these have been folded into his master plan, implemented this year as W2 (shorthand for W.W., or Wisconsin Works). His critics say that some of those plans have come and gone so fast they are impossible to evaluate. But he says they should be judged as steps toward his overall plan, whose parts are still being assembled.

He has a health plan for the poor (Badger Care) that awaits more waivers. ("President Clinton is setting on it now.") His job-training program is similarly stymied by Washington. "There are 163 different kinds of rules and regulations dealing with school-to-work and job-ready money from the Federal Government. It's just plain idiotic."

Thompson has moved further and faster than other governors in taking control of his state's activities on many levels, but he says he cannot be judged until his whole plan is in operation and that will not happen until Washington unties his hands. Naturally, since he thinks he is just beginning to get his schemes in place after 12 years in the Governor's Mansion, he is adamantly opposed to term limits: "If you have people dumb enough to keep running for office, like me, you should let the people decide."

Thompson's central planning can look good if you consider the California alternative. There, the governor's hands are tied, not so much by Washington as by popular initiatives that have made a traffic jam of election ballots. In 1990, the state's ballot pamphlet setting forth the voters' choices ran to 222 pages. At a city election in San Francisco, there were more than 100 items. Voters, apparently, did not notice that in 1988 they passed one measure for public financing of campaigns (Proposition 68) and, simultaneously, another measure (Proposition 73) outlawing it.

Nor is California alone in this sharpening appetite for plebiscites. In 1996, 90 ballot initiatives were up for passage in 20 states. The referendum, too, is becoming more important, as Maine's overthrow of a gay-rights law demonstrated.

The contrast between California's free-for-all and Wisconsin's central planning shows that the cry for localism is not for a single good thing (state government) against an equally monolithic bad thing (the Federal Government). Local government can be improvisational or controlled, experimental or rigid, or anything in between.

Governor Thompson is certainly not a champion of localism if that means cities or counties or the State Legislature can defy his general strategy. He boasts of the 290 items he vetoed in the first budget submitted by the Legislature. He has used the line-item veto more than 1,500 times.

Advocates of direct democracy, like Robert Wiebe, the political historian and theorist, oppose "government by experts," and Thompson sometimes makes fun of Washington "know-it-alls" who could not pass his "Elroy test" (what his little hometown knows is good for it). But Thompson also boasts of his reliance on experts, called in from all quarters to help him with planning. One of those experts, Lawrence Mead, wants to make welfare "the new paternalism," frankly telling people what is good for them. Temperamentally, Thompson is inclined to such hectoring certitude, despite his populist campaign rhetoric.

I recently followed Thompson, who was out to greet some constituents at the state environmental center. With men, he has some of Mario Cuomo's locker-

room bluster. ("Don't be a wimp.") With women, he is a palsy chin-chucker. Despite the fact that both his parents were teachers and his wife still is (sixth grade in Elroy), he uses what must pass as "street talk" in rural Wisconsin—"setting" for sitting, "oncommon" for uncommon, "secatary" for secretary.

He presents himself as embattled and with few allies: "I'm the only one still talking devolution." The Republican Congress is "as bad as the President." He feels that he has the spirit of Fighting Bob La Follette, the Wisconsin progressive—except that La Follette went after big business and Thompson is a sworn foe of big government (at least in Washington). If one of Thompson's projects fails, he wants us to believe, it will be because of his encirclement by foes.

To get a "top down" view of the states' new activism, I interviewed President Clinton in April. He had just come in from a Rose Garden announcement of his education program. Clinton, the policy wonk, was eager to talk governmental relations even when aides were trying to move him to the next event. He finds the states'-rights activism a healthy development.

"What the states did in assuming greater responsibilities was mostly positive—in education, in taking advantage of the opportunity Congress gave them to be more active in covering more children under child health programs. What my Administration tried to do was, basically, to emphasize two things—No. 1, states as laboratories of democracy, principally in education, health care and welfare reform; and secondly, actually reduce the aggregate volume of regulations on them in areas where I thought there was too much micromanagement."

Thompson would clearly not see this waiving of authority as sufficient. He would like even less Clinton's caveat that, in giving up some power to the states, the Federal Government was freed to do new things. "We have been more active in some areas than the Federal Government traditionally has been—in education, in wiring of schools and in trying to actually help them hire teachers to lower class size, the way we broke new ground by helping local law enforcement hire new officers." In short, Clinton does not see the states shoving the Federal Government off the scene but interacting with it in new ways.

Clinton is critical of the Supreme Court's tendency to exclude Washington from state-level activity, going beyond what Clinton praises as "basically a pragmatic reallocation of power between the states and the Federal Government over the last 20 years." He is especially upset by the Supreme Court's Brady Bill decision, "the most troubling of all because it said we couldn't even ask the local law-enforcement officials to do a minor ministerial job" of running background checks on gun purchasers.

On the other hand, Clinton takes a surprisingly benign view of state initiatives that express popular feeling rather than court-imposed mandates: "I don't agree with a lot of those votes, but I think they're votes that people have the right to make as long as they don't contravene a Federal statute or the Constitution.

"Usually there is a legitimate concern that these referenda are designed to address. Either representative government is going to have to move quickly into the breach when one of these proposals is on the ballot, so that it is not necessary by election time, or the progressive populists are going to have to put their own counter-proposals on the ballot. I don't think you can stop this movement any time soon when people want to have a more direct say on public issues."

We can see, by counterpointing the remarks of the Governor and the President, that there is little prospect of agreement in detail on the future of states' rights. The President is well disposed toward ballot initiatives, the most direct form of democracy. Governor Thompson is uneasy about uncoordinated proposals that might intrude on his master strategy. Though he once proposed introducing the initiative into the Wisconsin Constitution, that was when he was a young legislator. Now, he says, he is not interested in raising that issue.

Yet as the 10th Amendment fundamentalist, Thompson welcomes the Court's new interest in states' rights—while the President resists any effort to break up the partnership. The place where this disagreement causes a head-on collision is the devolution of power over things like welfare. Thompson thinks Washington has been too slow and niggardly in turning over money. Clinton's liberal critics, by contrast, think he was too quick to untie strings over welfare programs. The President himself considered the Republican bill he sighed too sweeping on some matters, but feels he remedied that by restoring food stamps and child-care provisions.

I asked him if he thinks that state welfare programs, spotty in their success even during a prosperous time, will stand up when economic reverses come. "Absolutely, as long as we keep the fundamental protection for children. We had, in my view, state-by-state settling of reimbursement for welfare families anyway.

"Before I signed the welfare bill, the reimbursement schedule for a family of three on welfare went from a low of $185 in Mississippi and Texas to a high of $660 in Vermont, and most states had welfare payments that were lower in real dollar terms, considerably lower, than they had been in the early 70's, because they had not kept up with inflation. So the Congress, long before I came along, had de facto ceded the monthly payments to the states anyway. Now the states are responsible.

"In the old days, nobody had to take responsibility for the welfare of the family and of the children, or whether there was a work-based program. Everybody could always kick the responsibility around. They could say that 'in our state the Federal Government has all these rules—and, oh, by the way, it's operated by the county.' I think that locating responsibility and fixing it with the states will be more positive than negative."

It is here that Thompson gets heated in his comments on the President. "President Clinton has done everything he possibly can to stymie what we're trying to do in Wisconsin." He has words just as harsh for Donna Shalala of Health and Human Services. "I could get matching grants" for new programs, Thompson complains, but the Government will not turn over the money he feels he needs. On this point Thompson will get no help from the Federal courts. They have repeatedly ruled that states have to observe Federal conditions if they accept Federal money.

Thompson desperately needs Federal money. As he readily admits, Workfare, at least at the outset and for some time to come, is more costly than welfare. To train people for work, to deal with obstacles to work (alcohol, drugs, mental problems), to find jobs, to motivate employers, to offer child care for those going to work, to provide health insurance—all this is not only expensive in itself but also has to be closely monitored. That is why the per-person yearly cost for people on welfare has gone up under Thompson, from $9,000 to $15,000.

Thompson's programs bring back the resented "social worker," who was an irritant under the old paternalism. His Learnfare program, for instance, was meant to dock welfare payments to any family whose child was not attending school. This involved keeping accurate truancy records, comparing them with welfare payments and weighing any alleviating circumstances (illness, transportation problems, children no longer living with their families, etc.). According to Pamela Fendt, a policy analyst at the University of Wisconsin at Milwaukee's Center for Economic Development, Learnfare saved $3 million in welfare payments but cost $14 million.

The expenses of Workfare exert tremendous pressure on the system to remove people from the program, one way or another. That is why Governor Thompson has tried to reach job-placement goals faster than required by Federal rules. One way to remove people from the rolls is simply to declare them ineligible. In Wisconsin, as in other states, many of those declared ineligible were reinstated on appeal. In Wisconsin, as in other states, the numbers going off welfare are not matched with reported jobs and income. Marcus White, associate director for the Interfaith Conference of Greater Milwaukee, says that there has been a quantum leap in the people showing up at Milwaukee shelters and soup kitchens, suggesting that not everyone disappearing from the welfare rolls is getting work.

So far, with the help of a booming economy in Wisconsin, the Governor has kept scrambling ahead of any clear signs of failure. When I suggest that Federal oversight might be justified by less commendable showings in other states, he is dismissive. "They're always saying that, that the states were going to be having a race to the bottom. I told them: 'You're wrong. That may have happened in the 40's and 50's. But right now you've got governors who are so darn competitive. They don't want to read that they're not taking care of the poor, and they're not going to let a governor in an adjoining state get ahead of them. We're very competitive'"

But Gov. Phil Batt of Idaho is not, apparently, feeling any competitive pressures. His state has cut welfare rolls by 77 percent, belying President Clinton's claim that disparities will be less acute under the new system. Idaho, which has the highest incidence of child abuse in the nation, spends $17 per capita for child welfare, as opposed to $99.30 in New York.

Peter Edelman, who resigned from the Department of Health and Human Services to protest Clinton's signing of the 1996 welfare bill, has kept a close eye on subsequent developments in the states. "There are some bright spots," he says. "There are some good states—Maine, Vermont, Rhode Island, Minnesota, Oregon. But there are some very bad states—Idaho, Mississippi, Georgia—and some states, like Pennsylvania, are not doing much. In California, the Governor proposed a bad plan that the Legislature blocked."

Governor Thompson claims that the states are sure to do things better than the Federal Government, since they are closer to the peoples' needs and wants. "The new ideas are coming from the governors, and when you have that clash of ideas, you're going to bring out the best in education or in government."

When I suggest that not all the ideas coming from the states are great ones, he is quick, as ever, to the challenge: "Tell me some that aren't." I name term limits, three-strikes, anti-immigration measures, anti-gay measures. "You're right," he

says. "I'll grant you there are some examples. But tell me some things in Wisconsin you don't like."

Thompson believes that the government closest to the people is the best government, which many people take to be a truism of democracy. Alexis de Tocqueville, during his 1831 visit to America, noted that "the Federal Government scarcely ever interferes in any but foreign affairs; and the governments of the states in reality direct society in America." The result, according to Tocqueville, was a "tyranny of the majority," by which local prejudice and conformity received no outside challenge.

It is the same complaint Madison had against the states' autonomy under the Articles of Confederation. The people were, in effect, the judges in their own cause—which always leads to skewed judgments. John Jay, arguing in "The Federalist" for a larger union, said that the people least likely to make wise policy about Native Americans were those in the friction of greatest proximity to them. It is the same lesson we learned, in this century, from the assertions of Southern leaders that they best understood blacks.

Though popular sentiment must be expressed in popular government, it is clear that some kinds of dispute need impartial arbiters. The effort of some states to deny education to the children of illegal immigrants, or legal rights to homosexuals, or organization to unions, shows that popular sentiment can be harsh with unpopular people.

Actually, there is no danger of returning to the Jacksonian days of independent states. Even if you remove the Federal Government from the scene, other national organizations cut across state lines and have to be addressed in a national way.

When I asked Governor Thompson why he did not start his new educational programs in the public schools, he said the teachers' union was too powerful. "If I wanted to hire you from Northwestern to teach in the public schools, I could not give you a contract. The union has to decide what you can teach and where. You might end up teaching music in an out-of-the-way school." Even allowing for hyperbole, teachers' unions are national organizations that can be hard to deal with on the state level.

The best proof of the states' vulnerability to national forces is the flow of outside money and influence into the local arena. When Maine put up its referendum to remove a gay rights law, religious organizations sent in money for ads and teams of "ex-gays" traveled there to support the measure. At an advanced level of communications and transportation, and with the complex organization of religious, ideological and educational enterprises, a return to the independent states of Jackson's time is impossible. To deal with national organizations, whether corporations or unions, philanthropies or crime syndicates, the states are often going to need help from the national Government.

President Clinton ended our interview by noticing how the hard line between domestic and foreign policy is being dissolved. There is a parallel softening of the division between state and national life, not just in government but in every sphere. This does not mean that states are not better at handling some things or at conducting experiments not easily tried on a national scale. There will be, as Clinton says, new kinds of interaction, dialogue and dispute. All that is healthy. But a 10th Amendment fundamentalism that looks back to the muscular states of

the Jacksonian era is, by now, an exercise in nostalgia for "good old days" that were not all that good. ■

The Comparative Context

The American model of federalism holds great attraction to many Europeans, who see the American constitutional system as a blueprint for the evolving European Union (EU). But the history of American federalism offers little hope that the road to a federal Europe will be perfectly smooth and direct. The fierce battles over federal and state power in the nineteenth century, and the continued debate over fundamental principles in the twentieth and twenty-first centuries, testify to the difficulty of the task of making "one out of many." In this cautionary article, the editors of the British magazine *The Economist* warn Europe's people and its politicians not to copy the New World's example without first studying its history.

Questions

1. What aspects of the American experience might provide advocates of a "United States of Europe" with a sense of optimism about the future of Europe? What aspects might produce pessimism?
2. What advice does *The Economist* give to advocates of a united Europe? Why?

2.5 If You Sincerely Want to Be a United States . . . (1991)

Imagine a hot summer in Paris. By grace of a kindly time-warp, a group of European eminences have assembled for a conference. Charles de Gaulle is their chairman. Among those attending are John Maynard Keynes (who has a continent-wide reputation, though he is still only 29) and Albert Einstein. Bertrand Russell is not there—he is holidaying on Cape Cod—but he barrages the proceedings by fax. Russell is kept abreast of things by young King Juan Carlos of Spain, who, with Keynes, provides the driving force of the conference.

Impossible, except in one of those rosy early-morning dreams. Now remember the men who gathered at Philadelphia in the summer of 1787. George Washington was the chairman. Alexander Hamilton, whose short life never knew a dull moment, was there, as was James Madison, a pragmatic man of principle who would later become president. Together, they directed the conference. Ben-

"If you sincerely want to be a United States . . ." *The Economist* (March 23, 1991), pp. 21–24.

3

LOUIS HARTZ

From *The Liberal Tradition in America*

Scholar Louis Hartz has used Alexis de Tocqueville's idea that Americans were "born equal" as a take-off point for his complicated philosophical analysis of the American political tradition. Citing the ideas of John Locke, Edmund Burke, and Jeremy Bentham, Hartz points to the many paradoxes evident in American thought: "pragmatism and absolutism, historicism and rationalism, optimism and pessimism, materialism and idealism, individualism and conformism." Underlying all these paradoxes is the ultimate one. Hartz argues that America, in many ways the most revolutionary nation in the world, never really had a revolution to attain the goal of equality. This paradox places the United States in a "strange relationship" with the nations that seek to emulate America's success.

THE ANALYSIS which this book contains is based on what might be called the storybook truth about American history: that America was settled by men who fled from the feudal and clerical oppressions of the Old World. If there is anything in this view, as old as the national folklore itself, then the outstanding thing about the American community in Western history ought to be the nonexistence of those oppressions, or since the reaction against them was in the broadest sense liberal, that the American community is a liberal community. We are confronted, as it were, with a kind of inverted Trotskyite law of combined development, America skipping the feudal stage of history as Russia presumably skipped the liberal stage. . . . One of the central characteristics of a nonfeudal society is that it lacks a genuine revolutionary tradition, the tradition which in Europe has been linked with the Puritan and French revolutions: that it is "born equal," as Tocqueville said. . . .

Surely, then, it is a remarkable force: this fixed, dogmatic liberalism of a liberal way of life. It is the secret root from which have sprung many of the most puzzling of American cultural phenomena. . . .

At bottom it is riddled with paradox. Here is a Lockian doctrine which in the West as a whole is the symbol of rationalism, yet in America the devotion to it has been so irrational that it has not even been recognized for what it is: liberalism. There has never been a "liberal movement" or

a real "liberal party" in America: we have only had the American Way of Life, a nationalist articulation of Locke which usually does not know that Locke himself is involved; and we did not even get that until after the Civil War when the Whigs of the nation, deserting the Hamiltonian tradition, saw the capital that could be made out of it. This is why even critics who have noticed America's moral unity have usually missed its substance. Ironically, "liberalism" is a stranger in the land of its greatest realization and fulfillment. But this is not all. Here is a doctrine which everywhere in the West has been a glorious symbol of individual liberty, yet in America its compulsive power has been so great that it has posed a threat to liberty itself. Actually Locke has a hidden conformitarian germ to begin with, since natural law tells equal people equal things, but when this germ is fed by the explosive power of modern nationalism, it mushrooms into something pretty remarkable. One can reasonably wonder about the liberty one finds in Burke.

I believe that this is the basic ethical problem of a liberal society: not the danger of the majority which has been its conscious fear, but the danger of unanimity, which has slumbered unconsciously behind it: the "tyranny of opinion" that Tocqueville saw unfolding. . . . When Tocqueville wrote that the "great advantage" of the American lay in the fact that he did not have "to endure a democratic revolution," he advanced what was surely one of his most fundamental insights into American life. However, while many of his observations have been remembered but not followed up, this one has scarcely even been remembered. Perhaps it is because, fearing revolution in the present, we like to think of it in the past, and we are reluctant to concede that its romance has been missing from our lives. Perhaps it is because the plain evidence of the American revolution of 1776, especially the evidence of its social impact that our newer historians have collected, has made the comment of Tocqueville seem thoroughly enigmatic. But in the last analysis, of course, the question of its validity is a question of perspective. Tocqueville was writing with the great revolutions of Europe in mind, and from that point of view the outstanding thing about the American effort of 1776 was bound to be, not the freedom to which it led, but the established feudal structure it did not have to destroy. . . .

Thus the fact that the Americans did not have to endure a "democratic revolution" deeply conditioned their outlook on people elsewhere who did; and by helping to thwart the crusading spirit in them, it gave to the wild enthusiasms of Europe an appearance not only of analytic error but of unrequited love. Symbols of a world revolution, the Americans were not in truth world revolutionaries. There is no use complaining about

the confusions implicit in this position, as Woodrow Wilson used to complain when he said that we had "no business" permitting the French to get the wrong impression about the American revolution. On both sides the reactions that arose were well-nigh inevitable. But one cannot help wondering about something else: the satisfying use to which our folklore has been able to put the incongruity of America's revolutionary role. For if the "contamination" that Jefferson feared, and that found its classic expression in Washington's Farewell Address, has been a part of the American myth, so has the "round the world" significance of the shots that were fired at Concord. We have been able to dream of ourselves as emancipators of the world at the very moment that we have withdrawn from it. We have been able to see ourselves as saviors at the very moment that we have been isolationists. Here, surely, is one of the great American luxuries that the twentieth century has destroyed. . . . When the Americans celebrated the uniqueness of their own society, they were on the track of a personal insight of the profoundest importance. For the nonfeudal world in which they lived shaped every aspect of their social thought: it gave them a frame of mind that cannot be found anywhere else in the eighteenth century, or in the wider history of modern revolutions. . . . The issue of history itself is deeply involved here. On this score, inevitably, the fact that the revolutionaries of 1776 had inherited the freest society in the world shaped their thinking in an intricate way. It gave them, in the first place, an appearance of outright conservatism. . . . The past had been good to the Americans, and they knew it. . . .

Actually, the form of America's traditionalism was one thing, its content quite another. Colonial history had not been the slow and glacial record of development that Bonald and Maistre loved to talk about.* On the contrary, since the first sailing of the *Mayflower*, it had been a story of new beginnings, daring enterprises, and explicitly stated principles—it breathed, in other words, the spirit of Bentham himself. The result was that the traditionalism of the Americans, like a pure freak of logic, often bore amazing marks of antihistorical rationalism. The clearest case of this undoubtedly is to be found in the revolutionary constitutions of 1776, which evoked, as Franklin reported, the "rapture" of European liberals everywhere. In America, of course, the concept of a written constitution, including many of the mechanical devices it embodied, was the end-product of a chain of historical experience that went back to the Mayflower

*Louis Bonald and Joseph de Maistre were prominent French conservative political theorists of the early nineteenth century. Both were inveterate enemies of the radical and rationalistic ideas associated with the French Revolution. They were leading figures in the European Reaction.—EDS.

Compact and the Plantation Covenants of the New England towns: it was the essence of political traditionalism. But in Europe just the reverse was true. The concept was the darling of the rationalists—a symbol of the emancipated mind at work. . . .

But how then are we to describe these baffling Americans? Were they rationalists or were they traditionalists? The truth is, they were neither, which is perhaps another way of saying that they were both. For the war between Burke and Bentham on the score of tradition, which made a great deal of sense in a society where men had lived in the shadow of feudal institutions, made comparatively little sense in a society where for years they had been creating new states, planning new settlements, and, as Jefferson said, literally building new lives.* In such a society a strange dialectic was fated to appear, which would somehow unite the antagonistic components of the European mind; the past became a continuous future, and the God of the traditionalists sanctioned the very arrogance of the men who defied Him.

This shattering of the time categories of Europe, this Hegelian-like revolution in historic perspective, goes far to explain one of the enduring secrets of the American character: a capacity to combine rock-ribbed traditionalism with high inventiveness, ancestor worship with ardent optimism. Most critics have seized upon one or the other of these aspects of the American mind, finding it impossible to conceive how both can go together. That is why the insight of Gunnar Myrdal is a very distinguished one when he writes: "America is . . . conservative. . . . But the principles conserved are liberal and some, indeed, are radical." Radicalism and conservatism have been twisted entirely out of shape by the liberal flow of American history. . . .

What I have been doing here is fairly evident: I have been interpreting the social thought of the American revolution in terms of the social goals *it did not need to achieve.* Given the usual approach, this may seem like a perverse inversion of the reasonable course of things; but in a world where the "canon and feudal law" are missing, how else are we to understand the philosophy of a liberal revolution? The remarkable thing about the "spirit of 1776," as we have seen, is not that it sought emancipation but that it sought it in a sober temper; not that it opposed power but that it opposed it ruthlessly and continuously; not that it looked forward to the

*Edmund Burke, an eighteenth-century English political theorist, is perhaps the most artful defender of tradition in the history of political theory. Jeremy Bentham, an English theorist of the late eighteenth and early nineteenth centuries, was as rationalistic as Burke was traditionalistic. While Burke generally saw virtues in inherited institutions, Bentham generally advocated their reform.—EDS.

future but that it worshiped the past as well. Even these perspectives, however, are only part of the story, misleading in themselves. The "free air" of American life, as John Jay once happily put it, penetrated to deeper levels of the American mind, twisting it in strange ways, producing a set of results fundamental to everything else in American thought. The clue to these results lies in the following fact: the Americans, though models to all the world of the middle class way of life, lacked the passionate middle class consciousness which saturated the liberal thought of Europe. . . .

But this is not all. If the position of the colonial Americans saved them from many of the class obsessions of Europe, it did something else as well: it inspired them with a peculiar sense of community that Europe had never known. . . . Amid the "free air" of American life, something new appeared: men began to be held together, not by the knowledge that they were different parts of a corporate whole, but by the knowledge that they were similar participants in a uniform way of life—by that "pleasing uniformity of decent competence" which Crèvecoeur loved so much. The Americans themselves were not unaware of this. When Peter Thacher proudly announced that "simplicity of manners" was the mark of the revolutionary colonists, what was he saying if not that the norms of a single class in Europe were enough to sustain virtually a whole society in America? Richard Hildreth, writing after the leveling impact of the Jacksonian revolution had made this point far more obvious, put his finger directly on it. He denounced feudal Europe, where "half a dozen different codes of morals," often in flagrant contradiction with one another, flourished "in the same community," and celebrated the fact that America was producing "one code, moral standard, by which the actions of all are to be judged. . . . " Hildreth knew that America was a marvelous mixture of many peoples and many religions, but he also knew that it was characterized by something more marvelous even than that: the power of the liberal norm to penetrate them all.

Now a sense of community based on a sense of uniformity is a deceptive thing. It looks individualistic, and in part it actually is. It cannot tolerate internal relationships of disparity, and hence can easily inspire the kind of advice that Professor Nettels once imagined a colonial farmer giving his son: "Remember that you are as good as any man—and also that you are no better." But in another sense it is profoundly anti-individualistic, because the common standard is its very essence, and deviations from that standard inspire it with an irrational fright. The man who is as good as his neighbors is in a tough spot when he confronts all of his neighbors combined. Thus William Graham Sumner looked at the other side of

Professor Nettels's colonial coin and did not like what he saw: "public opinion" was an "impervious mistress. . . . Mrs. Grundy held powerful sway and Gossip was her prime minister."

Here we have the "tyranny of the majority" that Tocqueville later described in American life; here too we have the deeper paradox out of which it was destined to appear. Freedom in the fullest sense implies both variety and equality. . . . At the bottom of the American experience of freedom, not in antagonism to it but as a constituent element of it, there has always lain the inarticulate premise of conformity. . . . American political thought, as we have seen, is a veritable maze of polar contradictions, winding in and out of each other hopelessly: pragmatism and absolutism, historicism and rationalism, optimism and pessimism, materialism and idealism, individualism and conformism. But, after all, the human mind works by polar contradictions; and when we have evolved an interpretation of it which leads cleanly in a single direction, we may be sure that we have missed a lot. The task of the cultural analyst is not to discover simplicity, or even to discover unity, for simplicity and unity do not exist, but to drive a wedge of rationality through the pathetic indecisions of social thought. In the American case that wedge is not hard to find. . . .

It is this business of destruction and creation which goes to the heart of the problem. For the point of departure of great revolutionary thought everywhere else in the world has been the effort to build a new society on the ruins of an old one, and this is an experience America has never had. We are reminded again of Tocqueville's statement: the Americans are "born equal."

That statement, especially in light of the strange relationship which the revolutionary Americans had with their admirers abroad, raises an obvious question. Can a people that is born equal ever understand peoples elsewhere that have become so? Can it ever lead them? . . . America's experience of being born equal has put it in a strange relationship to the rest of the world.

5.3 American Exceptionalism: A Double-Edged Sword (1997)

Seymour Martin Lipset

Born out of revolution, the United States is a country organized around an ideology which includes a set of dogmas about the nature of a good society. Americanism, as different people have pointed out, is an "ism" or ideology in the same way that communism or fascism or liberalism are isms. As G. K. Chesterton put it: "America is the only nation in the world that is founded on a creed. That creed is set forth with dogmatic and even theological lucidity in the Declaration of Independence. . . ." As noted in the Introduction, the nation's ideology can be described in five words: liberty, egalitarianism, individualism, populism, and laissez-faire. The revolutionary ideology which became the American Creed is liberalism in its eighteenth- and nineteenth-century meanings, as distinct from conservative Toryism, statist communitarianism, mercantilism, and *noblesse oblige* dominant in monarchical, state-church-formed cultures.

Other countries' senses of themselves are derived from a common history. Winston Churchill once gave vivid evidence to the difference between a national identity rooted in history and one defined by ideology in objecting to a proposal in 1940 to outlaw the anti-war Communist Party. In a speech in the House of Commons, Churchill said that as far as he knew, the Communist Party was composed of Englishmen and he did not fear an Englishman. In Europe, nationality is related to community, and thus one cannot become un-English or un-Swedish. Being an American, however, is an ideological commitment. It is not a matter of birth. Those who reject American values are un-American.

The American Revolution sharply weakened the *noblesse oblige*, hierarchically rooted, organic community values which had been linked to Tory sentiments, and enormously strengthened the individualistic, egalitarian, and anti-statist ones which had been present in the settler and religious background of the colonies. These values were evident in the twentieth-century fact that, as H. G. Wells pointed out close to ninety years ago, the United States not only has lacked a viable socialist party, but also has never developed a British or European-type Conservative or Tory party. Rather, America has been dominated by pure bourgeois, middle-class individualistic values. As Wells put it: "Essentially America is a middle-class [which has] become a community and so its essential problems are the problems of a modern individualistic society, stark and clear." He enunciated a theory of America as a liberal society, in the classic anti-statist meaning of the term:

> It is not difficult to show for example, that the two great political parties in America represent only one English party, the middle-class Liberal party. . . . There are no Tories . . .

> and no Labor Party. . . . [T]he new world [was left] to the Whigs and Nonconformists and to those less constructive, less logical, more popular and liberating thinkers who became Radicals in England, and Jeffersonians and then Democrats in America. All Americans are, from the English point of view, Liberals of one sort or another. . . .
>
> The liberalism of the eighteenth century was essentially the rebellion . . . against the monarchical and aristocratic state—against hereditary privilege, against restrictions on bargains. Its spirit was essentially anarchistic—the antithesis of Socialism. It was anti-State.

Comparative Perspectives

In dealing with national characteristics it is important to recognize that comparative evaluations are never absolutes, that they always are made in terms of more or less. The statement that the United States is an egalitarian society obviously does not imply that all Americans are equal in any way that can be defined. This proposition usually means (regardless of which aspect is under consideration—social relations, status, mobility, etc.) that the United States is more egalitarian than Europe.

Comparative judgments affect all generalizations about societies. This is such an obvious, commonsensical truism that is seems almost foolish to enunciate it. I only do so because statements about America or other countries are frequently challenged on the ground that they are not absolutely true. Generalizations may invert when the unit of comparison changes. For example, Canada looks different when compared to the United States than when contrasted with Britain. Figuratively, on a scale of 0 to 100, with the United States close to 0 on a given trait and Britain at 100, Canada would fall around 30. Thus, when Canada is evaluated by reference to the United States, it appears as more elitist, law-abiding, and statist, but when considering the variations between Canada and Britain, Canada looks more anti-statist, violent, and egalitarian.

The notion of "American exceptionalism" became widely applied in the context of efforts to account for the weakness of working-class radicalism in the United States. The major question subsumed in the concept became why the United States is the only industrialized country which does not have a significant socialist movement or Labor party. That riddle has bedeviled socialist theorists since the late nineteenth century. Friedrich Engels tried to answer it in the last decade of his life. The German socialist and sociologist Werner Sombart dealt with it in a major book published in his native language in 1906, *Why Is There No Socialism in the United States?* As we have seen, H. G. Wells, then a Fabian, also addressed the issue that year in *The Future in America*. Both Lenin and Trotsky were deeply concerned because the logic of Marxism, the proposition expressed by Marx in *Das Kapital* that "the more developed country shows the less developed the image of their future," implied to Marxists prior to the Russian Revolution that the United States would be the first socialist country.

Since some object to an attempt to explain a negative, a vacancy, the query may of course be reversed to ask why has America been the most classically liberal polity in the world from its founding to the present? Although the United States remains the wealthiest large industrialized nation, it devotes less of its income to welfare and the state is less involved in the economy than is true for other

developed countries. It not only does not have a viable, class-conscious, radical political movement, but its trade unions, which have long been weaker than those of almost all other industrialized countries, have been steadily declining since the mid-1950s. . . .

An emphasis on American uniqueness raises the obvious question of the nature of the differences. There is a large literature dating back to at least the eighteenth century which attempts to specify the special character of the United States politically and socially. One of the most interesting, often overlooked, is Edmund Burke's speech to the House of Commons proposing reconciliation with the colonies, in which he sought to explain to his fellow members what the revolutionary Americans were like. He noted that they were different culturally, that they were not simply transplanted Englishmen. He particularly stressed the unique character of American religion. J. Hector St. John Crèvecoeur, in his book *Letters from an American Farmer*, written in the late eighteenth century, explicitly raised the question, "What is an American?" He emphasized that Americans behaved differently in their social relations, were much more egalitarian than other nationalities, that their "dictionary" was "short in words of dignity, and names of honor," that is, in terms through which the lower strata expressed their subservience to the higher. Tocqueville, who observed egalitarianism in a similar fashion, also stressed individualism, as distinct from the emphasis on "group ties" which marked Europe.

These commentaries have been followed by a myriad—thousands upon thousands—of books and articles by foreign travelers. The overwhelming majority are by educated Europeans. Such writings are fruitful because they are comparative; those who wrote them emphasized cross-national variations in behavior and institutions. Tocqueville's *Democracy*, of course, is the best known. As we have seen, he noted that he never wrote anything about the United States without thinking of France. As he put it, in speaking of his need to contrast the same institutions and behavior in both countries, "without comparisons to make, the mind doesn't know how to proceed." Harriet Martineau, an English contemporary, also wrote a first-rate comparative book on America. Friedrich Engels and Max Weber were among the contributors to the literature. There is a fairly systematic and similar logic in many of these discussions.

Beyond the analysis of variations between the United States and Europe, various other comparisons have been fruitful. In previous writings, I have suggested that one of the best ways to specify and distinguish American traits is by contrast with Canada. There is a considerable comparative North American literature, written almost entirely by Canadians. They have a great advantage over Americans since, while very few of the latter study their northern neighbor, it is impossible to be a literate Canadian without knowing almost as much, if not more, as most Americans about the United States. Almost every Canadian work on a given subject (the city, religion, the family, trade unions, etc.) contains a great deal about the United States. Many Canadians seek to explain their own country by dealing with differences or similarities south of the border. Specifying and analyzing variations among the predominantly English-speaking countries—Australia, Canada, Great Britain, New Zealand, and the United States—is also useful precisely because the differences among them generally are smaller than between

each and non-Anglophonic societies. I have tried to analyze these variations in *The First New Nation*. The logic of studying societies which have major aspects in common was also followed by Louis Hartz in treating the overseas settler societies—United States, Canada, Latin America, Australia, and South Africa—as units for comparison. Fruitful comparisons have been made between Latin America and Anglophonic North America, which shed light on each.

Some Latin Americans have argued that there are major common elements in the Americas which show up in comparisons with Europe. Fernando Cardoso, a distinguished sociologist and now president of Brazil, once told me that he and his friends (who were activists in the underground left in the early 1960s) consciously decided not to found a socialist party as the military dictatorship was breaking down. They formed a populist party because, as they read the evidence, class-conscious socialism does not appeal in the Americas. With the exceptions of Chile and Canada (to a limited extent), major New World left parties from Argentina to the United States have been populist. Cardoso suggested that consciousness of social class is less salient throughout most of the Americas than in postfeudal Europe. However, I do not want to take on the issue of how exceptional the Americas are; dealing with the United States is more than enough.

Liberalism, Conservatism, and Americanism

The United States is viewed by many as the great conservative society, but it may also be seen as the most classically liberal polity in the developed world. To understand the exceptional nature of American politics, it is necessary to recognize, with H. G. Wells, that conservatism, as defined outside of the United States, is particularly weak in this country. Conservatism in Europe and Canada, derived from the historic alliance of church and government, is associated with the emergence of the welfare state. The two names most identified with it are Bismarck and Disraeli. Both were leaders of the conservatives (Tories) in their countries. They represented the rural and aristocratic elements, sectors which disdained capitalism, disliked the bourgeoisie, and rejected materialistic values. Their politics reflected the values of *noblesse oblige*, the obligation of the leaders of society and the economy to protect the less fortunate.

The semantic confusion about liberalism in America arises because both early and latter-day Americans never adopted the term to describe the unique American polity. The reason is simple. The American system of government existed long before the word "liberal" emerged in Napoleonic Spain and was subsequently accepted as referring to a particular party in mid-nineteenth-century England, as distinct from the Tory or Conservative Party. What Europeans have called "liberalism," Americans refer to as "conservatism": a deeply anti-statist doctrine emphasizing the virtues of laissez-faire. Ronald Reagan and Milton Friedman, the two current names most frequently linked with this ideology, define conservatism in America. And as Friedrich Hayek, its most important European exponent noted, it includes the rejection of aristocracy, social class hierarchy, and an established state church. As recently as the April and June 1987 issues of the British magazine *Encounter*, two leading trans-Atlantic conservative intellectuals, Max Beloff (Lord Beloff) and Irving Kristol, debated the use of titles. Kristol argued that

Britain "is soured by a set of very thin, but tenacious, aristocratic pretensions . . . [which] foreclose opportunities and repress a spirit of equality that has yet to find its full expression. . . ." This situation fuels many of the frustrations that make "British life . . . so cheerful, so abounding in *ressentiment*." Like Tocqueville, he holds up "social equality" as making "other inequalities tolerable in modern democracy." Beloff, a Tory, contended that what threatens conservatism in Britain "is not its remaining links with the aristocratic tradition, but its alleged indifference to some of the abuses of capitalism. It is not the Dukes who lose us votes, but the 'malefactors of great wealth. . . .'" He wondered "why Mr. Kristol believes himself to be a 'conservative,'" since he is "as incapable as most Americans of being a conservative in any profound sense." Lord Beloff concluded that "Conservatism must have a 'Tory' element or it is only the old 'Manchester School,'" i.e., liberal.

Canada's most distinguished conservative intellectual, George Grant, emphasized in his *Lament for a Nation* that "Americans who call themselves 'Conservatives' have the right to that title only in a particular sense. In fact, they are old-fashioned liberals. . . . Their concentration on freedom from governmental interference has more to do with nineteenth century liberalism than with traditional conservatism, which asserts the right of the community to restrain freedom in the name of the common good." Grant bemoaned the fact that American conservatism, with its stress on the virtues of competition and links to business ideology, focuses on the rights of individuals and ignores communal rights and obligations. He noted that there has been no place in the American political philosophy "for the organic conservatism that predates the age of progress. Indeed, the United States is the only society on earth that has no traditions from before the age of progress." The recent efforts, led by Amitai Etzioni, to create a "communitarian" movement are an attempt to transport Toryism to America. British and German Tories have recognized the link and have shown considerable interest in Etzioni's ideas.

Still, it must be recognized that American politics have changed. The 1930s produced a qualitative difference. As Richard Hofstadter wrote, this period brought a "social democratic tinge" to the United States for the first time in its history. The Great Depression produced a strong emphasis on planning, on the welfare state, on the role of the government as a major regulatory actor. An earlier upswing in statist sentiment occurred immediately prior to World War I, as evidenced by the significant support for the largely Republican Progressive movement led by Robert LaFollette and Theodore Roosevelt and the increasing strength (up to a high of 6% of the national vote in 1912) for the Socialist Party. They failed to change the political system. Grant McConnell explains the failure of the Progressive movement as stemming from "the pervasive and latent ambiguity in the movement" about confronting American anti-statist values. "Power as it exists was antagonistic to democracy, but how was it to be curbed without the erection of superior power?"

Prior to the 1930s, the American trade union movement was also in its majority anti-statist. The American Federation of Labor (AFL) was syndicalist, believed in more union, not more state power, and was anti-socialist. Its predominant leader for forty years, Samuel Gompers, once said when asked about his politics, that he guessed he was three quarters of an anarchist. And he was right. Europeans

and others who perceived the Gompers-led AFL as a conservative organization because it opposed the socialists were wrong. The AFL was an extremely militant organization, which engaged in violence and had a high strike rate. It was not conservative, but rather a militant anti-statist group. The United States also had a revolutionary trade union movement, the Industrial Workers of the World (IWW). The IWW, like the AFL, was not socialist. It was explicitly anarchist, or rather, anarcho-syndicalist. The revived American radical movement of the 1960s, the so-called New Left, was also not socialist. While not doctrinally anarchist, it was much closer to anarchism and the IWW in its ideology and organizational structure than to the Socialists or Communists.

The New Deal, which owed much to the Progressive movement, was not socialist either. Franklin Roosevelt clearly wanted to maintain a capitalist economy. In running for president in 1932, he criticized Herbert Hoover and the Republicans for deficit financing and expanding the economic role of the government, which they had done in order to deal with the Depression. But his New Deal, also rising out of the need to confront the massive economic downsizing, drastically increased the statist strain in American politics, while furthering public support for trade unions. The new labor movement which arose concomitantly, the Committee for (later Congress of) Industrial Organization (CIO), unlike the American Federation of Labor (AFL), was virtually social democratic in its orientation. In fact, socialists and communists played important roles in the movement. The CIO was much more politically active than the older Federation and helped to press the Democrats to the left. The Depression led to a kind of moderate "Europeanization" of American politics, as well as of its labor organizations. Class factors became more important in differentiating party support. The conservatives, increasingly concentrated among the Republicans, remained anti-statist and laissez-faire, but many of them grew willing to accommodate an activist role for the state.

This pattern, however, gradually inverted after World War II as a result of long-term prosperity. The United States, like other parts of the developed world, experienced what some have called an economic miracle. The period from 1945 to the 1980s was characterized by considerable growth (mainly before the mid-1970s), an absence of major economic downswings, higher rates of social mobility both on a mass level and into the elites, and a tremendous expansion of higher educational systems—from a few million to 11 or 12 million going to colleges and universities—which fostered that mobility. America did particularly well economically, leading Europe and Japan by a considerable margin in terms of new job creation. A consequence of these developments was a refurbishing of the classical liberal ideology, that is, American conservatism. The class tensions produced by the Depression lessened, reflected in the decline of the labor movement and lower correlations between class position and voting choices. And the members of the small (by comparative standards) American labor movement are today significantly less favorable to government action than European unionists. Fewer than half of American union members are in favor of the government providing a decent standard of living for the unemployed, as compared with 69 percent of West German, 72 percent of British, and 73 percent of Italian unionists. Even before Ronald Reagan entered the White House in 1981, the United States had a lower rate of taxation, a less developed welfare state, and many fewer government-owned industries than other industrialized nations. ■

Lincoln, Brandeis, and others who have found the American constitutional system, including its tradition of judicial review, well adapted to the needs of a free society. As Mr. Justice Brandeis said,

> the doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy.

It is error to insist that no society is democratic unless it has a government of unlimited powers, and that no government is democratic unless its legislature had unlimited powers. Constitutional review by an independent judiciary is a tool of proven use in the American quest for an open society of widely dispersed powers. In a vast country, of mixed population, with widely different regional problems, such an organization of society is the surest base for the hopes of democracy.

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DAVID O'BRIEN

From *Storm Center*

Professor David O'Brien's fine book on the Supreme Court touches on many landmark cases in constitutional law. Few are more important than Brown v. Board of Education of Topeka, Kansas. *Today's students of American government often take* Brown *for granted, since they've lived with the Court's ruling their whole lives; thus they may forget the dramatic events surrounding the 1954 decision. In this excerpt O'Brien revisits the first* Brown *case, as well as* Brown II, *exploring the delicate relationship between the Court and public opinion. He then goes back to President Franklin Roosevelt's infamous 1937 "court-packing" scheme to illustrate another aspect of the impact of public opinion on the judiciary. Unlike the citizenry's direct and immediate reaction to Congress and the president, the communication of views between the public and the judiciary is less easy to measure, O'Brien acknowledges. Yet the Supreme Court lies, as it should, at the heart of the process that resolves the nation's monumental political issues.*

"WHY DOES the Supreme Court pass the school desegregation case?" asked one of Chief Justice Vinson's law clerks in 1952. *Brown v.*

Board of Education of Topeka, Kansas had arrived on the Court's docket in 1951, but it was carried over for oral argument the next term and then consolidated with four other cases and reargued in December 1953. The landmark ruling did not come down until May 17, 1954. "Well," Justice Frankfurter explained, "we're holding it for the election"—1952 was a presidential election year. "You're holding it for the election?" The clerk persisted in disbelief. "I thought the Supreme Court was supposed to decide cases without regard to elections." "When you have a major social political issue of this magnitude," timing and public reactions are important considerations, and, Frankfurter continued, "we do not think this is the time to decide it." Similarly, Tom Clark has recalled that the Court awaited, over Douglas's dissent, additional cases from the District of Columbia and other regions, so as "to get a national coverage, rather than a sectional one." Such political considerations are by no means unique. "We often delay adjudication. It's not a question of evading at all," Clark concluded. "It's just the practicalities of life—common sense."

Denied the power of the sword or the purse, the Court must cultivate its institutional prestige. The power of the Court lies in the pervasiveness of its rulings and ultimately rests with other political institutions and public opinion. As an independent force, the Court has no chance to resolve great issues of public policy. *Dred Scott v. Sandford* (1857) and *Brown v. Board of Education* (1954) illustrate the limitations of Supreme Court policy-making. The "great folly," as Senator Henry Cabot Lodge characterized *Dred Scott*, was not the Court's interpretation of the Constitution or the unpersuasive moral position that blacks were not persons under the Constitution. Rather, "the attempt of the Court to settle the slavery question by judicial decision was simple madness." . . . A hundred years later, political struggles within the country and, notably, presidential and congressional leadership in enforcing the Court's school desegregation ruling saved the moral appeal of *Brown* from becoming another "great folly."

Because the Court's decisions are not self-executing, public reactions inevitably weigh on the minds of the justices. . . .

. . . Opposition to the school desegregation ruling in *Brown* led to bitter, sometimes violent confrontations. In Little Rock, Arkansas, Governor Orval Faubus encouraged disobedience by southern segregationists. The federal National Guard had to be called out to maintain order. The school board in Little Rock unsuccessfully pleaded, in *Cooper v. Aaron* (1958), for the Court's postponement of the implementation of *Brown's* mandate. In the midst of the controversy, Frankfurter worried that Chief Justice Warren's attitude had become "more like that of a fighting politician

than that of a judicial statesman." In such confrontations between the Court and the country, "the transcending issue," Frankfurter reminded the brethren, remains that of preserving "the Supreme Court as the authoritative organ of what the Constitution requires." When the justices move too far or too fast in their interpretation of the Constitution, they threaten public acceptance of the Court's legitimacy.

The political struggles of the Court (and among the justices) continue after the writing of opinions and final votes. Announcements of decisions trigger diverse reactions from the media, interest groups, lower courts, Congress, the President, and the general public. Their reactions may enhance or thwart compliance and reinforce or undermine the Court's prestige. Opinion days thus may reveal something of the political struggles that might otherwise remain hidden within the marble temple. They may also mark the beginning of larger political struggles for influence in the country. . . .

When deciding major issues of public law and policy, justices must consider strategies for getting public acceptance of their rulings. When striking down the doctrine of "separate but equal" facilities in 1954 in *Brown v. Board of Education (Brown I)*, for instance, the Warren Court waited a year before issuing, in *Brown II*, its mandate for "all deliberate speed" in ending racial segregation in public education.

Resistance to the social policy announced in *Brown I* was expected. A rigid timetable for desegregation would only intensify opposition. During oral arguments on *Brown II*, devoted to the question of what kind of decree the Court should issue to enforce *Brown*, Warren confronted the hard fact of southern resistance. The attorney for South Carolina, S. Emory Rogers, pressed for an open-ended decree—one that would not specify when and how desegregation should take place. He boldly proclaimed

> Mr. Chief Justice, to say we will conform depends on the decree handed down. I am frank to tell you, right now [in] our district I do not think that we will send—[that] the white people of the district will send their children to the Negro schools. It would be unfair to tell the Court that we are going to do that. I do not think it is. But I do think that something can be worked out. We hope so.

"It is not a question of attitude," Warren shot back, "it is a question of conforming to the decree." Their heated exchange continued as follows:

> CHIEF JUSTICE WARREN: But you are not willing to say here that there would be an honest attempt to conform to this decree, if we did leave it to the district court [to implement]?

MR. ROGERS: No, I am not. Let us get the word "honest" out of there.
CHIEF JUSTICE WARREN: No, leave it in.
MR. ROGERS: No, because I would have to tell you that right now we would not conform—we would not send our white children to the negro schools. . . .

Agreement emerged that the Court should issue a short opinion-decree. In a memorandum, Warren summarized the main points of agreement. The opinion should simply state that *Brown I* held radically segregated public schools to be unconstitutional. *Brown II* should acknowledge that the ruling creates various administrative problems, but emphasize that "local school authorities have the primary responsibility for assessing and solving these problems; [and] the courts will have to consider these problems in determining whether the efforts of local school authorities" are in good-faith compliance. . . .

Enforcement and implementation required the cooperation and coordination of all three branches. Little progress could be made, as Assistant Attorney General Pollack has explained, "where historically there had been slavery and a long tradition of discrimination [until] all three branches of the federal government [could] be lined up in support of a movement forward or a requirement for change." The election of Nixon in 1968 then brought changes both in the policies of the executive branch and in the composition of the Court. The simplicity and flexibility of *Brown*, moreover, invited evasion. It produced a continuing struggle over measures, such as gerrymandering school district lines and busing in the 1970s and 1980s, because the mandate itself had evolved from one of ending segregation to one of securing integration in public schools. . . .

"By itself," the political scientist Robert Dahl observed, "the Court is almost powerless to affect the course of national policy." *Brown* dramatically altered the course of American life, but it also reflected the justices' awareness that their decisions are not self-executing. The rulings [in] *Brown* . . . were unanimous but ambiguous. The ambiguity in the desegregation rulings . . . was the price of achieving unanimity. Unanimity appeared necessary if the Court was to preserve its institutional prestige while pursuing revolutionary change in social policy. Justices sacrificed their own policy preferences for more precise guidelines, while the Court tolerated lengthy delays in recognition of the costs of open defiance and the pressures of public opinion. . . .

Public opinion serves to curb the Court when it threatens to go too far or too fast in its rulings. The Court has usually been in step with major political movements, except during transitional periods or critical

elections. It would nevertheless be wrong to conclude, along with Peter Finley Dunne's fictional Mr. Dooley, that "th' supreme court follows th' iliction returns." To be sure, the battle over FDR's "Court-packing" plan and the Court's "switch-in-time-that-saved-nine" in 1937 gives that impression. Public opinion supported the New Deal, but turned against FDR after his landslide reelection in 1936 when he proposed to "pack the Court" by increasing its size from nine to fifteen. In a series of five-to-four and six-to-three decisions in 1935–1936, the Court had struck down virtually every important measure of FDR's New Deal program. But in the spring of 1937, while the Senate Judiciary Committee considered FDR's proposal, the Court abruptly handed down three five-to-four rulings upholding major pieces of New Deal legislation. Shortly afterward, FDR's close personal friend and soon-to-be nominee for the Court, Felix Frankfurter, wrote Justice Stone confessing that he was "not wholly happy in thinking that Mr. Dooley should, in the course of history turn out to have been one of the most distinguished legal philosophers." Frankfurter, of course, knew that justices do not simply follow the election returns. The influence of public opinion is more subtle and complex.

Life in the marble temple is not immune from shifts in public opinion. . . . The justices, however, deny being directly influenced by public opinion. The Court's prestige rests on preserving the public's view that justices base their decisions on interpretations of the law, rather than on their personal policy preferences. Yet, complete indifference to public opinion would be the height of judicial arrogance. . . .

"The powers exercised by this Court are inherently oligarchic," Frankfurter once observed when pointing out that "[t]he Court is not saved from being oligarchic because it professes to act in the service of humane ends." Judicial review is antidemocratic. But the Court's power stems from its duty to give authoritative meaning to the Constitution, and rests with the persuasive forces of reason, institutional prestige, the cooperation of other political institutions, and, ultimately, public opinion. The country, in a sense, saves the justices from being an oligarchy by curbing the Court when it goes too far or too fast with its policy-making. Violent opposition and resistance, however, threaten not merely the Court's prestige but the very idea of a government under law.

Some Court watchers, and occasionally even the justices, warn of "an imperial judiciary" and a "government by the judiciary." For much of the Court's history, though, the work of the justices has not involved major issues of public policy. In most areas of public law and policy, the fact that the Court decides an issue is more important than what it decides. Relatively few of the many issues of domestic and foreign policy that

arise in government reach the Court. When the Court does decide major questions of public policy, it does so by bringing political controversies within the language, structure, and spirit of the Constitution. By deciding only immediate cases, the Court infuses constitutional meaning into the resolution of the larger surrounding political controversies. But by itself the Court cannot lay those controversies to rest.

The Court can profoundly influence American life. As a guardian of the Constitution, the Court sometimes invites controversy by challenging majoritarian sentiments to respect the rights of minorities and the principles of a representative democracy. The Court's influence is usually more subtle and indirect, varying over time and from one policy issue to another. In the end, the Court's influence on American life cannot be measured precisely, because its policy-making is inextricably bound up with that of other political institutions. Major confrontations in constitutional politics, like those over school desegregation, school prayer, and abortion, are determined as much by what is possible in a system of free government and in a pluralistic society as by what the Court says about the meaning of the Constitution. At its best, the Court appeals to the country to respect the substantive value choices of human dignity and self-governance embedded in our written Constitution.

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PETER IRONS

From *Brennan vs. Rehnquist*

The U.S. Supreme Court today is different than it was when President Franklin Roosevelt called the justices "Nine Old Men." The Court's membership now includes justices who are black, female, and young, and they come from different regions, religions, and socioeconomic backgrounds. Yet the fundamental issues faced by the Court have not changed. Legal scholar Peter Irons examines a primary philosophical battle on the Supreme Court: individual and minority rights protected by an active judicial branch versus majority power, expressed by strong legislative and executive branches, with the Court exercising judicial restraint. The battle is never better illustrated, Irons feels, than in the contrast between former Justice William J. Brennan and Chief Justice William H. Rehnquist.

WILLIAM J. BRENNAN, JR., and William H. Rehnquist served together on the United States Supreme Court between 1972 and 1990. During these eighteen years, they headed the Court's liberal and conservative wings, and lobbied for the votes of moderate justices. They provided intellectual and political leadership to contending sides in a battle over the Constitution that affected the lives of every American. The two justices brought divergent judicial philosophies to the Court, rooted in different values and views about the relations of individuals and the state. Each won major victories, but neither won a final triumph. . . . Setting aside unanimous decisions, Brennan and Rehnquist agreed in only 273 of 1,815 case in which one or more justices dissented, just 15 percent of the Court's divided decisions over a span of almost two decades. This was the lowest rate of agreement of any pair of justices over those years. And they disagreed in virtually every case that raised important constitutional issues.

Brennan and Rehnquist are almost totally opposite in background, philosophy, and judicial voting. During their years together, they battled over the Constitution, each trying to rally the Court's moderates to his side. The stakes were high—questions of abortion, affirmative action, capital punishment, and other controversial issues hung in the balance. . . .

This book perceives the Supreme Court as a political institution, and constitutional litigation as a form of politics. These are hardly radical—or recent—notions. "Scarcely any political question arises in the United States," Alexis de Tocqueville observed in 1835, "that is not resolved, sooner or later, into a judicial question." The Court's first major decision, *Marbury v. Madison* in 1803, drew the justices into an intensely political conflict among all three branches of the federal government. Chief Justice John Marshall did not shrink from this dispute. "It is emphatically the province and duty of the judicial department," he wrote, "to say what the law is." His opinion established the Court as the ultimate arbiter of political disputes the other branches could not resolve.

The Supreme Court remains embroiled in political disputes. . . .

There is little question that William Brennan brought with him to the Supreme Court bench a well-formed constitutional philosophy. Shaped in childhood and sharpened by law practice and judicial experience, it can be capsulized in one word: dignity. . . .

The Due Process clauses of the Constitution, added by the Fifth and Fourteenth amendments, were designed to limit governmental authority by protecting the "life, liberty, or property" of Americans from arbitrary official action. As Brennan put it, "Due process required fidelity to a

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ANTHONY LEWIS

From *Gideon's Trumpet*

Written in 1964, Gideon's Trumpet *is one of the most-assigned books in American government courses. The excerpt presented here touches on all the major points in the legal and personal story of Clarence Earl Gideon, the Florida prisoner whose case,* Gideon v. Wainwright *(1963), transformed American justice. As Gideon's story unfolds, notice the following elements in journalist Anthony Lewis's account of the landmark case that ensured all defendants legal counsel in state criminal cases:* in forma pauperis*; writ of certiorari;* Betts v. Brady*;* stare decisis*; Attorney Abe Fortas; Fourteenth Amendment; selective incorporation of the Bill of Rights; "a great marble temple"; "Oyez, oyez, oyez"; Justice Black; 9–0; court-appointed attorney Fred Turner; public defenders; not guilty; the Bay Harbor Poolroom.*

IN THE MORNING MAIL of January 8, 1962, the Supreme Court of the United States received a large envelope from Clarence Earl Gideon, prisoner No. 003826, Florida State Prison, P.O. Box 221, Raiford, Florida. Like all correspondence addressed to the Court generally rather than to any particular justice or Court employee, it went to a room at the top of the great marble steps so familiar to Washington tourists. There a secretary opened the envelope. As the return address had indicated, it was another petition by a prisoner without funds asking the Supreme Court to get him out of jail—another, in the secretary's eyes, because pleas from prisoners were so familiar a part of her work. . . .

. . . A federal statute permits persons to proceed in any federal court *in forma pauperis*, in the manner of a pauper, without following the usual forms or paying the regular costs. The only requirement in the statute is that the litigant "make affidavit that he is unable to pay such costs or give security therefor."

The Supreme Court's own rules show special concern for *in forma pauperis* cases. Rule 53 allows an impoverished person to file just one copy of a petition, instead of the forty ordinarily required, and states that the Court will make "due allowance" for technical errors so long as there is substantial compliance. In practice, the men in the Clerk's Office—a half dozen career employees, who effectively handle the Court's relations

with the outside world—stretch even the rule of substantial compliance. Rule 53 also waives the general requirement that documents submitted to the Supreme Court be printed. It says that *in forma pauperis* applications should be typewritten "whenever possible," but in fact handwritten papers are accepted.

Gideon's were written in pencil. They were done in carefully formed printing, like a schoolboy's, on lined sheets evidently provided by the Florida prison. Printed at the top of each sheet, under the heading Correspondence Regulations, was a set of rules ("Only 2 letters each week . . . written on one side only . . . letters must be written in English . . . ") and the warning: MAIL WILL NOT BE DELIVERED WHICH DOES NOT CONFORM TO THESE RULES. Gideon's punctuation and spelling were full of surprises, but there was also a good deal of practiced, if archaic, legal jargon, such as "Comes now the petitioner . . . ".

Gideon was a fifty-one-year-old white man who had been in and out of prisons much of his life. He had served time for four previous felonies, and he bore the physical marks of a destitute life: a wrinkled, prematurely aged face, a voice and hands that trembled, a frail body, white hair. He had never been a professional criminal or a man of violence; he just could not seem to settle down to work, and so he had made his way by gambling and occasional thefts. Those who had known him, even the men who had arrested him and those who were now his jailers, considered Gideon a perfectly harmless human being, rather likeable, but one tossed aside by life. Anyone meeting him for the first time would be likely to regard him as the most wretched of men.

And yet a flame still burned in Clarence Earl Gideon. He had not given up caring about life or freedom; he had not lost his sense of injustice. Right now he had a passionate—some thought almost irrational—feeling of having been wronged by the State of Florida, and he had the determination to try to do something about it. Although the Clerk's Office could not be expected to remember him, this was in fact his second petition to the Supreme Court. The first had been returned for failure to include a pauper's affidavit, and the Clerk's Office had enclosed a copy of the rules and a sample affidavit to help him do better next time. Gideon persevered. . . .

Gideon's main submission was a five-page document entitled "Petition for a Writ of Certiorari Directed to the Supreme Court State of Florida." A writ of certiorari is a formal device to bring a case up to the Supreme Court from a lower court. In plain terms Gideon was asking the Supreme Court to hear his case.

What was his case? Gideon said he was serving a five-year term

for "the crime of breaking and entering with the intent to commit a misdemeanor, to wit, petty larceny." He had been convicted of breaking into the Bay Harbor Poolroom in Panama City, Florida. Gideon said his conviction violated the due-process clause of the Fourteenth Amendment to the Constitution, which provides that "No state shall . . . deprive any person of life, liberty, or property, without due process of law." In what way had Gideon's trial or conviction assertedly lacked "due process of law"? For two of the petition's five pages it was impossible to tell. Then came this pregnant statement:

"When at the time of the petitioners trial he ask the lower court for the aid of counsel, the court refused this aid. Petitioner told the court that this Court made decision to the effect that all citizens tried for a felony crime should have aid of counsel. The lower court ignored this plea."

Five more times in the succeeding pages of his penciled petition Gideon spoke of the right to counsel. To try a poor man for a felony without giving him a lawyer, he said, was to deprive him of due process of law. There was only one trouble with the argument, and it was a problem Gideon did not mention. Just twenty years before, in the case of *Betts v. Brady*, the Supreme Court had rejected the contention that the due-process clause of the Fourteenth Amendment provided a flat guarantee of counsel in state criminal trials.

Betts v. Brady was a decision that surprised many persons when made and that had been a subject of dispute ever since. For a majority of six to three, Justice Owen J. Roberts said the Fourteenth Amendment provided no universal assurance of a lawyer's help in a state criminal trial. A lawyer was constitutionally required only if to be tried without one amounted to "a denial of fundamental fairness." . . .

Later cases had refined the rule of *Betts v. Brady*. To prove that he was denied "fundamental fairness" because he had no counsel, the poor man had to show that he was the victim of what the Court called "special circumstances." Those might be his own illiteracy, ignorance, youth, or mental illness, the complexity of the charge against him or the conduct of the prosecutor or judge at the trial. . . .

But Gideon did not claim any "special circumstances." His petition made not the slightest attempt to come within the sophisticated rule of *Betts v. Brady*. Indeed, there was nothing to indicate he had ever heard of the case or its principle. From the day he was tried Gideon had had one idea: That under the Constitution of the United States he, a poor man, was flatly entitled to have a lawyer provided to help in his defense. . . .

Gideon was wrong, of course. The United States Supreme Court had

not said he was entitled to counsel; in *Betts v. Brady* and succeeding cases it had said quite the opposite. But that did not necessarily make Gideon's petition futile, for the Supreme Court never speaks with absolute finality when it interprets the Constitution. From time to time—with due solemnity, and after much searching of conscience—the Court has overruled its own decisions. Although he did not know it, Clarence Earl Gideon was calling for one of those great occasions in legal history. He was asking the Supreme Court to change its mind. . . .

Clarence Earl Gideon's petition for certiorari inevitably involved, for all the members of the Court, the most delicate factors of timing and strategy. The issue he presented—the right to counsel—was undeniably of first-rank importance, and it was an issue with which all of the justices were thoroughly familiar. . . .

. . . Professional comment on the Betts case, in the law reviews, had always been critical and was growing stronger, and within the Supreme Court several justices had urged its overruling. On the other hand, a majority might well draw back from so large a step. . . . At the conference of June 1, 1962, the Court had before it two jurisdictional statements asking the Court to hear appeals, twenty-six petitions for certiorari on the Appellate Docket, ten paupers' applications on the Miscellaneous Docket and three petitions for rehearing. . . .

The results of the deliberations at this conference were made known to the world shortly after ten A.M. the following Monday, June 4th, when a clerk posted on a bulletin board the mimeographed list of the Supreme Court's orders for that day. One order read:

Gideon v. Cochran 890 Misc.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The case is transferred to the appellate docket. In addition to other questions presented by this case, counsel are requested to discuss the following in their briefs and oral argument:

"Should this Court's holding in *Betts v. Brady*, 316 U.S. *455*, be reconsidered?" . . .

In the Circuit Court of Bay County, Florida, Clarence Earl Gideon had been unable to obtain counsel, but there was no doubt that he could have a lawyer in the Supreme Court of the United States now that it had agreed to hear his case. It is the unvarying practice of the Court to appoint a lawyer for any impoverished prisoner whose petition for review has been granted and who requests counsel.

Appointment by the Supreme Court to represent a poor man is a great honor. For the eminent practitioner who would never, otherwise, dip his fingers into the criminal law it can be an enriching experience, making him think again of the human dimensions of liberty. It may provide the first, sometimes the only, opportunity for a lawyer in some distant corner of the country to appear before the Supreme Court. It may also require great personal sacrifice. There is no monetary compensation of any kind—only the satisfaction of service. The Court pays the cost of the lawyer's transportation to Washington and home, and it prints the briefs, but there is no other provision for expenses, not even secretarial help or a hotel room. The lawyer donates that most valuable commodity, his own time. . . .

The next Monday the Court entered this order in the case of *Gideon v. Cochran:*

"The motion for appointment of counsel is granted and it is ordered that Abe Fortas, Esquire, of Washington, D.C., a member of the Bar of this Court be, and he is hereby, appointed to serve as counsel for petitioner in this case.

Abe Fortas is a high-powered example of that high-powered species, the Washington lawyer. He is the driving force in the firm of Arnold, Fortas and Porter. . . . A lawyer who has worked with him says: "Of all the men I have met he most knows why he is doing what he does. I don't like the s.o.b., but if I were in trouble I'd want him on my side. He's the most resourceful, the boldest, the most thorough lawyer I know." . . .

. . . "The real question," Fortas said, "was whether I should urge upon the Court the special-circumstances doctrine. As the record then stood, there was nothing to show that he had suffered from any special circumstances. . . .

When that transcript was read at Arnold, Fortas and Porter, there was no longer any question about the appropriateness of this case as the vehicle to challenge *Betts v. Brady.* Plainly Gideon was not mentally defective. The charge against him, and the proof, were not particularly complicated. The judge had tried to be fair; at least there was no overt bias in the courtroom. In short, Gideon had not suffered from any of the special circumstances that would have entitled him to a lawyer under the limited rule of *Betts v. Brady.* And yet it was altogether clear that a lawyer would have helped. The trial had been a rudimentary one, with a prosecution case that was fragmentary at best. Gideon had not made a single objection or pressed any of the favorable lines of defense. An Arnold, Fortas and Porter associate said later: "We knew as soon as we read that transcript that here was a perfect case to challenge the assumption of *Betts* that a man could have a fair trial without a lawyer. He did very well for a

layman, he acted like a lawyer. But it was a pitiful effort really. He may have committed this crime, but it was never proved by the prosecution. A lawyer—not a great lawyer, just an ordinary, competent lawyer—could have made ashes of the case." . . .

As Abe Fortas began to think about the case in the summer of 1962, before Justice Frankfurter's retirement, it was clear to him that overruling *Betts v. Brady* would not come easily to Justice Frankfurter or others of his view. This was true not only because of their judicial philosophy in general, but because of the way they had applied it on specific matters. One of these was the question of precedent.

"In most matters it is more important that the applicable rule of law be settled than that it be settled right." Justice Brandeis thus succinctly stated the basic reason for *stare decisis*, the judicial doctrine of following precedents. . . .

Another issue . . . cut even deeper than *stare decisis*, and closer to Gideon's case. This was their attitude toward federalism—the independence of the states in our federal system of government. . . .

The Bill of Rights is the name collectively given to the first ten amendments to the Constitution, all proposed by the First Congress of the United States in 1789 and ratified in 1791. The first eight contain the guarantees of individual liberty with which we are so familiar: freedom of speech, press, religion and assembly; protection for the privacy of the home; assurance against double jeopardy and compulsory self-incrimination; the right to counsel and to trial by jury; freedom from cruel and unusual punishments. At the time of their adoption it was universally agreed that these eight amendments limited only the Federal Government and its processes. . . .

There matters stood until the Fourteenth Amendment became part of the Constitution in 1868. A product of the Civil War, it was specifically designed to prevent abuse of individuals by state governments. Section 1 provided: "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." Soon the claim was advanced that this section had been designed by its framers to *incorporate*, and apply to the states, all the provisions of the first eight amendments.

This theory of wholesale incorporation of the Bill of Rights has been adopted by one or more Supreme Court justices from time to time, but never a majority. . . .

But if wholesale incorporation has been rejected, the Supreme Court

has used the Fourteenth Amendment to apply provisions of the Bill of Rights to the states *selectively*. The vehicle has been the clause assuring individuals due process of law. The Court has said that state denial of any right deemed "fundamental" by society amounts to a denial of due process and hence violates the Fourteenth Amendment. . . .

The difficult question has been which provisions of the first eight amendments to absorb. . . .

Grandiose is the word for the physical setting. The W.P.A. Guide to Washington* called the Supreme Court building a "great marble temple" which "by its august scale and mighty splendor seems to bear little relation to the functional purposes of government." Shortly before the justices moved into the building in 1935 from their old chamber across the street in the Capitol, Justice Stone wrote his sons "The place is almost bombastically pretentious, and thus it seems to me wholly inappropriate for a quiet group of old boys such as the Supreme Court." He told his friends that the justices would be "nine black beetles in the Temple of Karnak."

The visitor who climbs the marble steps and passes through the marble columns of the huge pseudo-classical facade finds himself in a cold, lofty hall, again all marble. Great bronze gates exclude him from the area of the building where the justices work in private—their offices, library and conference room. In the courtroom, which is always open to the public, the atmosphere of austere pomp is continued: there are more columns, an enormously high ceiling, red velvet hangings, friezes carved high on the walls. The ritual opening of each day's session adds to the feeling of awe. The Court Crier to the right of the bench smashes his gavel down sharply on a wooden block, everyone rises and the justices file in through the red draperies behind the bench and stand at their places as the Crier intones the traditional opening: "The honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States. Oyez, oyez, oyez. All persons having business before the honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this honorable Court."

But then, when an argument begins, all the trappings and ceremony seem to fade, and the scene takes on an extraordinary intimacy. In the most informal way, altogether without pomp, Court and counsel converse.

*The WPA, the Works Progress Administration, was started by President Franklin Roosevelt as part of the New Deal in 1935. WPA projects, designed to put people back to work during the Depression, included school and park building, theater and music performances, and map and guidebook writing.—EDS.

It is conversation—as direct, unpretentious and focused discussion as can be found anywhere in Washington. . . .

Chief Justice Warren, as is the custom, called the next case by reading aloud its full title: Number 155, Clarence Earl Gideon, petitioner, versus H. G. Cochran, Jr., director, Division of Corrections, State of Florida. . . .

The lawyer arguing a case stands at a small rostrum between the two counsel tables, facing the Chief Justice. The party that lost in the lower court goes first, and so the argument in *Gideon v. Cochran* was begun by Abe Fortas. As he stood, the Chief Justice gave him the customary greeting, "Mr. Fortas," and he made the customary opening: "Mr. Chief Justice, may it please the Court. . . ."

This case presents "a narrow question," Fortas said—the right to counsel—unencumbered by extraneous issues. . . .

"This record does not indicate that Clarence Earl Gideon was a person of low intelligence," Fortas said, "or that the judge was unfair to him. But to me this case shows the basic difficulty with Betts versus Brady. It shows that no man, however intelligent, can conduct his own defense adequately." . . .

"I believe we can confidently say that overruling Betts versus Brady at this time would be in accord with the opinion of those entitled to an opinion. That is not always true of great constitutional questions. . . . We may be comforted in this constitutional moment by the fact that what we are doing is a deliberate change after twenty years of experience—a change that has the overwhelming support of the bench, the bar and even of the states." . . .

It was only a few days later, as it happened, that *Gideon v. Wainwright* was decided. There was no prior notice; there never is. The Court gives out no advance press releases and tells no one what cases will be decided on a particular Monday, much less how they will be decided. Opinion days have a special quality. The Supreme Court is one of the last American appellate courts where decisions are announced orally. The justices, who divide on so many issues, disagree about this practice, too. Some regard it as a waste of time; others value it as an occasion for descending from the ivory tower, however briefly, and communicating with the live audience in the courtroom. . . .

Then, in the ascending order of seniority, it was Justice Black's turn. He looked at his wife, who was sitting in the box reserved for the justices' friends and families, and said: "I have for announcement the opinion and judgment of the Court in Number One fifty-five, Gideon against Wainwright."

Justice Black leaned forward and gave his words the emphasis and the drama of a great occasion. Speaking very directly to the audience in the courtroom, in an almost folksy way, he told about Clarence Earl Gideon's case and how it had reached the Supreme Court of the United States.

"It raised a fundamental question," Justice Black said, "the rightness of a case we decided twenty-one years ago, Betts against Brady. When we granted certiorari in this case, we asked the lawyers on both sides to argue to us whether we should reconsider that case. We do reconsider Betts and Brady, and we reach an opposite conclusion."

By now the page boys were passing out the opinions. There were four—by Justices Douglas, Clark and Harlan, in addition to the opinion of the Court. But none of the other three was a dissent. A quick look at the end of each showed that it concurred in the overruling of *Betts v. Brady.* On that central result, then, the Court was unanimous. . . .

That was the end of Clarence Earl Gideon's case in the Supreme Court of the United States. The opinions delivered that Monday were quickly circulated around the country by special legal services, then issued in pamphlets by the Government Printing Office. Eventually they appeared in the bound volumes of Supreme Court decisions, the United States Reports, to be cited as *Gideon v. Wainwright*, 372 U.S. 335—meaning that the case could be found beginning on page 335 of the 372nd volume of the reports.

Justice Black, talking to a friend a few weeks after the decision, said quietly: "When *Betts v. Brady* was decided, I never thought I'd live to see it overruled." . . .

The reaction of the states to *Gideon v. Wainwright* was swift and constructive. The most dramatic response came from Florida, whose rural-dominated legislature had so long refused to relieve the problem of the unrepresented indigent such as Gideon. Shortly after the decision Governor Farris Bryant called on the legislature to enact a public-defender law. . . .

Resolution of the great constitutional question in *Gideon v. Wainwright* did not decide the fate of Clarence Earl Gideon. He was now entitled to a new trial, with a lawyer. Was he guilty of breaking into the Bay Harbor Poolroom? The verdict would not set any legal precedents, but there is significance in the human beings who make constitutional-law cases as well as in the law. And in this case there was the interesting question whether the legal assistance for which Gideon had fought so hard would make any difference to him. . . .

. . . After ascertaining that Gideon had no money to hire a lawyer of his own choice, Judge McCrary asked whether there was a local law-

yer whom Gideon would like to represent him. There was: W. Fred Turner.

"For the record," Judge McCrary said quickly, "I am going to appoint Mr. Fred Turner to represent this defendant, Clarence Earl Gideon." . . .

The jury went out at four-twenty P.M., after a colorless charge by the judge including the instruction—requested by Turner—that the jury must believe Gideon guilty "beyond a reasonable doubt" in order to convict him. When a half-hour had passed with no verdict, the prosecutors were less confident. At five twenty-five there was a knock on the door between the courtroom and the jury room. The jurors filed in, and the court clerk read their verdict, written on a form. It was *Not Guilty.*

"So say you all?" asked Judge McCrary, without a flicker of emotion. The jurors nodded. . . .

After nearly two years in the state penitentiary Gideon was a free man. . . . That night he would pay a last, triumphant visit to the Bay Harbor Poolroom. Could someone let him have a few dollars? Someone did.

"Do you feel like you accomplished something?" a newspaper reporter asked.

"Well I did."

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Miranda v. Arizona

Chief Justice Earl Warren, the great liberal judge whose Court had already handed down a number of landmark rulings—among them, Brown v. Board of Education *(1954) on desegregation in public schools,* Mapp v. Ohio *(1961) on search and seizure by police, and* Gideon v. Wainwright *(1963) on the right to counsel in criminal trials in state courts—wrote the opinion in another major case,* Miranda v. Arizona *(1966). The case involved Ernesto Miranda, who had been arrested for kidnapping and rape, and who had been identified by the victim in a police lineup. Police officers then interrogated Miranda, who subsequently signed a confession at the top of which read that he had done so "with full knowledge of my legal rights, understanding that any statement I make may be used against me." During the trial, Miranda's confession was entered as evidence, and despite the officer's testimony that Miranda had not been told of his right to have an attorney present during interrogation, Miranda was found guilty. The Supreme Court of Arizona upheld the conviction on the grounds that Miranda had not specifically requested an attorney. The case went to the U.S. Supreme Court whose ruling resulted in what we now know as the "Miranda rights," a statement read to any suspect by law enforcement officers during an arrest.*

Miranda v. Arizona
384 U.S. 436, 86 S.Ct. 1602 (1966)

Chief Justice WARREN delivered the opinion of the Court.

The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.

We dealt with certain phases of this problem recently in *Escobedo v. Illinois,* 378 U.S. 478 (1964). There, as in the four cases before us, law enforcement officials took the defendant into custody and interrogated him in a police station for the purpose of obtaining a confession. The police did not effectively advise him of his right to remain silent or of his right to consult with his attorney. Rather, they confronted him with an alleged accomplice who accused him of having perpetrated a murder. When the defendant denied the accusation and said "I didn't shoot Manuel, you did it," they handcuffed him and took him to an interrogation room. There, while handcuffed and standing, he was questioned for four hours until he confessed. During this interrogation, the police denied his request to speak to his attorney, and they prevented his retained attorney, who had come to the police station, from consulting with him. At his trial, the State, over his objection, introduced the confession against him. We held that the statements thus made were constitutionally inadmissible. . . . We adhere to the principles of *Escobedo* today.

Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived

of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned. . . .

The constitutional issue we decide in each of these cases [being decided today] is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way. In each, the defendant was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process. In all the cases, the questioning elicited oral admissions, and in three of them, signed statements as well which were admitted at their trials. They all thus share salient features—incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights. . . . We stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. . . . Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms. A valuable source of information about present police practices, however, may be found in various police manuals and texts which document procedures employed with success in the past, and which recommend various other effective tactics. . . .

The officers are told by the manuals that the "principal psychological factor contributing to a successful interrogation is *privacy*—being alone with the person under interrogation." The efficacy of this tactic has been explained as follows:

"If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage." . . .

After this psychological conditioning, however, the officer is told to point out the incriminating significance of the suspect's refusal to talk:

"Joe, you have a right to remain silent. That's your privilege and I'm the last person in the world who'll try to take it away from you. If that's the way you want to leave this, O.K. But let me ask you this. Suppose you were in my shoes and I were in yours and you called me in to ask me about this and I told you, 'I don't want to answer any of your questions.' You'd think I had something to hide, and you'd probably be right in thinking that. That's exactly what I'll have to think about you, and so will everybody else. So let's sit here and talk this whole thing over."

Few will persist in their initial refusal to talk, it is said, if this monologue is employed correctly.

In the event that the subject wishes to speak to a relative or an attorney, the following advice is tendered:

"[T]he interrogator should respond by suggesting that the subject first tell the truth to the interrogator himself rather than get anyone else involved in the matter. If the request is for an attorney, the interrogator may suggest that the subject save himself or his family the expense of any such professional service, particularly if he is innocent of the offense under investigation. The interrogator may also add, 'Joe, I'm only looking for the truth, and if you're telling the truth, that's it. You can handle this by yourself.'" . . .

Even without employing brutality, the "third degree" or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals. . . .

. . . In each of the cases [heard by the court], the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent, for example, in *Miranda*, where the indigent Mexican defendant was a seriously disturbed individual with pronounced sexual fantasies, and in *Stewart*, in which the defendant was an indigent Los Angeles Negro who had dropped out of school in the sixth grade. To be sure, the records do not evince overt physical coercion or patent psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.

It is obvious that such an interrogation environment is created for no

purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice. . . .

To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him. . . . We turn now to these facts to consider the application to these cases of the constitutional principles discussed above. . . .

On March 13, 1963, petitioner, Ernesto Miranda, was arrested at his home and taken in custody to a Phoenix police station. He was there identified by the complaining witness. The police then took him to "Interrogation Room No. 2" of the detective bureau. There he was questioned by two police officers. The officers admitted at trial that Miranda was not advised that he had a right to have an attorney present. Two hours later, the officers emerged from the interrogation room with a written confession signed by Miranda. At the top of the statement was a typed paragraph stating that the confession was made voluntarily, without threats or promises of immunity and "with full knowledge of my legal rights, understanding any statement I make may be used against me."

At his trial before a jury, the written confession was admitted into evidence over the objection of defense counsel, and the officers testified to the prior oral confession made by Miranda during the interrogation. Miranda was found guilty of kidnapping and rape. He was sentenced to 20 to 30 years' imprisonment on each count, the sentences to run concurrently. On appeal, the Supreme Court of Arizona held that Miranda's constitutional rights were not violated in obtaining the confession and affirmed the conviction. 98 Ariz. 18, 401 P. 2d 721. In reaching its decision, the court emphasized heavily the fact that Miranda did not specifically request counsel.

We reverse. From the testimony of the officers and by the admission of respondent, it is clear that Miranda was not in any way apprised of his right to consult with an attorney and to have one present during the interrogation, nor was his right not to be compelled to incriminate himself effectively protected in any other manner. Without these warnings the statements were inadmissible.

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RICHARD POSNER

Security versus Civil Liberties

Living both in safety and in freedom have been values that the American people have always treasured. Contrary to the concerns of those who see security and civil liberties as an either/or proposition after the September 11, 2001 terrorist attacks in New York City and at the Pentagon, Richard Posner asks Americans to understand the importance of both values. Posner is a U.S. Court of Appeals judge as well as a law school lecturer. He knows all sides of this complex equation that will be weighed over and over in the coming years. Americans cannot view historical abridgements of civil liberties out of the context of their eras, he feels. Nor is the choice between security and civil liberties a fixed, clear cut one. Posner ends his piece with a suggestion that law enforcement take the opportunity created by September 11 to set new priorities for the best use of its time and effort.

IN THE WAKE OF THE September 11 terrorist attacks have come many proposals for tightening security; some measures to that end have already been taken. Civil libertarians are troubled. They fear that concerns about national security will lead to an erosion of civil liberties.

The Court's decision in *Roe* v. *Wade* made essentially four points. First, the right to terminate a pregnancy is included within the constitutional right to privacy. Second, the Fourteenth Amendment (which protects the right to life, liberty, and property) is not applicable to an unborn fetus. Third, a state cannot arbitrarily decide that life begins at conception and thereby block the woman's right to obtain an abortion. Finally, the woman's right of privacy is not absolute; the state's interest in protecting the potential life of the fetus grows as the fetus grows and eventually outweighs the woman's right. In the first trimester of pregnancy, therefore, the state could not interfere at all with her choice; during the second, it could regulate the abortion procedure but not prohibit abortion altogether; in the third, the state could completely ban all abortions.

Antiabortion groups mounted a strong campaign against *Roe*. The appointment of five new justices by Republican presidents Ronald Reagan and George Bush shifted the balance of power on the Supreme Court, and *Roe* seemed increasingly under threat throughout the 1980s. In 1989, in *Webster* v. *Reproductive Health Services*, the Court seemed on the brink of overturning *Roe* altogether, but in 1992 Justice Sandra Day O'Connor led a slim majority in affirming a woman's constitutional right to terminate her pregnancy (*Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, *selection* 3.3). Although *Casey* upheld the core rulings in *Roe*, it expanded somewhat the government's power to regulate the abortion right.

Questions

1. What is the constitutional basis for the right to privacy elaborated in *Roe* v. *Wade*? What provisions of the Constitution and the Bill of Rights support the idea that the Constitution protects privacy?
2. How does the abortion right proclaimed in *Casey* differ from that announced in *Roe*?

3.2 *Roe* v. *Wade* (1973)

Justice Harry A. Blackmun

Mr. Justice Blackmun delivered the opinion of the Court.

This [case] . . . present[s] constitutional challenges to state criminal abortion legislation. . . .

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

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410 U.S. 113 (1973).

In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.

Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection. We seek earnestly to do this, and, because we do, we have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortion procedure over the centuries. We bear in mind, too, Mr. Justice Holmes' admonition in his now-vindicated dissent in *Lochner* v. *New York* (1905):

> [The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

• • •

[I]

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co.* v. *Botsford* (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas of zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment; in the Fourth and Fifth Amendments; in the penumbras of the Bill of Rights; in the Ninth Amendment; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment. These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education.

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

On the basis of elements such as these, 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.

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

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Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest," and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.

In the recent abortion cases, . . . 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 that the State's determinations to protect health or prenatal life are dominant and constitutionally justifiable.

The . . . [State] argue[s] that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment. The appellant conceded as much on reargument. On the other hand, the appellee conceded on reargument that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment.

The 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: in the listing of qualifications for Representatives and Senators, in the Apportionment Clause, in the Migration and Importation provision, in the Emolument Clause, in the Electors provisions, in the provision, outlining qualifications for the office of President, in the Extradition provisions, and in the Fifth, Twelfth, and Twenty-second Amend-

ments, as well as in §§2 and 3 of the Fourteenth Amendment. But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application.

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

This conclusion, however, does not of itself fully answer the contentions raised by Texas, and we pass on to other considerations.

B. The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education. . . . 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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[II]

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 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, [Texas] 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.

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3.3 *Planned Parenthood of Southeastern Pennsylvania* v. *Casey* (1992)

Justice Sandra Day O'Connor

Justice O'Connor, Justice Kennedy, and Justice Souter announced the judgment of the Court. . . .

I

Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages, that definition of liberty is still questioned. . . .

At issue in these cases are five provisions of the Pennsylvania Abortion Control Act of 1982. . . . The Act requires that a woman seeking an abortion give her informed consent prior to the abortion procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed. For a

505 U.S. 833#(1992).

minor to obtain an abortion, the Act requires the informed consent of one of her parents, but provides for a judicial bypass option if the minor does not wish to or cannot obtain a parent's consent. Another provision of the Act requires that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband of her intended abortion. The Act exempts compliance with these three requirements in the event of a medical emergency. . . . In addition to the above provisions regulating the performance of abortions, the Act imposes certain reporting requirements on facilities that provide abortion services.

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After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis* [which states that courts should respect their previous decisions], we are led to conclude this: the essential holding of *Roe* v. *Wade* should be retained and once again reaffirmed.

It must be stated at the outset and with clarity that *Roe*'s essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.

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. . . In 1973, [this Court] confronted the already-divisive issue of governmental power to limit personal choice to undergo abortion, for which it provided a new resolution based on the due process guaranteed by the Fourteenth Amendment. Whether or not a new social consensus is developing on that issue, its divisiveness is no less today than in 1973, and pressure to overrule the decision, like pressure to retain it, has grown only more intense. A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe*'s original decision, and we do so today.

[II]

From what we have said so far it follows that it is a constitutional liberty of the woman to have some freedom to terminate her pregnancy. We conclude that the basic decision in *Roe* was based on a constitutional analysis which we cannot now repudiate. The woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point

in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted. . . .

Roe established a trimester framework to govern abortion regulations. Under this elaborate but rigid construct, almost no regulation at all is permitted during the first trimester of pregnancy; regulations designed to protect the woman's health, but not to further the State's interest in potential life, are permitted during the second trimester; and during the third trimester, when the fetus is viable, prohibitions are permitted provided the life or health of the mother is not at stake. . . .

The trimester framework no doubt was erected to ensure that the woman's right to choose not become so subordinate to the State's interest in promoting fetal life that her choice exists in theory but not in fact. We do not agree, however, that the trimester approach is necessary to accomplish this objective. A framework of this rigidity was unnecessary and in its later interpretation sometimes contradicted the State's permissible exercise of its powers.

Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself. "[T]he Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth." It follows that States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning. This, too, we find consistent with *Roe*'s central premises, and indeed the inevitable consequence of our holding that the State has an interest in protecting the life of the unborn.

We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*. Measures aimed at ensuring that a woman's choice contemplates the consequences for the fetus do not necessarily interfere with the right recognized in *Roe*, although those measures have been found to be inconsistent with the rigid trimester framework announced in that case. . . . Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause. . . .

A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends. . . .

[Applying its new "undue burden" test, the Court ruled that Pennsylvania could require a doctor to inform a woman seeking an abortion of the nature of the procedure, the health risks of the abortion and of childbirth, and the "probable gestational age of the child"; impose a 24-hour waiting period prior to the actual abortion procedure; require the consent of a parent or of a judge before an abortion could be performed on a young woman under the age of 18; and impose various recordkeeping and reporting requirements on doctors and hospitals. However, the Court ruled that a state requirement that a woman notify her husband prior to obtaining an abortion did constitute an "undue burden" and was therefore unconstitutional.]

Chief Justice Rehnquist, with whom Justice White, Justice Scalia, and Justice Thomas join, concurring in the judgment in part and dissenting in part.

The joint opinion, following its newly-minted variation on *stare decisis*, retains the outer shell of *Roe* v. *Wade* but beats a wholesale retreat from the substance of that case. We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases. We would . . . uphold the challenged provisions of the Pennsylvania statute in their entirety.

• • •

The joint opinion of Justices O'Connor, Kennedy, and Souter cannot bring itself to say that *Roe* was correct as an original matter, but the authors are of the view that "the immediate question is not the soundness of *Roe*'s resolution of the issue, but the precedential force that must be accorded to its holding." Instead of claiming that *Roe* was correct as a matter of original constitutional interpretation, the opinion therefore contains an elaborate discussion of *stare decisis*. This discussion of the principle of *stare decisis* appears to be almost entirely dicta, because the joint opinion does not apply that principle in dealing with *Roe*. *Roe* decided that a woman had a fundamental right to an abortion. The joint opinion rejects that view. *Roe* decided that abortion regulations were to be subjected to "strict scrutiny" and could be justified only in the light of "compelling state interests." The joint opinion rejects that view. *Roe* analyzed abortion regulation under a rigid trimester framework, a framework which has guided this Court's decisionmaking for 19 years. The joint opinion rejects that framework.

• • •

The joint opinion thus turns to what can only be described as an unconventional—and unconvincing—motion of reliance, a view based on the surmise that the availability of abortion since *Roe* has led to "two decades of economic and social developments" that would be undercut if the error of *Roe* were recognized. The joint opinion's assertion of this fact is undeveloped and totally conclusory. In fact, one can not be sure to what economic and social developments the opinion is referring. Surely it is dubious to suggest that women have reached their "places in society" in reliance upon *Roe*, rather than as a result of their determination to obtain higher education and compete with men in the job market, and of society's increasing recognition of their ability to fill positions that were previously thought to be reserved only for men.

In the end, having failed to put forth any evidence to prove any true reliance, the joint opinion's argument is based solely on generalized assertions about the national psyche, on a belief that the people of this country have grown accustomed to the *Roe* decision over the last 19 years and have "ordered their thinking and living around" it. As an initial matter, one might inquire how the joint opinion can view the "central holding" of *Roe* as so deeply rooted in our constitutional culture, when it so casually uproots and disposes of that same decision's trimester framework. Furthermore, at various points in the past, the same could have been said about this Court's erroneous decisions that the Constitution allowed "separate but equal" treatment of minorities . . . or that "liberty" under the Due Process Clause protected "freedom of contract." The simple fact that a generation or more had grown used to these major decisions did not prevent the Court from correcting its errors in those cases, nor should it prevent us from correctly interpreting the Constitution here.

The sum of the joint opinion's labors in the name of *stare decisis* and "legitimacy" is this: *Roe* v. *Wade* stands as a sort of judicial Potemkin Village, which may be pointed out to passers by as a monument to the importance of adhering to precedent. But behind the facade, an entirely new method of analysis, without any roots in constitutional law, is imported to decide the constitutionality of state laws regulating abortion. Neither *stare decisis* nor "legitimacy" are truly served by such an effort.

We have stated above our belief that the Constitution does not subject state abortion regulations to heightened scrutiny. A woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest.

[The opinion went on to examine and uphold all of the requirements at issue in the case.] ■

The Comparative Context

The idea that human beings have rights, and that governments have a responsibility to protect those rights, is a cornerstone of American constitutionalism. With the creation of the United Nations after World War II, human rights began to emerge as a critical concern of the international community as well. The member states of the United Nations formalized their commitment to human rights in 1948, with the adoption of the Universal Declaration of Human Rights.

The Universal Declaration, of course, was not self-enforcing. Half a century after its adoption, the broad proclamations of the Declaration remain closer to the ideal than the reality of world politics. But the rights proclaimed in the American Declaration of Independence and in the United States Constitution were not self-enforcing either; progress even in the United States was slow and uncertain for much of our history. The United

ing potential critics of the decision a broad target to aim at. His opinion, though criticized by some as insufficiently high-minded, got the job done.

The decision in *Brown* was accompanied by a parallel decision in *Bolling* v. *Sharpe* (selection 4.3), which dealt with segregation in the District of Columbia. Because the Equal Protection Clause applies to the states and not to the federal government, the Court used the Due Process Clause to strike down segregation in the District.

The first *Brown* decision simply announced that segregated schools were unconstitutional. Implementation of that decision was postponed one year, until 1955, when the Court ordered the federal district courts to implement *Brown* "with all deliberate speed."

Questions

1. Why, in Earl Warren's view, are "separate educational facilities inherently unequal"?
2. Does Justice Harlan's dissent in *Plessy* provide an alternative approach to deciding *Brown*? What are the advantages and disadvantages of this approach?

4.1 *Plessy* v. *Ferguson* (1896)

Justice Henry B. Brown, dissent by Justice John Marshall Harlan

This case turns upon the constitutionality of an act of the General Assembly of the State of Louisiana, passed in 1890, providing for separate railway carriages for the white and colored races.

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

1. That it does not conflict with the Thirteenth Amendment, which abolished slavery and involuntary servitude, except as a punishment for crime, is too clear for argument. Slavery implies involuntary servitude—a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services. This amendment was said in the *Slaughter-house cases* to have been intended primarily to abolish slavery, as it had been previously known in this country, and that it equally forbade Mexican peonage or the Chinese coolie trade, when they amounted to slavery or involuntary servitude, and that the use of the word "servitude" was intended to prohibit the use of all forms of involuntary slavery, of whatever class or nature. It was

163 U.S. 537 (1896).

intimated, however, in that case that this amendment was regarded by the statesmen of that day as insufficient to protect the colored race from certain laws which had been enacted in the Southern States, imposing upon the colored race onerous disabilities and burdens, and curtailing their rights in the pursuit of life, liberty and property to such an extent that their freedom was of little value; and that the Fourteenth Amendment was devised to meet this exigency.

So, too, in the *Civil Rights cases* it was said that the act of a mere individual, the owner of an inn, a public conveyance or place of amusement, refusing accommodations to colored people, cannot be justly regarded as imposing any badge of slavery or servitude upon the applicant, but only as involving an ordinary civil injury, properly cognizable by the laws of the State, and presumably subject to redress by those laws until the contrary appears. "It would be running the slavery argument into the ground," said Mr. Justice Bradley, "to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business."

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 proper construction of this amendment was first called to the attention of this court in the *Slaughter-house cases*, which involved, however, not a question of race, but one of exclusive privileges. The case did not call for any expression of opinion as to the exact rights it was intended to secure to the colored race, but it was said generally that its main purpose was to establish the citizenship of the negro; to give definitions of citizenship of the United States and of the States, and to protect from the hostile legislation of the States the privileges and immunities of citizens of the United States, as distinguished from those of citizens of the States.

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the es-

tablishment 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.

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So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put the 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*, "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 place.

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Mr. Justice Harlan dissenting.

By the Louisiana statute, the validity of which is here involved, all railway companies (other than street railroad companies) carrying passengers in that State are required to have separate but equal accommodations for white and colored persons, "by providing two or more passenger coaches for each passenger train, *or* by dividing the passenger coaches by a *partition* so as to secure separate accommodations." Under this statute, no colored person is permitted to occupy a seat in a coach assigned to white persons; nor any white person, to occupy a seat in a coach assigned to colored persons. The managers of the railroad are not allowed to exercise any discretion in the premises, but are required to assign each passenger to some coach or compartment set apart for the exclusive use of his race. If a passenger insists upon going into a coach or compartment not set apart for persons of his race, he is subject to be fined, or to be imprisoned in the parish jail. Penalties are prescribed for the refusal or neglect of the officers, directors, conductors and employees of railroad companies to comply with the provisions of the act.

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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 every one within the United States.

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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 power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast in 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. ■

4.2 *Brown* v. *Board of Education* (1954)

Chief Justice Earl Warren

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 the 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*. 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

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347 U.S. 483 (1954).

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*, 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* and *Gong Lum* v. *Rice* the validity of the doctrine itself was not challenged. In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt* v. *Painter*, 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*, 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*, 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

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*[This footnote, number 11 in the original, has become famous. It is frequently referred to simply as "footnote 11."] K. B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, Personality in the Making (1952), c. VI; Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J. Psychol 259 (1948); Chein, What Are the Psychological Effects of Segregation Under Conditions of Equal Facilities?, 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, Educational Costs, in Discrimination and National Welfare (MacIver, ed., 1949), 44–48; Frazier, The Negro in the United States (1949), 674–681. And see generally Myrdal, An American Dilemma (1944).

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. ■

4.3 *Bolling* v. *Sharpe* (1954)

Chief Justice Earl Warren

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

This case challenges the validity of segregation in the public schools of the District of Columbia. The petitioners, minors of the Negro race, allege that such segregation deprives them of due process of law under the Fifth Amendment. They were refused admission to a public school attended by white children solely because of their race. They sought the aid of the District Court for the District of Columbia in obtaining admission. That court dismissed their complaint. The Court granted a writ of certiorari before judgment in the Court of Appeals because of the importance of the constitutional question presented.

We have this day held that the Equal Protection Clause of the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools. The legal problem in the District of Columbia is somewhat different, however. The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the

347 U.S. 497 (1954).

Appendix

Marbury v. Madison (1803)

The power of judicial review—the authority of the federal courts to determine the constitutionality of state and federal legislative acts—was established early in the nation's history in the case of Marbury v. Madison *(1803). While the doctrine of judicial review is now firmly entrenched in the American judicial process, the outcome of* Marbury *was by no means a sure thing. The doctrine had been outlined in* The Federalist *No. 78, and had been relied upon implicitly in earlier, lower federal court cases, but there were certainly sentiments among some of the Founders to suggest that only Congress ought to be able to judge the constitutionality of its acts.*

[*The facts leading up to the decision in* Marbury v. Madison *tell an intensely political story. Efforts to reform the federal judiciary had been ongoing with the Federalist administration of President Adams. Following the defeat of the Federalist party in 1800, and the election of Thomas Jefferson as president, the Federalist Congress passed an act reforming the judiciary. The act gave outgoing President Adams authority to appoint several Federalist justices of the peace* before *Jefferson's term as president began. This would have enabled the Federalist party to retain a large measure of power.*

Marbury was appointed to be a justice of the peace by President Adams, but his commission, signed by the president and sealed by the secretary of state, without which he could not assume office, was not delivered to him before President Jefferson took office March 4, 1803. Jefferson refused to order James Madison, his secretary of state, to deliver the commission. Marbury, in turn, filed an action in the U.S. Supreme Court seeking an order—called a writ of mandamus—directing the secretary of state to compel the delivery of the commission.

The Constitution grants the Supreme Court original jurisdiction in only a limited number of cases—those involving ambassadors, public ministers, and those in which a state is a party; in the remaining cases, the Court has authority only as an appellate court. When it acts according to its original jurisdiction, the Court exercises initial authority over a controversy, just like a trial court,

as distinguished from the more limited authority it exercises when a case is presented as an appeal from a lower court's decision.

In 1789, Congress passed legislation setting up the federal courts, called the Judiciary Act of 1789. That legislation gave the Supreme Court the original authority to "issue writs of mandamus in cases warranted by the principles and usage of law. . . ." Thus, the ultimate question in Marbury v. Madison *was whether Congress could, by statute, enlarge the original jurisdiction of the Court.*

The Court first considered whether Marbury's appointment was complete—and therefore irrevocable—before Jefferson took office. Under the law, the appointment was deemed complete when the president signed the commission and the secretary of state sealed it; the appointment was a completed fact at that time, and was not dependent upon delivery. Therefore, the Court found that Marbury was entitled to his commission. The Court then decided that by withholding the commission, Secretary of State Madison was violating Marbury's legal rights. The remaining question was whether the Supreme Court could issue an order compelling the delivery of the commission.]

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

. . . It is, then, the opinion of the Court,

1st. That by signing the commission of Mr. Marbury, the President of the United States appointed him a justice of peace for the county of Washington, in the District of Columbia; and that the seal of the United States, affixed thereto by the Secretary of State, is conclusive testimony of the verity of the signature, and of the completion of the appointment, and that the appointment conferred on him a legal right to the office for the space of five years.

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

It remains to be inquired whether,

3d. He is entitled to the remedy for which he applies. This depends on,

1st. The nature of the writ applied for; and,

2d. The power of this court.

* * *

This . . . is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired,

Whether it can issue from this court.

The act to establish the judicial courts of the United States authorizes the Supreme Court "to issue writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

The Secretary of State, being a person holding an office under the authority of the United States, is precisely within the letter of the description, and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one Supreme Court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and, consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

In the distribution of this power it is declared that "the Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the Supreme Court shall have appellate jurisdiction."

* * *

To enable this court, then, to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

* * *

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. . . . [Y]et to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and, therefore, seems not to belong to appellate, but to original jurisdiction.

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

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

That the people have an original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great ex-

ertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

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

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

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

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

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

This theory is essentially attached to a written constitution, and, is consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

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

* * *

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must

of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

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

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

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

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution.

Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases, then, the constitution must be looked into by the judges.

. . . [I]t is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were

to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject.

* * *

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

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

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

McCulloch v. Maryland (1819)

Early in the nation's history, the United States Supreme Court interpreted the powers of the national government expansively. The first Supreme Court case to directly address the scope of federal authority under the Constitution was McCulloch v. Maryland *(1819). The facts were straightforward: Congress created the Bank of the United States—to the dismay of many states who viewed the creation of a national bank as a threat to the operation of banks within their own state borders. As a result, when a branch of the Bank of the United States was opened in Maryland, that state attempted to limit the bank's ability to do business under a law that imposed taxes on all banks not chartered by the state.*

In an opinion authored by Chief Justice Marshall, the Court considered two questions: whether Congress had the authority to create a national bank; and whether Maryland could in turn tax it. Marshall's answer to these two questions defends an expansive theory of implied powers for the national government and propounds the principle of national supremacy with an eloquence rarely found in judicial decisions.

CHIEF JUSTICE JOHN MARSHALL delivered the opinion of the Court.

The first question made in the cause is, has Congress power to incorporate a bank? The power now contested was exercised by the first Congress elected under the present constitution. The bill for incorporating

the Bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. . . . In discussing this question, the counsel for the state of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent states. The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion. . . . No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.

From these conventions the constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, insure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity." The assent of the states, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the state governments. The constitution, when thus adopted, was of complete obligation, and bound the state sovereignties.

The government of the Union, then (whatever may be the influence of this fact on the case), is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist. The government of the United States though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, "anything in the constitution or laws of any state to the contrary notwithstanding."

* * *

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal

code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. . . . in considering this question, then, we must never forget, that it is a constitution we are expounding.

Although, among the enumerated powers of government, we do not find the word "bank" or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government. . . . [I]t may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. . . . It is, then, the subject of fair inquiry, how far such means may be employed.

The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means.

* * *

But the constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department [or officer] thereof."

The counsel for the state of Maryland have urged various arguments, to prove that this clause . . . is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers.

. . . [Maryland argues that] Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.

Is it true, that this is the sense in which the word "necessary" is always used? . . . We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable.

Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it.

* * *

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

* * *

It being the opinion of the court that the act incorporating the bank is constitutional, and that the power of establishing a branch in the state of Maryland might be properly exercised by the bank itself, we proceed to inquire: Whether the state of Maryland may, without violating the constitution, tax that branch?

That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments; are truths which have never been denied. But, such is the paramount character of the constitution that its capacity to withdraw any subject from the action of even this power, is admitted. . . . [T]he paramount character [of the Constitution] would seem to restrain, as it certainly may restrain, a state from such other exercise of this power as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolutely repugnant to another, as entirely repeals that other as if express terms of repeal were used.

* * *

This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are adduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. That a power to create implies a power to preserve. 2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and to preserve. 3d. That where this repugnance exists, that authority which is supreme must control, not yield to that over which it is supreme.

. . . [T]axation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like sovereign powers of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the state, in the article of taxation itself, is subordinate to, and may be controlled by the constitution of the United States. How far it has been controlled by that instrument must be a question of construction. In making this construction, no principle not declared can be admissible, which would defeat the legitimate operations of a supreme government.

* * *

All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. . . . The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution—powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them.

If we apply the principle for which the state of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the states. The American people have declared their constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the states. If the controlling power of the states be established; if their supremacy as to taxation be acknowledged; what is to restrain their exercising this control in any shape they may please to give it? Their sovereignty is not confined to taxation. That is not the only mode in which it might be displayed. The question is, in truth, a question of supremacy; and if the right of the states to tax the means employed by the general government be conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation.

* * *

We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void. This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional.

Reversed.

Barron v. Baltimore (1833)

The declaration made in Barron v. Baltimore *(1833) that citizenship had a dual aspect—state and national—set the terms of the Supreme Court's inter-*

pretation of the Bill of Rights for nearly 150 years. The reasoning of the case proved persuasive even after the adoption of the Fourteenth Amendment, as the federal courts refused to extend the protections of the federal Constitution to citizens aggrieved by the actions of state or local governments.

[*Barron brought suit in a federal court claiming that the city of Baltimore had appropriated his property for a public purpose without paying him just compensation. He asserted that the Fifth Amendment to the Constitution operated as a constraint upon both state and federal governments.*]

CHIEF JUSTICE JOHN MARSHALL delivered the opinion of the Court.

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

If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states. In their several constitutions, they have imposed such restrictions on their respective governments, as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no further than they are supposed to have a common interest.

* * *

Had the people of the several states, or any of them, required changes in their constitutions; had they required additional safe-guards to liberty from the apprehended encroachments of their particular governments; the remedy was in their own hands, and could have been applied by themselves. A convention could have been assembled by the discontented state, and the required improvements could have been made by itself.

. . . Had Congress engaged in the extraordinary occupation of improving the constitutions of the several states, by affording the people additional protection from the exercise of power by their own governments, in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.

But it is universally understood, it is a part of the history of the day, that the great revolution which established the constitution of the United States, was not effected without immense opposition. Serious fears were extensively entertained, that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those unvaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments. In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.

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

This cause came on to be heard, on the transcript of the record from the court of appeals for the western shore of the state of Maryland, and was argued by counsel: On consideration whereof, it is the opinion of this court, that there is no repugnancy between the several acts of the general assembly of Maryland, given in evidence by the defendants at the trial of this cause in the court of that state, and the constitution of the United States; whereupon, it is ordered and adjudged by this court, that this writ of error be and the same is hereby dismissed, for the want of jurisdiction.

Roe v. Wade (1973)

One of the most significant changes in constitutional interpretation in the last three decades has been the Court's willingness to look beyond the explicit lan-

guage of the Bill of Rights to find unenumerated rights, such as the right to privacy. In discovering such rights, the Court has engaged in what is known as substantive due process analysis—defining and articulating fundamental rights—distinct from its efforts to define the scope of procedural due process, when it decides what procedures the state and federal governments must follow to be fair in their treatment of citizens. The Court's move into the substantive due process area has generated much of the political discussion over the proper role of the Court in constitutional interpretation.

The case that has been the focal point for this debate is Roe v. Wade, *the 1973 case that held that a woman's right to privacy protected her decision to have an abortion. The right to privacy in matters relating to contraception and childbearing had been recognized in the 1965 decision of* Griswold v. Connecticut, *and was extended in subsequent decisions culminating in* Roe. *The theoretical issue of concern here relates back to the incorporation issue: Should the Supreme Court be able to prohibit the states not only from violating the express guarantees contained in the Bill of Rights, but its implied guarantees as well?*

[*Texas law prohibited abortions except for "the purpose of saving the life of the mother." Plaintiff challenged the constitutionality of the statute, claiming that it infringed upon her substantive due process right to privacy.*]

Justice Blackmun delivered the opinion of the Court.

. . . [We] forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, and the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to affect one's thinking [about] abortion. In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem. Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection. We seek earnestly to do this, and, because we do, we have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortion procedure over the centuries.

* * *

[*The Court here reviewed ancient and contemporary attitudes toward abortion, observing that restrictive laws date primarily from the late nineteenth century. The Court also reviewed the possible state interests in restricting abortions,*

including discouraging illicit sexual conduct, limiting access to a hazardous medical procedure, and the states' general interests in protecting fetal life. The Court addressed only the third interest as a current legitimate interest of the state.]

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

On the basis of elements such as these, appellants and some amici [friends of the Court] argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. Appellants' arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, is unpersuasive. The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefor, 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.

* * *

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 state interests in regulation.

Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest," and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.

. . . The District Court held that the appellee failed to meet his burden of demonstrating that the Texas statute's infringement upon Roe's rights was necessary to support a compelling state interest. . . . Appellee argues that the State's determination to recognize and protect prenatal life from and after conception constitutes a compelling state interest. As noted above, we do not agree fully with either formulation.

The appellee and certain amici argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment. The appellant conceded as much on reargument. On the other hand, the appellee conceded on reargument that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment.

The 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. . . . But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application.

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

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

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

. . . In view of 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 is less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

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

With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to prescribe abortion during that period except when it is necessary to preserve the life or health of the mother.

Measured against these standards, 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.

* * *

Reversed.

Brown v. Board of Education (1954)

Brown v. Board of Education *(1954) was a momentous opinion, invalidating the system of segregation that had been established under* Plessy v. Ferguson *(1896). However, the constitutional pronouncement only marked the beginning of the struggle for racial equality, as federal courts got more and more deeply involved in trying to prod recalcitrant state and local governments into taking steps to end racial inequalities. The* Brown *decision follows.*

[*The* Brown *case involved appeals from several states. In each case, the plaintiffs had been denied access to public schools designated only for white children under a variety of state laws. They challenged the* Plessy v. Ferguson *(1896) "separate but equal" doctrine, contending that segregated schools were by their nature unequal.*

Chief Justice Warren first discussed the history of the Fourteenth Amendment's equal protection clause, finding it too inconclusive to be of assistance in determining how the Fourteenth Amendment should be applied to the question of public education.]

CHIEF JUSTICE WARREN writing for the majority.

. . . The doctrine of "separate but equal" did not make its appearance in this Court until 1896, in the case of Plessy v. Ferguson, involving not education but transportation. American courts have since labored with the doctrine for over a half a century. In this Court, there have been six cases involving the "separate but equal" doctrine in the field of public education.

* * *

In the instant cases, [the question of the application of the separate but equal doctrine to public education] is directly presented. Here, . . .

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 tanglible 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 [Fourteenth] 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 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, 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, 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.

United States v. Nixon (1974)

The Supreme Court has had few occasions to rule on the constitutional limits of executive authority. The Court is understandably reluctant to articulate the boundaries of presidential and legislative power, given the Court's own somewhat ambiguous institutional authority. In the case that follows, however, the Court looked at one of the ways in which the Constitution circumscribes the exercise of presidential prerogative.

United States v. Nixon *(1974) involves claims to executive authority. President Richard Nixon was implicated in a conspiracy to cover up a burglary of the Democratic Party Headquarters at the Watergate Hotel in Washington, D.C., during the 1972 re-election campaign. The Special Prosecutor assigned to investigate the break-in and file appropriate criminal charges asked the trial court to order the President to disclose a number of documents and tapes related to the cover-up in order to determine the scope of the President's involvement. The President produced edited versions of some of the materials, but refused to comply with most of the trial court's order, asserting that he was entitled to withhold the information under a claim of "executive privilege."*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

In the District Court, the President's counsel argued that the court lacked jurisdiction to issue the subpoena because the matter was an intra-branch dispute between a subordinate and superior officer of the Executive Branch and hence not subject to judicial resolution. That argument has been renewed in this Court with emphasis on the contention that the dispute does not present a "case" or "controversy" which can be adjudicated in the federal courts. The President's counsel argues that the federal courts should not intrude into areas committed to the other branches of Government. He views the present dispute as essentially a "jurisdictional" dispute within the Executive Branch which he analogizes to a dispute between two congressional committees. Since the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case, it is contended that a President's decision is final in determining what evidence is to be used in a given criminal case.

. . . Although his counsel concedes the President has delegated certain specific powers to the Special Prosecutor, he has not "waived nor delegated to the Special Prosecutor the President's duty to claim privilege as to all materials which fall within the President's inherent authority to refuse to disclose to any executive officer." The Special Prosecutor's demand for the items therefore presents, in the view of the President's counsel, a political question since it involves a "textually demonstrable" grant of power under Art. II. . . .

The demands of and the resistance to the subpoena present an obvious controversy in the ordinary sense, but that alone is not sufficient to meet constitutional standards. In the constitutional sense, controversy means more than disagreement and conflict; rather it means the kind of controversy courts traditionally resolve. Here at issue is the production or nonproduction of specified evidence deemed by the Special Prosecutor to be relevant and admissible in a pending criminal case. It is sought by one official of the Government within the scope of his express authority; it is resisted by the Chief Executive on the ground of his duty to preserve the confidentiality of the communications of the President. Whatever the correct answer on the merits, these issues are "of a type which are traditionally justiciable."

* * *

. . . We turn to the claim that the subpoena should be quashed because it demands "confidential conversations between a President and his close advisors that it would be inconsistent with the public interest to produce." The first contention is a broad claim that the separation of powers doctrine precludes judicial review of a President's claim of privilege. The second contention is that if he does not prevail on the claim of absolute privilege, the court should hold as a matter of constitutional law that the privilege prevails over the subpoena. . . .

* * *

[The Court discussed its authority to interpret the Constitution, concluding that it had full power to interpret a claim of executive privilege.]

In support of his claim of absolute privilege, the President's counsel urges two grounds one of which is common to all governments and one of which is peculiar to our system of separation of powers. The first ground is the valid need for protection of communications between high government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process. Whatever the nature of the privilege of confidentiality of presidential communications in the exercise of Art. II powers the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of presidential communications has similar constitutional underpinnings.

The second ground asserted by the President's counsel in support of the claim of absolute privilege rests on the doctrine of separation of powers. Here it is argued that the independence of the Executive Branch within its own sphere, insulates a president from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential presidential communications.

However, neither the doctrine of separation of powers, nor the need for confidentiality of high level communications, without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of presidential communications is significantly diminished by production of such material for *in camera* inspection with all the protection that a district court will be obliged to provide.

The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the judicial branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III. In designing the structure of our Government and dividing and allocating the sovereign power among three coequal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence. To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of "a workable government" and gravely impair the role of the court under Art. III.

Since we conclude that the legitimate needs of the judicial process may outweigh presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch. The rights and indeed the duty to resolve that question does not free the judiciary from according high respect to the representations made on behalf of the President. The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and added to those values the necessity for protection of the public interest in his responsibilities against the inroads of such a privilege on the fair administration of criminal justice. The interest in preserving confidentiality is weighty indeed and entitled to great respect. However we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.

On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowleged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by dis-

closure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demand of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

* * *

In this case the President challenges a subpoena served on him as a third party requiring the production of materials for use in a criminal prosecution on the claim that he has a privilege against disclosure of confidential communications. He does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to presidential responsibilities. No case of the Court, however, has extended this high degree of deference to a President's generalized interest in confidentiality. Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality; yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.

* * *

[*The Court distinguished this case from cases involving claims against the president while acting in an official capacity.*]

Mr. Chief Justice Marshall sitting as a trial judge in the *Burr* case was extraordinarily careful to point out that: "[I]n no case of this kind would a Court be required to proceed against the President as against an ordinary individual." Marshall's statement cannot be read to mean in any sense that a President is above the law, but relates to the singularly unique role under Art. II of a President's communications and activities, related to the performance of duties under that Article. Moreover, a President's communications and activities encompass a vastly wider range of sensitive material than would be true of any "ordinary individual." It is therefore necessary in the public interest to afford presidential confidentiality the greatest protection consistent with the fair administration of justice. The need for confidentiality even as to idle conversations with associates in which casual reference might be made concerning political leaders within the country or foreign statesmen is too obvious to call for further treatment. We have no doubt that the District Judge will at all times accord the presidential records that high degree of deference suggested in *United States v. Burr*, and will discharge his responsibility to see to it that until released to the Special Prosecutor no *in camera* [private] material is revealed to anyone. This burden applies with even greater force to excised material; once the decision is made to excise, the material is restored to its privileged status and should be returned under seal to its lawful custodian.

Affirmed.

Planned Parenthood of Southeastern Pennsylvania v. Casey (1992)

In Roe v. Wade *(1973), the Court held that the right to privacy encompassed a woman's right to choose to have an abortion. In the years since* Roe *was decided, a number of states have passed statutes attempting to limit that right and the Court indicated that it would uphold regulations on abortions so long as they did not place an "undue burden" upon a woman's right to choose an abortion. This was a less restrictive test for evaluating the constitutionality of the regulations than might have been applied, and which allowed for a broad interpretation by the states. Therefore, when a Pennsylvania law imposing significant restrictions on abortion "on demand" was passed in the early 1990s, Planned Parenthood of SEPA sued the state's Governor, Tom Casey, for violating a woman's right to an abortion.*

The Court in Planned Parenthood v. Casey *reaffirmed* Roe *by a bare majority. A prominent factor in the majority's opinion was the extent to which the Court should be willing to upset a prior holding. The majority opinion discussed in detail the conditions under which a departure from a settled interpretation ought to be considered, and expressed concern about perceptions of institutional legitimacy that might result if it acted too precipitously to overturn a prior decision. The dissent argued just as strongly that the Court was not compelled to save* Roe, *since the initial decision was ill considered.*

JUSTICE O'CONNOR, JUSTICE KENNEDY, AND JUSTICE SOUTER announce the judgment of the Court.

I

After considering the fundamental constitutional questions resolved by *Roe* [*v. Wade*, . . .], principles of institutional integrity, and the rule of *stare decisis*, [precedent] we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.

It must be stated at the outset and with clarity that *Roe*'s essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability

and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.

* * *

II

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. 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*, . . . Our precedents "have respected the private realm of family life which the state cannot enter." *Prince v. Massachusetts*, . . . 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.

* * *

While we appreciate the weight of the arguments made on behalf of the State in the case before us, arguments which in their ultimate formulation conclude that *Roe* should be overruled, the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*. We turn now to that doctrine.

III

A [W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proved to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special

hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than remnant of abandoned doctrine; or whether facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification[.]

Although *Roe* has engendered opposition, it has in no sense proven "unworkable," representing as it does a simple limitation beyond which a state law is unenforceable[.]

We have seen how time has overtaken some of *Roe*'s factual assumptions: advances in maternal health care allow for abortions safe to the mother later in pregnancy than was true in 1973, and advances in neonatal care have advanced viability to a point somewhat earlier. But these facts go only to the scheme of time limits on the realization of competing interests, and the divergences from the factual premises of 1973 have no bearing on the validity of *Roe*'s central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions. The soundness or unsoundness of that constitutional judgment in no sense turns on whether viability occurs at approximately 28 weeks, as was usual at the time of *Roe*, at 23 to 24 weeks, as it sometimes does today, or at some moment even slightly earlier in pregnancy, as it may if fetal respiratory capacity can somehow be enhanced in the future. Whenever it may occur, the attainment of viability may continue to serve as the critical fact, just as it has done since *Roe* was decided; which is to say that no change in *Roe*'s factual underpinning has left its central holding obsolete, and none supports an argument for overruling it.

B In a less significant case, *stare decisis* analysis could, and would, stop at the point we have reached. But the sustained and widespread debate *Roe* has provoked calls for some comparison between that case and others of comparable dimension that have responded to national controversies and taken on the impress of the controversies addressed.

* * *

[*The Court reviewed two earlier lines of cases involving major reversals of doctrine, holding that there had been no similar changes in the factual assumptions underpinning the decision here.*]

. . . In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty.

Because the case before us presents no such occasion it could be seen as no such response. Because neither the factual underpinnings of *Roe*'s central holding nor our understanding of it has changed (and because no other indication of weakened precedent has been shown) the Court

could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973[.]

. . . In the present case, . . . as our analysis to this point makes clear, [a] terrible price would be paid for overruling. Our analysis would not be complete, however, without explaining why overruling *Roe*'s central holding would not only reach an unjustifiable result under principles of *stare decisis*, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law[.]

The underlying substance of [the Court's] legitimacy is . . . expressed in the Court's opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all. But even when justification is furnished by apposite legal principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute. The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.

* * *

The Court's duty in the present case is clear. In 1973, it confronted the already-divisive issue of governmental power to limit personal choice to undergo abortion, for which it provided a new resolution based on the due process guaranteed by the Fourteenth Amendment. Whether or not a new social consensus is developing on that issue, its divisiveness is no less today than in 1973, and pressure to overrule the decision, like pressure to retain it, has grown only more intense. A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe*'s original decision, and we do so today.

IV

From what we have said so far it follows that it is a constitutional liberty of the woman to have some freedom to terminate her pregnancy. We conclude that the basic decision in *Roe* was based on a constitutional analysis which we cannot now repudiate. The woman's liberty is not so

unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.

That brings us, of course, to the point where much criticism has been directed at *Roe*, a criticism that always inheres when the Court draws a specific rule from what in the Constitution is but a general standard. . . . And it falls to us to give some real substance to the woman's liberty to determine whether to carry her pregnancy to full term.

We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy. We adhere to this principle for two reasons. First, as we have said, is the doctrine of *stare decisis*. Any judicial act of line-drawing may seem somewhat arbitrary, but *Roe* was a reasoned statement, elaborated with great care. We have twice reaffirmed it in the face of great opposition. Although we must overrule those parts of *Thornburgh* and *Akron I* which, in our view, are inconsistent with *Roe*'s statement that the State has a legitimate interest in promoting the life or potential life of the unborn, the central premise of those cases represents an unbroken commitment by this Court to the essential holding of *Roe*. It is that premise which we reaffirm today.

The second reason is that the concept of viability, as we noted in *Roe*, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman. Consistent with other constitutional norms, legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw. And there is no line other than viability which is more workable.

* * *

The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce.

* * *

Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as

well as a certain degree of state assistance if the mother chooses to raise the child herself. "The Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth." *Webster v. Reproductive Health Services* [(1989)]. It follows that States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning. This, too, we find consistent with *Roe*'s central premises, and indeed the inevitable consequence of our holding that the State has an interest in protecting the life of the unborn.

We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*. . . . The trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in *Roe*.

* * *

Because we set forth a standard of general application to which we intend to adhere, it is important to clarify what is meant by an undue burden.

A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. . . . [W]e answer the question, left open in previous opinions discussing the undue burden formulation, whether a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability could be constitutional. The answer is no.

Some guiding principles should emerge. What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose. Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.

Even when jurists reason from shared premises, some disagreement is inevitable. . . . We do not expect it to be otherwise with respect to the undue burden standard. We give this summary:

(a) To protect the central right recognized by *Roe v. Wade* while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis as explained in this opinion. An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.

(b) We reject the rigid trimester framework of *Roe v. Wade*. To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.

(c) As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.

(d) Our adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade*, and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.

(e) We also reaffirm *Roe*'s holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."

United States v. Lopez (1995)

How far does Congress's authority extend with respect to the states? Since the 1930s, when a liberalization of Supreme Court doctrine cleared the way for an expansion of federal authority, Congress has relied on a loose interpretation of the Commerce Clause to justify extensive involvement in state and local affairs. (Congress can also shape what states do, for example, by placing conditions upon the receipt of federal funds). In 1990, Congress enacted the Gun-Free School Zones Act, making possession of a firearm in designated school zones a federal crime. When Alfonso Lopez, Jr., was convicted of violating the act, his lawyer challenged the constitutionality of the law, arguing that it was "invalid as beyond the power of Congress under the Commerce Clause." In a striking reversal of interpretation, the Supreme Court agreed and declared the law invalid, holding that banning guns in schools was too far removed from any effect on interstate commerce to warrant federal intervention. Critics of the decision argued that the Court's reasoning might invalidate a large body of federal crime and drug legislation that relies on the connection between regulated activity and

interstate commerce. Supporters maintained that the decision marked a new era of judicial respect for federalism and state autonomy.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In the Gun-Free School Zones Act of 1990, Congress made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of "Congress to regulate Commerce . . . among the several States. . . ." (U.S. Constitution Art. I, 8, cl. 3).

On March 10, 1992, respondent, who was then a 12th-grade student, arrived at Edison High School in San Antonio, Texas, carrying a concealed .38 caliber handgun and five bullets. Acting upon an anonymous tip, school authorities confronted respondent, who admitted that he was carrying the weapon. He was arrested and charged under Texas law with firearm possession on school premises. The next day, the state charges were dismissed after federal agents charged respondent by complaint with violating the Gun-Free School Zones Act of 1990.

A federal grand jury indicted respondent on one count of knowing possession of a firearm at a school zone, in violation of 922(q) [the relevant section of the Act of 1990]. Respondent moved to dismiss his federal indictment on the ground that 922(q) "is unconstitutional as it is beyond the power of Congress to legislate control over our public schools." The District Court denied the motion, concluding that 922(q) "is a constitutional exercise of Congress' well-defined power to regulate activities in and affecting commerce, and the 'business' of elementary, middle and high schools . . . affects interstate commerce." Respondent waived his right to a jury trial. The District Court conducted a bench trial, found him guilty of violating 922(q), and sentenced him to six months' imprisonment and two years' supervised release.

On appeal, respondent challenged his conviction based on his claim that 922(q) exceeded Congress' power to legislate under the Commerce Clause. The Court of Appeals for the Fifth Circuit agreed and reversed respondent's conviction. It held that, in light of what it characterized as insufficient congressional findings and legislative history, "in the full reach of its terms, is invalid as beyond the power of Congress under the Commerce Clause." Because of the importance of the issue, we granted *certiorari* and we now affirm.

We start with first principles. The Constitution creates a Federal Government of enumerated powers. As James Madison wrote, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." (*The Federalist*, No. 45). This constitutionally mandated division of authority was adopted by the Framers to ensure protection of our fundamental liberties. Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

[For the next several pages Rehnquist reviews the evolution of interpretations of the Commerce Clause, starting with *Gibbons v. Ogden* (1824). This case established the relatively narrow interpretation of the Commerce Clause in which the Court prevented states from interfering with interstate commerce. Very rarely did cases concern Congress's power. The 1887 Interstate Commerce Act and the 1890 Sherman Antitrust Act expanded Congress's power to regulate intrastate commerce "where the interstate and intrastate aspects of commerce were so mingled together that full regulation of interstate commerce required incidental regulation of intrastate commerce," arguing that the Commerce Clause authorized such regulation. Several New Deal era cases, *NLRB v. Jones & Laughlin Steel Corp.* (1937), *United States v. Darby* (1941), and *Wickard v. rn* (1942) broadened the interpretation of the Commerce Clause.]

Jones & Laughlin Steel, Darby, and Wickard ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause. In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that had once been local or at most regional in nature had become national in scope. But the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.

But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits. In Jones & Laughlin Steel, the Court warned that the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." Since that time, the Court has heeded that warning and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce.

* * *

Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate com-

merce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, those activities that substantially affect interstate commerce.

Within this final category, admittedly, our case law has not been clear whether an activity must *affect* or *substantially affect* interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause. We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity *substantially affects* interstate commerce.

We now turn to consider the power of Congress, in the light of this framework, to enact 922(q) [The Gun-Free School Zones Act]. The first two categories of authority may be quickly disposed of: 922(q) is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can 922(q) be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce. Thus, if 922(q) is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce.

First, we have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce. Examples include the regulation of intrastate coal mining; intrastate extortionate credit transactions, restaurants utilizing substantial interstate supplies, inns and hotels catering to interstate guests, and production and consumption of homegrown wheat. These examples are by no means exhaustive, but the pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.

Even Wickard, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not. Roscoe Filburn operated a small farm in Ohio, on which, in the year involved, he raised 23 acres of wheat. It was his practice to sow winter wheat in the fall, and after harvesting it in July to sell a portion of the crop, to feed part of it to poultry and livestock on the farm, to use some in making flour for home consumption, and to keep the remainder for seeding future crops. The Secretary of Agriculture assessed a penalty against him under the Agricultural Adjustment Act of 1938 because he harvested about 12 acres more wheat than his allotment under the Act permitted. The Act was designed to regulate the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and shortages, and concomitant fluctuation in wheat prices, which had previously obtained. The Court said, in an opinion sustaining the application of the Act to Filburn's activity, "One of the primary purposes of the Act in question was to increase the market price of wheat and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce" (317 U.S., at 128).

Section 922(q) is a criminal statute that by its terms has nothing to do with *commerce* or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intra-state activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

Second, 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce. . . . 922(q) has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.

* * *

The Government's essential contention, in fine, is that we may determine here that 922(q) is valid because possession of a firearm in a local school zone does indeed substantially affect interstate commerce. The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being. As a result, the Government argues that Congress could rationally have concluded that 922(q) substantially affects interstate commerce.

We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.

Although Justice Breyer argues that acceptance of the Government's rationales would not authorize a general federal police power, he is unable to identify any activity that the States may regulate but Congress may not. Justice Breyer posits that there might be some limitations on Congress' commerce power such as family law or certain aspects of education. These suggested limitations, when viewed in light of the dissent's expansive analysis, are devoid of substance.

Justice Breyer focuses, for the most part, on the threat that firearm possession in and near schools poses to the educational process and the potential economic consequences flowing from that threat. Specifically, the dissent reasons that (1) gun-related violence is a serious problem; (2) that problem, in turn, has an adverse effect on classroom learning; and (3) that adverse effect on classroom learning, in turn, represents a substantial threat to trade and commerce. This analysis would be equally applicable, if not more so, to subjects such as family law and direct regulation of education.

For instance, if Congress can, pursuant to its Commerce Clause power, regulate activities that adversely affect the learning environment, then, a fortiori, it also can regulate the educational process directly. Congress could determine that a school's curriculum has a "significant" effect on the extent of classroom learning. As a result, Congress could mandate a federal curriculum for local elementary and secondary schools because what is taught in local schools has a significant "effect on classroom learning," and that, in turn, has a substantial effect on interstate commerce.

Justice Breyer rejects our reading of precedent and argues that "Congress . . . could rationally conclude that schools fall on the commercial side of the line" because it provides a "valuable service" namely, to equip [children] with the skills they need to survive in life and, more specifically, in the workplace. We do not doubt that Congress has authority under the Commerce Clause to regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process. That authority, though broad, does not include the authority to regulate each and every aspect of local schools.

Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender "legal uncertainty." As Chief Justice Marshall stated in *McCulloch v. Maryland*, (1819), "The [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist." The Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation. Congress has operated within this framework of legal uncertainty ever since this Court determined that it was the judiciary's duty "to say what the law is." Any possible benefit from eliminating this "legal uncertainty" would be at the expense of the Constitution's system of enumerated powers.

* * *

These are not precise formulations, and in the nature of things they cannot be. But we think they point the way to a correct decision of this case. The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.

To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the

Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.

For the foregoing reasons the judgment of the Court of Appeals is Affirmed.