AP UNITED STATES GOVERNMENT AND POLITICS

15 SCOTUS CASES READER

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Baker v. Carr (1962)

Argued: April 19–21, 1961
Re-argued: October 9, 1961
Decided: March 26, 1962

Background

In the U.S. each state is responsible for determining its legislative districts. For many decades states drew districts however they wanted. By the 1950s and 1960s, questions arose about whether the states' division of voting districts was fair. Many states had not changed their district lines in decades. During that time many people moved from rural areas to cities. As a result, a significant number of legislative districts became uneven—for example, a rural district with 500 people and an urban district with 5,000 people each would have only one representative in the state legislature. Some voters filed lawsuits to address the inequities, but federal courts deferred to state laws and would not hear these cases.

Federal courts did not hear these cases because they were thought to be "political" matters. Courts were reluctant to interfere when another branch of government (the executive or legislative) made a decision on an issue that was assigned to it by the Constitution. For example, if the president negotiated a treaty with another country (a power granted to the president by the Constitution), the courts would generally not decide a case questioning the legality of the treaty. The power of state legislatures to create voting districts was one of those "political questions" that the courts traditionally had avoided.

This is a case about whether federal courts could rule on the way states draw their state boundaries for the purpose of electing members of the state legislature.

Facts

In the late 1950s, Tennessee was still using boundaries between electoral districts that had been determined by the 1900 census. Each of Tennessee's 95 counties elected one member of the state's General Assembly. The problem with this plan was that the population of the state changed substantially between 1901 and 1950. The distribution of the population had changed too. Many more people lived in Memphis (and its district—Shelby County) in 1960 than had in 1900. But the entire county was still only represented by one person in the state legislature, while rural counties with far fewer people also each had one representative.

In fact, the state constitution required revising the legislative district lines every 10 years to account for changes in population. But state lawmakers ignored that requirement and refused to redraw the districts.

An eligible voter who lived in an urban area of Shelby County (Memphis), Charles Baker, believed that he and similar residents of more heavily populated legislative districts were being denied "equal

protection of the laws" under the 14th Amendment because their votes were "devalued." He argued that his vote, and those of voters in similar situations, would not count the same as those of voters residing in less populated, rural areas. He sued the state officials responsible for supervising elections in the U.S. District Court for the Middle District of Tennessee.

The state of Tennessee argued that courts could not provide a solution for this issue because this was a "political question" that federal courts could not decide. The state said that its political process should be allowed to function independently. The District Court dismissed Baker's complaint on the grounds that it lacked authority to decide the case. Baker appealed that decision up to the U.S. Supreme Court, which agreed to hear his case.

Issue

Do federal courts have the power to decide cases about the apportionment of population into state legislative districts?

Constitutional Articles and Amendments and Supreme Court Precedents

- **Article III, section 2 of the U.S. Constitution**

  "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . ."

- **14th Amendment to the U.S. Constitution**

  No State shall…deny to any person within its jurisdiction the equal protection of the laws."

- ***Colegrove v. Green* (1946)**

  An Illinois resident sued Illinois officials to prevent them from holding an upcoming election. He argued that the boundaries for congressional districts drawn by the Illinois legislature were irregularly shaped and did not include the same number of people in each. The Supreme Court was asked to decide whether Illinois' congressional districts violated constitutional requirements for fair districting.

  The Court dismissed the case, concluding that federal courts lack the competence to decide whether a state's districting decisions are consistent with the Constitution. The Court decided that, because the legislative districting process is inherently political in nature, the courts cannot second-guess the political judgment of a state as to how best to draw districts or order a state to draw its districts any particular way.

Arguments for Baker (petitioner)

- The courts should be able to decide this issue. The text of Article III, section 2 of the U.S. Constitution is clear: "judicial Power shall extend to all Cases, in Law and Equity, arising

under this Constitution." This is an issue that arises under the Constitution because the right of the residents of Tennessee to "equal protection of the law" under the 14th Amendment was in question.

- "Political questions" that the courts should not address are not neatly defined and are determined by a number of factors. Just because an issue involves politics does not mean it is a "political question" that courts cannot decide. By refusing to decide political questions, courts are trying to avoid a situation where a co-equal branch of government is telling another what to do. But the courts would not be drawing new districts (that is the legislature's responsibility). The courts would simply be instructing the legislature to fix any constitutional violations.
- Courts should not follow a long-held practice merely because it is a tradition. There needs to be an important and constitutional reason why the courts should not decide a case.
- Baker's complaint—that his vote does not count equally—is a very serious violation of his rights. Many states have been unwilling to address this violation. In a case like this, the courts must get involved to protect people's rights and prevent the harm that would happen if the situation is not addressed immediately.
- The states suggest that voters' concerns can be remedied by elected officials—that voters can lobby for state laws and practices. That solution is flawed. Most of the members of the Tennessee legislature benefited from the districting plan as it existed.

Arguments for Carr (respondent)

- The federal courts do not have the constitutional authority to review legislative districts. One branch of the government should not tell another what to do on a question that is committed to the discretion of that branch alone. All three branches—legislative, judicial, and executive—are equal in the Constitution, and co-equal bodies cannot interfere with each other's basic functions.
- If the courts decide this case, they will overstep their authority and abuse their power. The state of Tennessee can enforce its own laws and decide what legislative districts it thinks achieve the fairest representational system. The federal government should respect the state's sovereignty and not force uniformity in an area where the Constitution left it to the states to decide how best to draw districts.
- Federal courts have always viewed districting as a uniquely political function that states do not have to carry out in any particular way.
- Even if the courts had authority to hear the case, there is nothing in the Constitution that says that state legislative districts must each have the same number of people. Nor is there any objective way to decide whether a state's districting decisions are sufficiently "fair."

- The courts do not need to interfere with the democratic process. If the residents of Tennessee want to change how their legislature draws the state's districts, they can encourage their elected officials to make that change through the existing democratic process.

Decision

In a 6–2 decision, the U.S. Supreme Court decided in favor of Baker. Justice Brennan wrote the opinion of the Court and was joined by Justice Black and Chief Justice Warren. Justices Douglas, Clark, and Stewart also joined in Justice Brennan's majority opinion and wrote separate concurring opinions. Justice Frankfurter and Justice Harlan wrote dissenting opinions.

Majority

The Supreme Court decided that the lower court's decision that courts could not hear this case was incorrect. In a dramatic break with tradition and practice, the majority concluded that federal courts have the authority to enforce the requirement of equal protection of the law against state officials—including, ultimately, the state legislature itself—if the legislative districts that the state creates are so disproportionally weighted as to deny the residents of the overpopulated districts equivalent treatment with underpopulated districts. The majority concluded that there is no inherent reason why courts cannot determine whether state districts are irrationally drawn in ways that result in substantially differing populations. Even though politics may enter into the drawing of districts, the constitutional guarantee of equal protection is judicially enforceable. A challenge to the differing populations of legislative districts does not present a "political question" that courts are unable to decide.

The Court did not decide whether Tennessee's districts actually were unconstitutional, however. Instead, the justices instructed the District Court to allow a hearing on the merits of Baker's claim that the state's legislative districts violated his 14th Amendment rights. That course established a precedent that dozens of federal courts later followed in allowing disgruntled residents to try to prove that legislative districts are unconstitutionally unbalanced.

Dissents

Justices Frankfurter and Harlan disagreed with the majority. They asserted that the Court's own precedents were clear and consistent in refusing to review a state's districting decisions, and they saw no reason for federal courts to decide these types of cases. This case was seen as an entirely "different matter from denial of the franchise [right to vote] to individuals because of race, color, religion or sex." Because they found nothing in the Constitution that would require states to draw districts in a particular manner, there was no basis for federal courts to interfere with a political task that the Constitution left to the state legislatures.

Justice Harlan's dissent highlighted just how significant the majority decision was. As he noted:

"I can find nothing in the Equal Protection Clause or elsewhere in the Federal Constitution which expressly or impliedly supports the view that state legislatures must be so structured as to reflect with approximate equality the voice of every voter. Not only is that proposition refuted by history … but it strikes deep into the heart of our federal system. Its acceptance would require us to turn our backs on the regard which this Court has always shown for the judgment of state legislatures and courts on matters of basically local concern."

Brown v. Board of Education of Topeka (1954)

Argued: December 9–11, 1952
Reargued: December 7–9, 1953
Decided: May 17, 1954

Background

The 14th Amendment to the U.S. Constitution was adopted in the wake of the Civil War and says that states must give people equal protection of the laws. It also empowered Congress to pass laws to enforce the provisions of the Amendment. Although Congress attempted to outlaw racial segregation in places like hotels and theaters with the Civil Rights Act of 1875, the Supreme Court ruled that law was unconstitutional because it regulated private conduct. A few years later, the Supreme Court affirmed the legality of segregation in public facilities in their 1896 decision in *Plessy v. Ferguson*. There, the justices said that as long as segregated facilities were qualitatively equal, segregation did not violate the U.S. Constitution. This concept was known as "separate but equal" and provided the legal foundation for Jim Crow segregation. In *Plessy*, the Supreme Court said that segregation was a matter of social equality, not legal equality, and therefore the justice system could not interfere. In that 1896 case the Court stated, "If one race be inferior to the other socially, the constitution of the United States cannot put them on the same plane."

By the 1950s, many public facilities had been segregated by race for decades, including many schools across the country. This case is about whether such racial segregation violates the Equal Protection Clause of the 14th Amendment.

Facts

In the early 1950s, Linda Brown was a young African-American student in Topeka, Kansas. Every day she and her sister, Terry Lynn, had to walk through the Rock Island Railroad Switchyard to get to the bus stop for the ride to the all-black Monroe School. Linda Brown tried to gain admission to the Sumner School, which was closer to her house, but her application was denied by the Board of Education of Topeka because of her race. The Sumner School was for white children only.

At the time of the Brown case, a Kansas statute permitted, but did not require, cities of more than 15,000 people to maintain separate school facilities for black and white students. On that basis, the Board of Education of Topeka elected to establish segregated elementary schools.

The Browns felt that the decision of the Board violated the Constitution. They and a group of parents of students denied permission to white-only schools sued the Board of Education of Topeka, alleging that the segregated school system deprived Linda Brown of the equal protection of the laws required under the 14th Amendment.

The federal district court decided that segregation in public education had a detrimental effect upon black children, but the court denied that there was any violation of Brown's rights because of the

"separate but equal" doctrine established in *Plessy*. The court said that the schools were substantially equal with respect to buildings, transportation, curricula, and educational qualifications of teachers. The Browns asked the U.S. Supreme Court to review that decision, and the Supreme Court agreed to do so. The Court combined the Browns' case with similar cases from South Carolina, Virginia, and Delaware.

Issue

Does segregation of public schools by race violate the Equal Protection Clause of the 14th Amendment?

Constitutional Amendments and Precedents

- **14th Amendment to the U.S. Constitution**

  "No State shall…deny to any person within its jurisdiction the equal protection of the laws."

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

  A Louisiana law required railroad companies to provide equal, but separate, facilities for white and black passengers. A mixed-race customer named Homer Plessy rode in the whites-only car and was arrested. Plessy argued that the Louisiana law violated the 14th Amendment by treating black passengers as inferior to white passengers. The Supreme Court declared that segregation was legal as long as facilities provided to each race were equal. The justices reasoned that the legal separation of the races did not automatically imply that the black race was inferior and that legislation and court rulings could not overcome social prejudices. Justice Harlan wrote a strong dissent, arguing that segregation violated the Constitution because it permitted and enforced inequality among people of different races.

- ***Sweatt v. Painter* (1950)**

  Herman Sweatt was rejected from the University of Texas Law School because he was black. He sued school officials alleging a violation of the 14th Amendment. The Supreme Court examined the educational opportunities at the University of Texas Law School and a new law school at the Texas State University for Negroes and determined that the facilities, curricula, faculty, and other tangible factors were not equal. Therefore, they ruled that Sweatt's rights had been violated. In addition to the more straightforward criteria, the justices examined at the two schools, they reasoned that other factors, such as the reputation of the faculty and influence of the alumni, could not be equalized.

Arguments for Brown

- The 14th Amendment's Equal Protection Clause promises equal protection of the laws. That means that states cannot treat people differently based on their race, without an extremely

good reason. There is not a good reason to keep black children and white children from attending the same schools.

- Racial segregation in public schools reduces the benefits of education to black children, solely based on their race. Schools for black children were often inadequate and had less money and other resources than white schools.
- Even if states were ordered by courts to "equalize" their segregated schools, the problems would not go away. State-sponsored segregation creates and reinforces feelings of superiority among whites and inferiority among blacks. Segregation places a badge of inferiority on the black students, perpetuates a system of separation beyond school, and gives unequal benefits to white students as a result of their informal contacts with one another. It undermines black students' motivation to seek educational opportunities and damages identity formation.
- At least two of the high schools in Topeka, Kansas, had already been desegregated with no negative effects. The policy should be consistent in all of Topeka's public primary and secondary schools.
- Segregation is morally wrong.

Arguments for Board of Education

- The 14th Amendment states that people should be treated equally; it does not state that people should be treated the same. Treating people equally means giving them what they need. This could include providing an educational environment in which they are most comfortable learning. White students are probably more comfortable learning with other white students; black students are probably more comfortable learning with other black students. These students do not have to attend the same schools to be treated equally under the law; they must simply be given an equal environment for learning.
- In Topeka, unlike in *Sweatt v. Painter*, the schools for black and white students have similar, equal facilities.
- The United States has a federal system of government that leaves educational decision-making to state and local legislatures. States should make decisions about the best environments for their school-aged children.
- Housing and schooling have become interdependent. The segregation of schools has reinforced segregation in housing, making it likely that a change in school admission policies will have a dramatic effect on neighborhoods. Students might need to travel far away from their local school to attend an integrated school. This places a heavy burden on local government to deal with the changes.

Decision

The Supreme Court ruled for Linda Brown and the other students, and the decision was unanimous. Chief Justice Earl Warren delivered the opinion of the Court, ruling that segregation in public schools violates the 14th Amendment's Equal Protection Clause.

The Court noted that public education was central to American life. Calling it "the very foundation of good citizenship," they acknowledged that public education was not only necessary to prepare children for their future professions and to enable them to actively participate in the democratic process, but that it was also "a principal instrument in awakening the child to cultural values" present in their communities. The justices found it very unlikely that a child would be able to succeed in life without a good education. Access to such an education was thus "a right which must be made available to all on equal terms."

The justices then compared the facilities that the Board of Education of Topeka provided for the education of African-American children against those provided for white children. Ruling that they were substantially equal in "tangible factors" that could be measured easily, (such as "buildings, curricula, and qualifications and salaries of teachers"), they concluded that the Court must instead examine the more subtle, intangible effect of segregation on the system of public education. The justices then said that separating children solely on the basis of race created a feeling of inferiority in the "hearts and minds" of African-American children. Segregating children in public education created and perpetuated the idea that African-American children held a lower status in the community than white children, even if their separate educational facilities were substantially equal in "tangible" factors. This deprived black children of some of the benefits they would receive in an integrated school. The opinion said, "We conclude that in the field of public education the doctrine of 'separate but equal' has no place." Separate educational facilities are inherently unequal. This ruling was a clear departure from the reasoning in *Plessy v. Ferguson*, and in many ways it echoed aspects of Justice Harlan's dissent in that earlier case.

One year later, the Court addressed the implementation of its decision in a case known as *Brown v. Board of Education II*. Chief Justice Warren once again wrote an opinion for the unanimous court. The Court acknowledged that desegregating public schools would take place in various ways, depending on the unique problems faced by individual school districts. After charging local school authorities with the responsibility for solving these problems, the Court instructed federal trial courts to oversee the process and determine whether local authorities were desegregating schools in good faith, mandating that desegregation take place with "with all deliberate speed."

That language proved unfortunate, as it gave the Southern States in particular an incentive to delay compliance with the Court's mandate. This led to further litigation, culminating in the Court's declaration in *Griffin v. County School Board of Prince Edward County* (1964) that "[t]he time for mere 'deliberate speed' has run out, and that phrase can no longer justify denying . . . school children their constitutional rights."

Citizens United v. FEC (2010)

Argued: March 24, 2009
Reargued: September 9, 2009
Decided: January 21, 2010

Background

Each election cycle billions of dollars are spent on congressional and presidential campaigns, both by candidates and by outside groups who favor or oppose certain candidates. Americans disagree about the extent to which fundraising and spending on election campaigns should be limited by law. Some believe that unlimited fundraising and spending can have a corrupting influence—that politicians will "owe" the big donors who help them get elected. They also say that limits on fundraising and spending help make elections fair for those who don't have a lot of money. Others believe that more spending on election campaigns supports broader debate and allows more people to learn about and discuss political issues. Those supporting more spending say that giving and spending money on elections is a basic form of political speech protected by the First Amendment.

Over the past 100 years, Congress has attempted to set some limits on campaign fundraising in order to reduce corruption or anything that can be perceived as corruption.

The Supreme Court has decided that both donating and spending money on elections is a form of speech. For candidates, the money pays for ways to share his or her views with the electorate—through advertisements, mail and email, and travel to give speeches. For donors, giving money to a candidate is a way to express political views. Therefore, any law that limits donating or spending money on elections limits free speech, and the government must have a very good reason for making such laws.

The Supreme Court has ruled that laws that restrict how much candidates can spend on a campaign are unconstitutional, since candidates spend money to get their message out, which is a very important form of political speech. However, the Court has said that laws that restrict how much individuals and groups can donate directly to candidates are allowed, because that spending is slightly removed from core political speech, and such laws can prevent corruption. In 2018, the maximum amount an individual could give directly to a federal candidate was $2,700.

This case, however, is not about direct donations to candidates. Instead, this case is about how and when companies and other organizations can spend their own money to advocate the election or defeat of a candidate.

Facts

One of the federal laws that regulates how election money can be raised and spent is the Bipartisan Campaign Reform Act (BCRA), also known as the McCain-Feingold Act. Passed in 2002, one part of this law dealt with how corporations and unions could spend money to advocate the election or

defeat of a candidate. The law said that corporations and unions could not spend their own money on campaigns. Instead, they could set up political action committees (PACs). Employees or members could donate to the PACs, which could then donate directly to candidates or spend money to support candidates. The law prohibited corporations and unions from directly paying for advertisements that supported or denounced a specific candidate within 30 days of a primary election or 60 days of a general election. It is this part of the BCRA that is at issue in *Citizens United v. Federal Election Commission.*

In 2008, Citizens United, a non-profit organization funded partially by corporate donations, produced *Hillary: The Movie*, a film created to persuade voters not to vote for Hillary Clinton as the 2008 Democratic presidential nominee. Citizens United wanted to make the movie available to cable subscribers through video-on-demand services and wanted to broadcast TV advertisements for the movie in advance. The Federal Election Commission said that *Hillary: The Movie* was intended to influence voters, and, therefore, the BCRA applied. That meant that the organization was not allowed to advertise the film or pay to air it within 30 days of a primary election. Citizens United sued the FEC in federal court, asking to be allowed to show the film. The district court heard the case and decided that even though it was a full length movie and not a traditional television ad, the film was definitely an appeal to vote against Hillary Clinton. This meant that the bans in the BCRA applied: corporations and organizations could not pay to air this sort of direct appeal to voters so close to an election.

Because of a special provision in the BCRA, Citizens United was allowed to appeal the decision directly to the U.S. Supreme Court, which the organization did. Citizens United asked the Court to decide whether a feature-length film really fell under the rules of the BCRA and whether the law violated the organization's First Amendment rights to engage in political speech. The Supreme Court agreed to hear the case and heard oral argument in March 2009. Two months later the Supreme Court asked both parties to submit additional written responses to a further question: whether the Court should overrule its prior decisions about the constitutionality of the BCRA. The Court scheduled a second oral argument session for September 2009.

Issue

Does a law that limits the ability of corporations and labor unions to spend their own money to advocate the election or defeat of a candidate violate the First Amendment's guarantee of free speech?

Law and Supreme Court Precedents

- ***Austin v. Michigan Chamber of Commerce* (1990)**

  A state law in Michigan said that for-profit and non-profit corporations could not use their money to run ads that support or oppose candidates in state elections. The Supreme Court decided that the Michigan law was constitutional, even though it did restrict corporations' speech. First, the justices said that the government had a very important reason for

restricting speech—reducing corruption or the appearance of corruption. Corporations, they reasoned, can accumulate a lot of money and they might use that money to unfairly influence elections. The justices also pointed out that the Michigan law allowed corporations to set up separate special funds with money from donors and spend that money on election ads. That allowed the corporations other avenues for their speech.

- **The Bipartisan Campaign Reform Act (BRCA) of 2002 (Also known as the McCain-Feingold Act)**

  Among other things, this federal law banned any corporation (for-profit or non-profit) or union from paying for "electioneering communications." It defined an "electioneering communication" as a broadcast, cable, or satellite communication that named a federal candidate within 60 days of a general election or 30 days of a primary.

  In 2003, in a case called *McConnell v. FEC,* the Supreme Court said that the portion of the BCRA about electioneering communications was constitutional.

- ***Wisconsin Right to Life v. FEC*** **(2007)**

  The BCRA banned corporations and unions from paying broadcast advertisements that named specific candidates for office near election time. This included both "express advocacy" (ads that specifically appealed to voters to vote for or against a certain candidate) and "issue advocacy" (ads that expressed a view about a political issue and mentioned a candidate). The Supreme Court decided that the ban on issue advocacy was unconstitutional. The Court said that issue advocacy was political speech, and the government could not prevent organizations from discussing issues simply because the issues might be relevant in an upcoming election. The justices said that issue ads are not equivalent to contributions, and there is not a compelling reason that banning the issue ads would reduce corruption. They also said that issue ads can reasonably mention public officials, as long as they are not direct appeals to vote for or against a specific candidate.

Arguments for Citizens United (petitioner)

- Freedom of political speech is vital to our democracy and spending money on political advertisements is one way of spreading speech.
- The First Amendment applies equally to speech by individuals and speech by groups. Companies, unions, and other organizations should not face stricter rules about their speech than individuals do.
- Newspapers are corporations. Through editorials, news organizations and media companies try to influence elections. If Congress is allowed to ban corporations from placing political ads, what prevents them from regulating the media as well?

- If a movie about a political candidate produced by a corporation can be banned, then books about political candidates that are published within 60 days of an election might be banned as well. Government censorship of this kind would have far reaching implications.
- Though some people or organizations have more money and can therefore speak more, the First Amendment does not allow for making some forms of speech illegal in order to make things "fair."
- Merely spending money to support a candidate—particularly when the money is not given to the candidate, but rather spent independently—does not create or even suggest the corruption that campaign finance reform was originally created to address.
- Incumbents (the public officials already in office) have the most to gain by banning independent spending by companies and organizations. The incumbents have access to much more free visibility and media time. Americans, including organizations and corporations, should be able to criticize the existing government and advocate for a change in leadership.

Arguments for the Federal Election Commission (respondent)

- The First Amendment does not apply to corporations because the Constitution was established for "We the People" and was set up to protect individual, rather than corporate, liberties.
- The BCRA leaves corporations other ways to speak and to spend money on elections. The law allows corporations and unions to form Political Action Committees and to fund advertisements through the PAC. PACs can only use money that has been given to them for the purpose of political advocacy, unlike a corporation's general income, which comes from all sorts of people who might not agree with the corporation's message.
- The Supreme Court has ruled on these issues before in *Austin v. Michigan Chamber of Commerce* and in *McConnell v. FEC,* which upheld the BCRA's bans. The Court should not completely change the law, which has clear public support.
- Corruption is not limited to bribes and direct transactions. By being allowed to spend unlimited sums of money in support of a candidate, corporations and unions will have a certain amount of access to, if not power over, that candidate.
- Even if no corruption takes place, the public may view the vast sums spent by corporations and unions for specific candidates and see the appearance of corruption. That could cause people to lose faith in the electoral system.
- Corporations can accumulate so much money that they could overwhelm the conversation and drown out the speech of less wealthy individuals in an election.

Decision

Justice Kennedy wrote the majority opinion. He was joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. Justice Stevens dissented and was joined by Justices Ginsburg, Breyer, and Sotomayor.

Majority

The Court ruled, 5–4, that the First Amendment prohibits limits on corporate funding of independent broadcasts in candidate elections. The Court reversed two earlier decisions that held that political speech by corporations may be limited (*Austin v. Michigan Chamber of Commerce* and portions of *McConnell v. FEC*). The justices said that the government's rationale for the limits on corporate spending—to prevent corruption—was not persuasive enough to restrict political speech. A desire to prevent corruption can justify limits on donations to candidates, but not on independent expenditures (spending that is not coordinated with a candidate's campaign) to support or oppose candidates for elected office. Moreover, the Court said, corporations have free speech rights and their political speech cannot be restricted any more than that of individuals. Justice Kennedy, writing for the majority, said that political speech is "indispensable to a democracy, which is no less true because the speech comes from a corporation." The majority did not strike down parts of the BCRA that require that televised electioneering communications include disclosures about who is responsible for the ad and whether it was authorized by the candidate.

Dissent

Justice Stevens, writing for the dissenters, said that the First Amendment protects people, not corporations. The dissenters felt that the government should be allowed to ban corporate money because it could overwhelm the debate and drown out non-corporate voices. They noted that Congress had imposed special rules on corporate campaign spending for more than 100 years. Without such limits, corporations' wealth could give them unfair influence in the electoral process and lead to elections where corporate domination of the airwaves would decrease the average voter's exposure to different viewpoints. They argued that the Court's ruling "threatens to undermine the integrity of elected institutions across the Nation." The dissenters argued that the BCRA left open ways for corporations to speak—through political action committees—and argued that PACs would better protect corporate shareholders from having their stake in a corporation used to support candidates they disagree with.

Engel v. Vitale (1962)

Argued: April 3, 1962
Decided: June 25, 1962

Background

The First Amendment to the Constitution protects the right to religious worship yet also shields Americans from the establishment of state-sponsored religion. Courts are often asked to decide tough cases about the convergence of those two elements—the Free Exercise and Establishment Clauses of the First Amendment.

The United States has a long history of infusing religion into its political practices. For instance, "In God We Trust" is printed on currency. Congress opens each session with a prayer. Before testifying in court, citizens typically pledge an oath to God that they will tell the truth. Traditionally, presidents are sworn in by placing their hand on a bible. Congress employs a chaplain, and Supreme Court sessions are opened with the invocation "God save the United States and this Honorable Court." Public schools are a bedrock of institution in U.S. democracy, where the teaching of citizenship, rights, and freedoms are common. This is a case about whether public schools may also play a role in teaching faith to God through the daily recitation of prayer.

Facts

Each day, after the bell opened the school day, students in New York classrooms would salute the U.S. flag. After the salute, students and teachers voluntarily recited this school-provided prayer, which had been drafted by the state education agency, the New York Regents: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country." The prayer was said aloud in the presence of a teacher, who either led the recitation or selected a student to do so. Students were not required to say this prayer out loud; they could choose to remain silent. Two Jewish families (including Stephen Engel), a member of the American Ethical Union, a Unitarian, and a non-religious person sued the local school board, which required public schools in the district to have the prayer recited. The plaintiffs argued that reciting the daily prayer at the opening of the school day in a public school violated the First Amendment's Establishment Clause. After the New York courts upheld the prayer, the objecting families asked the U.S. Supreme Court to review the case, and the Court agreed to hear it.

Issue

Does the recitation of a prayer in public schools violate the Establishment Clause of the First Amendment?

Constitutional Amendment and Supreme Court Precedents

- **First Amendment to the U.S. Constitution**

  "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…;"

- ***West Virginia State Board of Education v. Barnette* (1943)**

  The West Virginia Board of Education required that all public schools include a salute of the American flag as a part of their activities. Everyone, including teachers and pupils, was required to salute the flag. If they did not, they could be charged with "insubordination" and punished. Students who were members of a religious sect, the Jehovah's Witnesses, cited a religious objection to saluting the flag, claiming that it was equivalent to "idolatry." Their parents sued the state board of education asserting that the compulsory flag salute was a violation of the Establishment Clause. The Supreme Court ruled that the mandatory salute was unconstitutional. They said that a flag salute was a form of speech, because it was a way to communicate ideas. In *Barnette,* the Court ruled that in most cases the government cannot require people to express ideas that they disagree with, especially when the ideas conflict with their own religious beliefs.

- ***McCollum v. Board of Education* (1948)**

  In *McCollum v. Board of Education,* the Court said a public school violated the Establishment Clause when it allowed the school to teach religious instruction during school hours on school property. The schools set aside time for religious instruction, organized selection of religious community members to teach the school children, and administered the instruction. The court ruled in an 8–1 decision this violated the Establishment Clause by establishing a government preference for certain religions.

Arguments for Engel (petitioner)

- This school-sponsored prayer violates the Establishment Clause of the First Amendment as applied to the states. Public schools are part of the government, and the Establishment Clause says that the government cannot favor any one religion over another. The prayer includes the words "Almighty God" and thus favors monotheistic religions.
- It also violates the Free Exercise part of the First Amendment, because it has the effect of coercing children to participate in a religious proceeding. Children are required to attend school; they cannot choose to skip school if the prayer conflicts with their beliefs.
- A teacher leads the students in prayer and cooperates in carrying out the mandate requiring religious training in the public schools. This prayer is religious instruction and teachers are state officials; therefore, the government is forcing a belief in organized religion.

- Although the prayer is voluntary, few parents or students would choose not to participate because students would be singled out for their religious (or non-religious) beliefs.
- In earlier cases like *Barnette* and *McCollum,* the Supreme Court made it clear that public schools cannot promote specific religions over others and cannot force children to participate in activities that violate their religious beliefs.

Arguments for Vitale (respondent)

- This prayer safeguards the religious heritage of the nation. Beginning with the Mayflower Compact, the country's founders have publicly and repeatedly recognized the existence of a supreme being or God. In the Declaration of Independence, there are four references to the creator who endowed humans with "unalienable rights." Congress opens its session with a prayer, and presidents often conclude speeches with "God bless the United States of America."
- The New York schools' prayer is a declaration of faith. It is non-denominational and does not imply preference of any one religion over others.
- Schools fulfill a function of character- and citizenship-education, supplementing the training that often occurs at home. A short, nondenominational prayer aligns with this character education function.
- The New York Regents prayer is voluntary, not mandatory. Any child could remain silent or be excused by parental request with principal approval.
- The Pledge of Allegiance includes the word "God" and is widely accepted and recited in schools. In previous cases the Supreme Court did not strike references to God down as violations of the First Amendment.

Decision

The Supreme Court ruled, 6–1, in favor of the objecting parents. Justice Black wrote the majority opinion, and was joined by Chief Justice Warren and Justices Douglas, Clark, Harlan, and Brennan. Justices Frankfurter and White did not participate. Justice Stewart dissented.

Majority

The Court ruled that the school-sponsored prayer was unconstitutional because it violated the Establishment Clause. The prayer was a religious activity composed by government officials (school administrators) and used as a part of a government program (school instruction) to advance religious beliefs. The Court rejected the claim that the prayer was nondenominational and voluntary. The Court's opinion provided an example from history: "…this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America." The Court also

explained that, while the most obvious effect of the Establishment Clause was to prevent the government from setting up a particular religious sect of church as the "official" church, its underlying objective is broader:

> "Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith."

The Court also said that preventing the government from sponsoring prayer does not indicate hostility toward religion.

Dissent

Justice Stewart argued in his dissent that the majority opinion misapplied the Constitution in this case. He emphasized that the prayer was voluntary and that students were free to choose not to say it. "I cannot see how an 'official religion' is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation." Stewart described the history of religious traditions reflected in American institutions and government, from the invocation that "God save the United States and this Honorable Court" at the opening of each Supreme Court session, to the references to God in the Star-Spangled Banner and the employment of a chaplain in the House of Representatives. None of these things established an "official religion," and neither did New York's school prayer. Stewart argued that the Establishment Clause was meant to keep the government from forming a state-sponsored church (like the Church of England), not prohibit all types of government involvement with religion.

Gideon v. Wainwright (1963)

Argued: January 15, 1963
Decided: March 16, 1963

Background

The Sixth Amendment to the U.S. Constitution protects the rights of people accused of crimes. Among these protections is the right to have the assistance of a lawyer for one's defense. That means that the government cannot prevent someone from consulting with a lawyer and having a lawyer represent them in court. However, not everyone who has been accused of a crime can afford to hire a lawyer. In 1938, the Supreme Court ruled that, in federal criminal courts, the government must pay for a lawyer for defendants who cannot afford one themselves. *Gideon v. Wainwright* is a case about whether or not that right must also be extended to defendants charged with crimes in state courts.

The 14th Amendment says that states shall not "deprive any person of life, liberty, or property, without due process of law." The Supreme Court has ruled that some of the constitutional rights that, at first, only protected people from infringement by the federal government, are so fundamental to our concept of liberty (protected by the 14th Amendment) that they must also apply to state governments. In 1963, the Supreme Court had to decide whether, in criminal cases, the right to counsel paid for by the government was one of those fundamental rights.

Facts

In 1961, a burglary occurred at the Bay Harbor Pool Room in Panama City, Florida. Police arrested Clarence Earl Gideon after he was found nearby with a pint of wine and some change in his pockets. Gideon, who could not afford a lawyer, asked the Florida court to appoint one for him, arguing that the Sixth Amendment entitles everyone to a lawyer. The judge denied his request. Florida state law required appointment of counsel for indigent defendants only in capital (death penalty) cases. Gideon defended himself at trial and did not do well. He was found guilty of breaking and entering and petty larceny, a felony under Florida law. While serving his five-year sentence in a Florida state prison, Gideon began studying law. His study reaffirmed his belief that his rights were violated when the Florida Circuit Court refused his request for appointed counsel. Gideon filed a *habeas corpus* petition, arguing that he was improperly imprisoned because he had been refused the right to counsel during his trial, thus violating his constitutional rights guaranteed by the Sixth Amendment. The Florida Supreme Court ruled against him. From his prison cell, Gideon wrote a petition to the U.S. Supreme Court, asking the Court to hear his case. The Supreme Court agreed to hear Gideon's case.

Issue

Does the Sixth Amendment's right to counsel in criminal cases extend to defendants in state courts, even in cases in which the death penalty is not at issue?

Constitutional Amendments and Supreme Court Precedents

- **U.S. Constitution, Amendment VI**

  "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

- **U.S. Constitution, Amendment XIV**

  "…nor shall any State deprive any person of life, liberty, or property, without due process of law…."

- ***Powell v. Alabama* (1932)**

  Nine teenagers were accused of assaulting two women. All nine were tried on one day within a week after being indicted and were found guilty in Alabama state court and sentenced to death. No lawyer represented the teens. The Supreme Court ruled that accused persons in a capital case have the right to counsel for their defense, which includes the right to have sufficient time to consult with counsel and to prepare a defense. The Court said that this is one of the fundamental rights that must be applied to the states under the 14th Amendment. The Court also said that state courts must appoint counsel, whether requested or not, when the defendant is incapable of making an adequate defense because of "ignorance, feeble-mindedness, illiteracy or the like."

- ***Johnson v. Zerbst* (1938)**

  The Supreme Court said that the Sixth Amendment requires that, in federal criminal cases that could be punishable by imprisonment, counsel must be appointed for defendants too poor to hire their own lawyer, unless the accused person waives that right.

- ***Betts v. Brady* (1942)**

  Betts was charged with robbery in Maryland. He requested that a lawyer be appointed for him since he was unable to afford one. The judge in the case denied the request. Betts argued his own defense and was convicted. The Supreme Court ruled that the 14th Amendment did not require states to provide counsel to the poor in non-death-penalty cases.

Arguments for Gideon (petitioner)

- We cannot assure fair trials unless everyone has the assistance of a lawyer. The average person does not have the knowledge, resources, and skill required to provide an adequate legal defense themselves.
- The Supreme Court has ruled that the right to counsel in death penalty cases is fundamental and applies to the states (*Powell v. Alabama*), but not in non-death-penalty cases (*Betts v. Brady*). This is not logical, and *Betts v. Brady* should be overturned. The Sixth Amendment does not distinguish between types of criminal cases, and neither does the 14th Amendment. Even non-capital crimes can result in long prison sentences, which is depriving someone of their liberty. There is no "trivial" criminal case because someone's liberty is at stake.
- There was a change in thinking about the right to counsel between 1942, when *Betts v. Brady* was decided and 1963, when *Gideon* was in front of the Court. At the time of the *Betts v. Brady* decision, fewer than half of the states required appointment of counsel to the poor. At the time of Gideon's arrest, over 45 states required it.
- There is broad support to overturn *Betts v. Brady*. Twenty-two states filed amicus curiae briefs to support the application of the Sixth Amendment right to counsel to state courts regardless of type of offense.

Arguments for Wainwright (respondent)

- *Betts v. Brady* established that in any criminal case a defendant is entitled to counsel if he can claim special circumstances that show he would be denied a fair trial without counsel. Gideon did not claim such circumstances.
- The U.S. has a federal system in which the federal government may not exercise arbitrary power over the states. Imposing an inflexible rule on states that all defendants are entitled to counsel if they cannot afford one would allow the Supreme Court (the federal government) to intrude into states' powers. A state should be free to adopt any system it chooses, experimenting and adopting the types of rules and procedures it feels are necessary in its own courts.
- It is possible for a defendant without a lawyer to have a fair trial. Several judges may be involved in the processing of a defendant including arraignment, pretrial, and the trial. This exposure to multiple judges protects the defendant who is without a lawyer, as each judge knows the law and will ensure that the defendant is treated fairly. In any case, representation by a lawyer does not automatically guarantee a fair trial.
- The Supreme Court should uphold *Betts v. Brady,* which was decided only 20 years before *Gideon.* The Court considered this issue then and issued a ruling that should remain.

- If *Betts v. Brady* is overturned, states would have to provide lawyers to the indigent in all criminal prosecutions, no matter how small or trivial they are. This would place a tremendous burden on the taxpayers of every state.

Decision

The Supreme Court ruled unanimously for Gideon. Justice Black delivered the opinion. Justices Harlan and Clark wrote concurring opinions.

The Supreme Court overturned part of *Betts v. Brady,* in which it had concluded that the Sixth Amendment's guarantee of counsel is not a fundamental right. Instead, the Court in *Gideon* said that the right to the assistance of counsel in felony criminal cases is a fundamental right essential to a fair trial. Therefore, this protection from the Sixth Amendment applied to state courts as well as federal courts. State courts must appoint counsel to represent defendants who cannot afford to pay for their own lawyers if charged with a felony.

The Court said that the best proof that the right to counsel is fundamental and essential is that governments spend a lot of money to try to convict defendants and those defendants who can afford to almost always hire the best lawyer they can get. This indicates that both the government and defendants consider the aid of a lawyer in criminal cases absolutely necessary. In addition, the opinion noted that the Constitution places great emphasis on procedural safeguards designed to guarantee that defendants get fair trials.

NOTE: The decision in *Gideon* did not have any legal impact in terms of providing free legal counsel for the poor in civil cases. In fact the decision only applied to criminal defendants charged with felonies. In 1972, the Court decided the case of *Argersinger v. Hamlin,* which extended the *Gideon* rule so that indigent misdemeanants could not be imprisoned unless they had received free legal counsel.

Marbury v. Madison (1803)

Argued: There was no oral argument at the appeals stage in this case.
Decided: February 24, 1803

Background

Article III of the U.S. Constitution, which provides the framework for the judicial branch of government, is relatively brief and broad. It gives the Supreme Court the authority to hear two types of cases: original cases and appeals. "Original jurisdiction" cases start at the Supreme Court—it is the first court to hear the case. "Appellate jurisdiction" cases are first argued and decided by lower courts and then appealed to the Supreme Court, which can review the decision and affirm or reverse it.

In order to build the court system and clarify the role of the courts, Congress passed the Judiciary Act of 1789. This law authorized the Supreme Court to "issue writs of *mandamus* … to persons holding office under the authority of the United States." A writ of *mandamus* is a command by a superior court to a public official or lower court to perform a special duty. These are common in court systems.

In 1801, at the end of President John Adams' time in office, he appointed many judges from his own political party before the opposing party took office. It was the responsibility of the secretary of state, John Marshall, to finish the paperwork and give it to each of the newly appointed judges—this was called "delivering the commissions." Although Marshall signed and sealed all of the commissions, he failed to deliver 17 of them to the respective appointees. Marshall assumed that his successor would finish the job. However, when Thomas Jefferson became president, he told his new secretary of state, James Madison, not to deliver some of the commissions because he did not want members of the opposing political party to assume these judicial positions. Those individuals couldn't take office until they actually had their commissions in hand.

Facts

William Marbury, who had been appointed a justice of the peace of the District of Columbia, was one of the appointees who did not receive his commission. Marbury sued James Madison and asked the Supreme Court to issue a writ of *mandamus* requiring Madison to deliver the commission.

The politics involved in this dispute were complicated. The new chief justice of the United States, who was being asked to decide this case, was John Marshall, the Federalist secretary of state, who had failed to deliver the commission. President Jefferson and Secretary of State Madison were Democratic-Republicans who were attempting to prevent the Federalist appointees from taking office. If Chief Justice Marshall and the Supreme Court ordered Madison to deliver the commission, it was likely that he and Jefferson would refuse to do so, which would make the Court look weak. However, if they didn't require the commission delivered, it could look like they were backing down

out of fear. Chief Justice Marshall instead framed the case as a question about whether the Supreme Court even had the power to order the writ of *mandamus*.

Issues

Does Marbury have a right to his commission, and can he sue the federal government for it? Does the Supreme Court have the authority to order the delivery of the commission?

Constitutional Clauses and Federal Law

- **Article III, Section 2, Clause 2 of the U.S. Constitution**

  "In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

- **The Judiciary Act of 1789**

  This Act authorized the Supreme Court to "issue writs of *mandamus* … to persons holding office under the authority of the United States."

Arguments

There was no oral argument at the appellate stage of this case. Below are arguments that can be made for the parties in the case.

Arguments for Marbury

- Marbury's commission was valid, whether it was physically delivered or not before the end of President Adams' term, because the president had ordered it.
- The Judiciary Act of 1789 clearly gives the Supreme Court the power to order the commission be delivered.
- Secretary of State Madison, as an official of the executive branch, was required to obey President Adams' official act. Therefore, the Court should exercise its authority under the Judiciary Act to issue a writ of *mandamus* against Madison.
- Article III states that Congress can make exceptions to which cases have original jurisdiction in the Courts. The case falls under original jurisdiction of the Supreme Court.

Arguments for Madison

- The appointment of Marbury to his position was invalid because his commission was not delivered before the expiration of Adams' term as president.

- The appointment of commissions raised a political issue, not a judicial one. Therefore, the Supreme Court should not be deciding this case.
- The case falls under the appellate, not original, jurisdiction of the Supreme Court. It should be tried in the lower courts first.

Decision

The decision in *Marbury v. Madison* ended up being much more significant than the resolution of the dispute between Marbury and the new administration. The Supreme Court, in this decision, established a key power of the Supreme Court that continues to shape the institution today.

The Court unanimously decided not to require Madison to deliver the commission to Marbury. In the opinion, written by Chief Justice Marshall, the Court ruled that Marbury was entitled to his commission, but that according to the Constitution, the Court did not have the authority to require Madison to deliver the commission to Marbury in this case. They said that the Judiciary Act of 1789 conflicted with the Constitution because it gave the Supreme Court more authority than it was given in Article III. The Judiciary Act of 1789 authorized the Supreme Court to "issue writs of *mandamus* … to persons holding office under the authority of the United States" as a matter of its original jurisdiction. However, Article III, section 2, clause 2 of the Constitution, as the Court read it, authorizes the Supreme Court to exercise original jurisdiction only in cases involving "ambassadors, other public ministers and consuls, and those [cases] in which a state shall be a party. In all other cases, the Supreme Court shall have appellate jurisdiction." The dispute between Marbury and Madison did not involve ambassadors, public ministers, consuls, or states. Therefore, according to the Constitution, the Supreme Court did not have the authority to exercise its original jurisdiction in this case. Thus the Judiciary Act of 1789 and the Constitution were in conflict with each other.

Declaring the Constitution "superior, paramount law," the Supreme Court ruled that when ordinary laws conflict with the Constitution, they must be struck down. Furthermore, the Court said, it is the job of judges, including the justices of the Supreme Court, to interpret laws and determine when they conflict with the Constitution. According to the Court, the Constitution gives the judicial branch the power to strike down laws passed by Congress (the legislative branch) and actions of the president and his executive branch officials and departments. This is the principle of judicial review. The opinion said that it is "emphatically the province and duty of the judicial department to say what the law is."

This decision established the judicial branch as an equal partner with the executive and legislative branches within the government, with the power to rule actions of the other branches unconstitutional. The ruling said that the Constitution is the supreme law of the land and established the Supreme Court as the final authority for interpreting it.

McCulloch v. Maryland (1819)

Argued: February 22–26, 1819
Reargued: March 1–3, 1819
Decided: March 6, 1819

Background

In 1791, the First Bank of the United States was established to serve as a central bank for the country. It was a place for storing government funds, collecting taxes, and issuing sound currency. At the time it was created, the government was in its infancy and there was a great deal of debate over exactly how much power the national government should have. In particular, many individuals focused on the fact that the Constitution did not expressly grant the power to Congress to charter corporations or banks. Many thought that the only way to justify the federal government's creation of a central bank would be to interpret the Constitution as giving the federal government "implied" powers. This idea of implied powers worried many individuals who feared that this interpretation of the Constitution—providing implied powers—would create an all-powerful national government that would threaten the presumed sovereignty of the states.

The debate about the constitutionality of the First Bank was intense. Some people, such as Alexander Hamilton, argued for the supremacy of the national government and a broad interpretation of its powers, which would include the ability to establish a bank. Others, such as Thomas Jefferson, advocated states' rights, limited government, and a narrower interpretation of the national government's powers under the Constitution and, therefore, no bank. While James Madison was president, the First Bank's charter was not renewed. Congress proposed a Second Bank of the United States in 1816. President Madison, who was a staunch opponent of the creation of the First Bank, approved the charter, believing that its constitutionality had been settled by prior practices and understandings.

The Second Bank established branches throughout the United States. Many states opposed opening branches of this bank within their boundaries for several reasons. First, the Bank of the United States competed with their own banks. (At this point in history, there was no single currency in the U.S. Each state issued its own money, and the Bank of the United States also had authority to issue currency.) Second, the states found many of the managers of the Second Bank to be corrupt. Third, the states felt that the federal government was exerting too much power over them by attempting to curtail the state practice of issuing more paper money than they were able to redeem on demand.

Facts

Maryland attempted to close the Baltimore branch of the national bank by passing a law that forced all banks chartered outside of the state to pay a yearly tax (the Second Bank was the only such bank

in the state). James McCulloch*, the chief administrative officer of the Baltimore branch, refused to pay the tax. The state of Maryland sued McCulloch, saying that Maryland had the power to tax any business in its state and that the Constitution does not give Congress the power to create a national bank. McCulloch was convicted, but he appealed the decision to the Maryland Court of Appeals. His attorneys argued that the establishment of a national bank was a "necessary and proper" function of Congress, one of many implied, but not explicitly stated, powers in the Constitution.

The Maryland Court of Appeals ruled in favor of Maryland, and McCulloch appealed again. The case was heard by the Supreme Court of the United States.

Issues

Did Congress have the authority under the Constitution to commission a national bank? If so, did the state of Maryland have the authority to tax a branch of the national bank operating within its borders?

Constitutional Text and Amendments

- **U.S. Constitution, Article I, Section 8, Clause 18 (Necessary and Proper Clause)**

  "The Congress shall have Power... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

- **U.S. Constitution, Article VI, Clause 2 (Supremacy Clause)**

  "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."

- **U.S. Constitution, Amendment X**

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

Arguments for McCulloch (petitioner)

- The Necessary and Proper Clause permits Congress to make laws as they see fit. A law creating a national bank is necessary for the running of the country.

* In the Supreme Court's opinion for this case, James McCulloch's surname was spelled M'Culloch.

- While the Constitution does not specifically say that Congress has the power to establish a national bank, there is also nothing in the Constitution restricting the powers of Congress to those specifically enumerated.
- The Constitution does give Congress the power to levy taxes, borrow or spend money, and raise and support an army and navy, among other things. Establishing a national bank is "necessary and proper" to the exercise of all of those other powers.
- If Congress passed a law within its authority under the Constitution, a state cannot interfere with that action. Maryland is attempting to interfere with Congress's action and might try to tax the bank so heavily that that it would be unable to exist. The Supremacy Clause prohibits that kind of state interference with federal law.

Arguments for Maryland (respondent)

- The Constitution never says that Congress may establish a national bank.
- The Constitution says that the powers not delegated to the United States are reserved to the states.
- The federal government shares the ability to raise taxes with the states—it is a concurrent power. Taxation within a sovereign state's border, including of federal entities, is a state's exercise of a Constitutional power.
- The establishment of a national bank interferes with the states' abilities to control their own supply of money and their own economies.

Decision

The decision was unanimous in favor of McCulloch and the federal government. Chief Justice John Marshall authored the opinion of the Court.

The Supreme Court determined that Congress did have the power under the Constitution to create a national bank. Even though the Constitution does not explicitly include that power, there is also nothing in the Constitution that restricts Congress's powers to those specifically enumerated. The Necessary and Proper Clause gives Congress the authority to make "all laws which shall be necessary and proper" for exercising the powers that are specifically enumerated, and the establishment of a national bank is "necessary and proper" to exercising other enumerated powers.

The Court also ruled that Maryland could not tax the Bank of the United States. In their decision the justices declared 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." Allowing a state to tax a branch of the national bank created by Congress would allow that state to interfere with the exercise of Congress's constitutional powers. Thus because "states have no power, by taxation or otherwise, to retard, impede, burden or in any manner control" the operation of

constitutional laws passed by Congress, Maryland could not be allowed to tax a branch of the national bank, even though that branch was operating within its borders.

McDonald v. City of Chicago (2010)

Argued: March 2, 2010
Decided: June 28, 2010

Background

The Second Amendment protects "the right of the people to keep and bear Arms," but there has been an ongoing national debate about exactly what that phrase means. The debate only intensified after the U.S. Supreme Court struck down a handgun ban in the District of Columbia in 2008 (*District of Columbia v. Heller*). Because of its unique constitutional status as the home of the federal government (and not a state), the District of Columbia is treated as subject to the restrictions that the Constitution places on the federal government. As a result, the *Heller* decision left open the question whether the Second Amendment applies to state and local governments. In this case, which is about a ban on guns in Chicago, the Court was presented with that question.

When the Constitution was written, the Bill of Rights applied only to the federal government—not to the state or local governments. After the Civil War, however, the Constitution was amended to include the 14th Amendment, which guarantees that the states shall not deprive anyone of life, liberty, or property without due process of law. In the decades after the 14th Amendment, the Supreme Court began to rule that different parts of the Bill of Rights did apply to state and local governments—the process of selective incorporation. The Court said that some of the liberties protected in the Bill of Rights are *fundamental* to our concept of liberty and that it would violate the 14th Amendment's guarantee of due process if states interfered with those liberties. Over time, the Court has ruled that almost all of the Bill of Rights do apply to the states. Before 2010, the Supreme Court had never ruled on whether the Second Amendment's right to bear arms was one of those fundamental rights that states could not infringe.

Facts

In 1982, the city of Chicago adopted a handgun ban to combat crime and minimize handgun related deaths and injuries. Chicago's law required anyone who wanted to own a handgun to register it. The registration process was complex, and possession of an unregistered firearm was a crime. In practice, most Chicago residents were banned from possessing handguns.

In 2008, after the Court decided *Heller* (see the summary below) and said that the Second Amendment includes an individual right to keep and bear arms, Otis McDonald and other Chicago residents sued the city for violating the Constitution. They claimed that Chicago's handgun regulations violate their 14th Amendment rights. Specifically, the residents argued that the 14th Amendment makes the Second Amendment right to keep and bear arms applicable to state and local governments.

The federal district court ruled for Chicago. McDonald appealed. The Seventh Circuit Court of Appeals decided for Chicago, as well. That court ruled that the Second Amendment right to keep

and bear arms protects individuals only from regulation by the federal government. McDonald asked the U.S. Supreme Court to hear the case, and it agreed to do so.

Issue

Does the Second Amendment right to keep and bear arms apply to state and local governments through the 14th Amendment and thus limit Chicago's ability to regulate guns?

Constitutional Amendments and Supreme Court Precedents

- **Second Amendment to the U.S. Constitution**

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

- **14th Amendment to the U.S. Constitution**

  "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…."

- ***Duncan v. Louisiana* (1968)**

  In this case the Supreme Court incorporated a provision of the Bill of Rights, making it applicable to state and local governments. Duncan was charged with simple battery, a crime that Louisiana law allowed to be tried without a jury. Duncan was convicted and then appealed his conviction. He argued that his conviction should be overturned because the state violated his Sixth Amendment right to a jury trial in a criminal case. At that time the right to a jury trial was guaranteed only in federal cases. When the Supreme Court considered whether a portion of the Bill of Rights should apply to the states under the 14th Amendment, the justices considered whether the right at issue was fundamental and rooted in the tradition and conscience of the American people. When his case reached the U.S. Supreme Court, the Court considered whether the right to a jury trial for criminal offenses is "fundamental to the American scheme of justice." Noting the long tradition of jury trials for criminal offenses, wide state recognition of the right, and the importance of having a jury, the Court ruled that the Sixth Amendment right to a jury trial applies to the states.

- ***District of Columbia v. Heller* (2008)**

  The District of Columbia (which is not a state) had a ban on handguns, and the U.S. Supreme Court ruled that ban unconstitutional. The Court decided that the Second Amendment guarantees an individual right to gun ownership, which the federal (or D.C.) government may not infringe. Laws from the 1600s and 1700s, which included a right for individuals to possess weapons for self-defense, indicated that the Framers recognized an individual right to bear arms as a fundamental right.

The Court observed, however, that the right is not absolute. It applies only to weapons in common use, such as handguns. The government may still impose reasonable regulations on weapons possession without infringing the right to bear arms. For example, it seemed likely that government could prohibit felons from having guns and prohibit the possession of guns in sensitive places such as schools. The Court also noted that its ruling in *Heller* was not a decision that applied directly to state and local gun regulations. It bound the District of Columbia because the District is an instrument of the federal government.

Arguments for McDonald (petitioner)

- The Second Amendment applies to the states because the right to keep and bear arms is deeply rooted in American history. Possessing a gun is a right that pre-dates even the founding of the country, and guns are still an important part of American culture and liberty.
- Most provisions of the first eight amendments already apply to the states, and the Second Amendment should not be treated differently. Rights articulated in the Bill of Rights are assumed to be fundamental.
- The Second Amendment affords American citizens the ability to defend themselves against a tyrannical government. It would not make sense to allow citizens to defend themselves against the federal government but not state or local governments.
- The Chicago ban obstructs the core right the Court recognized in *Heller*: keeping a common weapon, like a handgun, for protection in one's home.
- The Chicago ban is nearly the same as the one the Court struck down in *Heller,* so it cannot be described as a reasonable gun regulation. In practice, it is a total ban on gun ownership, and that is not reasonable.
- Applying the Second Amendment to the states will not create a public safety crisis. *Heller* suggested that the right to keep and bear arms is limited to weapons in common use and that traditional regulations that keep guns out of the hands of felons and out of places such as schools are not threatened by the Second Amendment.

Arguments for Chicago (respondent)

- The Constitution and Bill of Rights have traditionally been understood as limits on the federal government, not the states.
- Although *Heller* recognized an individual right to keep and bear arms that the federal government may not infringe, that decision did not prohibit states from controlling guns.
- Even if guns were an important part of this country at the time of the founding, much has changed since then. There is an ongoing national debate on guns and a variety of state approaches to gun control. The right to keep a handgun cannot be described as fundamental or an established American tradition that warrants incorporation.

- The Court's decision in *Heller* noted that the right to keep and bear arms is not absolute. States, like the federal government, should be able to impose some reasonable regulations to keep their citizens safe given that crime, injury, and death are all linked to handguns.
- Unlike D.C.'s complete ban on handguns, which was struck down in *Heller*, Chicago simply establishes procedures that residents must follow in order to possess a gun. Given the particulars of Chicago's history of gun violence, the regulation is reasonable.
- The Court should defer to state judgments regarding gun control. States and the cities within them each face their own particular public safety issues. Applying the Second Amendment to the states would likely strike down thousands of gun regulations across the country and create dangerous uncertainty for states and cities that face serious problems linked to guns.

Decision

Justice Alito announced the judgment and opinion of the Court. Chief Justice Roberts and Justices Scalia and Kennedy joined Justice Alito's opinion in full, and Justice Thomas joined only in part. Justices Stevens, Breyer, Ginsburg, and Sotomayor dissented.

Majority

Writing for a majority of the Court, Justice Alito concluded that the Second Amendment right to keep and bear arms for the purpose of self-defense is fully applicable to the states under the 14th Amendment. The Court considered whether the right to keep guns "is fundamental to our scheme of ordered liberty and system of justice." Relying on a variety of historical records, the Court determined that both the Framers of and those who ratified the 14th Amendment considered the right to keep and bear arms among the fundamental rights "necessary to our system of ordered liberty." They said that self-defense is a basic right, and that, under *Heller*, individual self-defense is the central component of the Second Amendment right to bear arms.

Four of the five justices in the majority also said that applying the Second Amendment against state and local governments "does not imperil every law regulating firearms." Echoing the *Heller* decision, the plurality suggested that reasonable gun restrictions—such as a ban on felons owning guns or on carrying guns on school property—would still be allowed. Since there was not a *majority* for that part of the opinion, however, it is not the law.

Dissents

Justices Stevens and Breyer each wrote lengthy dissenting opinions. Justice Stevens argued that the Second Amendment was adopted to protect the states from federal encroachment and that, therefore, it made no sense to apply that provision *against* state and local governments. Justice Breyer, joined by Justices Ginsburg and Sotomayor, argued that the Second Amendment should not be incorporated against the states under the 14th Amendment. He asserted that nothing in the Second Amendment's text, history, or underlying rationale made it "fundamental" and protective of

the keeping and bearing of arms for private self-defense. Justice Breyer criticized the Court for transferring the regulation of private firearm use away from democratically elected legislatures and states to the courts and the federal government.

New York Times Co. vs. U.S. (1971)

Argued: June 26, 1971
Decided: June 30, 1971

Background

The United States' involvement in the Vietnam War became increasingly controversial and unpopular among Americans as the conflict persisted over a decade.

Since security and secrecy were important to the U.S.'s aims in the war, the government enforced laws to punish spying or breaches of national security. The Espionage Act, which was enacted at the beginning of World War I, made it a crime for anyone to obtain information relating to America's national defense with the intent to use it (or reason to believe it will be used) to the injury of the U.S. or to the advantage of a foreign nation. Additionally, anyone who willfully received such information without reporting it to the appropriate government agent was also at risk for criminal prosecution. The law was used to punish traditional spying and sabotage, but it was also used sometimes to prosecute people for speaking out against wars or other government actions.

This case is about when laws intended to protect American security interests come into conflict with the First Amendment's freedom of the press. How much power does the government have to prevent the media from publishing sensitive information?

Facts

Daniel Ellsberg, a former military analyst, was disillusioned with the U.S.'s continued role in the Vietnam War. He felt so strongly that the U.S. should not be in Vietnam that in 1971, he illegally copied over 7,000 pages of classified reports kept at the RAND Corporation, a research institution where he worked. These pages would come to be known as the "Pentagon Papers." Some of these documents were leaked to major publications, such as The New York Times and The Washington Post. These documents contained intimate details about the decision-making plans behind the U.S.'s intervention in the Vietnam conflict, as well as details that revealed contradictions between President Lyndon Johnson's motivations in Southeast Asia and his public remarks.

Neil Sheehan, the New York Times reporter who received the lead from Ellsberg, knew he had the story of the year, but the paper ran the risk of violating the Espionage Act if they published the papers. After printing two stories about the Pentagon Papers, President Nixon directed his attorney general to order the Times to stop, claiming the publications would cause "irreparable injury to the defense interests of the United States." The Times refused and the U.S. government sued the newspaper for violating the Espionage Act.

A federal judge issued a restraining order to stop further publication until trial. However, during that time, the Washington Post also printed portions of Ellsberg's papers. The government asked a federal court to stop the Post from publishing future stories about the papers, citing again the Espionage Act. Both newspapers argued that the First Amendment protected their right to publish.

Two different federal courts heard the Times and Post cases. Both newspapers won at the trial court, and the government appealed. The Court of Appeals for the D.C. Circuit ruled for the Washington Post, while the Court of Appeals for the Second Circuit ruled for the government (against the New York Times). The U.S. Supreme Court agreed to hear both cases, combining them and holding oral argument just one day after the justices agreed to take the cases.

Issue

Did the government's efforts to prevent two newspapers from publishing classified information given to them by a government leaker violate the First Amendment protection of freedom of the press?

Constitutional Amendments and Supreme Court Precedents

- **First Amendment to the U.S. Constitution**

  "Congress shall make no law…abridging the freedom of speech, or of the press"

- ***Near v. Minnesota* (1931)**

  J.M. Near published The Saturday Press in Minneapolis, Minnesota; the paper was widely viewed as anti-Semitic, anti-labor, and anti-Catholic. Minnesota's "public nuisance" law prohibited the publication of scandalous, defamatory, or malicious newspapers. Near was sued under this law by someone the paper had frequently targeted. In a 5–4 decision, the U.S. Supreme Court decided that the state's statute was an infringement of the First Amendment. The Court held that, except in rare cases, censorship is unconstitutional. This case made the freedom of press protection applicable to the states, through the 14th Amendment, and emphasized that prior restraint (preventing the publication of something in advance) is almost always unconstitutional.

- ***Dennis v. United States* (1951)**

  The Supreme Court upheld the Smith Act, which made it a criminal offense for a person or group to advocate the violent overthrow of the government or to be a member of any group that supports such advocacy. This case involved members of the American Communist Party, which petitioned for socialist reforms. The Court said speech from a person or group so grave it poses a vital threat to the security of the nation is not protected under the First Amendment.

Arguments for The New York Times (petitioner)

- In the First Amendment, the Framers gave the press the protection it must have to fulfill its essential role in our democracy. People must have access to uncensored information in order to make decisions and choose leaders. The press was created to serve the governed, not the government.

- Congress has not made laws that abridge the freedom of the press in the name of national security and presidential power. The courts should not take it upon themselves to make law that would do so simply because the executive branch requests it.
- The newspaper did not publish the information in order to hurt the U.S. Instead, it published the information to help the country, by informing citizens about their government's actions on an important public issue.
- Secrecy in government is fundamentally anti-democratic, perpetuating government misdeeds or errors. Open, robust debate of public issues is vital to our national health. Publishing materials that reveal misjudgments, miscalculations, or mistakes made by government officials is exactly why we want a free press to have unrestrained publishing authority.

Arguments for the U.S. Government (respondent)

- During times of war, the executive branch must be given broad authority to restrict publication of sensitive information that could harm U.S. national security.
- The judicial branch and the executive branch are co-equal branches of government. The courts should refrain from passing judgment on the executive branch's assessment of national security and foreign affairs. Our system of government rests on the concept of separation of powers, and the Constitution assigns decisions about foreign affairs to the political departments of the government—the executive and legislative branches.
- The newspapers knew the Pentagon Papers contained sensitive information that was obtained illegally. Both media outlets could certainly anticipate that the government would object to publication. It would have been reasonable to give the government an opportunity to review the entire collection and determine whether agreement could be reached on which sections of the papers could be published.
- One of the basic duties of every citizen is to report to police the discovery or possession of stolen property or secret government documents. This duty applies to everyone equally—from regular citizens, to high officials, and certainly also to The New York Times and The Washington Post.

Decision

Only four days after hearing oral arguments, the Supreme Court ruled, 6–3, for the newspapers. The Court issued a short majority opinion not publicly attributed to any particular justice—called a *per curiam* (or "by the Court") opinion—and each of the six justices in the majority (Justices Black, Douglas, Stewart, White, Brennan, and Marshall) wrote a separate concurring opinion. Chief Justice Burger and Justices Harlan and Blackmun each filed a dissenting opinion. It is one of the few modern cases in which each of the nine Justices wrote an opinion.

Per Curiam

The Court reaffirmed its longstanding rule that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." "The Government thus carries a heavy burden of showing justification for the imposition of such a restraint." The *per curiam* opinion concluded, without analysis, that that "the Government had not met that burden" in these cases.

Concurrences

Justice Black, in an opinion joined by Justice Douglas, expressed the view that a court can **never** enjoin the publication of news consistent with the First Amendment. In his view, the First Amendment's freedom of the press is absolute, and "the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints." This freedom is part of the basic constitutional structure: when creating the federal government, "the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy," in which "[t]he press was to serve the governed, not the governors." When the First Amendment says that Congress shall pass "no law" abridging freedom of the press, it means "no law," not "some laws." And the government cannot evade this absolute command by invoking national security concerns: "The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment."

Justice Douglas, joined by Justice Black, wrote that the executive branch does not have any "inherent power" to protect "national security" sufficient to overcome the heavy presumption against the constitutionality of a prior restraint on publication.

Justice Brennan concurred to emphasize that the cases represented the first time in American history that the government sought to enjoin a newspaper from publishing information in its possession, and that none of the lower courts ever should ever have ruled for the government. Justice Brennan recognized that there is only "a single, extremely narrow" exception to the prior restraint doctrine, involving an imminent threat in a time of war, and that exception did not apply here.

Justice Stewart, joined by Justice White, recognized the government's interest in "confidentiality and secrecy," but emphasized that it is primarily the executive branch's obligation to protect its own secrets. Because "I cannot say that the disclosure of any of [the documents] will surely result in direct, immediate, and irreparable damage to our Nation or its people," prohibiting publication would violate the First Amendment.

Justice White, joined by Justice Stewart, emphasized that "I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations." He noted that the government had tools to punish leakers and drew a fundamental distinction between such permissible punishment and an injunction against the publication of the information by the press. He suggested that the government might even be able to charge the newspapers with a crime for having published the information but held that this possibility did not justify a prior restraint on the publication.

Justice Marshall concluded that no statute authorized the executive or judicial branch to enjoin the publication of information on national security grounds, and that neither branch had the "inherent power" to issue such an injunction. Congress' authorization of criminal punishment for certain disclosures is not tantamount to authorization to enjoin such disclosures.

Dissents

In his dissent, Chief Justice Burger complained that the Court had rushed its decision in the cases (it accepted, heard, and decided them in less than a week), and that the justices (and the lower court judges) "do not know the facts." And, he argued, the facts are critical because "the First Amendment right itself is not absolute." Given his lack of knowledge of the facts, he declared that he was "not prepared to reach the merits" of the cases, and characterized the Court's rushed decision as "a parody of the legal process."

Justice John Harlan, joined by Chief Justice Burger and Justice Blackmun, also complained that "the Court has been almost irresponsibly feverish in dealing with these cases," and the justices had not had time to consider many of the "difficult questions of fact, of law, and of judgment." He did, however, reach the merits, and concluded that the judiciary did not have the right to second-guess the executive branch on matters of national security beyond (1) satisfying itself that "the subject matter of the dispute does lie within the proper compass of the President's foreign relations power," and (2) insisting that "the determination that disclosure of the subject matter would irreparably harm the national security be made by the head of the Executive Department concerned."

Justice Blackmun emphasized that "[t]he First Amendment … is only one part of an entire Constitution," and that "Article II of the great document vests in the Executive Branch primary power over the conduct of foreign affairs, and places in that branch the responsibility for the Nation's safety." In his view, "[e]ach provision of the Constitution is important, and I cannot subscribe to a doctrine of unlimited absolutism for the First Amendment at the cost of downgrading other provisions." He, therefore, would have sent the case back to the lower courts for a further review of the documents and assessment of the national security implications of publishing them.

Roe v. Wade (1973)

Argued: December 13, 1971
Reargued: October 11, 1972
Decided: January 22, 1973

Background

The Constitution does not explicitly guarantee a right to privacy. The word privacy does not appear in the Constitution. However, the Bill of Rights includes protections for specific aspects of privacy, such as the Fourth Amendment's "right of the people to be secure in their persons, houses, papers and effects" from unreasonable government searches and seizures and the Fifth Amendment's right to be free of compelled self-incrimination in criminal cases. In early rulings about privacy, the Supreme Court connected the right to privacy to particular locations, with emphasis on a person's home as a private space where the government could not intrude without a warrant. During the 21st century, the Court began interpreting the Constitution, including the Due Process Clause of the 14th Amendment, as providing a broader right to privacy protecting people as well as places. Over the decades the Court interpreted this right to privacy to include decisions about child rearing, marriage, and birth control. This is a case about whether that constitutionally-protected right to privacy includes the right to obtain an abortion.

In the 19th and early 20th centuries, most states adopted laws banning or strictly regulating abortion. Many people felt that abortion was morally or religiously wrong, and so many states outlawed abortion except in cases where the mother's life was in jeopardy. But illegal abortions were widespread and often dangerous for women who underwent them because they were performed in unsanitary conditions. Wealthier women could travel to states or other countries with looser laws to obtain abortions, while poorer women often did not have that option. In the 1960s, a movement to make abortion legal gained ground. The movement advocated for changes in state laws (and four states did repeal their bans) and brought cases in courts challenging the abortion bans as unconstitutional.

Facts

In 1969, an unmarried and pregnant resident of Texas known as Jane Roe (a pseudonym used to protect her identity) wanted to terminate her pregnancy. Texas law made it a felony to abort a fetus unless "on medical advice for the purpose of saving the life of the mother." Roe and her attorneys filed a lawsuit on behalf of her and all other women who were or might become pregnant and seek abortions. The lawsuit was filed against Henry Wade, the district attorney of Dallas County, Texas, and claimed that the state law violated the U.S. Constitution.

A three-judge federal district court ruled the Texas abortion law unconstitutional under the Ninth Amendment, which states that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." In particular, the district court concluded that "[t]he fundamental right of single women and married persons to choose whether to

have children is protected by the Ninth Amendment," which applies to the states through the 14th Amendment. The case was then appealed directly to the U.S. Supreme Court, which agreed to hear it.

Issue

Does the U.S. Constitution protect the right of a woman to obtain an abortion?

Constitutional Amendments and Supreme Court Precedents

- **Ninth Amendment to the U.S. Constitution**

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

- **14th Amendment to the U.S. Constitution**

  "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."

- ***Griswold v. Connecticut* (1965)**

  A married couple sought advice about contraception from a Planned Parenthood employee named Griswold. Connecticut law criminalized providing counseling to married people for the purpose of preventing conception. The Supreme Court ruled that the Connecticut law violated the Constitution because it invaded the privacy of married couples to make decisions about their families. The Court identified privacy as an important value, fundamental to the American way of life, and to the other basic rights outlined in the Bill of Rights (including the First, Third, Fourth, and Ninth Amendments). Seven years later, the Court decided a case that extended access to contraception to unmarried persons, as well.

- ***U.S. v. Vuitch* (1971)**

  Washington, DC, had a law that prohibited abortions unless a woman's life or health was endangered by the pregnancy. Dr. Vuitch was arrested for violating that law, and he argued that only a doctor (not a prosecutor) could determine whether an abortion was necessary to protect a woman's life or health. The Supreme Court did not overturn the DC law. Instead it ruled that "health" should include both psychological and physical well-being.

Arguments for Roe

- A woman's right to privacy is implicitly guaranteed in the First, Fourth, Fifth, Ninth, and 14th Amendments. As the Court ruled in Griswold, there are certain matters—including the

decision about whether or not to have a child—that are individual decisions protected by the Constitution.

- Many women had unwanted pregnancies, which had a major impact on their lives. In the 1970s, women could be asked to leave their jobs if they became pregnant, and most employers did not provide maternity leave. Women could be endangering their careers or finances in addition to their psychological and physical health by being forced to carry a pregnancy to term.
- Women in Texas who wish to have an abortion must either travel to another state where abortion is legal or undergo an illegal abortion where conditions could be unsafe. Travel is costly and inconvenient, thus making access to a safe, legal abortion more difficult for poor women. Illegal abortions put women's life, health, and well-being at risk.
- The law criminalizes a safe medical procedure, and it is too vague for doctors to know what they may or may not do. Doctors must determine that a woman's life is at risk in order to perform a legal abortion, and their decision and professional interpretation of "at risk" could land them in jail.
- An unborn fetus is not recognized as a person and does not have rights equal to the mother. Abortions were more common in the 19th century, so it is clear that the framers of the 14th Amendment did not intend to include fetuses in the definition of "persons." No Supreme Court case has established that a fetus is a person and, therefore, entitled to constitutional rights.

Arguments for Wade

- There is no right to abortion guaranteed in the Constitution. It is mentioned nowhere in the text, and there is no reason to believe that those who wrote the 14th Amendment intended to protect that right.
- A fetus, from the date of conception, is a person and has constitutional rights. The state has an important interest in protecting its future citizens. The right to life of the unborn child is superior to the right to privacy of the mother. The balancing of the two interests should favor the most vulnerable, the unborn child.
- In previous decisions where the Court protected individual or marital privacy, that right was not absolute. All protected rights are subject to reasonable regulation, and Texas has a strong interest in protecting life and protecting women's health, so the abortion restrictions are reasonable.
- Abortion is different from contraception, so the Court's decision in *Griswold v. Connecticut* does not apply here. Contraception prevents creation of life whereas abortion destroys existing life.

- Abortion is a policy matter best left to the state legislatures to decide. As elected officials, legislators make laws that reflect the popular will and morality of the people—as they have done here. The prohibition against abortion in Texas has existed since 1854.

Decision

In a 7–2 decision, the U.S. Supreme Court decided in Roe's favor. Justice Blackmun wrote the opinion of the Court, which recognized that a woman's choice whether to have an abortion is protected by the Constitution. Chief Justice Burger and Justices Stewart and Douglas wrote concurring opinions. Justices White and Rehnquist wrote dissenting opinions.

Majority

The majority rooted a woman's right to decide whether to have an abortion in the Due Process Clause of the 14th Amendment, which prohibits states from "depriv[ing] any person of … liberty … without due process of law." According to the majority, the "liberty" protected by the 14th Amendment includes a fundamental right to privacy. The majority began by surveying the history of abortion laws, and concluded that "the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage," and "are not of ancient or even of common-law origin." The Court then held that "[t]his 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." Further, after considerable discussion of the law's historical lack of recognition of rights of a fetus, the majority concluded "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." A woman's right to choose to have an abortion falls within this fundamental right to privacy and is protected by the Constitution.

While holding that "the right of personal privacy includes the abortion decision," however, the Court also emphasized that "this right is not unqualified and must be considered against important state interests in regulation." In particular, the Court noted, "[w]here 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 protect only the legitimate state interests at stake." The Court recognized that "the State does have an important and legitimate interest in preserving and protecting the health of a pregnant woman" and "still another important and legitimate interest in protecting the potentiality of human life." Striking a balance between a woman's fundamental right to privacy and these state interests, the Court set up a framework laying out when states could regulate and even prohibit abortions.

Under that framework, in the first trimester (the first three months of the pregnancy), a woman's right to privacy surrounding the choice to have an abortion outweighs a state's interests in regulating this decision. During this stage, having an abortion does not pose a grave danger to the mother's life and health, and the fetus is still undeveloped. The state's interests are not yet compelling, so it

cannot regulate or prohibit her from having an abortion. During the second trimester, the state's interests become more compelling as the danger of complications increases and the fetus becomes more developed. During this stage, the state may regulate, but not prohibit, abortions, as long as the regulations are aimed at protecting the health of the mother. During the third trimester, the danger to the woman's health becomes the greatest and fetal development nears completion. In the final trimester, the state's interests in protecting the health of the mother and in protecting the life of the fetus become their most compelling. The state may regulate or even prohibit abortions during this stage, as long as there is an exception for abortions necessary to preserve the life and health of the mother.

Concurrences

Three Justices filed concurring opinions in the case. Justice Stewart emphasized that the Court was basing its holding on the so-called "substantive" component of the Due Process Clause of the 14th Amendment. Justice Douglas rejected Justice Stewart's invocation of "substantive" due process, but agreed that the constitutional right at issue was based in the term "liberty" in the Due Process Clause of the 14th Amendment. Chief Justice Burger underscored that "the Court today rejects any claim that the Constitution requires abortions on demand."

Dissents

Two Justices filed dissenting opinions. In his dissenting opinion, Justice White, joined by Justice Rehnquist, argued that he found "nothing in the language or history of the Constitution to support" the right to an abortion. He characterized the decision as "an extravagant and improvident exercise of the power of judicial review that the Constitution extends to this Court," and noted that the decision prevents the people and the legislatures of the states from "weighing the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand." Justice Rehnquist filed a separate dissenting opinion, arguing that abortion did not fit within the right of "privacy" recognized in the Court's previous cases and characterizing the decision as "partak[ing] more of judicial legislation than … a determination of the intent of the drafters of the Fourteenth Amendment."

Schenck v. U.S. (1919)

Argued: January 9, 10, 1919
Decided: March 3, 1919

Background

The First Amendment to the U.S. Constitution protects the freedom of speech. This right, however, like all rights protected by the Constitution, is not absolute. The government can place reasonable limits on protected rights in many instances. The extent to which the government can limit free speech depends on the context, and, generally, the government cannot exert much control over the content of someone's speech. At various points in history, the government has argued that national security concerns, or times of war, permit the government to place additional restrictions on speech.

Two months after the United States formally entered World War I, Congress passed the Espionage Act of 1917. Many elected officials were worried about foreign spies or American sympathizers with our opponents in the war. The Espionage Act made it a crime to "cause insubordination, disloyalty, mutiny, refusal of duty, in the military" or to obstruct military recruiting. A number of Americans were arrested and convicted under this law during World War I. In this case the Supreme Court had to decide whether the speech that was punished was protected by the First Amendment.

Facts

Charles T. Schenck was the general secretary for the Socialist Party chapter in Philadelphia. Along with fellow executive committee member, Elizabeth Baer, Schenck was convicted of violating the Espionage Act. He had printed and mailed 15,000 fliers to draft-age men arguing that conscription (the draft) was unconstitutional and urging them to resist.

On the side of the flier entitled "Long Live the Constitution of the United States," the Socialist Party argued that conscription was a form of "involuntary servitude" and thereby outlawed by the 13th Amendment. Schenck's flier also implored its recipients "to write to your Congressman and tell him you want the [conscription] law repealed. Do not submit to intimidation. You have the right to demand the repeal of any law. Exercise your rights of free speech, peaceful assemblage, and petitioning the government for a redress of grievances."

On the reverse side entitled "Assert Your Rights!", Schenck adopted more fiery language. He implored his audience to "do your share to maintain, support and uphold the rights of the people of this country" or else "you are helping condone a most infamous and insidious conspiracy" fueled by "cunning politicians and a mercenary capitalist press."

After Schenck's conviction for violating the Espionage Act in 1917, he asked the trial court for a new trial. This request was denied. He then appealed to the Supreme Court, which agreed to review his case in 1919.

Issue

Did Schenck's conviction under the Espionage Act for criticizing the draft violate his First Amendment free speech rights?

Constitutional Provisions and Federal Statutes

- **First Amendment to the U.S. Constitution**

  Congress shall make no law… abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

- **Espionage Act, Section 3**

  "Whoever, when the United States is at war, …shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both."

Arguments for Schenck

- The First Amendment not only prevents Congress from prohibiting criticism of government action. It also protects the speaker from punishment after the expression.
- The First Amendment must protect the free discussion of public matters. This practice helps hold government officials accountable and promotes transparency. Schenck was simply sharing his opinions about important government actions and policies.
- There is an important difference between words and actions. While the government may punish those who refuse to serve in the military once drafted (action), the effort to persuade people not to serve is protected by the Constitution as speech (words).
- Schenck exercised his free speech rights to communicate his opinions on important public issues. He was not directly calling on readers to break the law, only to exercise their right to redress grievances by writing their Congressional representatives.

Arguments for the United States

- Congress is empowered to declare war and ensure the functioning of the U.S. military. In a time of war, it may limit the expression of opinions if necessary to make sure the military and government can function—which includes the necessary recruitment and enlistment of soldiers.

- In distributing the flier, Schenck and Baer possessed a clear intent to persuade others to not enlist. That is a violation of the Espionage Act, which prohibits "willfully…obstruct[ing] the recruiting or enlistment service of the United States."
- War time is different from peace time; during war the government should have extra power to ensure the safety and security of the American people, even if that means limiting certain kinds of speech.

Decision

Justice Oliver Wendell Holmes delivered the unanimous opinion for the Court in favor of the United States, joined by Chief Justice White and Justices McKenna, Day, van Devanter, Pitney, McReynolds, Brandeis, and Clarke.

Justice Holmes accepted the possibility that the First Amendment did not only prevent Congress from exercising prior restraint (preemptively stopping speech). He said that the First Amendment could also be interpreted to prevent the punishment of speech after its expression.

Yet, according to Holmes, "the character of every act depends upon the circumstances in which it is done." In the context of the U.S. effort to mobilize for entry into World War I, the Espionage Act's criminalization of speech that caused or attempted to cause a disruption of the operation of the military was not a violation of the First Amendment. According to Holmes, "when a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."

Holmes held that some speech does not merit constitutional protection. He said that statements that "create a clear and present danger" of producing a harm that Congress is authorized to prevent, fall in that category of unprotected speech. Just as "free speech would not protect a man in falsely shouting fire in a theatre and causing a panic," the Constitution does not protect efforts to induce the criminal act of resisting the draft during a time of war.

Schenck was the first case decided by the Court that created a test for punishing a speaker solely because of the content of her or his speech, as opposed to punishing speech that had already caused harm. The "clear and present danger" test provided the framework for many later cases brought against unpopular speakers under both the Espionage Act and similar state laws. Under the "clear and present danger" test, the government typically won and the speakers usually lost. The Court later abandoned this test in favor of rulings more protective of free speech rights.

Shaw v. Reno (1993)

Argued: April 20, 1993
Decided: June 28, 1993

Background

After the Civil War, the 13th, 14th, and 15th Amendments ended slavery, granted citizenship to formerly enslaved persons, and gave African-American men the right to vote. Soon thereafter, state governments, primarily in the south, institutionalized black codes and Jim Crow laws to prevent former slaves from voting. Poll taxes, literacy tests, and felon disenfranchisement were among the practices commonly used to suppress black voting.

In order to prevent states from suppressing the right of African-Americans and other minorities to vote, Congress passed the Voting Rights Act in 1965. This law prohibited voting rules that discriminated on the basis of race. The law also placed cities, counties, and states with a history of discriminatory practices in a special category. These jurisdictions had to request pre-clearance from the federal government before changing their voting rules and were required to prove that the proposed change did not limit a person's right to vote because of their race. The courts concluded that the Voting Rights Act, including this "pre-clearance" requirement, applied to the drawing of legislative district boundaries, which each state must do every 10 years to account for changing populations. While states generally can adopt their own criteria for districting—which typically include making districts that are reasonably compact and contiguous (where all parts of the district are connected to one another) and that align with existing geographical boundaries like cities or counties—they may not draw districts in a way that discriminates on the basis of race.

In *Thornburg v. Gingles* (1986), the Supreme Court ruled that if voting is racially polarized, and if a minority group is both large enough and geographically compact enough to make up a majority of the voters in a new district, then the Voting Rights Act requires the district to be drawn to comprise a majority of minority voters—i.e., to be drawn as a "majority-minority" district. The Court concluded that drawing majority-minority districts in such circumstances is necessary to give minority groups "the opportunity to elect their candidate of choice."

Facts

Between 1865 and 1993, the state of North Carolina elected only seven African-Americans to the U.S. House of Representatives. In 1990, none of the state's 11 members of Congress were black, while 20% of the state's population was. After the 1990 census, the state gained a 12th Congressional seat, and the state legislature tried to ensure the election of an African-American representative through the creation of a legislative district that would be majority African-American. Forty of North Carolina's counties were covered by the Voting Rights Act requirement that redistricting plans be pre-cleared by the federal government, so the state submitted its plans to the U.S. Department of Justice. The attorney general rejected the North Carolina state legislature's first

redistricting plan because it created only one majority-minority district. The Department of Justice said that a second majority-minority district could also be created.

The General Assembly (North Carolina's legislature) redrew the district lines to create a second majority-minority district, District 12. District 12 ran along Interstate 85 in snake-like fashion for 160 miles, breaking up several counties, towns, and districts to connect geographically separate areas densely populated by minority voters into a single district that, in some places, was only as wide as the highway. The attorney general did not object to this new districting plan. In 1992, Melvin Watt won the 12th district, becoming one of North Carolina's first two black members of Congress in the 20th century.

Five white voters filed a lawsuit against both state and federal officials in the U.S. District Court for the Eastern District of North Carolina. They argued that District 12 violated the 14th Amendment's Equal Protection Clause because it was motivated by racial discrimination and resulted in a district drawn almost entirely on racial lines, with the sole purpose of electing black Congressional representatives. The District Court dismissed the case, concluding that using race-based districting to benefit minority voters does not violate the Constitution. The voters appealed to the Supreme Court, which is required by law to hear most redistricting cases.

Issue

Did the North Carolina residents' claim that the 1990 redistricting plan discriminated on the basis of race raise a valid constitutional issue under the 14th Amendment's Equal Protection Clause?

Constitutional Amendments and Supreme Court Precedents

- **14th Amendment to the U.S. Constitution**

  "Nor shall any state…deny to any person within its jurisdiction the equal protection of the laws."

- **15th Amendment to the U.S. Constitution**

  "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

- ***Gomillion v. Lightfoot* (1960)**

  In 1957, the Alabama legislature decided to redraw the boundaries of the city of Tuskegee. While the city had long been shaped as a square, the legislature redrew it as "a strangely irregular twenty-eight-sided figure." The result of this redistricting was to remove all but four or five of the city's 400 black voters from its boundaries, while removing no white voters or residents. The black voters sued, but the lower courts dismissed their case, concluding that courts have no power to interfere with how state legislatures draw district lines. The U.S. Supreme Court reversed. The Court found it difficult to explain the bizarrely shaped district as anything other than an effort to segregate black voters and deprive them of their right to

vote. The Court concluded that courts have the power under the 15th Amendment to invalidate districts that are drawn to abridge the right to vote on the basis of race.

- ***United Jewish Organizations of Williamsburgh, Inc. v. Carey*** **(1977)**

  A Hasidic Jewish community in New York was divided into two districts as a result of a reapportionment plan that reorganized several districts to achieve a minimum nonwhite representation of 65% in each district. The U.S. Supreme Court upheld the plan, holding that considering race when drawing districts does not necessarily violate the 14th or 15th Amendments. Although New York deliberately increased nonwhite majorities, the Court concluded that this use of racial criteria was permissible because there was no "fencing out" of the white population in the county from participating in the election processes, and whites were not subsequently underrepresented relative to their representation of the population.

Arguments for Shaw (petitioner)

- The Constitution is "color-blind," meaning it prohibits using race as the basis for how to draw districts. This redistricting plan is the opposite of color-blind and amounts to unconstitutional discrimination on the basis of race.
- The snake-like shape of District 12 makes it neither compact nor truly contiguous, which are the traditional criteria for district maps. The legislature's obvious disregard for these criteria confirms that its sole purpose was to create a seat to represent a particular racial group.
- In *Gomillion v. Lightfoot* (1960), the Court held that dividing voters into districts on the basis of their race is impermissible racial segregation. That does not change just because race is used to advance the interests of a minority group rather than limit them.
- Drawing districts on the basis of race advances the stereotype that black voters will only vote for a black candidate and white voters for a white candidate. Minority voters have different views and interests, and do not necessarily have a single, unified "candidate of choice."

Arguments for Reno (respondent)

- The courts have ruled that the use of race in redistricting is permissible and might even be more important than traditional districting features such as contiguousness and compactness, as long as the configurations are not too extreme. Oddly shaped districts are sometimes necessary if states are to elect representatives who are reflective of the people of the state.
- The Voting Rights Act of 1965 encourages the creation of districts with majorities of black, Hispanic, and other minority voters, especially where there has been voting discrimination in the past.
- In *Gomillion v. Lightfoot* (1960), the Court held that districts can't be drawn to discriminate against minorities. But that does not mean that race can't be used to draw districts that advance the interests of minorities.

- In *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, the Court approved "racial redistricting where appropriate to avoid abridging the right to vote on account of race." Though whites had lost one legislative seat as a result of redistricting, the Court found that their constitutional rights were not violated because they were not deprived of effective representation or the right to vote.

Decision

In a 5–4 decision, the U.S. Supreme Court decided in favor of Shaw, and sent the case back to the lower court to be reheard. Justice O'Connor authored the majority decision, which was joined by Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas. Justices White, Blackmun, Stevens, and Souter dissented.

Majority

Justice O'Connor detailed the troublesome history of racial gerrymandering and explained how North Carolina District 12 was similar in many ways to past districts that had been held unconstitutional, like the bizarrely shaped district in *Gomillion*. The justices said that classifications of citizens predominantly on the basis of race are undesirable in a free society and conflict with the American political value of equality.

The majority said that any redistricting plan that includes people in one district who are geographically disparate and share little in common with one another but their skin color, bears a strong resemblance to racial segregation. They wrote that racial classifications of any sort promotes the belief that individuals should be judged by the color of their skin. They also said that drawing districts to advance the perceived interests of one racial group may lead elected officials to see their obligation as representing only members of that group, rather than their constituency as a whole. The justices concluded that racial gerrymandering, even for remedial purposes, may "balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters."

The Court was tasked with deciding the grounds on which voters could challenge voting districts as racial gerrymanders. They decided that if a redistricting plan cannot rationally be understood as anything other than an effort to divide voters based on their race, voters may challenge such a district under the Equal Protection Clause. Therefore, the case was sent back to the lower court to determine if the North Carolina plan could be justified in terms other than race.

Dissents

In a series of separate dissents, the dissenters argued that consideration of race in the districting process is inevitable, and that it does not violate the Constitution unless the party challenging a district shows that the district was drawn in a way that deprives a racial group of an equal opportunity to participate in the political process. Some of the dissenters also argued that there are legitimate reasons to consider race because people of the same race share interests and often vote

together, and that race-conscious gerrymandering only violates the Equal Protection Clause if the purpose of those drawing the boundaries is to enhance the power of the group in control of the process, at the expense of minority voters.

Tinker v. Des Moines Independent Community School District (1969)

Argued: November 12, 1968
Decided: February 24, 1969

Facts

In 1966, in Des Moines, Iowa, five students, ages 13–16, decided to show opposition to the Vietnam War. The students planned to wear two-inch-wide black armbands to school for two weeks. The school district found out about the students' plan and preemptively announced a policy that any student who wore a black armband, or refused to take it off, would be suspended from school after the student's parents were called.

Mary Beth Tinker, an eighth-grader, and John Tinker and Christopher Eckardt, both high school students, wore black armbands to their respective schools. All three teens were sent home for violating the announced ban and told not to return until they agreed not to wear the armbands. Their parents filed suit against the school district for violating the students' First Amendment right to free speech. The federal district court dismissed the case and ruled that the school district's actions were reasonable to uphold school discipline. The U.S. Court of Appeals for the Eighth Circuit agreed with the district court. The Tinkers asked the U.S. Supreme Court to review that decision, and the Court agreed to hear the case.

Issue

Does a prohibition against the wearing of armbands in public school, as a form of symbolic speech, violate the students' freedom of speech protections guaranteed by the First Amendment?

Constitutional Amendment and Supreme Court Precedents

- **U.S. Constitution, Amendment I**

  Congress shall make no law … abridging the freedom of speech….

- ***West Virginia State Board of Education v. Barnette* (1943)**

  The West Virginia Board of Education required that all public schools include a salute of the American flag as a part of their activities. All teachers and pupils were required to salute the flag. If they did not, they could be charged with "insubordination" and punished. Students who were Jehovah's Witnesses and had a religious objection to saluting the flag sued the state board of education. The Supreme Court ruled that this mandatory salute was unconstitutional. The Court said that a flag salute was a form of speech, because it was a way to communicate ideas. The justices ruled that, in most cases, the government could not require people to express ideas that they disagree with.

Arguments for Tinker (petitioner)

- Students, whether in school or out of school, are "persons" under the Constitution. They possess fundamental rights that all levels of government must respect.
- Public schools are part of state government. The 14th Amendment protects people from state infringement of their First Amendment rights to free speech.
- Wearing the armbands was a form of speech. It was a silent, passive expression of opinion.
- The students' speech was not disruptive. The schools gave no evidence that the armbands were a distraction or disrupted the learning process. Just because the schools were afraid that there might be a disruption is not enough to infringe students' speech.
- The students wearing the armbands did not infringe any other student's rights. Wearing the armbands did not intrude upon the work of the school, teachers, or other students.
- Schools are meant to act as an environment for discourse and a forum for different ideas; allowing students the ability to express their ideals is an inevitable part of the educational process.

Arguments for Des Moines Independent Community School District (respondent)

- Free speech is not an absolute right. The First Amendment does not say that anyone may say anything, at any place, at any time. Schools are not an appropriate forum for protest.
- The function of a school is to teach the curriculum. Students in academic classes could have been distracted from their lessons by the armbands. The school has a legitimate interest in ensuring that instruction remains the focus of classrooms and, to that end, acted within appropriate authority to prohibit the armbands.
- The Vietnam War is a controversial issue. Wearing the armbands could be an explosive situation that disrupts learning. It is the school's duty to prevent substantial and serious disruption to the learning environment.
- Voicing controversial opinions in class or in school areas such as the hallways, lunchroom, and gym classes may lead to bullying or violence directed against the protesting students. It is the responsibility of the school to prevent such behavior and protect the safety of all students.
- The school did not ban all types of expressions, just the armbands. They were banned because of their inflammatory nature and potential for significant disruption. Students could still express opinions in other ways, by for example, wearing political emblems such as "Vote for Candidate X" buttons.

- If the Supreme Court rules in favor of the children, it would be overstepping its bounds and interfering with state and local government powers that govern day-to-day school operations.

Decision

The Supreme Court ruled in favor of the Tinkers, 7–2. Justice Fortas wrote the majority opinion for the Court and was joined by Chief Justice Warren and Justices Douglas, Brennan, Stewart, White, and Marshall. Justices Black and Harlan dissented.

The justices said that students retain their constitutional right to freedom of speech while in public schools. They said that wearing the armbands was a form of speech, because they were intended to express the wearer's views about the Vietnam War. The Court said, "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate...."

The Court stressed that this does not mean that schools can never limit students' speech. If schools could make a reasonable prediction that the speech would cause a "material and substantial disruption" to the discipline and educational function of the school, then schools may limit the speech. In this case, though, there was not evidence that the armbands would substantially interfere with the educational process or with other students' rights.

Dissent

In the primary dissent, Justice Black said that the First Amendment does not give people the right to express any opinion at any time. He said that a person does not "carry with him into the United States Senate or House, or into the Supreme Court, or any other court, a complete constitutional right to go into those places contrary to their rules and speak his mind on any subject he pleases. It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases. Our Court has decided precisely the opposite."

The armbands, he argued, did cause a disturbance, by taking students' minds of their classwork and diverting them to "the highly emotional subject of the Vietnam War." A ruling that limits school officials' ability to maintain order and discipline would negatively affect their ability to run the school. School discipline is an important part of training children to become good citizens. Schools, he warned, could become beholden to "the whims and caprices of their loudest-mouthed…students."

United States v. Lopez (1995)

Argued: November 8, 1994
Decided: April 26, 1995

Background

The U.S. Constitution sets up a system of government in which the federal government and the states share power. The powers of the federal government are limited and are described in the Constitution. Other powers, not delegated to the federal government, are reserved for the states. Article 1, Section 8, of the Constitution lists many of Congress's powers, including the power to create post offices, raise an army, coin money, and declare war. One of Congress's broadest powers is the power to regulate commerce among the states. Many of the laws Congress passes depend on this power to regulate interstate commerce. In this case, however, it is argued that Congress passed a law that exceeded this constitutional power.

Facts

In 1990, Congress passed the Gun Free School Zones Act (GFSZA). In an effort to reduce gun violence in and around schools, the GFSZA prohibited people from knowingly carrying a gun in a school zone. A school zone was defined as any area within 1,000 feet of a school. A 12th grade student, Alfonso Lopez Jr., was convicted of possessing a gun at a Texas school. Lopez appealed his conviction, arguing that Congress never had the authority to pass the GFSZA in the first place. The U.S. Court of Appeals for the Fifth Circuit agreed with Lopez and reversed his conviction. The United States government asked the Supreme Court to hear the case. The Court agreed to do so.

Issue

Did Congress have the power to pass the Gun Free School Zones Act?

Constitutional Clauses and Supreme Court Precedents

- **Article 1, Section 8, Clause 3 of the U.S. Constitution**

  "The Congress shall have the power …to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes…"

- **Article 1, Section 8, Clause 18 of the U.S. Constitution**

  "The Congress shall have the power …to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

- ***Wickard v. Filburn* (1942)**

  In an effort to increase wheat prices during the Great Depression, Congress passed a law limiting the amount of wheat that some farmers could grow. One farmer argued that Congress could not use the Commerce Clause to stop him from growing wheat for personal consumption because that wheat would not be sold, and, therefore, would not be part of interstate commerce. The Supreme Court ruled that Congress could regulate a farmer's personal wheat crop, because the production of wheat is a commercial activity that has interstate consequences. The Court reasoned that Congress may regulate *intrastate* activities that, if taken all together, would substantially affect interstate commerce. If many farmers decided to grow their own wheat and not buy it on the market, they would substantially affect interstate commerce.

- ***Heart of Atlanta Motel v. U.S.* (1964)**

  The Civil Rights Act of 1964 made racial discrimination in public places, including hotels, illegal. An Atlanta hotel refused to serve black customers. The hotel argued that Congress did not have the power to pass the law under the Commerce Clause. The Supreme Court ruled against the hotel, concluding that "commerce" includes travel from state to state, and that racial discrimination in hotels can affect travel from state to state. Congress can therefore prohibit discrimination in hotels because, in the aggregate, it affects interstate commerce.

Arguments for the United States (petitioner)

- Congress had the authority to pass the GFSZA under the Commerce Clause. The Supreme Court, in earlier cases such as *Wickard* and *Heart of Atlanta Motel*, ruled that Congress can regulate things that are not by themselves interstate commerce if, when accumulated together, they affect interstate commerce.
- Although possession of a gun in a school zone is not a direct form of interstate commerce, it can be classified as commerce because the costs associated with violent crime are substantial and affect many people across the country.
- The presence of guns near schools also negatively affects students' ability to learn, which will impede their future success, and thus affect the economy of the nation.
- Insurance costs for activities related to gun violence are high and gun violence at schools interferes with the willingness of people to travel to some parts of the country. Both of these activities, insurance and travel, are forms of commerce.
- The GFSZA does not encroach on state authority as most states had their own laws prohibiting possession of guns on school property. Federal regulation in this case is concurrent with state regulation and does not displace it.

Arguments for Lopez (respondent)

- The GFSZA is not related to interstate commerce. The Constitution says that Congress can only pass certain types of laws, including laws that regulate "interstate commerce." Commerce means commercial activities, and this law is not related to any commercial activities.
- The Gun Free Schools Zone Act is not like the law at issue in *Wickard,* which was about buying and selling crops, nor is it like the laws in *Heart of Atlanta Motel,* which were about customers paying for hotel rooms. Those are both economic activities.
- Mere possession of a gun at or near a school is not a form of commerce and does not involve more than one state.
- If mere possession of an object were classified as commerce, then anything could be classified as commerce. This would give Congress virtually unlimited powers; there would be no limits to the reach of the national government in a federal system.
- The Constitution limited Congress's power to make laws for a reason. Some things are best left to the states. If Congress could call possession of a gun "interstate commerce," then Congress would be allowed to regulate anything and the states will have less authority to set their own laws.
- Different communities have different needs and standards. It should be up to states to decide whether people may carry guns near schools.

Decision

The Supreme Court ruled in favor of Lopez, 5–4. Chief Justice Rehnquist wrote the majority opinion for the Court, and was joined by Justices O'Connor, Kennedy, Scalia, and Thomas. Justices O'Connor and Thomas filed separate concurring opinions. Justices Breyer, Ginsburg, Stevens, and Souter dissented.

The Supreme Court ruled that the law exceeded Congress's authority under the Commerce Clause because carrying a gun in a school zone is not an *economic* activity. It said that Congress may regulate only:

- Channels of interstate commerce, including highways, waterways, and air traffic.
- People, machines, and things moving in, or used in carrying out, interstate commerce.
- Economic activities that have a substantial effect on interstate commerce.

The Court rejected the government's argument that merely because crime negatively affected education, Congress could conclude that crime in schools affects commerce in a substantial way. Finally, the opinion stated that the Constitution created a national government with only limited, delegated powers. To claim that any kind of activity is commerce means that the power of Congress would be unlimited, which directly contradicts the principle of limited government and explicit

powers. As the Court explained, "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."

Dissent

Justice Breyer argued that the Commerce Clause includes the right to regulate local activity so long as the activity significantly affects interstate commerce. In addition, the Court must consider the cumulative effect of regulations, not just one instance. Finally, he argued, the Court's role is not to determine if an activity like possession of a gun was commerce but instead if Congress had a "rational basis" for doing so.

Justice Stevens filed a separate dissent, arguing that the national interest in safeguarding the education system would benefit the overall economy, which provided sufficient authority under the Commerce Clause to protect against gun possession near schools.

Justice Souter's separate dissent emphasized his view that the courts should defer to Congress's informed judgment about the potential economic effects of activity that Congress seeks to regulate, so long as there is a "rational basis" for the judgment that Congress has made.

Wisconsin v. Yoder (1972)

Argued: December 8, 1971
Decided: May 15, 1972

Background

The First Amendment protects the right of people to exercise their religion freely. This means that the government cannot outlaw any religious beliefs. Sometimes, however, conduct related to those beliefs conflicts with government laws and regulations. In these cases, courts are asked to rule on whether the government is allowed to forbid some conduct required by someone's religious belief or compel conduct that is forbidden by that belief. This is a case about the free exercise of the religious beliefs of Amish and Mennonite communities.

The Amish and Mennonite sects of Christianity view individualism, competition, and self-promotion as vices that separate members from God, one another, and their own salvation. In order to preserve these values, each rural community seeks to become largely self-sufficient, providing for its members' needs with minimal support from those outside the community. These beliefs led many communities to stop formal education, in the form of public, private, or home schooling, for their children after the age of 14. For generations that approach aligned with state and local laws related to the number of years children were required to be in school. In the mid-20th century, however, many U.S. states raised the age to which children must attend school, and that created conflict with Old Order Amish and Mennonite practices.

Facts

The state of Wisconsin convicted three members of Old Order Amish and Mennonite communities for violating the state's compulsory education law, which requires attendance at school until the age of 16. Frieda Yoder and two other students had stopped attending school at the end of eighth grade. The Amish claimed that their religious faith and their mode of life are inseparable and interdependent. They sincerely believe that exposure to competitive pressures of formal schooling, the content of higher learning, and removal from their religiously-infused practices of daily life will endanger children's salvation, the parents' own salvation, and the continuation of the Amish community itself. The Amish community provides an alternative education that adequately prepares children for their adult roles within their community. This alternative education also prepares them to be law abiding and self-sufficient.

Mr. Yoder and the other parents were convicted in Wisconsin Circuit Court for their students' truancy (failure to attend compulsory schooling). They were required to pay a five dollar fine, which they refused to do as a matter of conscience. The Yoders appealed to the Wisconsin Supreme Court on the grounds that their families' First Amendment free exercise rights were violated. The state Supreme Court agreed and reversed the Circuit Court's decision, ruling in favor of Yoder. The state of Wisconsin sought review by the U.S. Supreme Court, which agreed to hear the case.

Issue

Under what conditions does the state's interest in promoting compulsory education override parents' First Amendment right to free exercise of religion?

Constitutional Amendments and Supreme Court Precedents

- **First Amendment to the U.S. Constitution**

  "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…"

- **14th Amendment to the U.S. Constitution**

  "...nor shall any State deprive any person of life, liberty, or property, without due process of law..."

- ***Pierce v. Society of Sisters* (1925)**

  Oregon had banned private school attendance in an effort to eliminate religious schools, and required parents or guardians to send children to local public schools between the ages of eight and 16. The Society of Sisters, an order of nuns that cared for orphans and provided Catholic schooling, sued the state, arguing that the requirement to attend public schools violated the First Amendment's protection for free exercise of religion. The Supreme Court ruled that the Oregon law was unconstitutional under the Due Process Clause of the 14th Amendment, implicitly incorporating the right to religious liberty. The Court explained that, while the state has an important interest in providing public education, even that important objective must be balanced against the interests of parents in the free exercise of religion. As long as privately-provided education would adequately prepare students, the state could not prevent religious parents or communities from educating students in private schools.

- ***Prince v. Massachusetts (1944)***

  Sarah Prince challenged her conviction under Massachusetts child labor laws that prevented boys under the age of 12 and girls under the age of 18 from selling any publications or other forms of merchandise in public places. Sarah Prince was a member of a religious sect, the Jehovah's Witnesses, and the aunt and guardian for Betty Simmons, age nine. While under Ms. Prince's care, and with her knowledge, young Betty distributed religious literature on the street and accepted donations. The Supreme Court upheld the state law prohibiting the distribution of religious literature in a public place by a minor. The Court reasoned that a state's generally applicable regulation to protect child welfare (a prohibition against child labor) could override the parents' free exercise of religion, if there was a demonstrated threat to the child's physical or mental health or to the public order.

Arguments for Wisconsin (petitioner)

- Compulsory education up to the age of 16 is a "compelling governmental interest" that benefits the larger society. That compelling interest should override the Amish community's claims that school attendance negatively affects the practice of their religion.

- The final years of high school prepare students for employment and civic participation. The government has a compelling interest in requiring all students to complete secondary education in order to participate effectively in the American political system and become self-sufficient.
- At some point in the future, students may choose to leave the Amish community. In order to avoid being a burden to society, students need to have a full and proper education to be successful outside of the religious community.
- Mandatory school attendance laws apply neutrally and equally to everyone regardless of their religion and do not discriminate in favor of or against any particular religion. Therefore, they are beyond protection of the First Amendment.

Arguments for Yoder (respondent)

- The Amish and Mennonite communities' beliefs about the danger of formal education to their religion are sincere. They should not be forced to violate their own religious beliefs.
- The Amish community provides an alternative vocational education that prepares children for their adult roles in the Amish community, so they do not need to send their children to school past eighth grade. That alternative education prepares the Amish to become self-sufficient.
- Additional years of compulsory schooling would not better prepare Amish students for their lives of agrarian and manual labor, even if they choose to leave Amish life.
- The Amish and Mennonite communities are law-abiding and have been for centuries. That is evidence that the requirements of citizenship had been met by the Amish without the required additional years of secondary education.
- Leaving school after eighth grade does not create physical or mental harm to the students and does not disrupt the school or the community.

Decision

The Court decided the case unanimously, 7–0, in favor of Yoder. Chief Justice Burger delivered the opinion of the court. Justices Powell and Rehnquist did not take part in the case. Justice Douglas delivered a partial dissent.

Majority

The Supreme Court held that the Free Exercise Clause of the First Amendment, as incorporated by the 14th Amendment, prevented the state of Wisconsin from compelling the respondents to send their children to formal secondary school beyond the age of 14.

The Court ruled that the families' religious beliefs and practices outweighed the state's interests in making the children attend school beyond the eighth grade. The Court first satisfied itself that, according to expert testimony in the record, the requirement to send their children to school beyond the eighth grade would actually interfere with well-established and deeply held religious convictions:

> "In sum, the unchallenged testimony of acknowledged experts in education and religious history, almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger, if not destroy, the free exercise of respondents' religious beliefs."

The Court then rejected the state's arguments for overriding the parents' religious beliefs. The Court commented that an additional one or two years of high school (until the required age of 16) would not produce enough educational benefits for the Amish to constitute a "compelling government interest." The Court cited the endurance of their law-abiding community for centuries as evidence that the Amish meet the responsibilities of citizenship without the required additional years of secondary education.

The justices also noted that nothing in their decision undermined general state compulsory school attendance laws for non-Amish people and emphasized that states may still set reasonable standards for church-sponsored schools, including for Amish agricultural vocational education, as long as those rules do not impair the free exercise of religion.

Dissent, in part

Justice Douglas joined the majority decision as applied to Mr. Yoder but disagreed with the majority's ruling regarding some of the other families. Because the majority opinion focused only on the free exercise claims of the parents (the ones who were charged with a crime) and not the children, Justice Douglas would have sent the cases of the other children back to lower courts to learn whether or not the children wanted to attend school past eighth grade. Mr. Yoder's daughter had testified in lower court that she wished to be educated at home.

