the "right of assembly" -- a right that extends to all, irrespective of their race or ideology. *De Jonge v. Oregon*, 299 U. S. 353. The right of "association," like the right of belief (*Board of Education v. Barnette*, 319 U. S. 624), is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion, and, while it is not expressly included in the First Amendment, its existence is necessary in making the express guarantees fully meaningful.

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See *Poe v. Ullman*, 367 U. S. 497, 367 U. S. 516-522 (dissenting opinion). Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment, in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner, is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment, in its Self-Incrimination Clause, enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

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The Fourth and Fifth Amendments were described in *Boyd v. United States*, 116 U. S. 616, 116 U. S. 630, as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." We recently referred in *Mapp v. Ohio*, 367 U. S. 643, 367 U. S. 656, to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully an particularly reserved to the people."….

We have had many controversies over these penumbral rights of "privacy and repose."…. These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives, rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."

NAACP v. Alabama, 377 U. S. 288, 377 U. S. 307. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

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

Reversed.

JUSTICE OLIVER WENDELL HOLMES, JR.

Dissents

IN *ABRAMS V. UNITED STATES* AND *GITLOW V. NEW YORK*

1919 and 1925
Supreme Court | Washington, D.C.

BACKGROUND

Just Oliver Wendell Holmes wrote these dissents in two cases involving speech against the government.

ANNOTATIONS

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Jacob Abrams, et al. v. United States

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power, and want a certain result with all your heart, you naturally express your wishes in law, and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an

Abrams v. United States, 250 US 616 (1919); Gitlow v. New York, 268 US 652 (1925).

immediate check is required to save the country. I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States, through many years, had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law…abridging the freedom of speech." Of course, I am speaking only of expressions of opinion and exhortations, which were all that were uttered here, but I regret that I cannot put into more impressive words my belief that, in their conviction upon this indictment, the defendants were deprived of their rights under the Constitution of the United States.

Benjamin Gitlow v. People of the State of New York

MR. JUSTICE BRANDEIS and I are of opinion that this judgment should be reversed. The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word "liberty" as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States. If I am right, then I think that the criterion sanctioned by the full Court in *Schenck v. United States*, 249 U. S. 47, 249 U. S. 52, applies.

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the State] has a right to prevent."

It is true that, in my opinion, this criterion was departed from in *Abrams v. United States*, 250 U. S. 616, but the convictions that I expressed in that case are too deep for it to be possible for me as yet to believe that it and *Schaefer v. United States*, 251 U. S. 466, have settled the law. If what I think the correct test is applied, it is manifest that there was no

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

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

JUSTICE HARLAN FISKE STONE

United States v. Carolene Products Co., Footnote 4

U.S. SUPREME COURT MAJORITY OPINION EXCERPT

April 25, 1938
Supreme Court | Washington, D.C.

BACKGROUND

Justice Harlan Fiske Stone offered this preview of the direction the Supreme Court would like to take future cases in the footnote to his majority opinion in *U.S. v. Carolene Products Co.*

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There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth….

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation….

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious...or national…or racial minorities…: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry….

United States v. Carolina Product Company, 304 US 144 (1938).

U.S. Supreme Court

Clarence Brandenburg v. State of Ohio

Unsigned Opinion Excerpts

June 9, 1969
Supreme Court | Washington, D.C.

Background

The Supreme Court offered this unsigned opinion in response to Clarence Brandenburg, who appealed his conviction under an Ohio law that prohibited speech encouraging of criminal actions, arguing that the law violated his First Amendment rights.

Guiding Questions

1. What type of speech did Ohio make illegal?

2. What did the Court rule on the Ohio law? Why?

Branden v. Ohio, 395 US 444 (1969).

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The appellant, a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute for 'advocat(ing) * * * the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform' and for 'voluntarily assembl(ing) with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.' Ohio Rev. Code Ann. § 2923.13. He was fined $1,000 and sentenced to one to 10 years' imprisonment. The appellant challenged the consitutionality of the criminal syndicalism statute under the First and Fourteenth Amendments to the United States Constitution, but the intermediate appellate court of Ohio affirmed his conviction without opinion. The Supreme Court of Ohio dismissed his appeal, sua sponte, 'for the reason that no substantial constitutional question exists herein.' It did not file an opinion or explain its conclusions. Appeal was taken to this Court, and we noted probable jurisdiction. 393 U.S. 948, 89 S.Ct. 377, 21 L.Ed.2d 360 (1968). We reverse….

The Ohio Criminal Syndicalism Statute was enacted in 1919. From 1917 to 1920, identical or quite similar laws were adopted by 20 States and two territories. E. Dowell, *A History of Criminal Syndicalism Legislation in the United States* 21 (1939). In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act, Cal. Penal Code §§ 11400—11402, the text of which is quite similar to that of the laws of *Ohio*. *Whitney v. California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927). The Court upheld the statute on the ground that, without more, 'advocating' violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. Cf. *Fiske v. Kansas*, 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed. 1108 (1927). But Whitney has been thoroughly discredited by later decisions. See *Dennis v. United States*, 341 U.S. 494, at 507, 71 S.Ct. 857, at 866, 95 L.Ed. 1137 (1951). These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.2 As we said in *Noto v. United States*, 367 U.S. 290, 297—298, 81 S.Ct. 1517, 1520—1521, 6 L.Ed.2d 836 (1961), 'the mere abstract teaching * * * of the moral

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propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.' See also *Herndon v. Lowry*, 301 U.S. 242, 259—261, 57 S.Ct. 732, 739—740, 81 L.Ed. 1066 (1937); Bond v. Floyd, 385 U.S. 116, 134, 87 S.Ct. 339, 348, 17 L.Ed.2d 235 (1966). A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control….

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

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

Mr. Justice BLACK, concurring.

JUSTICE HUGO BLACK

Arch R. Everson v. Board of Education of the Township of Ewing, et al.

U.S. SUPREME COURT MAJORITY OPINION EXCERPTS

February 10, 1947
Supreme Court | Washington, D.C.

BACKGROUND

The Supreme Court made this ruling on the relationship between religion and government support thereof.

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

…The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.

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

JUSTICE HUGO BLACK

Steven I. Engel, et al. v. William J. Vitale, Jr., et al.

U.S. SUPREME COURT MAJORITY OPINION EXCERPTS

June 6, 1962
Supreme Court | Washington, D.C.

BACKGROUND

Justice Hugo Black delivered this opinion concerning the government's relationship with religion.

ANNOTATIONS

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The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say--that the people's religions must not be subjected to the pressures of government for change each time a new political administration is elected to office. Under that Amendment's prohibition against governmental establishment of religion, as reinforced by the provisions of the Fourteenth Amendment, government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity.

There can be no doubt that New York's state prayer program officially establishes the religious beliefs embodied in the Regents' prayer. The respondents' argument to the contrary, which is largely based upon the contention that the Regents' prayer is "nondenominational" and the fact that the program, as modified and approved by state courts, does not require all pupils to recite the prayer, but permits those who wish to do so to remain silent or be

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Engel v. Vitale, 370 U.S. 421 (1962).

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excused from the room, ignores the essential nature of the program's constitutional defects. Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause, of the First Amendment, both of which are operative against the States by virtue of the Fourteenth Amendment. Although these two clauses may, in certain instances, overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.

JUSTICE JOHN MARSHALL HARLAN

Paul Robert Cohen v. State of California

U.S. SUPREME COURT MAJORITY OPINION EXCERPTS

June 7, 1971
Supreme Court | Washington, D.C.

BACKGROUND

Paul Cohen was charged under a California statute that prohibited offensive conduct for wearing a jacket emblazoned with profanity while inside a county courthouse. He was found guilty and sentenced to 30 days in jail. Cohen argued that California's statute violated a right to free expression protected by the First Amendment. The Court ruled on his appeal in this decision.

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[T]he principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

Additionally, we cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive func-

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Cohen v. California, 403 US 15 (1971).

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tion which, practically speaking, may often be the more important element of the overall message sought to be communicated. Indeed, as Mr. Justice Frankfurter has said, "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism, but the freedom to speak foolishly and without moderation…."

Finally, and in the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results.

U.S. Supreme Court

James L. Buckley, et al. v. Francis R. Valeo, Secretary of the United States Senate, et al.

Unsigned Opinion Excerpts

January 30, 1976
Supreme Court | Washington, D.C.

Background

Congress attempted to amend the Campaign Finance Act of 1971 to impose contribution and expenditure restrictions, and the Court delivered this opinion on the constitutionality of the changes by Congress.

Guiding Questions

1. What Constitutional amendment did the Court hold that the limits on expenditures violated?

2. Why did the Court determine that the individual contribution limits were constitutional?

Buckley v. Valeo, 424 U.S. 1 (1976).

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The Federal Election Campaign Act of 1971 (Act), as amended in 1974, (a) limits political contributions to candidates for federal elective office by an individual or a group to $1,000 and by a political committee to $5,000 to any single candidate per election, with an over-all annual limitation of $25,000 by an individual contributor; (b) limits expenditures by individuals or groups "relative to a clearly identified candidate" to $1,000 per candidate per election, and by a candidate from his personal or family funds to various specified annual amounts depending upon the federal office sought, and restricts over-all general election and primary campaign expenditures by candidates to various specified amounts, again depending upon the federal office sought; (c) requires political committees to keep detailed records of contributions and expenditures, including the name and address of each individual contributing in excess of $10, and his occupation and principal place of business if his contribution exceeds $100, and to file quarterly reports with the Federal Election Commission disclosing the source of every contribution exceeding $100 and the recipient and purpose of every expenditure over $100, and also requires every individual or group, other than a candidate or political committee, making contributions or expenditures exceeding $100 "other than by contribution to a political committee or candidate" to file a statement with the Commission; and (d) creates the eight-member Commission as the administering agency with recordkeeping, disclosure, and investigatory functions and extensive rulemaking, adjudicatory, and enforcement powers, and consisting of two members appointed by the President pro tempore of the Senate, two by the Speaker of the House, and two by the President (all subject to confirmation by both Houses of Congress), and the Secretary of the Senate and the Clerk of the House as ex officio nonvoting members. Subtitle H of the Internal Revenue Code of 1954 (IRC), as amended in 1974, provides for public financing of Presidential nominating conventions and general election and primary campaigns from general revenues and allocates such funding to conventions and general election campaigns by establishing three categories: (1) "major" parties (those whose candidate received 25% or more of the vote in the most recent election), which receive full funding; (2) "minor" parties (those whose candidate received at least 5% but less than 25% of the votes at the last election), which receive only a percentage of the funds to which the major parties are entitled; and (3) "new" parties (all other parties), which are limited to receipt of post-election

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funds or are not entitled to any funds if their candidate receives less than 5% of the vote. A primary candidate for the Presidential nomination by a political party who receives more than $5,000 from private sources (counting only the first $250 of each contribution) in each of at least 20 States is eligible for matching public funds. Appellants (various federal office-holders and candidates, supporting political organizations, and others) brought suit against appellees (the Secretary of the Senate, Clerk of the House, Comptroller General, Attorney General, and the Commission) seeking declaratory and injunctive relief against the above statutory provisions on various constitutional grounds. The Court of Appeals, on certified questions from the District Court, upheld all but one of the statutory provisions. A three-judge District Court upheld the constitutionality of Subtitle H.…

The Act's contribution provisions are constitutional, but the expenditure provisions violate the First Amendment.

(a) The contribution provisions, along with those covering disclosure, are appropriate legislative weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions, and the ceilings imposed accordingly serve the basic governmental interest in safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion.

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.18 This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

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(b) The First Amendment requires the invalidation of the Act's independent expenditure ceiling, its limitation on a candidate's expenditures from his own personal funds, and its ceilings on overall campaign expenditures, since those provisions place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate.…

The expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech. The $1,000 ceiling on spending "relative to a clearly identified candidate," 18 U.S.C. § 608(e)(1) (1970 ed., Supp. IV), would appear to exclude all citizens and groups except candidates, political parties, and the institutional press19 from any significant use of the most effective modes of communication.20 Although the Act's limitations on expenditures by campaign organizations and political parties provide substantially greater room for discussion and debate, they would have required restrictions in the scope of a number of past congressional and Presidential campaigns21 and would operate to constrain campaigning by candidates who raise sums in excess of the spending ceiling.

By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate.22 A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if

spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

Given the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy. There is no indication, however, that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations.23 The overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.

The Act's contribution and expenditure limitations also impinge on protected associational freedoms. Making a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals. The Act's contribution ceilings thus limit one important means of associating with a candidate or committee, but leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates. And the Act's contribution limitations permit associations and candidates to aggregate large sums of money to promote effective advocacy. By contrast, the Act's $1,000 limitation on independent expenditures "relative to a clearly identified candidate" precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association.

JUSTICE ANTONIN SCALIA

District of Columbia, et al. v. Dick Anthony Heller

U.S. SUPREME COURT MAJORITY OPINION EXCERPTS

June 26, 2008
Supreme Court | Washington, D.C.

BACKGROUND

Provisions of the District of Columbia Code made it illegal to carry an unregistered firearm and prohibited the registration of handguns, though the chief of police could issue one-year licenses for handguns. The Code also contained provisions that required owners of lawfully registered firearms to keep them unloaded and disassembled or bound by a trigger lock or other similar device unless the firearms were located in a place of business or being used for legal recreational activities. The Court delivered its opinion on the constitutionality of these restrictions in the following decision.

GUIDING QUESTIONS

1. What are the clauses into which Scalia divides the 2nd Amendment?
2. What was meant by "arms" during the founding, according to Scalia?
3. How do the clauses of the amendment stand in relation to each other?
4. What does the Court rule and why?

DC v. Heller, 554 US 570 (2008).

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…We turn first to the meaning of the Second Amendment.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In interpreting this text, we are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *United States v. Sprague*, 282 U. S. 716, 731 (1931); see also *Gibbons v. Ogden*, 9 Wheat. 1, 188 (1824). Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.

The two sides in this case have set out very different interpretations of the Amendment. Petitioners and today's dissenting Justices believe that it protects only the right to possess and carry a firearm in connection with militia service. See Brief for Petitioners 11–12; post, at 1 (Stevens, J., dissenting). Respondent argues that it protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home. See Brief for Respondent 2–4.

The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose. The Amendment could be rephrased, "Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." See J. Tiffany, A Treatise on Government and Constitutional Law §585, p. 394 (1867); Brief for Professors of Linguistics and English as Amici Curiae 3 (hereinafter Linguists' Brief). Although this structure of the Second Amendment is unique in our Constitution, other legal documents of the founding era, particularly individual-rights provisions of state constitutions, commonly included a prefatory statement of purpose. See generally Volokh, The Commonplace Second Amendment, 73 N. Y. U. L. Rev. 793, 814–821 (1998).

Logic demands that there be a link between the stated purpose and the command. The Second Amendment would be nonsensical if it read, "A well regulated Militia, being necessary to the security of a free State, the right of the people to petition for redress of grievances shall not be infringed." That requirement of logical connection may cause a prefatory clause to resolve an ambiguity in the operative clause ("The separation of church and state being an important objective, the teachings of canons shall have no place in our jurisprudence." The preface makes clear that the operative clause refers not to canons of interpretation but to clergymen.) But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause. See F. Dwarris, A General Treatise on Statutes 268–269 (P. Potter ed. 1871) (hereinafter Dwarris); T. Sedgwick, The Interpretation and Construction of Statutory and Constitutional Law 42–45 (2d ed. 1874). " 'It is nothing unusual in acts … for the enacting part to go beyond the preamble; the remedy often extends beyond the particular act or mischief which first suggested the necessity of the law.' " J. Bishop, Commentaries on Written Laws and Their Interpretation §51, p. 49 (1882) (quoting *Rex v. Marks*, 3 East, 157, 165 (K. B. 1802)). Therefore, while we will begin our textual analysis with the operative clause, we will return to the prefatory clause to ensure that our reading of the operative clause is consistent with the announced purpose.

1. Operative Clause.

a. "Right of the People." The first salient feature of the operative clause is that it codifies a "right of the people." The unamended Constitution and the Bill of Rights use the phrase "right of the people" two other times, in the First Amendment's Assembly-and-Petition Clause and in the Fourth Amendment's Search-and-Seizure Clause. The Ninth Amendment uses very similar terminology ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"). All three of these instances unambiguously refer to individual rights, not "collective" rights, or rights that may be exercised only through participation in some corporate body.

Three provisions of the Constitution refer to "the people" in a context other than "rights"—the famous preamble ("We the people"), §2 of Article I (providing that "the people" will

choose members of the House), and the Tenth Amendment (providing that those powers not given the Federal Government remain with "the States" or "the people"). Those provisions arguably refer to "the people" acting collectively—but they deal with the exercise or reservation of powers, not rights. Nowhere else in the Constitution does a "right" attributed to "the people" refer to anything other than an individual right.

What is more, in all six other provisions of the Constitution that mention "the people," the term unambiguously refers to all members of the political community, not an unspecified subset. As we said in *United States v. Verdugo-Urquidez*, 494 U. S. 259, 265 (1990):

" '[T]he people' seems to have been a term of art employed in select parts of the Constitution… . [Its uses] sugges[t] that 'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."

This contrasts markedly with the phrase "the militia" in the prefatory clause. As we will describe below, the "militia" in colonial America consisted of a subset of "the people"—those who were male, able bodied, and within a certain age range. Reading the Second Amendment as protecting only the right to "keep and bear Arms" in an organized militia therefore fits poorly with the operative clause's description of the holder of that right as "the people."

We start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.

b. "Keep and bear Arms." We move now from the holder of the right—"the people"—to the substance of the right: "to keep and bear Arms."

Before addressing the verbs "keep" and "bear," we interpret their object: "Arms." The 18th-century meaning is no different from the meaning today. The 1773 edition of Samuel John-

son's dictionary defined "arms" as "weapons of offence, or armour of defence." 1 Dictionary of the English Language 107 (4th ed.) (hereinafter Johnson). Timothy Cunningham's important 1771 legal dictionary defined "arms" as "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." 1 A New and Complete Law Dictionary (1771); see also N. Webster, American Dictionary of the English Language (1828) (reprinted 1989) (hereinafter Webster) (similar).

The term was applied, then as now, to weapons that were not specifically designed for military use and were not employed in a military capacity. For instance, Cunningham's legal dictionary gave as an example of usage: "Servants and labourers shall use bows and arrows on Sundays, &c. and not bear other arms." See also, e.g., An Act for the trial of Negroes, 1797 Del. Laws ch. XLIII, §6, p. 104, in 1 First Laws of the State of Delaware 102, 104 (J. Cushing ed. 1981 (pt. 1)); see generally *State v. Duke*, 42 Tex. 455, 458 (1874) (citing decisions of state courts construing "arms"). Although one founding-era thesaurus limited "arms" (as opposed to "weapons") to "instruments of offence generally made use of in war," even that source stated that all firearms constituted "arms." 1 J. Trusler, The Distinction Between Words Esteemed Synonymous in the English Language 37 (1794) (emphasis added).

Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, e.g., *Reno v. American Civil Liberties Union*, 521 U. S. 844, 849 (1997), and the Fourth Amendment applies to modern forms of search, e.g., *Kyllo v. United States*, 533 U. S. 27, 35–36 (2001), the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.

We turn to the phrases "keep arms" and "bear arms." Johnson defined "keep" as, most relevantly, "[t]o retain; not to lose," and "[t]o have in custody." Johnson 1095. Webster defined it as "[t]o hold; to retain in one's power or possession." No party has apprised us of

an idiomatic meaning of "keep Arms." Thus, the most natural reading of "keep Arms" in the Second Amendment is to "have weapons."

The phrase "keep arms" was not prevalent in the written documents of the founding period that we have found, but there are a few examples, all of which favor viewing the right to "keep Arms" as an individual right unconnected with militia service. William Blackstone, for example, wrote that Catholics convicted of not attending service in the Church of England suffered certain penalties, one of which was that they were not permitted to "keep arms in their houses." 4 Commentaries on the Laws of England 55 (1769) (hereinafter Blackstone); see also 1 W. & M., c. 15, §4, in 3 Eng. Stat. at Large 422 (1689) ("[N]o Papist … shall or may have or keep in his House … any Arms … "); 1 Hawkins, Treatise on the Pleas of the Crown 26 (1771) (similar). Petitioners point to militia laws of the founding period that required militia members to "keep" arms in connection with militia service, and they conclude from this that the phrase "keep Arms" has a militia-related connotation. See Brief for Petitioners 16–17 (citing laws of Delaware, New Jersey, and Virginia). This is rather like saying that, since there are many statutes that authorize aggrieved employees to "file complaints" with federal agencies, the phrase "file complaints" has an employment-related connotation. "Keep arms" was simply a common way of referring to possessing arms, for militiamen and everyone else.

At the time of the founding, as now, to "bear" meant to "carry." See Johnson 161; Webster; T. Sheridan, A Complete Dictionary of the English Language (1796); 2 Oxford English Dictionary 20 (2d ed. 1989) (hereinafter Oxford). When used with "arms," however, the term has a meaning that refers to carrying for a particular purpose—confrontation. In *Muscarello v. United States*, 524 U. S. 125 (1998), in the course of analyzing the meaning of "carries a firearm" in a federal criminal statute, Justice Ginsburg wrote that "[s]urely a most familiar meaning is, as the Constitution's Second Amendment … indicate[s]: 'wear, bear, or carry … upon the person or in the clothing or in a pocket, for the purpose … of being armed and ready for offensive or defensive action in a case of conflict with another person.' " Id., at 143 (dissenting opinion) (quoting Black's Law Dictionary 214 (6th ed. 1998)). We think that Justice Ginsburg accurately captured the natural meaning of "bear arms." Although

the phrase implies that the carrying of the weapon is for the purpose of "offensive or defensive action," it in no way connotes participation in a structured military organization.

From our review of founding-era sources, we conclude that this natural meaning was also the meaning that "bear arms" had in the 18th century. In numerous instances, "bear arms" was unambiguously used to refer to the carrying of weapons outside of an organized militia. The most prominent examples are those most relevant to the Second Amendment: Nine state constitutional provisions written in the 18th century or the first two decades of the 19th, which enshrined a right of citizens to "bear arms in defense of themselves and the state" or "bear arms in defense of himself and the state." It is clear from those formulations that "bear arms" did not refer only to carrying a weapon in an organized military unit. Justice James Wilson interpreted the Pennsylvania Constitution's arms-bearing right, for example, as a recognition of the natural right of defense "of one's person or house"—what he called the law of "self preservation." 2 Collected Works of James Wilson 1142, and n. x (K. Hall & M. Hall eds. 2007) (citing Pa. Const., Art. IX, §21 (1790)); see also T. Walker, Introduction to American Law 198 (1837) ("Thus the right of self-defence [is] guaranteed by the [Ohio] constitution"); see also id., at 157 (equating Second Amendment with that provision of the Ohio Constitution). That was also the interpretation of those state constitutional provisions adopted by pre-Civil War state courts. These provisions demonstrate—again, in the most analogous linguistic context—that "bear arms" was not limited to the carrying of arms in a militia.

The phrase "bear Arms" also had at the time of the founding an idiomatic meaning that was significantly different from its natural meaning: "to serve as a soldier, do military service, fight" or "to wage war." See Linguists' Brief 18; post, at 11 (Stevens, J., dissenting). But it unequivocally bore that idiomatic meaning only when followed by the preposition "against," which was in turn followed by the target of the hostilities. See 2 Oxford 21. (That is how, for example, our Declaration of Independence ¶28, used the phrase: "He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country … .") Every example given by petitioners' amici for the idiomatic meaning of "bear arms" from the founding period either includes the preposition "against" or is not clearly

idiomatic. See Linguists' Brief 18–23. Without the preposition, "bear arms" normally meant (as it continues to mean today) what Justice Ginsburg's opinion in *Muscarello* said.…

c. Meaning of the Operative Clause. Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment. We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it "shall not be infringed." As we said in *United States v. Cruikshank*, 92 U. S. 542, 553 (1876), "[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second amendment declares that it shall not be infringed … ." …

There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment's right of free speech was not, see, e.g., *United States v. Williams*, 553 U. S. ___ (2008). Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose. Before turning to limitations upon the individual right, however, we must determine whether the prefatory clause of the Second Amendment comports with our interpretation of the operative clause.

2. Prefatory Clause.

The prefatory clause reads: "A well regulated Militia, being necessary to the security of a free State … ."

a. "Well-Regulated Militia." In *United States v. Miller*, 307 U. S. 174, 179 (1939), we explained that "the Militia comprised all males physically capable of acting in concert for the common defense." That definition comports with founding-era sources. See, e.g., Webster

("The militia of a country are the able bodied men organized into companies, regiments and brigades … and required by law to attend military exercises on certain days only, but at other times left to pursue their usual occupations"); *The Federalist* No. 46, pp. 329, 334 (B. Wright ed. 1961) (J. Madison) ("near half a million of citizens with arms in their hands"); Letter to Destutt de Tracy (Jan. 26, 1811), in *The Portable Thomas Jefferson* 520, 524 (M. Peterson ed. 1975) ("[T]he militia of the State, that is to say, of every man in it able to bear arms").

Petitioners take a seemingly narrower view of the militia, stating that "[m]ilitias are the state- and congressionally-regulated military forces described in the Militia Clauses (art. I, §8, cls. 15–16)." Brief for Petitioners 12. Although we agree with petitioners' interpretive assumption that "militia" means the same thing in Article I and the Second Amendment, we believe that petitioners identify the wrong thing, namely, the organized militia. Unlike armies and navies, which Congress is given the power to create ("to raise … Armies"; "to provide … a Navy," Art. I, §8, cls. 12–13), the militia is assumed by Article I already to be in existence. Congress is given the power to "provide for calling forth the militia," §8, cl. 15; and the power not to create, but to "organiz[e]" it—and not to organize "a" militia, which is what one would expect if the militia were to be a federal creation, but to organize "the" militia, connoting a body already in existence, ibid., cl. 16. This is fully consistent with the ordinary definition of the militia as all able-bodied men. From that pool, Congress has plenary power to organize the units that will make up an effective fighting force. That is what Congress did in the first militia Act, which specified that "each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be enrolled in the militia." Act of May 8, 1792, 1 Stat. 271. To be sure, Congress need not conscript every able-bodied man into the militia, because nothing in Article I suggests that in exercising its power to organize, discipline, and arm the militia, Congress must focus upon the entire body. Although the militia consists of all able-bodied men, the federally organized militia may consist of a subset of them.

Finally, the adjective "well-regulated" implies nothing more than the imposition of proper discipline and training. See Johnson 1619 ("Regulate": "To adjust by rule or method"); Rawle 121–122; cf. Va. Declaration of Rights §13 (1776), in 7 Thorpe 3812, 3814 (referring to "a well-regulated militia, composed of the body of the people, trained to arms").

b. "Security of a Free State." The phrase "security of a free state" meant "security of a free polity," not security of each of the several States as the dissent below argued, see 478 F. 3d, at 405, and n. 10. Joseph Story wrote in his treatise on the Constitution that "the word 'state' is used in various senses [and in] its most enlarged sense, it means the people composing a particular nation or community." 1 Story §208; see also 3 id., §1890 (in reference to the Second Amendment's prefatory clause: "The militia is the natural defence of a free country"). It is true that the term "State" elsewhere in the Constitution refers to individual States, but the phrase "security of a free state" and close variations seem to have been terms of art in 18th-century political discourse, meaning a " 'free country' " or free polity. See Volokh, "Necessary to the Security of a Free State," 83 Notre Dame L. Rev. 1, 5 (2007); see, e.g., 4 Blackstone 151 (1769); Brutus Essay III (Nov. 15, 1787), in The Essential Antifederalist 251, 253 (W. Allen & G. Lloyd eds., 2d ed. 2002). Moreover, the other instances of "state" in the Constitution are typically accompanied by modifiers making clear that the reference is to the several States—"each state," "several states," "any state," "that state," "particular states," "one state," "no state." And the presence of the term "foreign state" in Article I and Article III shows that the word "state" did not have a single meaning in the Constitution.

There are many reasons why the militia was thought to be "necessary to the security of a free state." See 3 Story §1890. First, of course, it is useful in repelling invasions and suppressing insurrections. Second, it renders large standing armies unnecessary—an argument that Alexander Hamilton made in favor of federal control over the militia. The Federalist No. 29, pp. 226, 227 (B. Wright ed. 1961) (A. Hamilton). Third, when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.

3. Relationship between Prefatory Clause and Operative Clause

We reach the question, then: Does the preface fit with an operative clause that creates an individual right to keep and bear arms? It fits perfectly, once one knows the history that the founding generation knew and that we have described above. That history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents. This is what had occurred in England that prompted codification of the right to have arms in the English Bill of Rights.

The debate with respect to the right to keep and bear arms, as with other guarantees in the Bill of Rights, was not over whether it was desirable (all agreed that it was) but over whether it needed to be codified in the Constitution. During the 1788 ratification debates, the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric. See, e.g., Letters from The Federal Farmer III (Oct. 10, 1787), in 2 *The Complete Anti-Federalist* 234, 242 (H. Storing ed. 1981). John Smilie, for example, worried not only that Congress's "command of the militia" could be used to create a "select militia," or to have "no militia at all," but also, as a separate concern, that "[w]hen a select militia is formed; the people in general may be disarmed." 2 Documentary History of the Ratification of the Constitution 508–509 (M. Jensen ed. 1976) (hereinafter Documentary Hist.). Federalists responded that because Congress was given no power to abridge the ancient right of individuals to keep and bear arms, such a force could never oppress the people. See, e.g., A Pennsylvanian III (Feb. 20, 1788), in The Origin of the Second Amendment 275, 276 (D. Young ed., 2d ed. 2001) (hereinafter Young); White, To the Citizens of Virginia, Feb. 22, 1788, in id., at 280, 281; A Citizen of America, (Oct. 10, 1787) in id., at 38, 40; Remarks on the Amendments to the federal Constitution, Nov. 7, 1788, in id., at 556. It was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down.

It is therefore entirely sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans

valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution. Justice Breyer's assertion that individual self-defense is merely a "subsidiary interest" of the right to keep and bear arms, see post, at 36, is profoundly mistaken. He bases that assertion solely upon the prologue—but that can only show that self-defense had little to do with the right's codification; it was the central component of the right itself.…

IV

We turn finally to the law at issue here. As we have said, the law totally bans handgun possession in the home. It also requires that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable.

As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," 478 F. 3d, at 400, would fail constitutional muster.

Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban. And some of those few have been struck down. In *Nunn v. State*, the Georgia Supreme Court struck down a prohibition on carrying pistols openly (even though it upheld a prohibition on carrying concealed weapons). See 1 Ga., at 251. In *Andrews v. State*, the Tennessee Supreme Court likewise held that a statute that forbade openly carrying a pistol "publicly or privately, without regard to time or place, or circumstances," 50 Tenn., at 187, violated the state constitutional provision (which the court equated with the Second Amendment). That was so even though the statute did not restrict the carrying of

long guns. Ibid. See also State v. Reid, 1 Ala. 612, 616–617 (1840) ("A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional").

It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed. It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon. There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.

We must also address the District's requirement (as applied to respondent's handgun) that firearms in the home be rendered and kept inoperable at all times. This makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional. The District argues that we should interpret this element of the statute to contain an exception for self-defense. See Brief for Petitioners 56–57. But we think that is precluded by the unequivocal text, and by the presence of certain other enumerated exceptions: "Except for law enforcement personnel … , each registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia." D. C. Code §7–2507.02. The nonexistence of a self-defense exception is also suggested by the D. C. Court of Appeals' statement that the statute forbids residents to use firearms to stop intruders, see *McIntosh v. Washington*, 395 A. 2d 744, 755–756 (1978).

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Apart from his challenge to the handgun ban and the trigger-lock requirement respondent asked the District Court to enjoin petitioners from enforcing the separate licensing requirement "in such a manner as to forbid the carrying of a firearm within one's home or possessed land without a license." App. 59a. The Court of Appeals did not invalidate the licensing requirement, but held only that the District "may not prevent [a handgun] from being moved throughout one's house." 478 F. 3d, at 400. It then ordered the District Court to enter summary judgment "consistent with [respondent's] prayer for relief." Id., at 401. Before this Court petitioners have stated that "if the handgun ban is struck down and respondent registers a handgun, he could obtain a license, assuming he is not otherwise disqualified," by which they apparently mean if he is not a felon and is not insane. Brief for Petitioners 58. Respondent conceded at oral argument that he does not "have a problem with … licensing" and that the District's law is permissible so long as it is "not enforced in an arbitrary and capricious manner." Tr. of Oral Arg. 74–75. We therefore assume that petitioners' issuance of a license will satisfy respondent's prayer for relief and do not address the licensing requirement.…

In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense. Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home.

PRESIDENT LYNDON B. JOHNSON (D)

Commencement Address at Howard University

SPEECH

June 4, 1965
Howard University | Washington, D.C.

BACKGROUND

President Lyndon Johnson delivered the commencement address to the 1965 class at Howard University.

GUIDING QUESTIONS

1. What is Johnson's definition of freedom?
2. Why does Johnson argue that this freedom is insufficient?
3. What role does nature or nurture play in Johnson's account of inequality?
4. Johnson speaks of "true equality"; what does he mean by this?
5. What does Johnson deem the most important cause of poverty among African Americans?
6. What does Johnson declare to be his chief goal for his next term?

Lyndon Johnson, *Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1965*, Vol. 2 (Washington, D.C.: Government Printing Office, 1966), 635-40.

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Dr. Nabrit, my fellow Americans:

I am delighted at the chance to speak at this important and this historic institution. Howard has long been an outstanding center for the education of Negro Americans. Its students are of every race and color and they come from many countries of the world. It is truly a working example of democratic excellence.

Our earth is the home of revolution. In every corner of every continent men charged with hope contend with ancient ways in the pursuit of justice. They reach for the newest of weapons to realize the oldest of dreams, that each may walk in freedom and pride, stretching his talents, enjoying the fruits of the earth.

Our enemies may occasionally seize the day of change, but it is the banner of our revolution they take. And our own future is linked to this process of swift and turbulent change in many lands in the world. But nothing in any country touches us more profoundly, and nothing is more freighted with meaning for our own destiny than the revolution of the Negro American.

In far too many ways American Negroes have been another nation: deprived of freedom, crippled by hatred, the doors of opportunity closed to hope.

In our time change has come to this Nation, too. The American Negro, acting with impressive restraint, has peacefully protested and marched, entered the courtrooms and the seats of government, demanding a justice that has long been denied. The voice of the Negro was the call to action. But it is a tribute to America that, once aroused, the courts and the Congress, the President and most of the people, have been the allies of progress.

Thus we have seen the high court of the country declare that discrimination based on race was repugnant to the Constitution, and therefore void. We have seen in 1957, and 1960, and again in 1964, the first civil rights legislation in this Nation in almost an entire century.

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As majority leader of the United States Senate, I helped to guide two of these bills through the Senate. And, as your President, I was proud to sign the third. And now very soon we will have the fourth—a new law guaranteeing every American the right to vote.

No act of my entire administration will give me greater satisfaction than the day when my signature makes this bill, too, the law of this land.

The voting rights bill will be the latest, and among the most important, in a long series of victories. But this victory—as Winston Churchill said of another triumph for freedom—"is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning."

That beginning is freedom; and the barriers to that freedom are tumbling down. Freedom is the right to share, share fully and equally, in American society—to vote, to hold a job, to enter a public place, to go to school. It is the right to be treated in every part of our national life as a person equal in dignity and promise to all others.

But freedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please.

You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair.

Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates.

This is the next and the more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result.

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For the task is to give twenty million Negroes the same chance as every other American to learn and grow, to work and share in society, to develop their abilities—physical, mental and spiritual, and to pursue their individual happiness.

To this end equal opportunity is essential, but not enough, not enough. Men and women of all races are born with the same range of abilities. But ability is not just the product of birth. Ability is stretched or stunted by the family that you live with, and the neighborhood you live in—by the school you go to and the poverty or the richness of your surroundings. It is the product of a hundred unseen forces playing upon the little infant, the child, and finally the man.

This graduating class at Howard University is witness to the indomitable determination of the Negro American to win his way in American life.

The number of Negroes in schools of higher learning has almost doubled in fifteen years. The number of non-white professional workers has more than doubled in ten years. The median income of Negro college women tonight exceeds that of white college women. And there are also the enormous accomplishments of distinguished individual Negroes—many of them graduates of this institution, and one of them the first lady ambassador in the history of the United States.

These are proud and impressive achievements. But they tell only the story of a growing middle class minority, steadily narrowing the gap between them and their white counterparts.

But for the great majority of Negro Americans—the poor, the unemployed, the uprooted, and the dispossessed—there is a much grimmer story. They still, as we meet here tonight, are another nation. Despite the court orders and the laws, despite the legislative victories and the speeches, for them the walls are rising and the gulf is widening.

Here are some of the facts of this American failure.

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Thirty-five years ago the rate of unemployment for Negroes and whites was about the same. Tonight the Negro rate is twice as high.

In 1948 the eight percent unemployment rate for Negro teenage boys was actually less than that of whites. By last year that rate had grown to twenty-three percent, as against thirteen percent for whites unemployed.

Between 1949 and 1959, the income of Negro men relative to white men declined in every section of this country. From 1952 to 1963 the median income of Negro families compared to white actually dropped from fifty-seven percent to fifty-three percent.

In the years 1955 through 1957, twenty-two percent of experienced Negro workers were out of work at some time during the year. In 1961 through 1963 that proportion had soared to twenty-nine percent.

Since 1947 the number of white families living in poverty has decreased twenty-seven percent while the number of poorer nonwhite families decreased only three percent.

The infant mortality of nonwhites in 1940 was seventy percent greater than whites. Twenty-two years later it was ninety percent greater.

Moreover, the isolation of Negro from white communities is increasing, rather than decreasing as Negroes crowd into the central cities and become a city within a city.

Of course Negro Americans as well as white Americans have shared in our rising national abundance. But the harsh fact of the matter is that in the battle for true equality too many—far too many—are losing ground every day.

We are not completely sure why this is. We know the causes are complex and subtle. But we do know the two broad basic reasons. And we do know that we have to act.

First, Negroes are trapped—as many whites are trapped—in inherited, gateless poverty. They lack training and skills. They are shut in, in slums, without decent medical care. Private and public poverty combine to cripple their capacities.

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We are trying to attack these evils through our poverty program, through our education program, through our medical care and our other health programs, and a dozen more of the Great Society programs that are aimed at the root causes of this poverty.

We will increase, and we will accelerate, and we will broaden this attack in years to come until this most enduring of foes finally yields to our unyielding will.

But there is a second cause—much more difficult to explain, more deeply grounded, more desperate in its force. It is the devastating heritage of long years of slavery; and a century of oppression, hatred, and injustice.

For Negro poverty is not white poverty. Many of its causes and many of its cures are the same. But there are differences—deep, corrosive, obstinate differences—radiating painful roots into the community, and into the family, and the nature of the individual.

These differences are not racial differences. They are solely and simply the consequence of ancient brutality, past injustice, and present prejudice. They are anguishing to observe. For the Negro they are a constant reminder of oppression. For the white they are a constant reminder of guilt. But they must be faced and they must be dealt with and they must be overcome, if we are ever to reach the time when the only difference between Negroes and whites is the color of their skin.

Nor can we find a complete answer in the experience of other American minorities. They made a valiant and a largely successful effort to emerge from poverty and prejudice.

The Negro, like these others, will have to rely mostly upon his own efforts. But he just can not do it alone. For they did not have the heritage of centuries to overcome, and they did not have a cultural tradition which had been twisted and battered by endless years of hatred and hopelessness, nor were they excluded—these others—because of race or color—a feeling whose dark intensity is matched by no other prejudice in our society.

Nor can these differences be understood as isolated infirmities. They are a seamless web. They cause each other. They result from each other. They reinforce each other.

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Much of the Negro community is buried under a blanket of history and circumstance. It is not a lasting solution to lift just one corner of that blanket. We must stand on all sides and we must raise the entire cover if we are to liberate our fellow citizens.

One of the differences is the increased concentration of Negroes in our cities. More than seventy-three percent of all Negroes live in urban areas compared with less than seventy percent of the whites. Most of these Negroes live in slums. Most of these Negroes live together—a separated people.

Men are shaped by their world. When it is a world of decay, ringed by an invisible wall, when escape is arduous and uncertain, and the saving pressures of a more hopeful society are unknown, it can cripple the youth and it can desolate the men.

There is also the burden that a dark skin can add to the search for a productive place in our society. Unemployment strikes most swiftly and broadly at the Negro, and this burden erodes hope. Blighted hope breeds despair. Despair brings indifferences to the learning which offers a way out. And despair, coupled with indifferences, is often the source of destructive rebellion against the fabric of society.

There is also the lacerating hurt of early collision with white hatred or prejudice, distaste or condescension. Other groups have felt similar intolerance. But success and achievement could wipe it away. They do not change the color of a man's skin. I have seen this uncomprehending pain in the eyes of the little, young Mexican-American schoolchildren that I taught many years ago. But it can be overcome. But, for many, the wounds are always open.

Perhaps most important—its influence radiating to every part of life—is the breakdown of the Negro family structure. For this, most of all, white America must accept responsibility. It flows from centuries of oppression and persecution of the Negro man. It flows from the long years of degradation and discrimination, which have attacked his dignity and assaulted his ability to produce for his family.

This, too, is not pleasant to look upon. But it must be faced by those whose serious intent is to improve the life of all Americans.

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Only a minority—less than half—of all Negro children reach the age of eighteen having lived all their lives with both of their parents. At this moment, tonight, little less than two-thirds are at home with both of their parents. Probably a majority of all Negro children receive federally-aided public assistance sometime during their childhood.

The family is the cornerstone of our society. More than any other force it shapes the attitude, the hopes, the ambitions, and the values of the child. And when the family collapses it is the children that are usually damaged. When it happens on a massive scale the community itself is crippled.

So, unless we work to strengthen the family, to create conditions under which most parents will stay together—all the rest: schools, and playgrounds, and public assistance, and private concern, will never be enough to cut completely the circle of despair and deprivation.

There is no single easy answer to all of these problems.

Jobs are part of the answer. They bring the income which permits a man to provide for his family.

Decent homes in decent surroundings and a chance to learn—an equal chance to learn—are part of the answer.

Welfare and social programs better designed to hold families together are part of the answer.

Care for the sick is part of the answer.

An understanding heart by all Americans is another big part of the answer.

And to all of these fronts—and a dozen more—I will dedicate the expanding efforts of the Johnson administration.

But there are other answers that are still to be found. Nor do we fully understand even all of the problems. Therefore, I want to announce tonight that this fall I intend to call a White

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House conference of scholars, and experts, and outstanding Negro leaders—men of both races—and officials of Government at every level.

This White House conference's theme and title will be "To Fulfill These Rights."

Its object will be to help the American Negro fulfill the rights which, after the long time of injustice, he is finally about to secure.

To move beyond opportunity to achievement.

To shatter forever not only the barriers of law and public practice, but the walls which bound the condition of many by the color of his skin.

To dissolve, as best we can, the antique enmities of the heart which diminish the holder, divide the great democracy, and do wrong—great wrong—to the children of God.

And I pledge you tonight that this will be a chief goal of my administration, and of my program next year, and in the years to come. And I hope, and I pray, and I believe, it will be a part of the program of all America.

For what is justice?

It is to fulfill the fair expectations of man.

Thus, American justice is a very special thing. For, from the first, this has been a land of towering expectations. It was to be a nation where each man could be ruled by the common consent of all—enshrined in law, given life by institutions, guided by men themselves subject to its rule. And all—all of every station and origin—would be touched equally in obligation and in liberty.

Beyond the law lay the land. It was a rich land, glowing with more abundant promise than man had ever seen. Here, unlike any place yet known, all were to share the harvest.

And beyond this was the dignity of man. Each could become whatever his qualities of mind and spirit would permit—to strive, to seek, and, if he could, to find his happiness.

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This is American justice. We have pursued it faithfully to the edge of our imperfections, and we have failed to find it for the American Negro.

So, it is the glorious opportunity of this generation to end the one huge wrong of the American Nation and, in so doing, to find America for ourselves, with the same immense thrill of discovery which gripped those who first began to realize that here, at last, was a home for freedom.

All it will take is for all of us to understand what this country is and what this country must become.

The Scripture promises: "I shall light a candle of understanding in thine heart, which shall not be put out."

Together, and with millions more, we can light that candle of understanding in the heart of all America.

And, once lit, it will never again go out.

JUSTICE LEWIS POWELL

Regents of the University of California v. Allan Bakke

U.S. SUPREME COURT MAJORITY OPINION EXCERPTS

June 28, 1978
Supreme Court | Washington, D.C.

BACKGROUND

The Supreme Court issued this ruling on universities using a student's race in determining whether they would admit him or her.

GUIDING QUESTIONS

1. What are the four reasons Powell gives arguing against the idea of preference programs?

2. Why does Powell use Harvard's diversity program as a favorable example?

3. How does Powell propose to reconcile the unconstitutionality of racial quotas with the professed benefits of factoring a student's race into deciding to admit the student?

Regents of University of California v. Allan Bakke, 438 U.S. 265 (1978).

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Justice POWELL delivered the opinion of the Court.

For the reasons stated in the following opinion, I believe that so much of the judgment of the California court as holds petitioner's special admissions program unlawful and directs that respondent be admitted to the Medical School must be affirmed. For the reasons expressed in a separate opinion, my Brothers THE CHIEF JUSTICE, MR. JUSTICE STEWART, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS concur in this judgment.

I also conclude for the reasons stated in the following opinion that the portion of the court's judgment enjoining petitioner from according any consideration to race in its admissions process must be reversed. For reasons expressed in separate opinions, my Brothers MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN concur in this judgment.

Affirmed in part and reversed in part....

The guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." It is settled beyond question that the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights," *Shelley v. Kraemer, supra, at 22*. Accord, *Missouri ex rel. Gaines v. Canada, supra, at 351; McCabe v. Atchison, T. & S. F. R. Co.*, 235 U. S. 151, 161-162 (1914). The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal….

The Court has never questioned the validity of those pronouncements. Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.

Moreover, there are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is in fact benign. Courts may be asked to validate burdens imposed upon individual members of a particular group in order

to advance the group's general interest. See *United Jewish Organizations v. Carey*, 430 U. S., at 172-173 (BRENNAN, J., concurring in part). Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. See *DeFunis v. Odegaard*, 416 U. S. 312, 343 (1974) (Douglas, J., dissenting). Third, there is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making….

Nor would the state interest in genuine diversity be served by expanding petitioner's two-track system into a multitrack program with a prescribed number of seats set aside for each identifiable category of applicants. Indeed, it is inconceivable that a university would thus pursue the logic of petitioner's two-track program to the illogical end of insulating each category of applicants with certain desired qualifications from competition with all other applicants.

The experience of other university admissions programs, which take race into account in achieving the educational diversity valued by the First Amendment, demonstrates that the assignment of a fixed number of places to a minority group is not a necessary means toward that end. An illuminating example is found in the Harvard College program:

In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students….

In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are `admissible' and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can

bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer….

In such an admissions program, race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to a particular quality may vary from year to year depending upon the "mix" both of the student body and the applicants for the incoming class.

This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment….