45th Annual Bench-Bar & Boardroom Conference

Thursday, May 17, 2018

9:00 – 10:55 AM

Jeopardy: Review of Landmark Cases

10.0 CLE Hours, Including 2.0 Ethics Hours in Missouri
10.0 CLE Hours, including 2.0 Ethics in Kansas

2300 Main Street, St. 100 ■ KC, MO 64108 ■ phone 816-474-4322 ■ fax 816-474-0103

KCMBA
Kansas City Metropolitan Bar Association

Hon. W. Brent Powell, *Supreme Court of Missouri*

Dates of judicial service:

- Appointed to the Supreme Court in April 2017
- Appointed circuit judge in the 16th Judicial Circuit (Jackson County) in February 2008; retained in November 2010 and November 2016

Education:

- Bachelor of arts in political science, William Jewell College, 1992
    - Graduated *magna cum laude*
    - Earned varsity letter in football
- Juris doctor, University of Missouri-Columbia School of Law, 1996
    - Case note editor and member, Missouri Law Review
    - President, treasurer and first-year representative, Student Bar Association
    - Lieutenant governor, American Bar Association
    - Student Law Clerk for the Honorable Elwood Thomas, Supreme Court of Missouri

Professional employment prior to judicial service:

- United States Attorney's Office, Western District of Missouri
    - Executive Assistant United States attorney, 2007 to 2008
    - Chief, general crimes unit, 2006 to 2007
    - Deputy Chief, general crimes unit, 2005 to 2006
    - Assistant United States Attorney, 2001 to 2005
- Assistant Prosecuting Attorney, Platte County Prosecutor's Office, 1997 to 2001
- Lathrop & Gage LC, Kansas City, Missouri
    - Associate, 1996 to 1997
    - Summer associate, 1995 (firm then called Gage & Tucker)
- Constituent services representative, Office of United States Senator Christopher "Kit" Bond, Jefferson City, Missouri 1992 to 1993
- Juvenile detention officer, Clay County juvenile detention facility, Liberty, Missouri 1992

Hon. Mary Rhodes Russell, *Supreme Court of Missouri*

Dates of judicial service:

- Appointed to the Supreme Court in September 2004
- Retained in office at the November 2006 general election for a 12-year term expiring December 31, 2018
- Served a two-year term as chief justice from July 2013 through June 2015
- Previously served as a judge on the Missouri Court of Appeals, Eastern District, from 1995 to 2004 and as its chief judge from 1999 to 2000

Education:

- Educated in Hannibal, Missouri, public schools and valedictorian of her high school graduating class
- Bachelor of Arts and Bachelor of Science, summa cum laude (majors - communications and print media), Truman State University, 1980
- Juris Doctor, University of Missouri-Columbia School of Law, 1983, Dean's List

Prior employment:

- Partner, Clayton & Rhodes Law Office, Hannibal, 1984 to 1995
- Law clerk, Supreme Court of Missouri, the Honorable George Gunn, 1983 to 1984

Hon. Laura Denvir Stith, *Supreme Court of Missouri*

Dates of judicial service:

- Appointed to the Supreme Court in March 2001
- Retained in office at the November 2002 general election and again at the November 2014 general election
- Current term expires December 31, 2026
- Served as chief justice for the term of July 1, 2007, through June 30, 2009
- Previously served as a judge on the Missouri Court of Appeals, Western District, from 1994 to March 2001

Education:

- Graduated with honors from John Burroughs School, St. Louis, in 1971
- Studied at the University of Madrid through a program administered by the Institute of European Studies
- Bachelor of Arts, magna cum laude, (majors - political science and social psychology, Tufts University, Boston, 1975 (attended Tufts on a national merit scholarship)
- Juris Doctor, magna cum laude, Georgetown University Law Center, Washington, D.C., 1978

Prior employment:

- Attorney, Shook, Hardy & Bacon law firm, Kansas City
  - Partner, 1984 to 1994
  - Associate, 1980 to 1984
- Co-founder and member, Appellate Practice Group
- Law Clerk to Supreme Court of Missouri Judge Robert E. Seiler, 1978 to 1979
- Iglauer Fellowship Intern in Washington D.C. for Senator Thomas Eagleton, 1973

Nathan A. Orr, *Spencer Fane LLP*

Nate Orr serves as general counsel for his clients, managing their legal matters across all the firm's practice areas. His goal is to connect clients with the very best attorneys available, no matter their business needs. Nate's approach is to quarterback client relationships, providing clients with a single contact through which to direct all concerns and questions. Whether they have in-house general counsel or not, Nate's approach enables clients to confidently receive unparalleled quality, efficiency and responsiveness. Nate wants clients to call him, knowing they will end up in the hands of the very best person to handle their issue — whether that is him or someone else.

In managing his client's relationships with the firm, Nate takes the primary role coordinating litigation and dispute resolution services. His practice focuses on commercial, financial services and employment litigation. He uses his litigation experience to counsel dozens of businesses and financial institutions, serving as coordinating counsel and providing strategy to restructure credits, protect assets, avoid costly litigation and create new business relationships.

Nate's litigation experience includes complex commercial disputes and an array of employment matters. He has defended management against all types of discrimination and wage and hour claims, including class action and multiple employee cases, and litigation of numerous contracts, including non-competition and non-solicitation provisions. He also has significant experience and trial work litigating various business disputes, including a six-week jury trial in a $250 million real estate dispute involving complex municipal finance and creative damage theories.

Nate's involvement in the community enables him to make critical connections and introductions for his clients. He actively speaks on issues such as litigation avoidance and is a published author. Nate is committed to his clients and very involved in numerous charitable and civic organizations, but his strongest commitment is to his family.

Amendments 1-5 for 100

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

Q. What is the 3rd Amendment?

The Third Amendment (Amendment III) to the United States Constitution places restrictions on the quartering of soldiers in private homes without the owner's consent, forbidding the practice in peacetime. The amendment is a response to Quartering Acts passed by the British parliament during the buildup to the American Revolutionary War, which had allowed the British Army to lodge soldiers in private residences.

The Third Amendment was introduced in Congress in 1789 by James Madison as a part of the United States Bill of Rights, in response to Anti-Federalist objections to the new Constitution. Congress proposed the amendment to the states on September 28, 1789, and by December 15, 1791, the necessary three-quarters of the states had ratified it. Secretary of State Thomas Jefferson announced the adoption of the amendment on March 1, 1792.

The amendment is one of the least controversial of the Constitution and is rarely litigated, with the American Bar Association calling it the "runt piglet" of the U.S. Constitution. To date, it has never been the primary basis of a Supreme Court decision, though it was the basis of the Court of Appeals for the Second Circuit case Engblom v. Carey.

The amendment as proposed by Congress in 1789 reads as follows:

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

Judicial interpretation

The Third Amendment is among the least cited sections of the U.S. Constitution. In the words of Encyclopædia Britannica, "as the history of the country progressed with little conflict on American soil, the amendment has had little occasion to be invoked." To date, no major Supreme Court decision has used the amendment as its primary basis.

The Third Amendment has been invoked in a few instances as helping establish an implicit right to privacy in the Constitution. Justice William O. Douglas used the amendment along with others in the Bill of Rights as a partial basis for the majority decision in Griswold v. Connecticut (1965), which cited the Third Amendment as implying a belief that an individual's home should be free from agents of the state.

In one of the seven opinions in Youngstown Sheet & Tube Co. v. Sawyer (1952), Justice Robert H. Jackson cited the Third Amendment as providing evidence of the Framers' intent to constrain executive power even during wartime:

"[t]hat military powers of the Commander in Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary

American history. Time out of mind, and even now in many parts of the world, a military commander can seize private housing to shelter his troops. Not so, however, in the United States, for the Third Amendment says…[E]ven in war time, his seizure of needed military housing must be authorized by Congress."

One of the few times a federal court was asked to invalidate a law or action on Third Amendment grounds was in Engblom v. Carey (1982). In 1979, prison officials in New York organized a strike; they were evicted from their prison facility residences, which were reassigned to members of the National Guard who had temporarily taken their place as prison guards. The United States Court of Appeals for the Second Circuit ruled: (1) that the term owner in the Third Amendment includes tenants (paralleling similar cases regarding the Fourth Amendment, governing search and seizure), (2) National Guard troops count as soldiers for the purposes of the Third Amendment, and (3) that the Third Amendment is incorporated (that is, that it applies to the states) by virtue of the Fourteenth Amendment. The case was remanded to the district court, which dismissed the case on the grounds that state officials could not have been aware of this interpretation.

In the most recent Third Amendment decision handed down by a federal court, on February 2, 2015, the United States District Court for the District of Nevada held in Mitchell v. City of Henderson that the Third Amendment does not apply to intrusions by municipal police officers since despite their appearance & equipment they are not soldiers.

In an earlier case, United States v. Valenzuela (1951), the defendant asked that a federal rent-control law be struck down because it was "the incubator and hatchery of swarms of bureaucrats to be quartered as storm troopers upon the people in violation of Amendment III of the United States Constitution." The court declined his request. Later, in Jones v. United States Secretary of Defense (1972), Army reservists unsuccessfully cited the Third Amendment as justification for refusing to march in a parade. Similar arguments in a variety of contexts have been denied in other cases.

Amendments 1-5 for 200

A. Accused persons may refuse to answer questions on the grounds that the answers might tend to incriminate them.
Q. What is the 5th Amendment?

The Fifth Amendment (Amendment V) to the United States Constitution is part of the Bill of Rights and, among other things, protects individuals from being compelled to be witnesses against themselves in criminal cases. "Pleading the Fifth" is thus a colloquial term for invoking the right that allows witnesses to decline to answer questions where the answers might incriminate them, and generally without having to suffer a penalty for asserting the right. This evidentiary privilege ensures that defendants cannot be compelled to become witnesses at their own trials. If, however, they choose to testify, they are not entitled to the right during cross-examination, where questions are relevant to their testimony on direct examination. The Amendment requires that felonies be tried only upon indictment by a grand jury. Federal grand juries can force people to take the witness stand, but defendants in those proceedings have

Fifth Amendment privileges until they choose to answer any question. To claim the privilege for failure to answer when being interviewed by police, the interviewee must have explicitly invoked the constitutional right when declining to answer questions.

The Amendment's Double Jeopardy Clause provides the right to be tried only once in federal court for the same offense. The Amendment also has a Due Process Clause (similar to the one in the 14th Amendment) as well as an implied equal protection requirement (Bolling v. Sharpe, 1954). Finally, the Amendment requires that the power of eminent domain be coupled with "just compensation" for those whose property is taken.

The amendment as proposed by Congress in 1789 reads as follows:

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

Grand jury

The grand jury is a pre-constitutional common law institution and a constitutional fixture in its own right exclusively embracing common law. The process applies to the states to the extent that the states have incorporated grand juries and/or common law. Most states have an alternative civil process. "Although state systems of criminal procedure differ greatly among themselves, the grand jury is similarly guaranteed by many state constitutions and plays an important role in fair and effective law enforcement in the overwhelming majority of the States." Branzburg v. Hayes (No. 70-85) 1972. Grand juries, which return indictments in many criminal cases, are composed of a jury of peers and operate in closed deliberation proceedings; they are given specific instructions regarding the law by the judge. Many constitutional restrictions that apply in court or in other situations do not apply during grand jury proceedings. For example, the exclusionary rule does not apply to certain evidence presented to a grand jury; the exclusionary rule states that evidence obtained in violation of the Fourth, Fifth or Sixth amendments cannot be introduced in court. Also, an individual does not have the right to have an attorney present in the grand jury room during hearings. An individual would have such a right during questioning by the police while in custody, but an individual testifying before a grand jury is free to leave the grand jury room to consult with his attorney outside the room before returning to answer a question.

Currently, federal law permits the trial of misdemeanors without indictments. Additionally, in trials of non-capital felonies, the prosecution may proceed without indictments if the defendants waive their Fifth Amendment right.

Grand jury indictments may be amended by the prosecution only in limited circumstances. In Ex Parte Bain, 121 U.S. 1 (1887), the Supreme Court held that the indictment could not be changed at all by the prosecution. United States v. Miller, 471 U.S. 130 (1985) partly reversed Ex parte Bain; now, an indictment's scope may be narrowed by the prosecution. Thus, lesser included charges may be dropped, but new charges may not be added.

The Grand Jury Clause of the Fifth Amendment does not protect those serving in the armed forces, whether during wartime or peacetime. Members of the state militia called up to serve with federal forces are not protected under the clause either. In O'Callahan v. Parker, 395 U.S. 258 (1969), the Supreme Court held that only charges relating to service may be brought against members of the militia without indictments. That decision was overturned in 1987, when the Court held that members of the militia in actual service may be tried for any offense without indictments.

The grand jury indictment clause of the Fifth Amendment has not been incorporated under the Fourteenth Amendment. This means that the grand jury requirement applies only to felony charges in the federal court system. While many states do employ grand juries, no defendant has a Fifth Amendment right to a grand jury for criminal charges in state court. States are free to abolish grand juries, and many (though not all) have replaced them with preliminary hearing.

Infamous crime

Whether a crime is "infamous", for purposes of the Grand Jury Clause, is determined by the nature of the punishment that may be imposed, not the punishment that is actually imposed; however, crimes punishable by death must be tried upon indictments. The historical origin of "infamous crime" comes from the infamia, a punishment under Roman law by which a citizen was deprived his citizenship. In United States v. Moreland, 258 U.S. 433 (1922), the Supreme Court held that incarceration in a prison or penitentiary, as opposed to a correction or reformation house, attaches infamy to a crime. In Mackin v. United States, 117 U.S. 348 (1886), the Supreme Court judged that "'Infamous crimes' are thus, in the most explicit words, defined to be those 'punishable by imprisonment in the penitentiary.'", while it later in Green v. United States 356 U.S. 165 (1957), stated that "imprisonment in a penitentiary can be imposed only if a crime is subject to imprisonment exceeding one year". Therefore, an infamous crime is one that is punished by imprisonment for over one year. Susan Brown, a former defense attorney and Professor of Law at the University of Dayton School of Law, concluded: "Since this is essentially the definition of a felony, infamous crimes translate as felonies."

Double jeopardy

...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb...

The Double Jeopardy Clause encompasses four distinct prohibitions: subsequent prosecution after acquittal, subsequent prosecution after conviction, subsequent prosecution after certain mistrials, and multiple punishments in the same indictment. Jeopardy applies when the jury is empaneled in a jury trial, when the first witness is sworn in during a bench trial, or when a plea is rendered.

Prosecution after acquittal

The government is not permitted to appeal or try again after the entry of an acquittal, whether a directed verdict before the case is submitted to the jury, a directed verdict after a deadlocked jury, an appellate reversal for sufficiency (except by direct appeal to a higher appellate court), or an "implied acquittal" via conviction of a lesser included offense. In addition, the government is barred by collateral estoppel from re-litigating against the same defense, a fact necessarily found by the jury in a prior acquittal, even if the jury hung on other counts.

This principle does not prevent the government from appealing a pre-trial motion to dismiss or other non-merits dismissal, or a directed verdict after a jury conviction, nor does it prevent the trial judge from entertaining a motion for reconsideration of a directed verdict, if the jurisdiction has so provided by rule or statute. Nor does it prevent the government from retrying the defendant after an appellate reversal other than for sufficiency, including habeas, or "thirteenth juror" appellate reversals notwithstanding sufficiency on the principle that jeopardy has not "terminated." There is also an exception for judicial bribery in a bench trial.

Multiple punishment, including prosecution after conviction

In Blockburger v. United States (1932), the Supreme Court announced the following test: the government may separately try and punish the defendant for two crimes if each crime contains an element that the other does not. Blockburger is the default rule, unless the legislature intends to depart; for example, Continuing Criminal Enterprise (CCE) may be punished separately from its predicates, as can conspiracy.

The Blockburger test, originally developed in the multiple punishments context, is also the test for prosecution after conviction. In Grady v. Corbin (1990), the Court held that a double jeopardy violation could lie even where the Blockburger test was not satisfied, but Grady was overruled in United States v. Dixon (1993).

Prosecution after mistrial

The rule for mistrials depends upon who sought the mistrial. If the defendant moves for a mistrial, there is no bar to retrial, unless the prosecutor acted in "bad faith", i.e., goaded the defendant into moving for a mistrial because the government specifically wanted a mistrial. If the prosecutor moves for a mistrial, there is no bar to retrial if the trial judge finds "manifest necessity" for granting the mistrial. The same standard governs mistrials granted sua sponte.

Prosecution in different States

In Heath v. Alabama (1985), the Supreme Court held, that the Fifth Amendment rule against double jeopardy does not prohibit two different states from separately prosecuting and convicting the same individual for the same illegal act.

Self-incrimination

The Fifth Amendment protects individuals from being forced to incriminate themselves. Incriminating oneself is defined as exposing oneself (or another person) to "an accusation or charge of crime," or as involving oneself (or another person) "in a criminal prosecution or the danger thereof." The privilege against compelled self-incrimination is defined as "the constitutional right of a person to refuse to answer questions or otherwise give testimony against himself. ... " To "plead the Fifth" is to refuse to answer any question because "the implications of the question, in the setting in which it is asked" lead a claimant to possess a "reasonable cause to apprehend danger from a direct answer", believing that "a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."

Historically, the legal protection against compelled self-incrimination was directly related to the question of torture for extracting information and confessions.

The legal shift away from widespread use of torture and forced confession dates to turmoil of the late 16th and early 17th century in England. Anyone refusing to take the oath ex officio mero (confessions or swearing of innocence, usually before hearing any charges) was considered guilty. Suspected Puritans were pressed to take the oath and then reveal names of other Puritans. Coercion and torture were commonly used to compel "cooperation." Puritans, who were at the time fleeing to the New World, began a practice of refusing to cooperate with interrogations. In the most famous case John Lilburne refused to take the oath in 1637. His case and his call for "freeborn rights" were rallying points for reforms against forced oaths, forced self-incrimination, and other kinds of coercion. Oliver Cromwell's revolution overturned the practice and incorporated protections, in response to a popular group of English citizens known as the Levellers. The Levellers presented The Humble Petition of Many Thousands to Parliament in 1647 with 13 demands, the third of which was the right against self-incrimination in criminal cases. These protections were brought to America by Puritans, and were later incorporated into the United States Constitution through the Bill of Rights.

Protection against compelled self-incrimination is implicit in the Miranda rights statement, which protects the "right to remain silent." This amendment is also similar to Section 13 of the Canadian Charter of Rights and Freedoms. In other Commonwealth of Nations countries like Australia and New Zealand, the right to silence of the accused both during questioning and at trial is regarded as an important right inherited from common law, and is protected in the New Zealand Bill of Rights Act and in Australia through various federal and state acts and codes governing the criminal justice system.

In South African law the right to silence originating from English common law has been entrenched in Section 35 of the Constitution of the Republic of South Africa, 1996.

The Supreme Court has held that "a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances."

However, Professor James Duane of the Regent University School of Law argues that the Supreme Court, in a 5–4 decision in Salinas v. Texas, significantly weakened the privilege, saying "our choice to use the Fifth Amendment privilege can be used against you at trial depending exactly how and where you do it."

In the Salinas case, justices Alito, Roberts, and Kennedy held that "the Fifth Amendment's privilege against self-incrimination does not extend to defendants who simply decide to remain mute during questioning. Long-standing judicial precedent has held that any witness who desires protection against self-incrimination must explicitly claim that protection."

Justice Thomas, siding with Alito, Roberts and Kennedy, in a separate opinion, held that, "Salinas' Fifth Amendment privilege would not have been applicable even if invoked because the prosecutor's testimony regarding his silence did not compel Salinas to give self-incriminating testimony." Justice Antonin Scalia joined Thomas' opinion."

Legal proceedings and congressional hearings

The Fifth Amendment privilege against compulsory self-incrimination applies when an individual is called to testify in a legal proceeding. The Supreme Court ruled that the privilege applies whether the witness is in a federal court or, under the incorporation doctrine of the Fourteenth Amendment, in a state court, and whether the proceeding itself is criminal or civil.

The right to remain silent was asserted at grand jury or congressional hearings in the 1950s, when witnesses testifying before the House Committee on Un-American Activities or the Senate Internal Security Subcommittee claimed the right in response to questions concerning their alleged membership in the Communist Party. Under the Red Scare hysteria at the time of McCarthyism, witnesses who refused to answer the questions were accused as "fifth amendment communists". They lost jobs or positions in unions and other political organizations, and suffered other repercussions after "taking the Fifth."

Senator Joseph McCarthy (R-Wisc.) asked, "Are you now, or have you ever been, a member of the Communist Party," while he was chairman of the Senate Government Operations Committee Permanent Subcommittee on Investigations. Admitting to a previous Communist Party membership was not sufficient. Witnesses were also required to "name names," to implicate others they knew to be Communists or who had been Communists in the past. Academy Award winning director Elia Kazan testified before the House Committee on Un-American Activities that he had belonged to the Communist Party briefly in his youth. He also "named names," which incurred enmity of many in Hollywood. Other entertainers such as Zero Mostel found themselves on a Hollywood blacklist after taking the Fifth, and were unable to find work for a while in show business. Pleading the Fifth in response to such questions was held inapplicable, since being a Communist itself was not a crime.

The amendment has also been used by defendants and witnesses in criminal cases involving the American Mafia.

Statements made to non-governmental entities

The privilege against self-incrimination does not protect an individual from being suspended from membership in a non-governmental, self-regulatory organization (SRO), such as the New York Stock Exchange (NYSE), where the individual refuses to answer questions posed by the SRO. An SRO itself is not a court of law, and cannot send a person to jail. SROs, such as the NYSE and the National Association of Securities Dealers (NASD), are generally not considered to be state actors. See United States v. Solomon, D. L. Cromwell Invs., Inc. v. NASD Regulation, Inc., and Marchiano v. NASD. SROs also lack subpoena powers. They rely heavily on requiring testimony from individuals by wielding the threat of loss of membership or a bar from the industry (permanent, if decided by the NASD) when the individual asserts his Fifth Amendment privilege against compelled self-incrimination. If a person chooses to provide statements in testimony to the SRO, the SRO may provide information about those statements to law enforcement agencies, who may then use the statements in a prosecution of the individual.

Custodial interrogation

The Fifth Amendment limits the use of evidence obtained illegally by law enforcement officers. Originally, at common law, even a confession obtained by torture was admissible. However, by the eighteenth century, common law in England provided that coerced confessions were inadmissible. The common law rule was incorporated into American law by the courts. The Supreme Court has repeatedly overruled convictions based on such confessions, in cases such as Brown v. Mississippi, 297 U.S. 278 (1936).

Law enforcement responded by switching to more subtle techniques, but the courts held that such techniques, even if they do not involve physical torture, may render a confession involuntary and inadmissible. In Chambers v. Florida (1940) the Court held a confession obtained after five days of prolonged questioning, during which time the defendant was held incommunicado, to be coerced. In Ashcraft v. Tennessee (1944), the suspect had been interrogated continuously for thirty-six hours under electric lights. In Haynes v. Washington, the Court held that an "unfair and inherently coercive context" including a prolonged interrogation rendered a confession inadmissible.

Miranda v. Arizona (1966) was a landmark case involving confessions. Ernesto Miranda had signed a statement confessing to the crime, but the Supreme Court held that the confession was inadmissible because the defendant had not been advised of his rights.

The Court held "the prosecution may not use statements ... stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. Custodial interrogation is initiated by law enforcement after a person has been taken into custody or otherwise deprived of his freedom of movement before being questioned as to the specifics of the crime.

As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Before any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." The warning to which Chief Justice Earl Warren referred is now called the Miranda warning, and it is customarily delivered by the police to an individual before questioning.

Miranda has been clarified by several further Supreme Court rulings. For the warning to be necessary, the questioning must be conducted under "custodial" circumstances. A person detained in jail or under arrest is, of course, deemed to be in police custody. Alternatively, a person who is under the reasonable belief that he may not freely leave from the restraint of law enforcement is also deemed to be in "custody." That determination of "reasonableness" is based on a totality of the objective circumstances. A mere presence at a police station may not be sufficient, but neither is such a presence required. Traffic stops are not deemed custodial. The Court has ruled that age can be an objective factor. In Yarborough v. Alvarado (2004), the Court held that "a state-court decision that failed to mention a 17-year-old's age as part of the Miranda custody analysis was not objectively unreasonable". In her concurring opinion Justice O'Connor wrote that a suspect's age may indeed "be relevant to the 'custody' inquiry"; the Court did not find it relevant in the specific case of Alvarado. The Court affirmed that age could be a relevant and objective factor in J.D.B. v. North Carolina where they ruled that "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test".

The questioning does not have to be explicit to trigger Miranda rights. For example, two police officers engaging in a conversation designed to elicit an incriminating statement from a suspect would constitute questioning. A person may choose to waive his Miranda rights, but the prosecution has the burden of showing that such a waiver was actually made.

A confession not preceded by a Miranda warning where one was necessary cannot be admitted as evidence against the confessing party in a judicial proceeding. The Supreme Court, however, has held that if a defendant voluntarily testifies at the trial that he did not commit the crime, his confession may be introduced to challenge his credibility, to "impeach" the witness, even if it had been obtained without the warning.

In Hiibel v. Sixth Judicial District Court of Nevada (2004), the Supreme Court ruled 5–4 that being required to identify oneself to police under states' stop and identify statutes is not an unreasonable search or seizure, and is not necessarily self-incrimination.

Explicit invocation

In June 2010, the Supreme Court ruled in Berghuis v. Thompkins that a criminal suspect must now invoke the right to remain silent unambiguously. Unless and until the suspect actually states that he is relying on that right, police may continue to interact with (or question) him, and any voluntary statement he makes can be used in court. The mere act of remaining silent is, on its own, insufficient to imply the suspect has invoked those rights. Furthermore, a voluntary reply, even after lengthy silence, can be construed as implying a waiver. The new rule will defer to police in cases where the suspect fails to assert the right to remain silent. This standard was extended in Salinas v. Texas in 2013 to cases where individuals not in custody who volunteer to answer officers' questions and who are not told their Miranda rights. The Court stated that there was no "ritualistic formula" necessary to assert this privilege, but that a person could not do so "by simply standing mute."

Production of documents

Under the Act of Production Doctrine, the act of an individual in producing documents or materials (e.g., in response to a subpoena) may have a "testimonial aspect" for purposes of the individual's right to assert the Fifth Amendment privilege against self-incrimination to the extent that the individual's act of production provides information not already in the hands of law enforcement personnel about the (1) existence; (2) custody; or (3) authenticity, of the documents or materials produced. See United States v. Hubbell. In Boyd v. United States, the U.S. Supreme Court stated that "It is equivalent to a compulsory production of papers to make the nonproduction of them a confession of the allegations which it is pretended they will prove".

By corporations

Corporations may also be compelled to maintain and turn over records; the Supreme Court has held that the Fifth Amendment protections against self-incrimination extend only to "natural persons." The Court has also held that a corporation's custodian of records can be forced to produce corporate documents even if the act of production would incriminate him personally. The only limitation on this rule is that the jury cannot be told that the custodian personally produced those documents in any subsequent prosecution of him, but the jury is still allowed to draw adverse inferences from the content of the documents combined with the position of the custodian in the corporation.

Refusal to testify in a criminal case

In Griffin v. California (1965), the Supreme Court ruled that a prosecutor may not ask the jury to draw an inference of guilt from a defendant's refusal to testify in his own defense. The Court overturned as unconstitutional under the federal constitution a provision of the California state constitution that explicitly granted such power to prosecutors.

Refusal to testify in a civil case

While defendants are entitled to assert the privilege against compelled self-incrimination in a civil court case, there are consequences to the assertion of the privilege in such an action.

The Supreme Court has held that "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." Baxter v. Palmigiano, "[A]s Mr. Justice Brandeis declared, speaking for a unanimous court in the Tod case, 'Silence is often evidence of the most persuasive character.'" "'Failure to contest an assertion ... is considered evidence of acquiescence ... if it would have been natural under the circumstances to object to the assertion in question.'"

In Baxter, the state was entitled to an adverse inference against Palmigiano because of the evidence against him and his assertion of the Fifth Amendment privilege.

Some civil cases are considered "criminal cases" for the purposes of the Fifth Amendment. In Boyd v. United States, the U.S. Supreme Court stated that "A proceeding to forfeit a person's goods for an offence against the laws, though civil in form, and whether in rem or in personam, is a "criminal case" within the meaning of that part of the Fifth Amendment which declares that no person "shall be compelled, in any criminal case, to be a witness against himself."

Federal income tax

In some cases, individuals may be legally required to file reports that call for information that may be used against them in criminal cases. In United States v. Sullivan, the United States Supreme Court ruled that a taxpayer could not invoke the Fifth Amendment's protections as the basis for refusing to file a required federal income tax return. The Court stated: "If the form of return provided called for answers that the defendant was privileged from making, he could have raised the objection in the return, but could not on that account refuse to make any return at all. We are not called on to decide what, if anything, he might have withheld."

In Garner v. United States, the defendant was convicted of crimes involving a conspiracy to "fix" sporting contests and to transmit illegal bets. During the trial the prosecutor introduced, as evidence, the taxpayer's federal income tax returns for various years. In one return the taxpayer had showed his occupation to be "professional gambler." In various returns the taxpayer had reported income from "gambling" or "wagering." The prosecution used this to help contradict the taxpayer's argument that his involvement was innocent. The taxpayer tried unsuccessfully to keep the prosecutor from introducing the tax returns as evidence, arguing that since the taxpayer was legally required to report the illegal income on the returns, he was being compelled to be a witness against himself. The Supreme Court agreed that he was legally required to report the illegal income on the returns, but ruled that the privilege against self-incrimination still did not apply. The Court stated that "if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the Government has not 'compelled' him to incriminate himself."

Sullivan and Garner are viewed as standing, in tandem, for the proposition that on a required federal income tax return a taxpayer would probably have to report the amount of the illegal income, but might validly claim the privilege by labeling the item "Fifth Amendment" (instead of "illegal gambling income," "illegal drug sales," etc.) The United States Court of Appeals for the Eleventh Circuit has stated: "Although the source of income might be privileged, the amount must be reported." The U.S. Court of Appeals for the Fifth Circuit has stated: ". ... the amount of a taxpayer's income is not privileged even though the source of income may be, and Fifth Amendment rights can be exercised in compliance with the tax laws "by simply listing his alleged ill-gotten gains in the space provided for 'miscellaneous' income on his tax form." In another case, the Court of Appeals for the Fifth Circuit stated: "While the source of some of [the defendant] Johnson's income may have been privileged, assuming that the jury believed his uncorroborated testimony that he had illegal dealings in gold in 1970 and 1971, the amount of his income was not privileged and he was required to pay taxes on it." In 1979, the U.S. Court of Appeals for the Tenth Circuit stated: "A careful reading of Sullivan and Garner, therefore, is that the self-incrimination privilege can be employed to protect the taxpayer from revealing the information as to an illegal source of income, but does not protect him from disclosing the amount of his income."

Grants of immunity

If the government gives an individual immunity, then that individual may be compelled to testify. Immunity may be "transactional immunity" or "use immunity"; in the former, the witness is immune from prosecution for offenses related to the testimony; in the latter, the witness may be prosecuted, but his testimony may not be used against him. In Kastigar v. United States, the Supreme Court held that the government need only grant use immunity to compel testimony. The use immunity, however, must extend not only to the testimony made by the witness, but also to all evidence derived therefrom. This scenario most commonly arises in cases related to organized crime.

Record keeping

A statutorily required record-keeping system may go too far such that it implicates a record-keeper's right against self-incrimination. A three part test laid out by Albertson v. Subversive Activities Control Board, is used to determine this: 1. the law targets a highly selective group inherently suspect of criminal activities; 2. the activities sought to be regulated are already permeated with criminal statutes as opposed to essentially being non-criminal and largely regulatory; and 3. the disclosure compelled creates a likelihood of prosecution and is used against the record-keeper. In this case, the Supreme Court struck down an order by the Subversive Activities Control Board requiring members of the Communist Party to register with the government and upheld an assertion of the privilege against self-incrimination, on the grounds that statute under which the order had been issued was "directed at a highly selective group inherently suspect of criminal activities."

In Leary v. United States, the court struck down the Marijuana Tax Act because its record keeping statute required self-incrimination.

In Haynes v. United States, the Supreme Court ruled that, because convicted felons are prohibited from owning firearms, requiring felons to register any firearms they owned constituted a form of self-incrimination and was therefore unconstitutional.

Combinations and passwords

While no such case has yet arisen, the Supreme Court has indicated that a respondent cannot be compelled to turn over "the contents of his own mind", e.g. he cannot be compelled to reveal the password to a bank account if doing so would prove the existence of the bank account under his control.

Lower courts have given conflicting decisions on whether forced disclosure of computer passwords is a violation of the Fifth Amendment.

In In re Boucher (2009), the US District Court of Vermont ruled that the Fifth Amendment might protect a defendant from having to reveal an encryption password, or even the existence of one, if the production of that password could be deemed a self-incriminating "act" under the Fifth Amendment. In Boucher, production of the unencrypted drive was deemed not to be a self-incriminating act, as the government already had sufficient evidence to tie the encrypted data to the defendant.

In January 2012 a federal judge in Denver ruled that a bank-fraud suspect was required to give an unencrypted copy of a laptop hard drive to prosecutors. However, in February 2012 the Eleventh Circuit ruled otherwise - finding that requiring a defendant to produce an encrypted drive's password would violate the Constitution, becoming the first federal circuit court to rule on the issue. In April 2013, a District Court magistrate judge in Wisconsin refused to compel a suspect to provide the encryption password to his hard drive after FBI agents had unsuccessfully spent months trying to decrypt the data.

Employer coercion

As a condition of employment, workers may be required to answer their employer's narrowly defined questions regarding conduct on the job. If an employee invokes the Garrity rule (sometimes called the Garrity Warning or Garrity Rights) before answering the questions, then the answers cannot be used in criminal prosecution of the employee. This principle was developed in Garrity v. New Jersey, 385 U.S. 493 (1967). The rule is most commonly applied to public employees such as police officers.

Due process

Takings clause

Eminent domain

The Supreme Court has held that the federal government and each state has the power of eminent domain—the power to take private property for "public use". The Takings Clause, the last clause of the Fifth Amendment, limits the power of eminent domain by requiring that "just compensation" be paid if private property is taken for public use. The just compensation provision of the Fifth Amendment did not originally apply directly to the states, but since Chicago, B. & Q. Railroad Co. v. Chicago (1897), federal courts have held that the Fourteenth Amendment extended the effects of that provision to the states. The federal courts, however, have shown much deference to the determinations of Congress, and even more so to the determinations of the state legislatures, of what constitutes "public use". The property need not actually be used by the public; rather, it must be used or disposed of in such a manner as to benefit the public welfare or public interest. One exception that restrains the federal government is that the property must be used in exercise of a government's enumerated powers.

The owner of the property that is taken by the government must be justly compensated. When determining the amount that must be paid, the government does not need to take into account any speculative schemes in which the owner claims the property was intended to be used. Normally, the fair market value of the property determines "just compensation". If the property is taken before the payment is made, interest accrues (though the courts have refrained from using the term "interest").

The federal courts have not restrained state and local governments from seizing privately owned land for private commercial development on behalf of private developers. This was upheld on June 23, 2005, when the Supreme Court issued its opinion in Kelo v. City of New London. This 5–4 decision remains controversial. The majority opinion, by Justice Stevens, found that it was appropriate to defer to the city's decision that the development plan had a public purpose, saying that "the city has carefully formulated a development plan that it believes will provide appreciable benefits to the community, including, but not limited to, new jobs and increased tax revenue." Justice Kennedy's concurring opinion observed that in this particular case the development plan was not "of primary benefit to ... the developer" and that if that was the case the plan might have been impermissible. In the dissent, Justice Sandra Day O'Connor argued that this decision would allow the rich to benefit at the expense of the poor, asserting that "Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms." She argued that the decision eliminates "any distinction between private and public use of property—and thereby effectively delete[s] the words 'for public use' from the Takings Clause of the Fifth Amendment". A number of states, in response to Kelo, have passed laws and/or state constitutional amendments which make it more difficult for state governments to seize private land. Takings that are not "for public use" are not directly covered by the doctrine, however such a taking might violate due process rights under the Fourteenth amendment, or other applicable law.

The exercise of the police power of the state resulting in a taking of private property was long held to be an exception to the requirement of government paying just compensation. However the growing trend under the various state constitution's taking clauses is to compensate innocent third parties whose property was destroyed or "taken" as a result of police action.

"Just compensation"

The last two words of the amendment promise "just compensation" for takings by the government. In United States v. 50 Acres of Land (1984), the Supreme Court wrote that "The Court has repeatedly held that just compensation normally is to be measured by "the market value of the property at the time of the taking contemporaneously paid in money." Olson v. United States, 292 U.S. 246 (1934) ... Deviation from this measure of just compensation has been required only "when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public." United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950).

Civil asset forfeiture

Civil asset forfeiture or occasionally civil seizure, is a controversial legal process in which law enforcement officers take assets from persons suspected of involvement with crime or illegal activity without necessarily charging the owners with wrongdoing. While civil procedure, as opposed to criminal procedure, generally involves a dispute between two private citizens, civil forfeiture involves a dispute between law enforcement and property such as a pile of cash or a house or a boat, such that the thing is suspected of being involved in a crime. To get back the seized property, owners must prove it was not involved in criminal activity. Sometimes it can mean a threat to seize property as well as the act of seizure itself.

In civil forfeiture, assets are seized by police based on a suspicion of wrongdoing, and without having to charge a person with specific wrongdoing, with the case being between police and the thing itself, sometimes referred to by the Latin term in rem, meaning "against the property"; the property itself is the defendant and no criminal charge against the owner is needed. If property is seized in a civil forfeiture, it is "up to the owner to prove that his cash is clean" and the court can weigh a defendant's use of their 5th amendment right to remain silent in their decision. In civil forfeiture, the test in most cases is whether police feel there is a preponderance of the evidence suggesting wrongdoing; in criminal forfeiture, the test is whether police feel the evidence is beyond a reasonable doubt, which is a tougher test to meet. In contrast, criminal forfeiture is a legal action brought as "part of the criminal prosecution of a defendant", described by the Latin term in personam, meaning "against the person", and happens when government indicts or charges the property which is either used in connection with a crime, or derived from a crime, that is suspected of being committed by the defendant; the seized assets are temporarily held and become government property officially after an accused person has been convicted by a court of law; if the person is found to be not guilty, the seized property must be returned.

Normally both civil and criminal forfeiture require involvement by the judiciary; however, there is a variant of civil forfeiture called administrative forfeiture which is essentially a civil forfeiture which does not require involvement by the judiciary, which derives its powers from the Tariff Act of 1930, and empowers police to seize banned imported merchandise, as well as things used to import or transport or store a controlled substance, money, or other property which is less than $500,000 value.

Amendments 1-5 for 300

A. Americans may present petitions to the government.
Q. What is Freedom of petition?

The right to petition is protected by the First Amendment in the Bill of Rights.

In the United States the right to petition is guaranteed by the First Amendment to the United States Constitution, which specifically prohibits Congress from abridging "the right of the people...to petition the Government for a redress of grievances".

Although often overlooked in favor of other more famous freedoms, and sometimes taken for granted, many other civil liberties are enforceable against the government only by exercising this basic right. The right to petition is regarded as fundamental in some republics, such as the United States, as a means of protecting public participation in government.

Historic roots

The American right of petition is derived from British precedent. In Blackstone's Commentaries, Americans in the Thirteen Colonies read that "the right of petitioning the king, or either house of parliament, for the redress of grievances" was a "right appertaining to every individual".

In 1776, the Declaration of Independence cited King George's perceived failure to redress the grievances listed in colonial petitions, such as the Olive Branch Petition of 1775, as a justification to declare independence:

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.

Historically, the right can be traced back to English documents such as Magna Carta, which, by its acceptance by the monarchy, implicitly affirmed the right, and the later Bill of Rights 1689, which explicitly declared the "right of the subjects to petition the king".

First use

The first significant exercise and defense of the right to petition within the U.S. was to advocate the end of slavery by petitioning Congress in the mid-1830s, including 130,000 such requests in 1837 and 1838. In 1836, the House of Representatives adopted a gag rule that would table all such anti-slavery petitions. John Quincy Adams and other Representatives eventually achieved the repeal of this rule in 1844 on the basis that it was contrary to the right to petition the government.

Scope

While the prohibition of abridgment of the right to petition originally referred only to the federal legislature (the Congress) and courts, the incorporation doctrine later expanded the protection of the right to its current scope, over all state and federal courts and legislatures and the executive branches of the state and federal governments. The right to petition includes under its umbrella the right to sue the government, and the right of individuals, groups and possibly corporations to lobby the government.

Some litigants have contended that the right to petition the government includes a requirement that the government listen to or respond to members of the public. This view was rejected by the United States Supreme Court in 1984:

"Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to communications of members of the public on public issues."

See also Smith v. Arkansas State Highway Employees, where the U.S. Supreme Court ruled that the Arkansas State Highway Commission's refusal to consider employee grievances when filed by the union, rather than directly by an employee of the State Highway Department, did not violate the First Amendment to the United States Constitution.

Restrictions

The law of South Dakota prohibits sex offenders from circulating petitions, carrying a maximum potential sentence of one year in jail and a $2,000 fine.

Circulation of a petition by a prisoner in Federal Bureau of Prisons (BOP) is a prohibited act under 28 C.F.R. 541.3, and is punishable by solitary confinement.

The term "Petition" as used in both of these regulations is restricted to those petitions which are directed at the executive or legislative branches of government, and does not include documents filed in a court of law, which are also referred to as "petitions", such as petitions for coram nobis, mandamus, habeas corpus, prohibition, and certiorari, among others. While these are commonly referred to as a "petition" they are forms of civil action against the government that may result in the courts issuing a writ directing the government to act, or refrain from acting, in a specified manner.

Amendments 1-5 for 400

A. The government cannot tell the newspapers what to print.
Q. What is freedom of the press?

Freedom of the press in the United States is protected by the First Amendment to the United States Constitution. This amendment is generally understood to prevent the government from interfering with the distribution of information and opinions. Nevertheless, freedom of the press is subject to certain restrictions, such as defamation law.

Thirteen Colonies

In the Thirteen Colonies before the signing of the Declaration of Independence, the media was subject to a series of regulations. British authorities attempted to prohibit the publication and circulation of information of which they did not approve.

One of the earliest cases concerning freedom of the press occurred in 1734. In a libel case against The New York Weekly Journal publisher John Peter Zenger by British governor William Cosby, Zenger was acquitted and the publication continued until 1751. At that time, there were only two newspapers in New York City and the second was not critical of Cosby's government.

The First Amendment permits information, ideas and opinions without interference, constraint or prosecution by the government. It was adopted on December 15, 1791, as one of the ten amendments that constitute the Bill of Rights.

20th century

Near v. Minnesota

The 1931 U.S. Supreme Court decision Near v. Minnesota recognized freedom of the press by roundly rejecting prior restraints on publication, a principle that applied to free speech generally in subsequent jurisprudence. The court ruled that a Minnesota law targeting publishers of malicious or scandalous newspapers violated the First Amendment (as applied through the Fourteenth Amendment).

Branzburg v. Hayes

Freedom of the press was described in Branzburg v. Hayes as "a fundamental personal right", not confined to newspapers and periodicals. In Lovell v. City of Griffin (1938), Chief Justice Charles Evans Hughes defined the press as "every sort of publication which affords a vehicle of information and opinion." This right has been extended to newspapers, books, plays, movies, and video games.

Associated Press v. United States

Associated Press v. United States (1945) dealt with media cooperation and consolidation. The court held that the AP violated the Sherman Antitrust Act by prohibiting the sale or proliferation of news to nonmember organizations and keeping nonmembers from joining; the AP bylaws constituted restraint of trade, and the fact that AP had not achieved a monopoly was irrelevant. The First Amendment did not excuse newspapers from the Sherman Antitrust Act. News, traded between states, counts as interstate commerce and is subject to the act. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests (326 U.S. 20). Justice Hugo Black wrote, "The First Amendment ... rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public ... Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not".

New York Times Co. v. Sullivan

In New York Times Co. v. Sullivan (1964), the Supreme Court ruled that when a publication involves a public figure, to support a suit for libel the plaintiff bears the burden of proving that the publisher acted with actual malice: knew of the inaccuracy of the statement or acted with reckless disregard of its truth.

New York Times Co. v. United States

In 1971, the Supreme Court upheld the publication of the Pentagon Papers.

21st century

Although it had been uncertain whether people who blog or use other social media are journalists entitled to protection by media shield laws, they are protected by the Free Speech and Free Press Clauses (neither of which differentiates between media businesses and nonprofessional speakers). This is further supported by the Supreme Court, which has refused to grant increased First Amendment protection to institutional media over other speakers; In a case involving campaign finance laws, the court rejected the "suggestion that communication by corporate members of the institutional press is entitled to greater constitutional protection than the same communication by" non-institutional-press businesses.

Stop Online Piracy Act

On October 26, 2011 the Stop Online Piracy Act, which opponents said would threaten free speech and censor the Internet, was introduced to the U.S. House of Representatives. White

House Press Secretary Jay Carney said that President Obama "[would] not support legislation that reduces freedom of expression." The bill was shelved in 2012 after widespread protests.

Obsidian Finance Group, LLC v. Cox

On 2014, blogger Crystal Cox accused Obsidian and Kevin D. Padrick of corrupt and fraudulent conduct. Although the court dismissed most of Cox's blog posts as opinion, it found one post to be more factual in its assertions (and, therefore, defamatory).

It was ruled for the first time, by the Court of Appeals for the Ninth Circuit, that a blogger is entitled to the same free speech protection as a journalist and cannot be liable for defamation unless the blogger acted negligently. In the decision, journalists and bloggers are equally protected under the First Amendment because the "protections of the First Amendment do not turn on whether the defendant was a trained journalist, formally affiliated with traditional news entities, engaged in conflict-of-interest disclosure, went beyond just assembling others' writings, or tried to get both sides of a story."

Ranking of United States press freedom

Freedom House, an independent watchdog organization, ranked the United States 30th out of 197 countries in press freedom in 2014. Its report praised the constitutional protections given American journalists and criticized authorities for placing undue limits on investigative reporting in the name of national security. Freedom House gives countries a score out of 100, with 0 the most free and 100 the least free. The score is broken down into three separately-weighted categories: legal (out of 30), political (out of 40) and economic (out of 30). The United States scored 6, 10, and 5, respectively, that year for a cumulative score of 21.

In 2014, the U.S. ranked 46th in the Reporters Without Borders Press Freedom Index. This is a measure of freedom available to the press, which encompasses areas such as government censorship and is not indicative of journalistic quality. Its ranking fell from 20th in 2010 to 42nd in 2012, which was attributed to arrests of journalists covering the Occupy movement. The U.S. ranked 49th in 2015 and 41st in 2016. In 2012, Finland and Norway tied for first place worldwide. Canada ranked 10th, Germany tied with Jamaica for 17th and Japan tied with Suriname for 22nd. The UK ranked 28th, Australia 30th and France 38th. Extraterritorial regions of the U.S. ranked 57th.

Notable exceptions

In 1798, shortly after the adoption of the Constitution, the governing Federalist Party attempted to stifle criticism with the Alien and Sedition Acts. According to the Sedition Act, criticism of Congress or the President (but not the Vice-President) was a crime; Thomas Jefferson—a non-Federalist—was Vice-President when the act was passed. These restrictions on the press were very unpopular, leading to the party's eventual demise. Jefferson, who vehemently opposed the acts, was elected president in 1800 and pardoned most of those convicted under them. In his March 4, 1801 inaugural address, he reiterated his longstanding commitment to freedom of speech and of the press: "If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."

In mid-August 1861, four New York City newspapers (the New York Daily News, The Journal of Commerce, the Day Book and the New York Freeman's Journal) were given a presentment by a U.S. Circuit Court grand jury for "frequently encouraging the rebels by expressions of sympathy and agreement". This began a series of federal prosecutions during the Civil War of northern U.S. newspapers which expressed sympathy for Southern causes or criticized the Lincoln administration. Lists of "peace newspapers", published in protest by the New York Daily News, were used to plan retributions. The Bangor Democrat in Maine, was one of these newspapers; assailants believed part of a covert Federal raid destroyed the press and set the building ablaze. These actions followed executive orders issued by President Abraham Lincoln; his August 7, 1861 order made it illegal (punishable by death) to conduct "correspondence with" or give "intelligence to the enemy, either directly or indirectly".

The Espionage Act of 1917 and the Sedition Act of 1918, which amended it, imposed restrictions on the press during wartime. The acts imposed a fine of $10,000 and up to 20 years' imprisonment for those publishing "... disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag ..." In Schenck v. United States (1919) the Supreme Court upheld the laws, setting the "clear and present danger" standard. Congress repealed both laws in 1921, and Brandenburg v. Ohio (1969) revised the clear-and-present-danger test to the significantly less-restrictive "imminent lawless action" test. In Hazelwood v. Kuhlmeier (1988), the Supreme Court upheld the right of a school principal to review (and suppress) controversial articles in a school newspaper funded by the school and published in its name. In United States v. Manning (2013), Chelsea Manning was found guilty of six counts of espionage for furnishing classified information to Wikileaks.

Amendments 1-5 for 500

A. **Level of belief that the police officer must have in order to get a warrant (4th Amendment)**
Q. **What is probable cause?**

In United States criminal law, probable cause is the standard by which police authorities have reason to obtain a warrant for the arrest of a suspected criminal or the issuing of a search warrant. The principle behind the standard is to limit the power of authorities to perform random or abusive searches (unlawful search and seizure), and to promote lawful evidence gathering and procedural form during criminal arrest and prosecution. The standard also applies to personal or property searches.

The term comes from the Fourth Amendment of the United States Constitution:

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

Probable in this case may relate to statistical probability or to a general standard of common behavior and customs. The context of the word probable here is not exclusive to community standards, and could partially derive from its use in formal mathematical statistics as some have suggested; but cf. probō, Latin etymology.

Definition

A common definition is "a reasonable amount of suspicion, supported by circumstances sufficiently strong to justify a prudent and cautious person's belief that certain facts are probably true". Notable in this definition is a lack of requirement for public position or public authority of the individual making the recognition, allowing for use of the term by citizens and/or the general public.

In the context of warrants, the Oxford Companion to American Law defines probable cause as "information sufficient to warrant a prudent person's belief that the wanted individual had committed a crime (for an arrest warrant) or that evidence of a crime or contraband would be found in a search (for a search warrant)". "Probable cause" is a stronger standard of evidence than a reasonable suspicion, but weaker than what is required to secure a criminal conviction. Even hearsay can supply probable cause if it is from a reliable source or supported by other evidence, according to the Aguilar–Spinelli test.

In Brinegar v. United States, the U.S. Supreme Court defines probable cause as "where the facts and circumstances within the officers' knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a belief by a man of reasonable caution that a crime is being committed."

History and development

The use of probable cause in the United States and its integration in the Fourth Amendment has roots in English common law and the old saying that "a man's home is his castle". This is the idea that someone has the right to defend their "castle" or home from unwanted "attacks" or intrusion. In the 1600s, this saying started to apply legally to landowners to protect them from casual searches from government officials.

In the 1700s, the British use of the writs of assistance and general warrants, which allowed authorities to search wherever and whenever sometimes, without expiration date, in the American colonies were raised in several court cases. The first was in Massachusetts in 1761 when a customs agent submitted for a new writ of assistance and Boston merchants challenged its legality. In the case the lawyer for the merchants James Otis argued that writs of assistance violated the fundamentals of English Law and was unconstitutional. John Adams, a lawyer at the time who later wrote the Massachusetts provision on which the Fourth Amendment heavily relied, was impacted by James Otis's argument.

A case against general warrants was the English case Entick v. Carrington (1765). In that case, Lord Camden the chief judge said that general warrants were not the same as specific warrants and that parliament or case law could not authorize general warrants. Along with these statements, Lord Camden also affirmed that the needs of the state were more important than the individuals rights. This upheld the ideology of the social contract while holding to idea that the government purpose was to protect the property of the people. He called for the government to seek reasonable means in order to search private property, as well as a cause.

Probationers and parolees

In early cases in the United States, the Supreme Court held that when a person is on probation, the standard required for a search to be lawful is lowered from "probable cause" to "reasonable grounds" or "reasonable suspicion". Specifically, the degree of individualized suspicion required of a search was a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable. The Supreme Court held:

Although the Fourth Amendment ordinarily requires the degree of probability embodied in the term "probable cause," a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable ... When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable.

Later, in Samson v. California, the Supreme Court ruled that reasonable suspicion is not even necessary:

The California Legislature has concluded that, given the number of inmates the State paroles and its high recidivism rate, a requirement that searches be based on individualized suspicion would undermine the State's ability to effectively supervise parolees and protect the public from criminal acts by reoffenders. This conclusion makes eminent sense. Imposing a reasonable suspicion requirement, as urged by petitioner, would give parolees greater opportunity to anticipate searches and conceal criminality.

The court held that reasonableness, not individualized suspicion, is the touchstone of the Fourth Amendment. It has been proposed that Fourth Amendment rights be extended to probationers and parolees, but such proposals have not gained traction. There is not much that remains of the Fourth Amendment rights of probationers after waiving their right to be free from unreasonable searches and seizures. An essay called "They Released Me from My Cage...But They Still Keep Me Handcuffed" was written in response to the Samson decision.

It has been argued that the requirement that a police officer must have individualized suspicion before searching a parolee's person and home was long considered a foundational element of the Court's analysis of Fourth Amendment questions and that abandoning it in the name of crime prevention represents an unprecedented blow to individual liberties.

Use of trained drug dogs

In the United States, use of a trained dog to smell for narcotics has been ruled in several court cases as sufficient probable cause. A K-9 Sniff in a public area is not a search according to the Supreme Court's ruling in 1983 United States v. Place. In this particular case, Place was in the New York Airport, and DEA agents took his luggage, even though he refused to have his bag searched. His luggage smelled of drugs, and the trained dog alerted the agents to this. Dogs alerting their officers provides enough probable cause for the officer to obtain a warrant. The DEA then procured a warrant and found a sizable amount of drugs in Place's luggage. It was not considered a search until after the warrant because a trained dog can sniff out the smell of narcotics, without having to open and look through the luggage.

The power of probable cause by K-9 units smelling for drugs is not limited to just airports, but even in schools, public parking lots, high crime neighborhood streets, mail, visitors in prisons, traffic stops, etc. If there is an incident where the dog alerts its officer, the probable cause from the dog is considered enough to conduct a search, as long as one of the exceptions to a warrant are present, such as plain view, incident to arrest, automobile, exigency, or with a stop and frisk. During a traffic stop and checkpoint, it is legal for police to allow a drug dog to sniff the exterior of the car. This is legal as long as it does not cause the traffic stop to be any longer than it would have been without the dog. If the dog finds a scent, it is again a substitute for probable cause.

Cyber surveillance

Under the 2001 USA Patriot Act, law enforcement officials do not need probable cause, in order to access communications records, credit cards, bank numbers and stored emails held by third parties. They only need reasonable suspicion that the information they are accessing is part of criminal activities. Under this, officers are authorized for a court order to access the communication information. Only certain information can be accessed under this act (such as names, addresses, and phone numbers, etc.). Probable cause is needed for more detailed information because law enforcement needs a warrant to access additional information. Generally, law enforcement is not required to notify the suspect. However, the text of the Patriot Act limits the application of that statute to issues that clearly involve the national security of the United States.

Consent to search

If voluntary consent is given and the individual giving the consent has authority over the search area, such as a car, house, business, etc. then a law enforcement officer does not need probable cause or even reasonable suspicion. If the person does not give voluntary consent, then the officer needs probable cause, and in some cases, a search warrant may be required to search the premises. Unless another exclusion to the fourth amendment of the US constitution occurs, when the person withdraws their consent for searching, the officer has to stop looking immediately.

Accident investigation

In the United States, the term probable cause is used in accident investigation to describe the conclusions reached by the investigating body as to the factor or factors which caused the accident. This is primarily seen in reports on aircraft accidents, but the term is used for the conclusion of diverse types of transportation accidents investigated in the United States by the National Transportation Safety Board or its predecessor, the Civil Aeronautics Board.

Amendments 6-10 for 100

A. This amendment allows a person to speedy public trial.
Q. What is the 6th Amendment?

The Sixth Amendment (Amendment VI) to the United States Constitution is the part of the United States Bill of Rights that sets forth rights related to criminal prosecutions. The Supreme Court has applied the protections of this amendment to the states through the Due Process Clause of the Fourteenth Amendment.

The amendment as proposed by Congress in 1789 reads as follows:

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

Rights secured

Speedy trial

Criminal defendants have the right to a speedy trial. In Barker v. Wingo, 407 U.S. 514 (1972), the Supreme Court laid down a four-part case-by-case balancing test for determining whether the defendant's speedy trial right has been violated. The four factors are:

- Length of delay. A delay of a year or more from the date on which the speedy trial right "attaches" (the date of arrest or indictment, whichever first occurs) was termed "presumptively prejudicial," but the Court has never explicitly ruled that any absolute time limit applies.
- Reason for the delay. The prosecution may not excessively delay the trial for its own advantage, but a trial may be delayed to secure the presence of an absent witness or other practical considerations (e.g., change of venue).
- Time and manner in which the defendant has asserted his right. If a defendant agrees to the delay when it works to his own benefit, he cannot later claim that he has been unduly delayed.
- Degree of prejudice to the defendant which the delay has caused.

In Strunk v. United States, 412 U.S. 434 (1973), the Supreme Court ruled that if the reviewing court finds that a defendant's right to a speedy trial was violated, then the indictment must be dismissed and/or the conviction overturned. The Court held that, since the delayed trial is the state action which violates the defendant's rights, no other remedy would be appropriate. Thus, a reversal or dismissal of a criminal case on speedy trial grounds means that no further prosecution for the alleged offense can take place.

Public trial

In Sheppard v. Maxwell, 384 U.S. 333 (1966), the Supreme Court ruled that the right to a public trial is not absolute. In cases where excess publicity would serve to undermine the defendant's right to due process, limitations can be put on public access to the proceedings. According to Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986), trials can be closed at the behest of the government if there is "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." The accused may also request a closure of the trial; though, it must be demonstrated that "first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent, and second, reasonable alternatives to closure cannot adequately protect the defendant's right to a fair trial."

Impartial jury

The right to a jury has always depended on the nature of the offense with which the defendant is charged. Petty offenses—those punishable by imprisonment for no more than six months—are not covered by the jury requirement. Even where multiple petty offenses are concerned, the total time of imprisonment possibly exceeding six months, the right to a jury trial does not exist. Also, in the United States, except for serious offenses (such as murder), minors are usually tried in a juvenile court, which lessens the sentence allowed, but forfeits the right to a jury.

Originally, the Supreme Court held that the Sixth Amendment right to a jury trial indicated a right to “a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted.” Therefore, it was held that juries had to be composed of twelve persons and that verdicts had to be unanimous, as was customary in England.

When, under the Fourteenth Amendment, the Supreme Court extended the right to a trial by jury to defendants in state courts, it re-examined some of the standards. It has been held that twelve came to be the number of jurors by "historical accident," and that a jury of six would be sufficient, but anything less would deprive the defendant of a right to trial by jury. The Sixth Amendment mandates unanimity in a federal jury trial. However, the Supreme Court has ruled that the Due Process Clause of the Fourteenth Amendment, while requiring states to provide jury trials for serious crimes, does not incorporate all the elements of a jury trial within the meaning of the Sixth Amendment. Thus, states are not mandated to require jury unanimity, unless the jury has only six members.

Impartiality

The Sixth Amendment requires juries to be impartial. Impartiality has been interpreted as requiring individual jurors to be unbiased. At voir dire, each side may question potential jurors to determine any bias, and challenge them if the same is found; the court determines the validity of these challenges for cause. Defendants may not challenge a conviction because a challenge for cause was denied incorrectly if they had the opportunity to use peremptory challenges.

In Peña-Rodriguez v. Colorado (2017), the Supreme Court ruled that the Sixth Amendment requires a court in a criminal trial to investigate whether a jury's guilty verdict was based on racial bias. For a guilty verdict to be set-aside based on the racial bias of a juror, the defendant must prove that the racial bias "was a significant motivating factor in the juror's vote to convict."

Venire of juries

Another factor in determining the impartiality of the jury is the nature of the panel, or venire, from which the jurors are selected. Venires must represent a fair cross-section of the community; the defendant might establish that the requirement was violated by showing that the allegedly excluded group is a "distinctive" one in the community, that the representation of such a group in venires is unreasonable and unfair in regard to the number of persons belonging to such a group, and that the under-representation is caused by a systematic exclusion in the selection process. Thus, in Taylor v. Louisiana, 419 U.S. 522 (1975), the Supreme Court invalidated a state law that exempted women who had not made a declaration of willingness to serve from jury service, while not doing the same for men.

Sentencing

In Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296 (2004), the Supreme Court ruled that a criminal defendant has a right to a jury trial not only on the question of guilt or innocence, but also regarding any fact used to increase the defendant's sentence beyond the maximum otherwise allowed by statutes or sentencing guidelines. In Alleyne v. United States, 11-9335 (2013), the Court expanded on Apprendi and Blakely by ruling that a defendant's right to a jury applies to any fact that would increase a defendant's sentence beyond the minimum otherwise required by statute.

Vicinage

Article III, Section 2 of the Constitution requires defendants be tried by juries and in the state in which the crime was committed. The Sixth Amendment requires the jury to be selected from judicial districts ascertained by statute. In Beavers v. Henkel, 194 U.S. 73 (1904), the Supreme Court ruled that the place where the offense is charged to have occurred determines a trial's location. Where multiple districts are alleged to have been locations of the crime, any of them may be chosen for the trial. In cases of offenses not committed in any state (for example, offenses committed at sea), the place of trial may be determined by the Congress.

Notice of accusation

A criminal defendant has the right to be informed of the nature and cause of the accusation against him. Therefore, an indictment must allege all the ingredients of the crime to such a degree of precision that it would allow the accused to assert double jeopardy if the same charges are brought up in subsequent prosecution. The Supreme Court held in United States v. Carll, 105 U.S. 611 (1881) that “in an indictment ... it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.” Vague wording, even if taken directly from a statute, does not suffice. However, the government is not required to hand over written copies of the indictment free of charge.

Confrontation

The Confrontation Clause relates to the common law rule preventing the admission of hearsay, that is to say, testimony by one witness as to the statements and observations of another person to prove that the statement or observation was accurate. The rationale was that the defendant had no opportunity to challenge the credibility of and cross-examine the person making the statements. Certain exceptions to the hearsay rule have been permitted; for instance, admissions by the defendant are admissible, as are dying declarations. Nevertheless, in California v. Green, 399 U.S. 149 (1970), the Supreme Court has held that the hearsay rule is not the same as the Confrontation Clause. Hearsay is admissible under certain circumstances. For example, in Bruton v. United States, 391 U.S. 123 (1968), the Supreme Court ruled that while a defendant's out of court statements were admissible in proving the defendant's guilt, they were inadmissible hearsay against another defendant. Hearsay may, in some circumstances, be admitted though it is not covered by one of the long-recognized exceptions. For example, prior testimony may sometimes be admitted if the witness is unavailable. However, in Crawford v. Washington, 541 U.S. 36 (2004), the Supreme Court increased the scope of the Confrontation Clause by ruling that "testimonial" out-of-court statements are inadmissible if the accused did not have the opportunity to cross-examine that accuser and that accuser is unavailable at trial. In Davis v. Washington 547 U.S. 813 (2006), the Court ruled that "testimonial" refers to any statement that an objectively reasonable person in the declarant's situation would believe likely to be used in court. In Melendez-Diaz v. Massachusetts, 557 U.S. ___ (2009), and Bullcoming v. New Mexico, 564 U.S. ___ (2011), the Court ruled that admitting a lab chemist's analysis into evidence, without having him testify, violated the Confrontation Clause. In Michigan v. Bryant, 562 U.S. ___ (2011), the Court ruled that the "primary purpose" of a shooting victim's statement as to who shot him, and the police's reason for questioning him, each had to be objectively determined. If the "primary purpose" was for dealing with an "ongoing emergency", then any such statement was not testimonial and so the Confrontation Clause would not require the person making that statement to testify in order for that statement to be admitted into evidence.

The right to confront and cross-examine witnesses also applies to physical evidence; the prosecution must present physical evidence to the jury, providing the defense ample opportunity to cross-examine its validity and meaning. Prosecution generally may not refer to evidence without first presenting it.

In the late 20th and early 21st century this clause became an issue in the use of the silent witness rule.

Compulsory process

The Compulsory Process Clause gives any criminal defendant the right to call witnesses in his favor. If any such witness refuses to testify, that witness may be compelled to do so by the court at the request of the defendant. However, in some cases the court may refuse to permit a defense witness to testify. For example, if a defense lawyer fails to notify the prosecution of the identity of a witness to gain a tactical advantage, that witness may be precluded from testifying.

Assistance of counsel

A criminal defendant has the right to be represented by counsel.

In Powell v. Alabama, 287 U.S. 45 (1932), the Supreme Court ruled that “in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him.” In Johnson v. Zerbst, 304 U.S. 458 (1938), the Supreme Court ruled that in all federal cases, counsel would have to be appointed for defendants who were too poor to hire their own.

In 1961, the Court extended the rule that applied in federal courts to state courts. It held in Hamilton v. Alabama, 368 U.S. 52 (1961), that counsel had to be provided at no expense to defendants in capital cases when they so requested, even if there was no "ignorance, feeble mindedness, illiteracy, or the like." Gideon v. Wainwright, 372 U.S. 335 (1963), ruled that counsel must be provided to indigent defendants in all felony cases, overruling Betts v. Brady, 316 U.S. 455 (1942), in which the Court ruled that state courts had to appoint counsel only when the defendant demonstrated "special circumstances" requiring the assistance of counsel. Under Argersinger v. Hamlin, 407 U.S. 25 (1972), counsel must be appointed in any case resulting in a sentence of actual imprisonment. Regarding sentences not immediately leading to imprisonment, the Court in Scott v. Illinois, 440 U.S. 367 (1979), ruled that counsel did not need to be appointed, but in Alabama v. Shelton, 535 U.S. 654 (2002), the Court held that a suspended sentence that may result in incarceration can not be imposed if the defendant did not have counsel at trial.

As stated in Brewer v. Williams, 430 U.S. 387 (1977), the right to counsel "[means] at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him, whether by formal charge, preliminary hearing, indictment, information, or arraignment." Brewer goes on to conclude that once adversary proceeding have begun against a defendant, he has a right to legal representation when the government interrogates him and that when a defendant is arrested, "arraigned on [an arrest] warrant before a judge", and "committed by the court to confinement", "[t]here can be no doubt that judicial proceedings ha[ve] been initiated."

Self-representation

A criminal defendant may represent himself, unless a court deems the defendant to be incompetent to waive the right to counsel.

In Faretta v. California, 422 U.S. 806 (1975), the Supreme Court recognized a defendant's right to pro se representation. However, under Godinez v. Moran, 509 U.S. 389 (1993), a court that believes the defendant is less than fully competent to represent himself can require that defendant to be represented by counsel. In Martinez v. Court of Appeal of California, 528 U.S. 152 (2000), the Supreme Court ruled the right to pro se representation did not apply to appellate courts. In Indiana v. Edwards, 554 U.S. 164 (2008), the Court ruled that a criminal defendant could be simultaneously competent to stand trial, but not competent to represent himself.

In Bounds v. Smith, 430 U.S. 817 (1977), the Supreme Court held that the constitutional right of "meaningful access to the courts" can be satisfied by counsel or access to legal materials. Bounds has been interpreted by several United States courts of appeals to mean a pro se defendant does not have a constitutional right to access a prison law library to research his defense when access to the courts has been provided through appointed counsel.

Amendments 6-10 for 200

A. Guarantees the right to jury trial.

Q. What is the 7th Amendment?

The Seventh Amendment (Amendment VII) to the United States Constitution is part of the Bill of Rights. This amendment codifies the right to a jury trial in certain civil cases and inhibits courts from overturning a jury's findings of fact.

An early version of the Seventh Amendment was introduced in Congress in 1789 by James Madison, along with the other amendments, in response to Anti-Federalist objections to the new

Constitution. Congress proposed a revised version of the Seventh Amendment to the states on September 28, 1789, and by December 15, 1791, the necessary three-quarters of the states had ratified it. Secretary of State Thomas Jefferson announced the adoption of the amendment on March 1, 1792.

The Seventh Amendment is generally considered one of the more straightforward amendments of the Bill of Rights. While the Seventh Amendment's provision for jury trials in civil cases has never been incorporated (i.e.,applied to the states) almost every state voluntarily complies with this requirement. The prohibition of overturning a jury's findings of fact applies to federal cases, state cases involving federal law, and to review of state cases by federal courts. United States v. Wonson (1812) established the historical test, which interpreted the amendment as relying on English common law to determine whether a jury trial was necessary in a civil suit. The amendment thus does not guarantee trial by jury in cases under maritime law, in lawsuits against the government itself, and for many parts of patent claims. In all other cases, the jury can be waived by consent of the parties.

The amendment additionally guarantees a minimum of six members for a jury in a civil trial. The amendment's twenty dollar threshold has not been the subject of much scholarly or judicial writing; that threshold remains applicable despite the inflation that has occurred since the 18th century.

The amendment as proposed by Congress in 1789 reads as follows:

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

Judicial interpretation

The Seventh Amendment is generally considered one of the more straightforward amendments of the Bill of Rights. Scholar Charles W. Wolfram states that it has usually "been interpreted as if it were virtually a self-explanatory provision".

Unlike most of the provisions of the Bill of Rights, the Seventh Amendment has never been applied to the states. The Supreme Court stated in Walker v. Sauvinet (1875), Minneapolis & St. Louis Railroad v. Bombolis (1916) and Hardware Dealers' Mut. Fire Ins. Co. of Wisconsin v. Glidden Co. (1931) that states were not required to provide jury trials in civil cases. Nonetheless, most states voluntarily guarantee the right to a civil jury trial, and they must do so in certain state court cases that are decided under federal law.

Historical test

Justice Joseph Story issued the first judicial opinion on the amendment in United States v. Wonson (1812).

The first judicial opinion issued on the amendment came in United States v. Wonson (1812), in which the federal government wished to retry the facts of a civil case it had lost against Samuel Wonson. Supreme Court Justice Joseph Story, acting as a circuit court judge, ruled for Wonson, stating that to retry the facts of the case would violate the Seventh Amendment. Regarding the amendment's phrase "the rules of common law", Story wrote:

Beyond all question, the common law here alluded to is not the common law of any individual state, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence. It cannot be necessary for me to expound the grounds of this opinion, because they must be obvious to every person acquainted with the history of the law.

Wonson's ruling established the historical test, which interpreted the amendment as relying on English common law to determine whether a jury trial was necessary in a civil suit. Applying the historical test in Parsons v. Bedford (1830), for example, the Supreme Court found that jury trials were not constitutionally guaranteed for cases under maritime law, an area in which English common law did not require juries. The Court further clarified this rule as a fixed historical test in Thompson v. Utah (1898), which established that the relevant guide was English common law of 1791, rather than that of the present day. In Chauffeurs, Teamsters, and Helpers Local No. 391 v. Terry (1990), the Court explained that the right to a jury trial provided by the Seventh Amendment encompasses more than the common law forms of action recognized in 1791 (when the Bill of Rights was ratified), but rather any lawsuit in which parties' legal rights were to be determined, as opposed to suits that only involve equitable rights and remedies.

In Galloway v. United States (1943), the Court permitted a directed verdict (a verdict ordered by a judge on the basis of overwhelming lack of evidence) in a civil suit, finding that it did not violate the Seventh Amendment under the fixed historical test. The Court extended the amendment's guarantees in Beacon Theatres v. Westover (1959) and Dairy Queen, Inc. v. Wood (1962), ruling in each case that all issues that required trial by jury under English common law also required trial by jury under the Seventh Amendment. This guarantee was also further extended to shareholder suits in Ross v. Bernhard (1970) and to copyright infringement lawsuits in Feltner v. Columbia Pictures TV (1998).

In Markman v. Westview Instruments, Inc. (1996), the Court ruled that many parts of patent claims are questions of law rather than of fact, and that the Seventh Amendment guarantee of a jury trial therefore does not necessarily apply. Lawsuits against the federal government itself do not receive Seventh Amendment protections due to the doctrine of sovereign immunity. In Lehman v. Nakshian (1981), the Court ruled that citizens may sue the federal government only in cases where such right has been granted by act of Congress.

Jury size

The Supreme Court has held that the Seventh Amendment's guarantee of a jury trial also guarantees a jury of sufficient size. The Court found a six-member jury sufficient to meet the amendment's requirements in Colgrove v. Battin (1973).

Twenty Dollars Clause

Little historical evidence exists to interpret the Twenty Dollars Clause, which was added in a closed session of the Senate, and is often omitted in judicial and scholarly discussion of the amendment. A Harvard Law Review article described it as "mysterious ... of shrouded origin and neglected for two centuries", stating that "no one believes that the Clause bears on the right protected by the Seventh Amendment." According to law professor Philip Hamburger, this clause was intended to become obsolete by inflation, so that its application to more cases would be phased out gradually.

Congress has never extended federal diversity jurisdiction to amounts that small. Under federal law (28 U.S.C. §1332), the amount in dispute must exceed $75,000 for a case to be heard in federal court based on diversity of the parties' citizenship (the parties are from different states or different countries). However, civil cases may arise in federal court that are not diversity cases (e.g., in places like the District of Columbia that are federal jurisdictions), in which case the Twenty Dollars Clause may apply.

Re-examination of facts

The Re-Examination Clause of the Seventh Amendment states: "In suits at common law, ... no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." This clause forbids any court from reexamining or overturning any factual determinations made by a jury guaranteeing that facts decided by that jury cannot be reexamined at a later date. Exceptions to this prohibition are possible if it is later determined that legal errors were made or evidence submitted was insufficient in some way. In such cases the reexamination is conducted by another jury so that the decision is still left in the hands of the people. The clause applies only to cases where private rights—i.e., rights that exist between private citizens—have been violated. The Re-Examination Clause applies not only to federal courts, but also to "a case tried before a jury in a state court and brought to the Supreme Court on appeal."

Justice Samuel Nelson wrote the opinion of the Supreme Court in The Justices v. Murray, 76 U.S. 9 Wall. 274 (1869), in which he quoted Justice Joseph Story to explain the modes to reexamine facts tried by juries according to common law: "Mr. Justice Story […] referring to this part of the amendment, observed […] that it was 'a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner [than according to Common Law].' […] He further observed that 'the only modes known to the common law to re-examine such facts was the granting of a new trial by the court where the issue was tried, or the award of a venire facias de novo, by the appellate court, for some error of law that had intervened in the proceedings.'"

As common law provided, the judge could set aside (or nullify) a jury verdict when the judge decided that the verdict was contrary to the evidence or the law. Common law precluded the judge from himself entering a verdict; a new trial, with a new jury, was the only course permissible. In Slocum v. New York Insurance Co. (1913), the Supreme Court upheld this rule. Later cases have undermined Slocum, but generally only when the evidence is overwhelming, or if a specific law provides narrow guidelines by which there can be no reasonable question as to the required outcome, may the court enter "judgment as a matter of law" or otherwise set aside the jury's findings.

Amendments 6-10 for 300

A. A defendant can refuse the services of an attorney.

Q. What is the 6th Amendment?

The Sixth Amendment (Amendment VI) to the United States Constitution is the part of the United States Bill of Rights that sets forth rights related to criminal prosecutions. The Supreme Court has applied the protections of this amendment to the states through the Due Process Clause of the Fourteenth Amendment.

The amendment as proposed by Congress in 1789 reads as follows:

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

Rights secured

The Sixth Amendment to the United States Constitution provides:

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

The assistance of counsel clause includes, as relevant here, five distinct rights: the right to counsel of choice, the right to appointed counsel, the right to conflict-free counsel, the effective assistance of counsel, and the right to represent oneself pro se.

A defendant does not have a Sixth Amendment right to counsel in any civil proceeding, including a deportation hearing (even though deportability is often a collateral consequence of criminal conviction). However, as described below, there are certain civil proceedings where parties have a right to appointed counsel; such a right is pursuant to the Fourteenth Amendment's due process or equal protection clause, a state constitution's due process or equal protection clause, or a federal/state statute.

Choice of counsel

Subject to considerations such as conflicts of interest, scheduling, counsel's authorization to practice law in the jurisdiction, and counsel's willingness to represent the defendant (whether pro bono or for a fee), criminal defendants have a right to be represented by counsel of their choice. The remedy for erroneous deprivation of first choice counsel is automatic reversal.

Appointment of counsel

A criminal defendant unable to retain counsel has the right to appointed counsel at the government's expense. While the Supreme Court recognized this right gradually, it currently applies in all federal and state criminal proceedings where the defendant faces authorized imprisonment greater than one year (a "felony") or where the defendant is actually imprisoned.

Criminal defendants do not have a right to appointed counsel if they are not sentenced to actual imprisonment, and could not have been sentenced for more than one year, even if that conviction is later used to enhance sentencing for another crime, or even if the revocation of probation may result in actual imprisonment (although for parole revocation, the court evaluates the right to counsel on a case-by-case-basis). Nor does the defendant have the right to appointed counsel to raise frivolous arguments on direct appeal, or to raise any arguments on habeas or other collateral appeal, even if facing execution.

With respect to federal law on civil proceedings, there is a constitutional right to counsel for juveniles in delinquency proceedings, and there is a right to "qualified and independent assistance" (although not necessarily an attorney) for prisoners involuntarily transferred to a mental health facility. The federal constitutional right to appointed counsel in termination of parental rights proceedings is on a case-by-case basis. For civil contempt proceedings related to failure to pay child support, the U.S. Supreme Court has said there is no federal constitutional right to counsel even if the litigant is being jailed, provided that all of the following is true: a) the state is providing sufficient procedural safeguards to ensure the person actually has the ability to pay but is refusing to do so; b) the matter is not "unusually complex"; and c) the plaintiff is neither the government nor represented by counsel. Federal statutory law provides for a right to counsel in certain types of federal court proceedings, such as civil forfeiture of a primary residence or proceedings involving those in active military service. Finally, all states provide a right to counsel by either statute, court decision, or court rule in at least some civil proceedings, with the most commonly covered proceedings being termination of parental rights, abuse/neglect, civil commitment, paternity, and civil contempt. The state court decisions can be based on interpretation of either the federal or state constitution, and under basic principles of federalism, a state court can grant more rights under its state constitution than the Supreme Court has recognized under the federal constitution.

Conflict-free counsel

Whether counsel is retained or appointed, the defendant has a right to counsel without a conflict of interest. If an actual conflict of interest is present, and that conflict results in any adverse effect on the representation, the result is automatic reversal. The general rule is that conflicts can be knowingly and intelligently waived, but some conflicts are not waivable.

Ineffective assistance of counsel

In Strickland v. Washington (1984), the Court held that, on collateral review, a defendant may obtain relief if the defendant demonstrates both (1) that defense counsel's performance fell below an objective standard of reasonableness (the "performance prong") and (2) that, but for the deficient performance, there is a reasonable probability that the result of the proceeding would have been different (the "prejudice prong").

To satisfy the prejudice prong of Strickland, a defendant who pleads guilty must show that, but for counsel's deficient performance, they would not have pleaded guilty. In Padilla v. Kentucky (2010), the Court held that counsel's failure to inform an alien pleading guilty of the risk of deportation fell below the objective standard of the performance prong of Strickland and permitted an alien who would not have pleaded guilty but for such failure to withdraw his guilty plea.

Amendments 6-10 for 400

A. Excessive bail shall not be required.

Q. What is the 8th Amendment?

The Eighth Amendment, in part, provides constitutional protection against excessive bail, including the practical denial of bail by fixing its amount unreasonably high, as decided in United States v. Motlow, 10 F.2d 657 (1926).

Although the Eighth Amendment protects against excessive bail, there is not an absolute right to bail, as noted in The Bail Reform Act, 18 USC Chapter 207 (1984). Section 3142 of the Act denies bail to certain defendants pending trial, specifically denying bail to defendants likely to flee or pose a danger to society. This includes defendants charged with: a crime of violence; an offense where the maximum sentence is life imprisonment or death; certain drug offenses; repeat felony offenders; or a defendant who poses a serious risk of flight. The court conducts a special hearing to determine whether the defendant fits within these categories; anyone who is not likely to flee and does not pose a danger to society must be offered bail while pending trial.

Section 3143 governs the rules for offenders found guilty of a crime who are pending an appeal. Section 3143(a)(1) denies bail to offenders found guilty of non-enumerated crimes unless there is clear and convincing evidence that the person is unlikely to flee or be a danger if released. Section 3143(a)(2) denies bail to offenders found guilty of certain enumerated offenses, including a crime of violence; certain drug offenses; or repeat felony offenders who are pending appeal. The offender must be detained unless there is clear and convincing evidence that the person is unlikely to flee or be a danger if released and there is either: a substantial likelihood that an acquittal or new trial will be granted, or a Government attorney recommends against imprisonment.

The Supreme Court upheld the constitutionality of the Bail Reform Act of 1984 in United States v. Salerno, 481 U.S. 739 (1987). The Court determined that the Eighth Amendment places a restriction on the amount of bail set, so bail cannot place excessive restrictions on a defendant in relation to the perceived evil. Thus, the amount of bail cannot be set to an amount higher than what is necessary to prevent the perceived evil. The Eighth Amendment does not, however, restrict the factors that may be considered when determining bail. The court, for example, may consider risk of flight when determining the amount of bail. The Court also noted that, even if the Bail Reform Act could be hypothetically unconstitutional, this was insufficient to render the entire statute invalid.

As the Eighth Amendment only provides a constitutional protection for the amount of bail set, there is no constitutional protection for receiving speedy bail. In Fields v. Henry County, 701

F.3d 180 (2012), the Sixth Circuit held it was constitutional to impose a requirement of an automatic twelve hour holding period for domestic assault offenders before bail.

Amendments 6-10 for 500

A. This amendment recognizes that the states and people have additional powers.

Q. What is the 10th Amendment?

The Tenth Amendment (Amendment X) to the United States Constitution, which is part of the Bill of Rights, was ratified on December 15, 1791. It expresses the principle of federalism and states' rights, which strictly supports the entire plan of the original Constitution for the United States of America, by stating that the federal government possesses only those powers delegated to it by the United States Constitution. All remaining powers are reserved for the states or the people.

The amendment was proposed by Congress in 1789 during its first term following the Constitutional Convention and ratification of the Constitution. It was considered by many members as a prerequisite of such ratification particularly to satisfy demands by the Anti-Federalism movement that opposed the creation of a stronger U.S. federal government.

In drafting this amendment, its framers had two purposes in mind: first, as a necessary rule of construction; and second, as a reaffirmation of the nature of federalism.

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.

Judicial interpretation

The Tenth Amendment, which makes explicit the idea that the federal government is limited to only the powers granted in the Constitution, has been declared to be a truism by the Supreme Court. In United States v. Sprague (1931) the Supreme Court asserted that the amendment "added nothing to the [Constitution] as originally ratified."

States and local governments have occasionally attempted to assert exemption from various federal regulations, especially in the areas of labor and environmental controls, using the Tenth Amendment as a basis for their claim. An often-repeated quote, from United States v. Darby Lumber Co., reads as follows:

The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

The Supreme Court rarely declares laws unconstitutional for violating the Tenth Amendment. In the modern era, the Court has only done so where the federal government compels the states to enforce federal statutes. In 1992, in New York v. United States,] for only the second time in 55 years, the Supreme Court invalidated a portion of a federal law for violating the Tenth Amendment. The case challenged a portion of the Low-Level Radioactive Waste Policy Amendments Act of 1985. The act provided three incentives for states to comply with statutory obligations to provide for the disposal of low-level radioactive waste. The first two incentives were monetary. The third, which was challenged in the case, obliged states to take title to any waste within their borders that was not disposed of prior to January 1, 1996, and made each state liable for all damages directly related to the waste. The Court, in a 6–3 decision, ruled that the imposition of that obligation on the states violated the Tenth Amendment. Justice Sandra Day O'Connor wrote that the federal government can encourage the states to adopt certain regulations through the spending power (e.g. by attaching conditions to the receipt of federal funds, see South Dakota v. Dole, or through the commerce power (by directly pre-empting state law). However, Congress cannot directly compel states to enforce federal regulations.

In 1998, the Court again ruled that the Brady Handgun Violence Prevention Act violated the Tenth Amendment in Printz v. United States. The act required state and local law enforcement officials to conduct background checks on people attempting to purchase handguns. Justice Antonin Scalia, writing for the majority, applied New York v. United States to show that the law violated the Tenth Amendment. Since the act "forced participation of the State's executive in the actual administration of a federal program", it was unconstitutional.

In 2012, in National Federation of Independent Business v. Sebelius,] Chief Justice John Roberts, writing for the Court, held that the Patient Protection and Affordable Care Act (commonly referred to as the ACA or Obamacare) improperly coerced the States to expand Medicaid. He classified the ACA's language as coercive because it effectively forced States to join the federal program by conditioning the continued provision of Medicaid funds on States agreeing to materially alter Medicaid eligibility to include all individuals who fell below 133% of the poverty line.

Commerce clause

In modern times, the Commerce Clause has become one of the most frequently-used sources of Congress's power, and thus its interpretation is very important in determining the allowable scope of federal government.

In the 20th century, complex economic challenges arising from the Great Depression triggered a reevaluation in both Congress and the Supreme Court of the use of Commerce Clause powers to maintain a strong national economy.

In Wickard v. Filburn (1942), in the context of World War II, the Court ruled that federal regulations of wheat production could constitutionally be applied to wheat grown for "home consumption" on a farm – that is, wheat grown to be fed to farm animals or otherwise consumed on the farm. The rationale was that a farmer's growing "his own wheat" can have a substantial cumulative effect on interstate commerce, because if all farmers were to exceed their production quotas, a significant amount of wheat would either not be sold on the market or would be bought from other producers. Hence, in the aggregate, if farmers were allowed to consume their own wheat, it would affect the interstate market in wheat.

In Garcia v. San Antonio Metropolitan Transit Authority (1985), the Court changed the analytic framework to be applied in Tenth Amendment cases. Prior to the Garcia decision, the determination of whether there was state immunity from federal regulation turned on whether the state activity was "traditional" for or "integral" to the state government. The Court noted that this analysis was "unsound in principle and unworkable in practice", and rejected it without providing a replacement. The Court's holding declined to set any formula to provide guidance in future cases. Instead, it simply held "...we need go no further than to state that we perceive nothing in the overtime and minimum-wage requirements of the FLSA ... that is destructive of state sovereignty or violative of any constitutional provision." It left to future courts how best to determine when a particular federal regulation may be "destructive of state sovereignty or violative of any constitutional provision."

In United States v. Lopez, a federal law mandating a "gun-free zone" on and around public school campuses was struck down because, the Supreme Court ruled, there was no clause in the Constitution authorizing it. This was the first modern Supreme Court opinion to limit the government's power under the Commerce Clause. The opinion did not mention the Tenth Amendment, and the Court's 1985 Garcia opinion remains the controlling authority on that subject.

Most recently, the Commerce Clause was cited in the 2005 decision Gonzales v. Raich. In this case, a California woman sued the Drug Enforcement Administration after her medical cannabis crop was seized and destroyed by federal agents. Medical cannabis was explicitly made legal under California state law by Proposition 215; however, cannabis is prohibited at the federal level by the Controlled Substances Act. Even though the woman grew cannabis strictly for her own consumption and never sold any, the Supreme Court stated that growing one's own cannabis affects the interstate market of cannabis. The theory was that the cannabis could enter the stream of interstate commerce, even if it clearly wasn't grown for that purpose and that was unlikely ever to happen (the same reasoning as in the Wickard v. Filburn decision). It therefore ruled that this practice may be regulated by the federal government under the authority of the Commerce Clause.

Federal funding

The federal system limits the ability of the federal government to use state governments as an instrument of the national government, as held in Printz v. United States. However, where Congress or the Executive has the power to implement programs, or otherwise regulate, there are, arguably, certain incentives in the national government encouraging States to become the instruments of such national policy, rather than to implement the program directly. One incentive is that state implementation of national programs places implementation in the hands of local officials who are closer to local circumstances. Another incentive is that implementation of federal programs at the state level would in principle limit the growth of the national bureaucracy.

For this reason, Congress often seeks to exercise its powers by offering or encouraging States to implement national programs consistent with national minimum standards; a system known as cooperative federalism. One example of the exercise of this device was to condition allocation of federal funding where certain state laws do not conform to federal guidelines. For example, federal educational funds may not be accepted without implementation of special education programs in compliance with IDEA. Similarly, the nationwide state 55 mph (90 km/h) speed limit, .08 legal blood alcohol limit, and the nationwide state 21-year drinking age[18] were imposed through this method; the states would lose highway funding if they refused to pass such laws (though the national speed limit has since been repealed).

Precedence for 100

A. Supreme Court case that established precedent of "separate but equal"

Q. What is Plessy v. Ferguson?

Plessy v. Ferguson, 163 U.S. 537 (1896), was a landmark decision of the U.S. Supreme Court issued in 1896. It upheld the constitutionality of racial segregation laws for public facilities as long as the segregated facilities were equal in quality – a doctrine that came to be known as "separate but equal". This legitimized the many state laws re-establishing racial segregation that had been passed in the American South after the end of the Reconstruction Era (1865–1877). The decision was handed down by a vote of 7 to 1, with the majority opinion written by Justice Henry Billings Brown and the lone dissent written by Justice John Marshall Harlan.

Plessy is widely regarded as one of the worst decisions in U.S. Supreme Court history. Despite this status, the decision itself has never been explicitly overruled. However, a series of subsequent decisions—beginning with Brown v. Board of Education in 1954—have severely weakened it to the point that it is usually considered to have been de facto overruled. In Brown, the Supreme Court ruled that Plessy's "separate but equal" doctrine was unconstitutional in the context of schools and educational facilities.

Background

In 1890, the state of Louisiana passed the Separate Car Act, which required separate accommodations for blacks and whites on railroads, including separate railway cars. Concerned, a group of prominent black, creole, and white New Orleans residents formed the Comité des Citoyens (Committee of Citizens) dedicated to repeal the law or fight its effect. They persuaded Homer Plessy, a man of mixed race, to participate in an orchestrated test case. Plessy was born a free man and was an "octoroon" (of seven-eighths European descent and one-eighth African descent). However, under Louisiana law, he was classified as black, and thus required to sit in the "colored" car.

On June 7, 1892, Plessy bought a first-class ticket at the Press Street Depot and boarded a "whites only" car of the East Louisiana Railroad in New Orleans, Louisiana, bound for Covington, Louisiana. The railroad company, which had opposed the law on the grounds that it would require the purchase of more railcars, had been previously informed of Plessy's racial lineage, and the intent to challenge the law. Additionally, the committee hired a private detective with arrest powers to detain Plessy, to ensure that he would be charged for violating the Separate Car Act, as opposed to a vagrancy or some other offense. After Plessy took a seat in the whites-only railway car, he was asked to vacate it, and sit instead in the blacks-only car. Plessy refused and was arrested immediately by the detective. As planned, the train was stopped, and Plessy was taken off the train at Press and Royal streets. Plessy was remanded for trial in Orleans Parish.

In his case, Homer Adolph Plessy v. The State of Louisiana, Plessy's lawyers argued that the state law which required East Louisiana Railroad to segregate trains had denied him his rights under the Thirteenth and Fourteenth amendments of the United States Constitution, which provided for equal treatment under the law. However, the judge presiding over his case, John Howard Ferguson, ruled that Louisiana had the right to regulate railroad companies while they operated within state boundaries. Plessy was convicted and sentenced to pay a $25 fine. Plessy immediately sought a writ of prohibition.

The Committee of Citizens took Plessy's appeal to the Supreme Court of Louisiana, where he again found an unreceptive ear, as the state Supreme Court upheld Judge Ferguson's ruling.

In speaking for the court's decision that Ferguson's judgment did not violate the 14th Amendment, Louisiana Supreme Court Justice Charles Fenner cited precedents from two Northern states commonly associated with abolitionism. The Massachusetts Supreme Court had ruled as early as 1849 that segregated schools were constitutional. In answering the charge that segregation perpetuated race prejudice, the Massachusetts court stated: "This prejudice, if it exists, is not created by law and cannot be changed by law." Similarly, in commenting on a Pennsylvania law mandating separate railcars for different races the Pennsylvania Supreme Court stated: "To assert separateness is not to declare inferiority ... It is simply to say that following the order of Divine Providence, human authority ought not to compel these widely separated races to intermix." Undaunted, the Committee appealed to the United States Supreme Court in 1896. Two legal briefs were submitted on Plessy's behalf. One was signed by Albion W. Tourgée and James C. Walker and the other by Samuel F. Phillips and his legal partner F. D. McKenney. Oral arguments were held before the Supreme Court on April 13, 1896. Tourgée and Phillips appeared in the courtroom to speak on behalf of Plessy.

Tourgée built his case upon violation of Plessy's rights under the Thirteenth Amendment, prohibiting slavery, and the Fourteenth Amendment, which guarantees the same rights to all citizens of the United States, and the equal protection of those rights, against the deprivation of life, liberty, or property without due process of law. Tourgée argued that the reputation of being a black man was "property", which, by the law, implied the inferiority of African Americans as compared to whites.

Judgment

John Marshall Harlan became known as the "Great Dissenter" for his fiery dissent in Plessy and other early civil rights cases.

The state legal brief was prepared by Attorney General Milton Joseph Cunningham of Natchitoches and New Orleans. Earlier, Cunningham had fought to restore white supremacy during Reconstruction.

Justice Edward Douglass White of Louisiana was one of the majority; the other six who voted in the seven-to-one majority decision were from states that had sided with the Union during the Civil War.

On May 18, 1896, in a seven-to-one decision written by Henry Billings Brown the Court rejected Plessy's arguments based on the Fourteenth Amendment, seeing no way in which the Louisiana statute violated it. In addition, the decision rejected the view that the Louisiana law implied any inferiority of blacks, in violation of the Fourteenth Amendment. Instead, it contended that the law separated the two races as a matter of public policy.

When summarizing, Justice Brown declared, "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." Justice Brown also cited a Boston case upholding segregated schools.

While the Court did not find a difference in quality between the whites-only and blacks-only railway cars, this was manifestly untrue in the case of most other separate facilities, such as public toilets, cafés, and public schools, where the facilities designated for blacks were consistently of lesser quality than those for whites.

Dissent

Justice John Marshall Harlan dissented, and predicted the court's decision would become as infamous as Dred Scott v. Sandford (1857). Justice Harlan was from Kentucky, which was a border state during the Civil War. Harlan said, in part:

The white race deems itself to be the dominant race in this country. And so it is in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case.

Precedence for 200

A. **Supreme court case that held that "Police must inform suspects of their rights before questioning"**

Q. **What is Miranda v. Arizona**

Miranda v. Arizona, 384 U.S. 436 (1966), was a landmark decision of the United States Supreme Court. In a 5–4 majority, the Court held that both inculpatory and exculpatory statements made in response to interrogation by a defendant in police custody will be admissible at trial only if the prosecution can show that the defendant was informed of the right to consult with an attorney before and during questioning and of the right against self-incrimination before police questioning, and that the defendant not only understood these rights, but voluntarily waived them.

This case has a significant impact on law enforcement in the United States, by making what became known as the Miranda rights part of routine police procedure to ensure that suspects were informed of their rights. The Supreme Court decided Miranda with three other consolidated cases: Westover v. United States, Vignera v. New York, and California v. Stewart.

The Miranda warning (often shortened to "Miranda", or "Mirandizing" a suspect) is the name of the formal warning that is required to be given by law enforcement in the United States to criminal suspects in police custody (or in a custodial situation) before they are interrogated, in accordance with the Miranda ruling. Its purpose is to ensure the accused are aware of, and reminded of, these rights before questioning or actions that are reasonably likely to elicit an incriminating response.

Per the U.S. Supreme Court decision Berghuis v. Thompkins (June 1, 2010), criminal suspects who are aware of their right to silence and to an attorney, but choose not to "unambiguously" invoke them, may find any subsequent voluntary statements treated as an implied waiver of their rights, and used as or as part of evidence. At least one scholar has argued that Thompkins effectively gutted Miranda.

Legal aid movement

During the 1960s, a movement which provided defendants with legal aid emerged from the collective efforts of various bar associations.

In the civil realm, it led to the creation of the Legal Services Corporation under the Great Society program of President Lyndon Baines Johnson. Escobedo v. Illinois, a case which closely foreshadowed Miranda, provided for the presence of counsel during police interrogation. This concept extended to a concern over police interrogation practices, which were considered by many[who?] to be barbaric and unjust. Coercive interrogation tactics were known in period slang as the "third degree".

Arrest and conviction

On March 13, 1963, Ernesto Miranda was arrested, by the Phoenix Police Department, based on circumstantial evidence linking him to the kidnapping and rape of an eighteen-year-old woman ten days earlier. After two hours of interrogation by police officers, Miranda signed a confession to the rape charge on forms that included the typed statement: "I do hereby swear that I make this statement voluntarily and of my own free will, with no threats, coercion, or promises of immunity, and with full knowledge of my legal rights, understanding any statement I make may be used against me."

However, at no time was Miranda told of his right to counsel. Before being presented with the form on which he was asked to write out the confession he had already given orally, he was not advised of his right to remain silent, nor was he informed that his statements during the interrogation would be used against him. At trial, when prosecutors offered Miranda's written confession as evidence, his court-appointed lawyer, Alvin Moore, objected that because of these facts, the confession was not truly voluntary and should be excluded. Moore's objection was overruled and based on this confession and other evidence, Miranda was convicted of rape and kidnapping. He was sentenced to 20–30 years of imprisonment on each charge, with sentences to run concurrently. Moore filed Miranda's appeal to the Arizona Supreme Court, claiming that Miranda's confession was not fully voluntary and should not have been admitted into the court proceedings. The Arizona Supreme Court affirmed the trial court's decision to admit the confession in State v. Miranda, 401 P.2d 721 (Ariz. 1965). In affirmation, the Arizona Supreme emphasized heavily the fact that Miranda did not specifically request an attorney.

Attorney John Paul Frank, former law clerk to Justice Hugo Black, represented Miranda in his appeal to the U.S. Supreme Court.

Opinion of the Supreme Court

Chief Justice Earl Warren, a former prosecutor, delivered the opinion of the Court, ruling that due to the coercive nature of the custodial interrogation by police (Warren cited several police training manuals which had not been provided in the arguments), no confession could be admissible under the Fifth Amendment self-incrimination clause and Sixth Amendment right to an attorney unless a suspect had been made aware of his rights and the suspect had then waived them:

The person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him.

Thus, Miranda's conviction was overturned. The Court also made clear what had to happen if the suspect chose to exercise his or her rights:

If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease... If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning.

Justice Brennan's comments on the Miranda decision.

Warren pointed to the existing practice of the Federal Bureau of Investigation (FBI) and the rules of the Uniform Code of Military Justice, both of which required notifying a suspect of his right to remain silent; the FBI warning included notice of the right to counsel.

However, the dissenting justices accused the majority of overreacting to the problem of coercive interrogations, and anticipated a drastic effect. They believed that, once warned, suspects would always demand attorneys, and deny the police the ability to gain confessions.

Clark's concurrence in part, dissent in part

In a separate concurrence in part, dissent in part, Justice Tom C. Clark argued that the Warren Court went "too far too fast". Instead, Justice Clark would use the "totality of the circumstances" test enunciated by Justice Goldberg in Haynes v. Washington. Under this test, the court would:

consider in each case whether the police officer prior to custodial interrogation added the warning that the suspect might have counsel present at the interrogation and, further, that a court would appoint one at his request if he was too poor to employ counsel. In the absence of warnings, the burden would be on the State to prove that counsel was knowingly and intelligently waived or that in the totality of the circumstances, including the failure to give the necessary warnings, the confession was clearly voluntary.

Harlan's dissent

In dissent, Justice John Marshall Harlan II wrote that "nothing in the letter or the spirit of the Constitution or in the precedents squares with the heavy-handed and one-sided action that is so precipitously taken by the Court in the name of fulfilling its constitutional responsibilities". Harlan closed his remarks by quoting former Justice Robert H. Jackson: "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added."

White's dissent

Justice Byron White took issue with the court announcing a new constitutional right when it had no "factual and textual bases" in the Constitution or previous opinions of the Court for the rule announced in the opinion. He stated: "The proposition that the privilege against self-incrimination forbids in-custody interrogation without the warnings specified in the majority opinion and without a clear waiver of counsel has no significant support in the history of the privilege or in the language of the Fifth Amendment." Nor did Justice White believe it had any basis in English common law.

White further warned of the dire consequences of the majority opinion:

I have no desire whatsoever to share the responsibility for any such impact on the present criminal process.

In some unknown number of cases, the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity.

Subsequent developments

Retrial

Miranda was retried in 1967 after the original case against him was thrown out. This time the prosecution, instead of using the confession, introduced other evidence and called witnesses. One witness was Twila Hoffman, a woman with whom Miranda was living at the time of the offense; she testified that he had told her of committing the crime. Miranda was convicted in 1967 and sentenced to serve 20 to 30 years. The Supreme Court of Arizona affirmed, and the United States Supreme Court denied review. Miranda was paroled in 1972. After his release, he returned to his old neighborhood and made a modest living autographing police officers' "Miranda cards" which contained the text of the warning, for reading to arrestees. He was stabbed to death during an argument in a bar on January 31, 1976. A suspect was arrested, but he, unlike Miranda, exercised his right to remain silent. With no evidence against him, he was released.

Another three defendants whose cases had been tied in with Miranda's – an armed robber, a stick-up man, and a bank robber – either made plea bargains to lesser charges or were found guilty again despite the exclusion of their confessions.

Reaction

The Miranda decision was widely criticized when it came down, as many felt it was unfair to inform suspected criminals of their rights, as outlined in the decision. Richard Nixon and other conservatives denounced Miranda for undermining the efficiency of the police, and argued the ruling would contribute to an increase in crime. Nixon, upon becoming President, promised to appoint judges who would be "strict constructionists" and who would exercise judicial restraint. Many supporters of law enforcement were angered by the decision's negative view of police officers.

Miranda warning

After the Miranda decision, the nation's police departments were required to inform arrested persons or suspects of their rights under the ruling prior to custodial interrogation. Such information is called a Miranda warning. Since it is usually required that the suspects be asked if they understand their rights, courts have also ruled that any subsequent waiver of Miranda rights must be knowing, intelligent, and voluntary.

Many American police departments have pre-printed Miranda waiver forms which a suspect must sign and date (after hearing and reading the warnings again) if an interrogation is to occur.

Precedence for 300

A. Case that overturned the Plessy v. Ferguson decision.

Q. What is Brown v. Board of Education?

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), was a landmark United States Supreme Court case in which the Court declared state laws establishing separate public schools for black and white students to be unconstitutional. The decision effectively overturned the Plessy v. Ferguson decision of 1896, which allowed state-sponsored segregation, insofar as it applied to public education. Handed down on May 17, 1954, the Warren Court's unanimous (9–0) decision stated that "separate educational facilities are inherently unequal." As a result, de jure racial segregation was ruled a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. This ruling paved the way for integration and was a major victory of the Civil Rights Movement, and a model for many future impact litigation cases. However, the decision's fourteen pages did not spell out any sort of method for ending racial segregation in schools, and the Court's second decision in Brown II (349 U.S. 294 (1955)) only ordered states to desegregate "with all deliberate speed".

Background

For much of the sixty years preceding the Brown case, race relations in the United States had been dominated by racial segregation. This policy had been endorsed in 1896 by the United States Supreme Court case of Plessy v. Ferguson, which held that as long as the separate facilities for the separate races were equal, segregation did not violate the Fourteenth Amendment ("no State shall ... deny to any person ... the equal protection of the laws").

The plaintiffs in Brown asserted that this system of racial separation, while masquerading as providing separate but equal treatment of both white and black Americans, instead perpetuated inferior accommodations, services, and treatment for black Americans. Racial segregation in education varied widely from the 17 states that required racial segregation to the 16 in which it was prohibited. Brown was influenced by UNESCO's 1950 Statement, signed by a wide variety of internationally renowned scholars, titled The Race Question. This declaration denounced previous attempts at scientifically justifying racism as well as morally condemning racism. Another work that the Supreme Court cited was Gunnar Myrdal's An American Dilemma: The Negro Problem and Modern Democracy (1944). Myrdal had been a signatory of the UNESCO declaration. The research performed by the educational psychologists Kenneth B. Clark and Mamie Phipps Clark also influenced the Court's decision. The Clarks' "doll test" studies presented substantial arguments to the Supreme Court about how segregation affected black schoolchildren's mental status.

The United States and the Soviet Union were both at the height of the Cold War during this time, and U.S. officials, including Supreme Court Justices, were highly aware of the harm that segregation and racism played on America's international image. When Justice William O. Douglas traveled to India in 1950, the first question he was asked was, "Why does America tolerate the lynching of Negroes?" Douglas later wrote that he had learned from his travels that "the attitude of the United States toward its colored minorities is a powerful factor in our relations with India." Chief Justice Earl Warren, nominated to the Supreme Court by President Eisenhower, echoed Douglas's concerns in a 1954 speech to the American Bar Association, proclaiming that "Our American system like all others is on trial both at home and abroad, ... the extent to which we maintain the spirit of our constitution with its Bill of Rights, will in the long run do more to make it both secure and the object of adulation than the number of hydrogen bombs we stockpile."

Case

Filing and arguments

In 1951, a class action suit was filed against the Board of Education of the City of Topeka, Kansas in the United States District Court for the District of Kansas. The plaintiffs were thirteen Topeka parents on behalf of their 20 children.

The suit called for the school district to reverse its policy of racial segregation. The Topeka Board of Education operated separate elementary schools under an 1879 Kansas law, which permitted (but did not require) districts to maintain separate elementary school facilities for black and white students in 12 communities with populations over 15,000. The plaintiffs had been recruited by the leadership of the Topeka NAACP. Notable among the Topeka NAACP leaders were the chairman McKinley Burnett; Charles Scott, one of three serving as legal counsel for the chapter; and Lucinda Todd.

The named plaintiff, Oliver L. Brown, was a parent, a welder in the shops of the Santa Fe Railroad, an assistant pastor at his local church, and an African American. He was convinced to join the lawsuit by Scott, a childhood friend. Brown's daughter Linda, a third grader, had to walk six blocks to her school bus stop to ride to Monroe Elementary, her segregated black school one mile (1.6 km) away, while Sumner Elementary, a white school, was seven blocks from her house.

As directed by the NAACP leadership, the parents each attempted to enroll their children in the closest neighborhood school in the fall of 1951. They were each refused enrollment and directed to the segregated schools.

The case "Oliver Brown et al. v. The Board of Education of Topeka, Kansas" was named after Oliver Brown as a legal strategy to have a man at the head of the roster. The lawyers, and the National Chapter of the NAACP, also felt that having Mr. Brown at the head of the roster would be better received by the U.S. Supreme Court Justices. The 13 plaintiffs were: Oliver Brown, Darlene Brown, Lena Carper, Sadie Emmanuel, Marguerite Emerson, Shirley Fleming, Zelma Henderson, Shirley Hodison, Maude Lawton, Alma Lewis, Iona Richardson, and Lucinda Todd. The last surviving plaintiff, Zelma Henderson, died in Topeka, on May 20, 2008, at age 88.

The District Court ruled in favor of the Board of Education, citing the U.S. Supreme Court precedent set in Plessy v. Ferguson, 163 U.S. 537 (1896), which had upheld a state law requiring "separate but equal" segregated facilities for blacks and whites in railway cars. The three-judge District Court panel found that segregation in public education has a detrimental effect on negro children, but denied relief on the ground that the negro and white schools in Topeka were substantially equal with respect to buildings, transportation, curricula, and educational qualifications of teachers.

Supreme Court review

The case of Brown v. Board of Education as heard before the Supreme Court combined five cases: Brown itself, Briggs v. Elliott (filed in South Carolina), Davis v. County School Board of Prince Edward County (filed in Virginia), Gebhart v. Belton (filed in Delaware), and Bolling v. Sharpe (filed in Washington D.C.).

All were NAACP-sponsored cases. The Davis case, the only case of the five originating from a student protest, began when 16-year-old Barbara Rose Johns organized and led a 450-student walkout of Moton High School. The Gebhart case was the only one where a trial court, affirmed by the Delaware Supreme Court, found that discrimination was unlawful; in all the other cases the plaintiffs had lost as the original courts had found discrimination to be lawful.

The Kansas case was unique among the group in that there was no contention of gross inferiority of the segregated schools' physical plant, curriculum, or staff. The district court found substantial equality as to all such factors. The lower court, in its opinion, noted that, in Topeka, "the physical facilities, the curricula, courses of study, qualification and quality of teachers, as well as other educational facilities in the two sets of schools [were] comparable." The lower court observed that "colored children in many instances are required to travel much greater distances than they would be required to travel could they attend a white school" but also noted that the school district "transports colored children to and from school free of charge" and that "[n]o such service [was] provided to white children."

In the Delaware case the district court judge in Gebhart ordered that the black students be admitted to the white high school due to the substantial harm of segregation and the differences that made the separate schools unequal.

The NAACP's chief counsel, Thurgood Marshall—who was later appointed to the U.S. Supreme Court in 1967—argued the case before the Supreme Court for the plaintiffs. Assistant attorney general Paul Wilson—later distinguished emeritus professor of law at the University of Kansas—conducted the state's ambivalent defense in his first appellate argument.

In December 1952, the Justice Department filed a friend of the court brief in the case. The brief was unusual in its heavy emphasis on foreign-policy considerations of the Truman administration in a case ostensibly about domestic issues. Of the seven pages covering "the interest of the United States," five focused on the way school segregation hurt the United States in the Cold War competition for the friendship and allegiance of non-white peoples in countries then gaining independence from colonial rule. Attorney General James P. McGranery noted that

The existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries. Racial discrimination furnishes grist for the Communist propaganda mills.

The brief also quoted a letter by Secretary of State Dean Acheson lamenting that

The United States is under constant attack in the foreign press, over the foreign radio, and in such international bodies as the United Nations because of various practices of discrimination in this country.

British barrister and parliamentarian Anthony Lester has written that "Although the Court's opinion in Brown made no reference to these considerations of foreign policy, there is no doubt that they significantly influenced the decision."

Unanimous opinion and consensus building

The members of the U.S. Supreme Court on May 17, 1954, ruled unanimously that racial segregation in public schools is unconstitutional.

In spring 1953, the Court heard the case but was unable to decide the issue and asked to rehear the case in fall 1953, with special attention to whether the Fourteenth Amendment's Equal Protection Clause prohibited the operation of separate public schools for whites and blacks.

The Court reargued the case at the behest of Associate Justice Felix Frankfurter, who used reargument as a stalling tactic, to allow the Court to gather a consensus around a Brown opinion that would outlaw segregation. The justices in support of desegregation spent much effort convincing those who initially intended to dissent to join a unanimous opinion. Although the legal effect would be same for a majority rather than unanimous decision, it was felt that dissent could be used by segregation supporters as a legitimizing counter-argument.

Conference notes and draft decisions illustrate the division of opinions before the decision was issued. Justices Douglas, Black, Burton, and Minton were predisposed to overturn Plessy. Fred M. Vinson noted that Congress had not issued desegregation legislation; Stanley F. Reed discussed incomplete cultural assimilation and states' rights and was inclined to the view that segregation worked to the benefit of the African-American community; Tom C. Clark wrote that "we had led the states on to think segregation is OK and we should let them work it out." Felix Frankfurter and Robert H. Jackson disapproved of segregation, but were also opposed to judicial activism and expressed concerns about the proposed decision's enforceability. Chief Justice Vinson had been a key stumbling block. After Vinson died in September 1953, President Dwight D. Eisenhower appointed Earl Warren as Chief Justice. Warren had supported the integration of Mexican-American students in California school systems following Mendez v. Westminster. However, Eisenhower invited Earl Warren to a White House dinner, where the president told him: "These [southern whites] are not bad people. All they are concerned about is to see that their sweet little girls are not required to sit in school alongside some big overgrown Negroes." Nevertheless, the Justice Department sided with the African American plaintiffs.

In his reading of the unanimous decision, Justice Warren noted the adverse psychological effects that segregated schools had on African American children. Brown's cite of the Kenneth and Mamie Doll Study was criticized by Justice Clarence Thomas in a later concurring opinion for implying black inferiority. According to Susan Firestone, the study itself is dubious in conclusion and unreliable in reproduction.

While all but one justice personally rejected segregation, the judicial restraint faction questioned whether the Constitution gave the Court the power to order its end. The activist faction believed the Fourteenth Amendment did give the necessary authority and were pushing to go ahead. Warren, who held only a recess appointment, held his tongue until the Senate confirmed his appointment.

Warren convened a meeting of the justices, and presented to them the simple argument that the only reason to sustain segregation was an honest belief in the inferiority of Negroes. Warren further submitted that the Court must overrule Plessy to maintain its legitimacy as an institution of liberty, and it must do so unanimously to avoid massive Southern resistance. He began to build a unanimous opinion.

Although most justices were immediately convinced, Warren spent some time after this famous speech convincing everyone to sign onto the opinion. Justices Jackson and Reed finally decided to drop their dissent. The final decision was unanimous. Warren drafted the basic opinion and kept circulating and revising it until he had an opinion endorsed by all the members of the Court. Reed was the last holdout and reportedly cried during the reading of the opinion.

Holding

Reporters who observed the court holding were surprised by two facts. First, the court made a unanimous decision. Prior to the ruling, there were reports that the court members were sharply divided and might not be able to agree. Second, the attendance of Justice Robert H. Jackson who had suffered a mild heart attack and was not expected to return to the bench until early June 1954. "Perhaps to emphasize the unanimity of the court, perhaps from a desire to be present when the history-making verdict was announced, Justice Jackson was in his accustomed seat when the court convened." Reporters also noted that former Secretary of State Dean Acheson (who had related the case to foreign policy considerations) and current Attorney General Herbert Brownell were in the courtroom.

The key holding of the Court was that, even if segregated black and white schools were of equal quality in facilities and teachers, segregation by itself was harmful to black students and unconstitutional. They found that a significant psychological and social disadvantage was given to black children from the nature of segregation itself, drawing on research conducted by Kenneth Clark assisted by June Shagaloff. This aspect was vital because the question was not whether the schools were "equal", which under Plessy they nominally should have been, but whether the doctrine of separate was constitutional. The justices answered with a strong "no":

[D]oes segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does. ...

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

We conclude that, in the field of public education, the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

Precedence for 400

A. Supreme court case determined that right to counsel is a fundamental right.

Q. What is Gideon v. Wainwright

Gideon v. Wainwright, 372 U.S. 335 (1963), is a landmark case in United States Supreme Court history. In it, the Supreme Court unanimously ruled that states are required under the Sixth Amendment to the U.S. Constitution to provide an attorney to defendants in criminal cases who are unable to afford their own attorneys. The case extended the right to counsel, which had been found under the Fifth and Sixth Amendments to impose requirements on the federal government, by imposing those requirements upon the states as well.

Facts and prior history

Between midnight and 8:00 a.m. on June 3, 1961, a burglary occurred at the Bay Harbor Pool Room in Panama City, Florida. An unknown person broke a door, smashed a cigarette machine and a record player, and stole money from a cash register. Later that day, a witness reported that he had seen Clarence Earl Gideon in the poolroom at around 5:30 that morning, leaving with a wine bottle and money in his pockets. Based on this accusation alone, the police arrested Gideon and charged him with breaking and entering with intent to commit petty larceny.

Gideon appeared in court alone as he was too poor to afford counsel, whereupon the following conversation took place:

The COURT: Mr. Gideon, I am sorry, but I cannot appoint counsel to represent you in this case. Under the laws of the State of Florida, the only time the court can appoint counsel to represent a defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint counsel to defend you in this case.

GIDEON: The United States Supreme Court says I am entitled to be represented by counsel.

The Florida court declined to appoint counsel for Gideon. As a result, he was forced to act as his own counsel and conduct his own defense in court, emphasizing his innocence in the case. At the conclusion of the trial the jury returned a guilty verdict. The court sentenced Gideon to serve five years in the state prison.

From the cell at Florida State Prison, making use of the prison library and writing in pencil on prison stationery, Gideon appealed to the United States Supreme Court in a suit against the Secretary of the Florida Department of Corrections, H.G. Cochran. Cochran later retired and was replaced with Louie L. Wainwright before the case was heard by the Supreme Court. Gideon argued in his appeal that he had been denied counsel and, therefore, his Sixth Amendment rights, as applied to the states by the Fourteenth Amendment, had been violated.

The Supreme Court assigned Gideon a prominent Washington, D.C., attorney, future Supreme Court justice Abe Fortas of the law firm Arnold, Fortas & Porter. Opposing, Bruce Jacob, who later became Dean of the Mercer University School of Law and Dean of Stetson University College of Law, argued the case for the State of Florida. Fortas was assisted by longtime Arnold, Fortas & Porter partner Abe Krash and famed legal scholar John Hart Ely, then a third-year student at Yale Law School.

During oral arguments before the Supreme Court, Fortas repeatedly referenced that the existing framework for a state trial court to appoint counsel was unworkable. Under the existing framework, a magistrate in a preliminary hearing made a determination on whether there were "special circumstances" in the case which supported that the Defendant should receive counsel. However, as Mr. Fortas highlighted, that determination occurred too early in the case to be of any use. For example, whether a witness's statement should be barred because it was hearsay, is an extremely complicated issue that no lay man could readily confront, and such a situation only arose in the middle of a trial.

As a second point, Mr. Fortas presented during oral argument that it was widely accepted in the legal community, that the first thing any reputable lawyer does when he is accused of a crime is hire an attorney. In providing an example, Mr. Fortas presented the justices with the fact that when Clarence Darrow, who was widely known as the greatest criminal attorney in the United States, was charged with jury tampering and suborning perjury, the first thing he did was get an attorney to represent him. Surely, as Mr. Fortas suggested, if the greatest attorney in the US needed an attorney to represent him in criminal proceedings, than a man without a legal education or any education for that matter needed a lawyer just the same.

Court decision

The first page of Gideon's handwritten petition for a writ of certiorari to the US Supreme Court.

The Supreme Court's decision was announced on March 18, 1963, and delivered by Justice Hugo Black. The decision was announced as unanimous in favor of Gideon. Two concurring opinions were written by Justices Clark and Douglas. The Supreme Court decision specifically cited its previous ruling in Powell v. Alabama. Whether or not the decision in Powell v. Alabama applied to non-capital cases had sparked heated debate. Betts v. Brady had earlier held that, unless certain circumstances were present, such as illiteracy or stupidity of the defendant, or an especially complicated case, there was no need for a court-appointed attorney in state court criminal proceedings. Betts had thus provided selective application of the Sixth Amendment right to counsel to the states, depending on the circumstances, as the Sixth Amendment had only been held binding in federal cases. Gideon v. Wainwright overruled Betts v. Brady, instead holding that the assistance of counsel, if desired by a defendant who could not afford to hire counsel, was a fundamental right under the United States Constitution, binding on the states, and essential for a fair trial and due process of law regardless of the circumstances of the case.

Justice Clark's concurring opinion stated that the Sixth Amendment to the Constitution does not distinguish between capital and non-capital cases, so legal counsel must be provided for an indigent defendant in all cases. Justice Harlan's concurring opinion stated that the mere existence of a serious criminal charge in itself constituted special circumstances requiring the services of counsel at trial.

The Supreme Court remanded the case to the Supreme Court of Florida for "further action not inconsistent with this decision."

Gideon v. Wainwright was one of a series of Supreme Court decisions that confirmed the right of defendants in criminal proceedings, upon request, to have counsel appointed both during trial and on appeal. In the subsequent cases of Massiah v. United States, 377 U.S. 201 (1964) and Miranda v. Arizona 384 U.S. 436 (1966), the Supreme Court further extended the rule to apply even during police interrogation.

Implications

About 2000 individuals were freed in Florida alone as a result of the Gideon decision. The decision did not directly result in Gideon being freed; instead, he received a new trial with the appointment of defense counsel at the government's expense.

Gideon chose W. Fred Turner to be his lawyer in his second trial. The retrial took place on August 5, 1963, five months after the Supreme Court ruling. Turner, during the trial, picked apart the testimony of eyewitness Henry Cook, and in his opening and closing statements suggested that Cook likely had been a lookout for a group of young men who broke into the poolroom to steal beer, then grabbed the coins while they were there. Turner also obtained a statement from the cab driver who had taken Gideon from Bay Harbor to a bar in Panama City, stating that Gideon was carrying neither wine, beer, nor Coke when he picked him up, even though Cook testified that he had watched Gideon walk from the pool hall to the phone and then wait for a cab. This testimony completely discredited Cook.

The jury acquitted Gideon after one hour of deliberation. After his acquittal, Gideon resumed his previous life and married again some time later. He died of cancer in Fort Lauderdale on January 18, 1972, at age 61. Gideon's family in Missouri accepted his body and laid him to rest in an unmarked grave. A granite headstone was added later. It was inscribed with a quote from a letter Gideon wrote to Abe Fortas, the attorney appointed to represent him in the Supreme Court: "Each era finds an improvement in law for the benefit of mankind."

Impact on courts

The former "incorrect trial" rule, where the government was given a fair amount of latitude in criminal proceedings as long as there were no "shocking departures from fair procedure" was discarded in favor of a firm set of "procedural guarantees" based on the Constitution. The court reversed Betts and adopted rules that did not require a case-by-case analysis, but instead established the requirement of appointed counsel as a matter of right, without a defendant's having to show "special circumstances" that justified the appointment of counsel. In this way, the case helped to refine stare decisis: when a prior appellate court decision should be upheld and what standard should be applied to test a new case against case precedent to achieve acceptable practice and due process of law.

Public defender system

Many changes have been made in the prosecution and legal representation of indigent defendants since the Gideon decision. The decision created and then expanded the need for public defenders which had previously been rare. For example, immediately following the decision, Florida required public defenders in all of the state's circuit courts. The need for more public defenders also led to a need to ensure that they were properly trained in criminal defense in order to allow defendants to receive as fair a trial as possible. Several states and counties followed suit. Washington D.C., for instance, has created a training program for their public defenders, who must receive rigorous training before they are allowed to represent defendants, and must continue their training in order to remain current in criminal law, procedure, and practices. In 2010, a public defender's office in the South Bronx, The Bronx Defenders, created the Center for Holistic Defense, which has helped other public defender offices from Montana to Massachusetts, developed a model of public defense called holistic defense or holistic advocacy. In it, criminal defense attorneys work on interdisciplinary teams, alongside civil attorneys, social workers, and legal advocates to help clients with not only direct but also collateral aspects of their criminal cases. More recently the American Bar Association and the National Legal Aid and Defender Association have set minimum training requirements, caseload levels, and experience requirements for defenders. There is often controversy whether caseloads set upon public defenders give them enough time to sufficiently defend their clients. Some criticize the mindset in which public defense lawyers encourage their clients to simply plead guilty. Some defenders say this is intended to lessen their own workload, while others would say it is intended to obtain a lighter sentence by negotiating a plea bargain as compared with going to trial and perhaps having a harsher sentence imposed. Tanya Greene, an ACLU lawyer, has said that is why 90 to 95 percent of defendants do plead guilty: "You've got so many cases, limited resources, and there's no relief. You go to work, you get more cases. You have to triage."]

Right to counsel

The Doughty v. Maxwell decision demonstrates the differences between how states and the federal government address standards for waiver of the right to counsel. In this case the Supreme Court granted certiorari and reversed the decision of the state court in Doughty, which held that regardless of Gideon, the defendant waived his or her right to appointed counsel by entering a plea of guilty. The underlying alleged crime and trial in Doughty took place in Ohio, which had its own way of interpreting the right to counsel as do many states. Pennsylvania and West Virginia also deemed that the right to counsel was waived when a plea of guilty was entered. Depending upon one's viewpoint, rules such as these could be seen as an attempt by a state to establish reasonable rules in criminal cases or as an attempt to save money even at the expense of denying a defendant due process. This varies a great deal from federal law, which generally has stricter guidelines for waiving the right to counsel. An analogous area of criminal law is the circumstances under which a criminal defendant can waive the right to trial. Under federal law, the defendant can only waive his or her right to trial if it is clear that the defendant understands the "charges, the consequences of the various pleas, and the availability of counsel". State laws on the subject are often not as strict, making it easier for prosecutors to obtain a defendant's waiver of the right to trial.

Precedence for 500

A. Supreme court case that established the doctrine of "judicial review"

Q. What is Marbury v. Madison

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), is a landmark case by the United States Supreme Court which forms the basis for the exercise of judicial review in the United States under Article III of the Constitution. The landmark decision helped define the boundary between the constitutionally separate executive and judicial branches of the American form of government.

The case resulted from a petition to the Supreme Court by William Marbury, who had been appointed Justice of the Peace in the District of Columbia by President John Adams but whose commission was not subsequently delivered. Marbury petitioned the Supreme Court to force the new Secretary of State, James Madison, to deliver the documents. The Court, with John Marshall as Chief Justice, found firstly that Madison's refusal to deliver the commission was both illegal and correctible. Nonetheless, the Court stopped short of ordering Madison (by writ of mandamus) to hand over Marbury's commission, instead holding that the provision of the Judiciary Act of 1789 that enabled Marbury to bring his claim to the Supreme Court was itself unconstitutional, since it purported to extend the Court's original jurisdiction beyond that which Article III established. The petition was therefore denied.

The Marbury v. Madison decision expanded the power of the Supreme Court in general, by announcing that the 1789 law which gave the Court jurisdiction in this case was unconstitutional. Marbury thus lost his case, which the Court said he should have won, but, in explaining its inability to provide Marbury the remedy it said he deserved, the Court established the principle of judicial review, i.e., the power to declare a law unconstitutional.

Background of the case

In the presidential election of 1800, Democratic-Republican Thomas Jefferson defeated Federalist John Adams, becoming the third President of the United States. Although the election was decided on February 17, 1801, Jefferson did not take office until March 4, 1801. Until that time, outgoing president Adams and the Federalist-controlled 6th Congress were still in power. During this lame-duck session, Congress passed the Judiciary Act of 1801. This Act modified the Judiciary Act of 1789 in establishing ten new district courts, expanding the number of circuit courts from three to six, and adding additional judges to each circuit, giving the President the authority to appoint Federal judges and justices of the peace. The act also reduced the number of Supreme Court justices from six to five, effective upon the next vacancy in the Court.

William Marbury

On March 3, just before his term was to end, Adams, in an attempt to stymie the incoming Democratic-Republican Congress and administration, appointed 16 Federalist circuit judges and 42 Federalist justices of the peace to offices created by the Judiciary Act of 1801. These appointees, the infamous "Midnight Judges", included William Marbury, a prosperous financier in Maryland. An ardent Federalist, Marbury was active in Maryland politics and a vigorous supporter of the Adams presidency. He had been appointed to the position of justice of the peace in the District of Columbia. The term for a justice of the peace was five years, and they were "authorized to hold courts and cognizance of personal demands of the value of 20 dollars".

On the following day, the appointments were approved en masse by the Senate; however, to go into effect, the commissions had to be delivered to those appointed. This task fell to John Marshall, who, even though recently appointed Chief Justice of the United States, continued as the acting Secretary of State at President Adams's personal request.

While a majority of the commissions were delivered, it proved impossible for all of them to be delivered before Adams's term as president expired. As these appointments were routine in nature, Marshall assumed the new Secretary of State James Madison would see they were delivered, since "they had been properly submitted and approved, and were, therefore, legally valid appointments." On March 4, 1801, Thomas Jefferson was sworn in as President. As soon as he was able, President Jefferson ordered Levi Lincoln, who was the new administration's Attorney General and acting Secretary of State until the arrival of James Madison, not to deliver the remaining appointments. Without the commissions, the appointees were unable to assume the offices and duties to which they had been appointed. In Jefferson's opinion, the undelivered commissions, not having been delivered on time, were void.

The newly sworn-in Democratic-Republican 7th Congress immediately set about voiding the Judiciary Act of 1801 with their own Judiciary Act of 1802 which reversed the act of 1801 so that the Judicial branch once again operated under the dictates of the original Judiciary Act of 1789. In addition, it replaced the Court's two annual sessions with one session to begin on the first Monday in February, and "canceled the Supreme Court term scheduled for June of that year [1802] ... seeking to delay a ruling on the constitutionality of the repeal act until months after the new judicial system was in operation".

Status of the judicial power before Marbury

Secretary of State Madison was ordered by President Jefferson to withhold the commissions made at the last minute by outgoing President Adams.

Sir Edward Coke

Although the power of judicial review is sometimes said to have originated with Marbury, the concept of judicial review has older roots in the United States, and possibly in England as well. The idea is often attributed to the English jurist Edward Coke and his opinion in Dr. Bonham’s Case, 8 Co. Rep. 107a (1610), although this attribution has been called "one of the most enduring myths of American constitutional law and theory, to say nothing of history".Bonham's Case was not mentioned in Marbury v. Madison, and the Court later stated that Bonham's Case did not make common law supreme over statutory law:

[N]otwithstanding what was attributed to Lord COKE in Bonham's Case, 8 Reporter, 115, 118a, the omnipotence of parliament over the common law was absolute, even against common right and reason. The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the commons.

Coke's meaning has been disputed over the years, for example by scholars who contend that Coke only meant to construe a statute without challenging Parliamentary sovereignty. His remarks that seem suggestive of judicial review are sometimes considered obiter dicta, rather than part of the rationale of the case.

Any notion that courts could declare statutes void was defeated in England with the Glorious Revolution of 1688, when King James II was removed and the elected Parliament declared itself supreme. However, it continued to be known in the American colonies and at the bars of young states, where Coke's books were very influential. The doctrine was specifically enshrined in some state constitutions, and by 1803 it had been employed in both State and Federal courts in actions dealing with state statutes, but only insofar as the statutes conflicted with the language of state constitutions.

A number of legal scholars argue that the power of judicial review in the United States predated Marbury, and that Marbury was merely the first Supreme Court case to exercise a power that already existed and was acknowledged. These scholars point to statements about judicial review made in the Constitutional Convention and the state ratifying conventions, statements about judicial review in publications debating ratification, and court cases before Marbury that involved judicial review.

At the Constitutional Convention in 1787, there were a number of references to judicial review. Fifteen delegates made statements about the power of the federal courts to review the constitutionality of laws, with all but two of them supporting the idea.

Likewise, at the state ratifying conventions, over two dozen delegates in at least seven states indicated that under the Constitution, the federal courts would have the power to declare statutes unconstitutional. Professors Saikrishna Prakash and John Yoo point out, with respect to the ratification of the Constitution, that "no scholar to date has identified even one participant in the ratification fight who argued that the Constitution did not authorize judicial review of Federal statutes. This silence in the face of the numerous comments on the other side is revealing."

The concept of judicial review was discussed in The Federalist Papers. Alexander Hamilton asserted in Federalist No. 78 that under the Constitution, the federal courts would have not just the power, but the duty, to examine the constitutionality of statutes:

[T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

The opponents to ratification, known as Anti-federalists, agreed that the federal courts would have the power to declare statutes unconstitutional, but were concerned that this would give the federal courts too much power. Robert Yates argued: "The supreme court then have a right, independent of the legislature, to give a construction to the constitution and every part of it, and there is no power provided in this system to correct their construction or do it away. If, therefore, the legislature pass any laws, inconsistent with the sense the judges put upon the constitution, they will declare it void."

A number of courts engaged in judicial review before Marbury was decided. At the time of the Constitutional Convention, there had been cases in the state courts of at least seven states involving judicial review of state statutes. Between the ratification of the Constitution in 1788 and the Supreme Court's decision in Marbury in 1803, judicial review was used a number of times in both state and federal courts. One scholar counted thirty-one cases during this period in which courts found statutes unconstitutional, concluding: "The sheer number of these decisions not only belies the notion that the institution of judicial review was created by Chief Justice Marshall in Marbury, it also reflects widespread acceptance and application of the doctrine."

Scholars have pointed out the Supreme Court itself already had engaged in judicial review before Marbury, although it had not struck down the statute in question because it concluded that the statute was constitutional. In Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796), the Court upheld a federal tax on carriages against a claim that the tax violated the "direct tax" provision of the Constitution. Therefore, the concept of judicial review was familiar before Marbury.

However, it is important to note that nothing in the text of the Constitution explicitly authorized the power of judicial review, despite persistent fears voiced by Anti-federalists over the power of the new Federal court system:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State, between Citizens of different States, between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

— U.S. Constitution, Article III, Section 2, Clause 1

Relevant law

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned [within the judicial power of the United States], 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.

— U.S. Constitution, Article III, Section 2, Clause 2

The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after provided for; and shall have power to issue writs of prohibition to the district courts [...] and writs of mandamus [...] to any courts appointed, or persons holding office, under the authority of the United States.

— Judiciary Act of 1789, § 13

Issue

Inscription on the wall of the Supreme Court Building from Marbury v. Madison, in which Chief Justice John Marshall outlined the concept of judicial review.

There are three ways a case can be heard in the Supreme Court: (1) filing directly in the Supreme Court; (2) filing in a lower federal court, such as a district court, and appealing all the way up to the Supreme Court; (3) filing in a state court, appealing all the way up through the state's highest courts, and then appealing to the Supreme Court on an issue of federal law. The first is an exercise of the Court's original jurisdiction; the second and third are exercises of the Supreme Court's appellate jurisdiction.

Because Marbury filed his petition for the writ of mandamus directly in the Supreme Court, the Court needed to be able to exercise original jurisdiction over the case in order to have the power to hear it.

Marbury's argument is that in the Judiciary Act of 1789, Congress granted the Supreme Court original jurisdiction over petitions for writs of mandamus. This raises several issues that the Supreme Court had to address:

Does Article III of the Constitution create a floor for original jurisdiction, which Congress can add to, or does it create an exhaustive list that Congress can't modify at all?

If Article III's original jurisdiction is an exhaustive list, but Congress tries to modify it anyway, who wins that conflict, Congress or the Constitution?

And, more importantly, who is supposed to decide who wins?

In its answer to this last question, the Supreme Court formalizes the notion of judicial review. In short, the constitutional issue on which Marbury v. Madison was decided was whether Congress could expand the original jurisdiction of the Supreme Court.

Decision

On February 24, 1803, the Court rendered a unanimous (4–0) decision, that Marbury had the right to his commission but the court did not have the power to force Madison to deliver the commission. Chief Justice Marshall wrote the opinion of the court. Marshall presented the case as raising three distinct questions:

Did Marbury have a right to the commission?

Do the laws of the country give Marbury a legal remedy?

Is asking the Supreme Court for a writ of mandamus the correct legal remedy?

Marshall quickly answered the first two questions affirmatively. He found that the failure to deliver the commission was "violative of a vested legal right".

In deciding whether Marbury had a remedy, Marshall stated: "The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right." One of the key legal principles on which Marbury relies is the notion that for every violation of a vested legal right, there must be a legal remedy. Marshall next described two distinct types of Executive actions: political actions, where the official can exercise discretion, and purely ministerial functions, where the official is legally required to do something. Marshall found that delivering the appointment to Marbury was a purely ministerial function required by law, and therefore the law provided him a remedy.

A federal court has a "special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.'" If a court does not have the power to hear a case, it will not issue dicta. Consequently, with exceptions not applicable here, a federal court must decide whether it has jurisdiction before discussing the merits of the case. Chief Justice Marshall, however, did not address jurisdictional issues until addressing the first two questions presented above. Because of the canon of constitutional avoidance (i.e., where a statute can fairly be interpreted so as to avoid a constitutional issue, it should be so interpreted), courts generally deal with the constitutional issues only if necessary. In this case, the jurisdictional issue was a constitutional one.

In analyzing the third question, Marshall divided the question further, asking if a writ of mandamus was the correct means by which to restore Marbury to his right, and if so, whether the writ Marbury sought could issue from the Supreme Court. Concluding quickly that since a writ of mandamus, by definition, was the correct judicial means to order an official of the United States (in this case, the Secretary of State) to do something required of him (in this case, deliver a commission), Marshall devotes the remainder of his inquiry at the second part of the question: "Whether it [the writ] can issue from this court".

Marshall first examined the Judiciary Act of 1789 and determined that the Act purported to give the Supreme Court original jurisdiction over writs of mandamus. Marshall then looked to Article III of the Constitution, which defines the Supreme Court's original and appellate jurisdictions (see Relevant Law above). Marbury had argued that the Constitution was only intended to set a floor for original jurisdiction that Congress could add to. Marshall disagreed and held that Congress does not have the power to modify the Supreme Court's original jurisdiction. Consequently, Marshall found that the Constitution and the Judiciary Act conflict.

This conflict raised the important question of what happens when an Act of Congress conflicts with the Constitution. Marshall answered that Acts of Congress that conflict with the Constitution are not law and the Courts are bound instead to follow the Constitution, affirming the principle of judicial review. In support of this position Marshall looked to the nature of the written Constitution—there would be no point of having a written Constitution if the courts could just ignore it. "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" Marshall also argued that the very nature of the judicial function requires courts to make this determination. Since it is a court's duty to decide cases, courts have to be able to decide what law applies to each case. Therefore, if two laws conflict with each other, a court must decide which law applies. Finally, Marshall pointed to the judge's oath requiring them to uphold the Constitution, and to the Supremacy Clause of the Constitution, which lists the "Constitution" before the "laws of the United States". Part of the core of this reasoning is found in the following statements from the decision:

It is emphatically the province and duty of the Judicial Department [the judicial branch] to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each.

So, if a law [e.g., a statute or treaty] be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law [e.g., the statute or treaty].

This doctrine would subvert the very foundation of all written constitutions.

"In denying his request, the Court held that it lacked jurisdiction because Section 13 of the Judiciary Act passed by Congress in 1789, which authorized the Court to issue such a writ, was unconstitutional and thus invalid."

Name That Case for 100

A. Case established that wearing armbands in a school was not disruptive, and did not impinge upon the rights of others. It was also determined that their actions were protected by Freedom of Speech and Due Process.

Q. Tinker v Des Moines

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), was a landmark decision by the United States Supreme Court that defined the constitutional rights of students in U.S. public schools. The Tinker test is still used by courts today to determine whether a school's disciplinary actions violate students' First Amendment rights.

Background of the case

In 1965, Des Moines, Iowa residents John F. Tinker (15 years old), his siblings Mary Beth Tinker (13 years old), Hope Tinker (11 years old), and Paul Tinker (8 years old), along with their friend Christopher Eckhardt (16 years old) decided to wear black armbands to their schools (high school for John and Christopher, junior high for Mary Beth, elementary school for Hope and Paul) in protest of the Vietnam War and supporting the Christmas Truce called for by Senator Robert F. Kennedy. The principals of the Des Moines schools learned of the plan and met on December 14 to create a policy that stated that school children wearing an armband would be asked to remove it immediately. Students violating the policy would be suspended and allowed to return to school after agreeing to comply with it. The participants decided to violate this policy. Mary Beth Tinker and Christopher Eckhardt were suspended from school for wearing the armbands on December 16 and John Tinker was suspended for doing the same on the following day. (The two youngest participants were not punished.) Mary Beth, Christopher, and John were suspended from school until after January 1, 1966, when their protest had been scheduled to end.

A suit was filed after the Iowa Civil Liberties Union approached the Tinker family and the ACLU agreed to help with the lawsuit. The children's fathers filed suit in the U.S. District Court, which upheld the decision of the Des Moines school board. A tie vote in the U.S. Court of Appeals for the 8th Circuit meant that the U.S. District Court's decision continued to stand, and forced the Tinkers and Eckhardts to appeal to the Supreme Court directly. The case was argued before the court on November 12, 1968.

The case was funded by Des Moines residents Louise Noun, then the president of the Iowa Civil Liberties Union, and her brother, Joseph Rosenfield, a businessman.

Legal precedents and issues

Previous decisions, such as West Virginia State Board of Education v. Barnette, had established that students did have some constitutional protections in public school. This case was the first time that the court set forth standards for safeguarding public school students' free speech rights. This case involved symbolic speech, which was first recognized in Stromberg v. California.

The Court's decision

Majority opinion

The court's 7–2 decision held that the First Amendment applied to public schools, and that administrators would have to demonstrate constitutionally valid reasons for any specific regulation of speech in the classroom. The court observed, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Justice Abe Fortas wrote the majority opinion, holding that the speech regulation at issue in Tinker was "based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation's part in the conflagration in Vietnam." The Court held that for school officials to justify censoring speech, they "must be able to show that [their] action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," that the conduct that would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." The Court found that the actions of the Tinkers in wearing armbands did not cause disruption and held that their activity represented constitutionally protected symbolic speech.

Dissents

Justices Hugo Black and John M. Harlan II dissented. Black, who had long believed that disruptive "symbolic speech" was not constitutionally protected, wrote, "While I have always believed that under the First and Fourteenth Amendments neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases." Black argued that the Tinkers' behavior was indeed disruptive and declared, "I repeat that if the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary."

Harlan dissented on the grounds that he "[found] nothing in this record which impugns the good faith of respondents in promulgating the armband regulation."

Subsequent jurisprudence

Tinker remains a viable and frequently cited Court precedent, though Court decisions have determined limitations on the scope of student free speech rights. In Bethel School District v. Fraser, a 1986 case, the Supreme Court held that a high school student's sexual innuendo-laden speech during a student assembly was not constitutionally protected. Though Fraser applies the Tinker test of disruption to school decorum, if not undermining of educational mission, the effect is to make an exception to Tinker for "indecent" speech. Hazelwood v. Kuhlmeier, where the court ruled that schools have the right to regulate, for legitimate educational reasons, the content of non-forum, school-sponsored newspapers, also limits Tinker's application. The Court in Hazelwood clarified that both Fraser and Hazelwood were decided under the doctrine of Perry Education Association v. Perry Local Educators Association. Such a distinction keeps undisturbed the Material Disruption doctrine of Tinker, while deciding certain student free speech cases under the Nonpublic Forum doctrine of Perry. In Morse v. Frederick, the so-called "Bong Hits For Jesus" case of 2007, the Court held that schools may, consistent with the First Amendment, restrict student speech at a school-sponsored event, even those events occurring off school grounds, when that speech is reasonably viewed as promoting illegal drug use. In 2013, the full U.S. Court of Appeals for the Third Circuit re-heard a case en banc that had been argued before a panel of three of its judges, considering whether middle school students involved in a charitable effort—a breast cancer awareness drive—could be prohibited from wearing bracelets imprinted with "I ♥ Boobies! (Keep a Breast)". The Third Circuit cited Tinker when ruling that the school's ban on the bracelets violated the students' right to free speech because the bracelets were not plainly offensive or disruptive and were speech conducted to raise awareness of a social issue. The Supreme Court later declined to take up the case.

Name That Case for 200

A. US Supreme Court case involving a women's right vote

Q. What is the United States v. Susan B. Anthony?

United States v. Susan B. Anthony was the criminal trial of Susan B. Anthony in a U.S. federal court in 1873. The defendant was a leader of the women's suffrage movement who was arrested for voting in Rochester, New York in the 1872 elections in violation of state laws that allowed only men to vote. Anthony argued that she had the right to vote because of the recently adopted Fourteenth Amendment to the U.S. Constitution, part of which reads, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

The judge, Ward Hunt, was a recently appointed U.S. Supreme Court Justice who had responsibility for the federal circuit court in which the trial was held. He did not allow the jurors to discuss this case but instead directed them to find Anthony guilty. On the final day of the trial, Hunt asked Anthony if she had anything to say. Anthony, who had not previously been permitted to speak, responded with what one historian of the women's movement has called "the most famous speech in the history of the agitation for woman suffrage". Repeatedly ignoring the judge's order to stop talking and sit down, she protested what she called "this high-handed outrage upon my citizen's rights". She also protested the injustice of denying women the right to vote. When Justice Hunt sentenced Anthony to pay a fine of $100, she defiantly said that she would never do so. Hunt then announced that Anthony would not be jailed for failure to pay the fine, a move that had the effect of preventing her from taking her case to the Supreme Court.

Fourteen other Rochester women who lived in Anthony's ward also voted in that election and were arrested, but the government never took them to trial. The election inspectors who allowed the women to vote were arrested, tried and found guilty. They were pardoned by President Ulysses S. Grant after being jailed for refusing to pay the fines imposed by the court.

The trial, which was closely followed by the national press, helped make women's suffrage a national issue. It was a major step in the transition of the women's rights movement from one that encompassed a number of issues into one that focused primarily on women's suffrage. Judge Hunt's directed verdict created a controversy within the legal community that lasted for years. In 1895, the Supreme Court ruled that a federal judge could not direct a jury to return a guilty verdict in a criminal trial.

Background

Early demands for women's suffrage

The demand for women's suffrage grew out of the broader movement for women's rights, which began to emerge in the U.S. in the early 1800s. There was little demand for the right to vote in the movement's early days, when the focus was on such issues as the right of women to speak in public settings and on property rights for married women. At the first women's rights convention, the Seneca Falls Convention held in western New York in 1848, the only resolution that did not pass unanimously was the one that called for women's suffrage. Originated by Elizabeth Cady Stanton, who was just beginning her career as a suffrage leader, the resolution was adopted only after Frederick Douglass, an abolitionist leader and a former slave, gave it his strong support. That convention helped to popularize the idea of women suffrage, and by the time of the first National Women's Rights Convention in 1850, suffrage was becoming a generally accepted part of the movement's goals.

Women began to attempt to vote. In Vineland, New Jersey, a center for radical spiritualists, nearly 200 women placed their ballots into a separate box and attempted to have them counted during the 1868 elections, but without success. Lucy Stone, a leader of the women's rights movement who lived nearby, attempted to vote soon afterwards, also without success.

New Departure strategy

In 1869, Francis and Virginia Minor, husband and wife suffragists from Missouri, developed a strategy that became known as the New Departure, which engaged the suffrage movement for several years. This strategy was based on the belief that the recently adopted Fourteenth Amendment to the U.S. Constitution, together with the pending Fifteenth Amendment, implicitly enfranchised women. The primary purpose of these amendments was to establish the newly freed slaves as citizens with voting rights. In the process of doing so, these amendments defined citizenship in a way that clearly included women, prohibited the states from abridging "the privileges or immunities of citizens", and transferred partial control over voting rights from the state to the federal level. The Minors cited Corfield v. Coryell, a case in 1823 in which a federal circuit court ruled that voting rights were included in the privileges and immunities of citizens. They also cited the preamble to the Constitution to support their assertion that the basic rights of citizens were natural rights that provided the foundation for constitutional authority. According to the New Departure strategy, the main task of the suffrage movement was to establish through court action that these principles taken together implied that women had the right to vote.

In 1871 Victoria Woodhull, a stockbroker with little previous connection to the women's movement, presented a modified version of the New Departure strategy to a committee of Congress. Instead of asking the courts to rule that the Constitution implicitly enfranchised women, she asked Congress to pass a declaratory act to accomplish the same goal. The committee rejected her proposal.

In early 1871, the National Woman Suffrage Association (NWSA) officially adopted the New Departure strategy. It encouraged women to attempt to vote and to file federal lawsuits if denied that right. The NWSA, organized by Susan B. Anthony and Elizabeth Cady Stanton in 1869, was the first national women's rights organization. A rival organization called the American Woman Suffrage Association, which was created a few months later, did not adopt the New Departure strategy but instead campaigned for state laws that would enable women to vote.

Soon hundreds of women attempted to vote in dozens of localities. Accompanied by Frederick Douglass, an abolitionist leader and a supporter of women's rights, sixty-four women unsuccessfully tried to register in Washington, D.C. in the spring of 1871, and more than seventy attempted to vote. In November 1871, the Supreme Court of the District of Columbia ruled against lawsuits brought by these women. It ruled that citizenship did not imply the right to vote, saying that "the legal vindication of the natural right of all citizens to vote would, at this stage of popular intelligence, involve the destruction of civil government" and that "The fact that the practical working of the assumed right would be destructive of civilization is decisive that the right does not exist."

Arrest and conviction for voting

Vote in 1872 election

The reaction of the authorities was muted in these unsuccessful attempts to vote. The reaction was sharply different when Susan B. Anthony succeeded in voting in the presidential election of 1872 in Rochester, New York. Anthony was a nationally known figure. She and Stanton had founded the Women's Loyal National League, the first national women's political organization in the U.S., in 1863 during the American Civil War. Anthony was the chief organizer of the League's petition drive against slavery, which collected nearly 400,000 signatures in the largest petition drive in U.S. history up to that time. She and Stanton were the leaders of National

Woman Suffrage Association. At the time when she cast her ballot, Anthony was the nation's best-known advocate of the right of women to vote.

John Van Voorhis

On November 1, 1872, Anthony walked with her sisters Guelma, Hannah and Mary to a voter registration office in a nearby barber shop and demanded to be registered. Anthony quoted the Fourteenth Amendment to the election inspectors to justify their demand and threatened to sue the inspectors personally if they refused. The inspectors consulted a prominent local lawyer, John Van Voorhis (a strong supporter of women's suffrage), who advised them to register the women after they took the standard oaths of registry, which, he said, "would put the entire onus of the affair on them."

A skilled publicist, Anthony then went to a newspaper office to provide an interview about what had just happened. News of the women's registration appeared in the afternoon newspapers, with some of them calling for the arrest of the inspectors who had registered the women. Anthony returned to the voter registration office to ask the inspectors to stand firm and to assure them that she would cover any legal costs they might incur. Other women in Rochester began to register, bringing the total to nearly fifty.

On Election Day, November 5, Anthony and fourteen other women from her ward went to the polling place to cast their ballots. Sylvester Lewis, a poll watcher, challenged their right to vote, thereby triggering a requirement that they take an oath stating that they were qualified to vote, which they did. The election inspectors were now in a difficult position. They were at risk of violating state law if they turned the women away because state law did not give them the authority to refuse the ballot to anyone who took the required oath. Federal law, however, made it illegal to receive the ballot of an ineligible voter. Moreover, federal law prescribed the same punishments for accepting the ballot of an ineligible voter as for refusing the ballot of an eligible voter. The inspectors decided to allow the women to vote. The negative publicity of the previous days had influenced the officials in the other wards, who turned the other registered women away.

Arrest

Anthony had not expected to vote, according to Ann D. Gordon, a historian of the women's movement. Instead, she had expected to be turned away from the polls, after which she planned to file a suit in federal court in pursuit of her right to vote. She didn't expect to be arrested either.

On November 14, warrants for the arrest of the women who had voted and the election inspectors who had allowed them to do so were drawn up and shown to the press. William C. Storrs, one of the commissioners for the U.S. Circuit Court for the Rochester area, sent word to Anthony asking her to meet him in his office. Anthony replied that she "had no social acquaintance with him and didn't wish to call on him."

On November 18, a deputy U.S. Marshal came to her house and said that Commissioner Storrs wished to see her in his office. When Anthony asked why, the officer replied that Storrs wanted to arrest her. Anthony said that men weren't arrested that way and demanded to be arrested properly. The deputy then produced the warrant and arrested her. Told that she was required to go with him, Anthony replied that she wasn't prepared to go immediately. The deputy said he would go on ahead, and she could follow when she was ready. Anthony said she would refuse to take herself to court, so the deputy waited while she changed her dress. Anthony then held out her wrists to be handcuffed, but the officer declined, saying he did not think that would be necessary.

Henry R. Selden

The other fourteen women who had voted and were subsequently arrested were: Charlotte ("Lottie") B. Anthony, Mary S. Anthony, Ellen S. Baker, Nancy M. Chapman, Hannah M. Chatfield, Jane M. Cogswell, Rhoda DeGarmo, Mary S. Hebard, Susan M. Hough, Margaret Garrigues Leyden, Guelma Anthony McLean, Hannah Anthony Mosher, Mary E. Pulver, and Sarah Cole Truesdale. The election inspectors who had allowed them to vote were arrested also. Their names were Beverly Waugh Jones, Edwin T. Marsh and William B. Hall. Several of the women were involved in various types of reform activity. DeGarmo had been the recording secretary for the Rochester Women's Rights Convention of 1848, the second such convention in the country, held two weeks after the Seneca Falls Convention.

As her attorney, Anthony chose Henry R. Selden, a respected local lawyer who had previously served as lieutenant governor of New York and as a judge on the New York Court of Appeals. The New York Commercial Advertiser said that Anthony's trial had taken on new importance now that Selden had agreed to take her case, and it suggested that men might need to reconsider their opinion on women's suffrage. Anthony also frequently consulted the lawyer for the election inspectors, John Van Voorhis, who had previously served as Rochester City Attorney.

The women who were arrested were held to $500 bail. Everyone posted bail except Anthony, who refused. Storrs issued a commitment authorizing the U.S. marshal to place her in the Albany County jail, but she was never actually held there.

Pre-trial speaking tour

Anthony's arrest generated national news, which she turned into an opportunity to generate publicity for the suffrage movement. She spoke in 29 towns and villages of Monroe County, New York, where her trial was to be held and which would provide the jurors for her trial. Her speech was entitled "Is it a Crime for a U.S. Citizen to Vote?" She said the Fourteenth Amendment gave her that right, proclaiming, "We no longer petition Legislature or Congress to give us the right to vote. We appeal to women everywhere to exercise their too long neglected 'citizen's right to vote'". She quoted to her audiences the first section of the recently adopted Fourteenth Amendment, which reads:

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

Anthony then argued that, "The only question left to be settled now, is: Are women persons? And I hardly believe any of our opponents will have the hardihood to say they are not. Being persons, then, women are citizens; and no State has a right to make any new law, or to enforce any old law, that shall abridge their privileges or immunities." Her speech was printed in its entirety in one of the Rochester daily newspapers, which further spread her message to potential jurors.

She drew attention to the inconsistent way that gendered words were used in the law. She pointed out that the New York tax laws referred only to "he", "him" and "his", yet taxes were collected from women. The federal Enforcement Act of 1870, which she was accused of violating, similarly used male pronouns only. Her official record of commitment was written with masculine pronouns, but the Clerk of the Court had inserted an "s" above "he" in the printed form to make it into "she", and similarly had altered to "his" to "her". She said, "I insist if government officials may thus manipulate the pronouns to tax, fine, imprison and hang women, women may take the same liberty with them to secure to themselves their right to a voice in the government."

Other pre-trial activity

On January 21, 1873, at a hearing before the U.S. District Court in Albany, the capital of New York state, Selden presented detailed arguments in support of Anthony's case. He said the question of the right of women to vote had not been settled in the courts and therefore the government had no basis for holding Anthony as a criminal defendant. Without giving U.S. Attorney Richard Crowley a chance to make the government's case, Judge Nathan K. Hall ruled that Anthony would remain in custody.

Anthony published Selden's arguments before this court as a pamphlet and distributed 3000 copies, some of which she mailed to newspaper editors in several states with requests to reprint them. In the letter that accompanied her request to the publisher of the Rochester Evening Express, she asked for help in convincing people that her vote was not a crime, saying, "We must get the men of Rochester so enlightened that no jury of twelve can be found to convict us."

The site of Anthony's trial: Ontario County Courthouse, Canandaigua, NY

On January 24, Crowley presented the proposed indictments to the grand jury at the District Court in Albany, which indicted the women voters. Anthony again pleaded not guilty and was held on bail for $1000. Selden posted Anthony's bail over her protest.

On March 4, Anthony voted once again at an election in Rochester. This time, however, she was the only woman to do so.

At an arraignment on May 22, Crowley requested the transfer of the case from the federal district court to the federal circuit court for the Northern New York District, which had concurrent jurisdiction. A session of this circuit court would meet in June in Canandaigua, the county seat of Ontario County, which borders on Monroe County. No reason for the move was given, but observers noted that U.S. Supreme Court Justice Ward Hunt was assigned to that circuit and would be available in June to try the case. Federal circuit courts often held important cases until the arrival of the assigned Supreme Court justice, whose participation would give the verdict greater weight. The transfer also meant that jurors would not be drawn from Monroe County, which Anthony had thoroughly covered with her recent speaking tour on women's right to vote. Anthony responded by speaking in every village in Ontario County also before the trial began. Anthony responded by speaking throughout Ontario County with the assistance of her colleague Matilda Joslyn Gage.

Trial

The trial had several complications. Anthony was accused of violating a state law that prohibited women from voting, but she was not tried in a state court. Instead she was tried in federal courts for violating the Enforcement Act of 1870, which made it a federal crime to vote in congressional elections if the voter was not qualified to vote under state law. Her case was handled by two overlapping arms of the federal court system: the U.S. District Court for the Northern District of New York and the U.S. Circuit Court for the Northern District of New York. (This circuit court system was abolished in 1912.)

Justice Ward Hunt, who had recently been appointed to the U.S. Supreme Court, had responsibility for that circuit and was the judge in this trial. Hunt had never served as a trial judge. Originally a politician, he had begun his judicial career by being elected to the New York Court of Appeals.

The trial, United States v. Susan B. Anthony, began on June 17, 1873, in Canandaigua, New York, and was closely followed by the national press. The case was being viewed as having some farcical aspects, and the press was ready for more. The New York Times reported that, "It was conceded that the defendant was, on the 5th November, 1872, a woman."

Justice Ward Hunt

Justice Hunt presided alone, which was contrary to established practice. Federal criminal trials at that time normally had two judges, and a case could not be forwarded to the Supreme Court unless the judges disagreed about the verdict. District Court Judge Nathan K. Hall, who had already been involved with Anthony's case in earlier court actions, served beside Judge Hunt during trials earlier that day, and he was on the bench with Hunt when Anthony's case was called. He did not remain there during Anthony's trial, however, but instead sat in the audience. Also in the audience was former president Millard Fillmore.

Legal arguments

Arguing for the defense, Selden said the first section of the Fourteenth Amendment made it clear that women were citizens and that states were prohibited from making laws that abridge "the privileges and immunities of citizens". Therefore, he said, women were entitled to all the rights of citizens, including the right to vote, the right that gives meaning to the other political rights. He cited examples of wrongs suffered by women in cultures all over the world partly because they had no voice in government. He said that Anthony voted in the sincere belief that she was voting legally and therefore could not be accused of knowingly violating a law.

Arguing for the prosecution, Crowley said the "privileges and immunities" protected by the Fourteenth Amendment applied only to such rights as life, liberty and property, not the right to vote. He said that children were citizens, but no one would claim they had the right to vote. He cited recent state and federal court decisions that had upheld the right of states to restrict suffrage to males. He pointed out that the second section of the Fourteenth Amendment specifically referred to male voters when it stipulated reduced representation in Congress for states that restricted male suffrage.

Through her attorney, Anthony requested permission to testify on her own behalf, but Hunt denied her request. Instead he followed a rule of common law at that time which prevented criminal defendants in federal courts from testifying.

Directed verdict

After both sides had presented their cases on the second day of the trial, Justice Hunt delivered his written opinion. He had written it beforehand, he said, to ensure that, "there would be no misapprehension about my views". He said the Constitution allowed states to prohibit women from voting and that Anthony was guilty of violating a New York law to that effect. He cited the Slaughter-House Cases and Bradwell v. Illinois, Supreme Court rulings made only weeks earlier that had narrowly defined the rights of U.S. citizenship. Furthermore, he said, the right to a trial by jury exists only when there is a disputed fact, not when there is an issue of law. In the most controversial aspect of the trial, Hunt ruled that the defense had conceded the facts of the case, and he directed the jury to deliver a guilty verdict. He denied Selden's request to poll the jury to get their opinions on what the verdict should be. These moves were controversial because the Sixth Amendment to the United States Constitution begins with the words, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury".

Name That Case for 300

A. **Court case was a result of a Presidential Election.**

Q. **Bush v Gore**

Bush v. Gore, 531 U.S. 98 (2000), was a decision of the United States Supreme Court that settled a recount dispute in Florida's 2000 presidential election. The ruling was issued on December 12, 2000. On December 9, the Court had preliminarily halted the Florida recount that was occurring. Eight days earlier, the Court unanimously decided the closely related case of Bush v. Palm Beach County Canvassing Board, 531 U.S. 70 (2000). The Electoral College was scheduled to meet on December 18, 2000, to decide the election.

In a per curiam decision, the Court ruled that there was an Equal Protection Clause violation in using different standards of counting in different counties and ruled that no alternative method could be established within the time limit set by Title 3 of the United States Code (3 U.S.C.), § 5 ("Determination of controversy as to appointment of electors"), which was December 12. The vote regarding the Equal Protection Clause was 7–2, and regarding the lack of an alternative method was 5–4. Three concurring justices also asserted that the Florida Supreme Court had violated Article II, § 1, cl. 2 of the Constitution, by misinterpreting Florida election law that had been enacted by the Florida Legislature.

The Supreme Court decision allowed the previous vote certification to stand, as made by Florida Secretary of State Katherine Harris, for George W. Bush as the winner of Florida's 25 electoral votes. Florida's votes gave Bush, the Republican candidate, 271 electoral votes, one more than the required 270 to win the Electoral College, and the defeat of Democratic candidate Al Gore, who received 266 electoral votes (a "faithless elector" from the District of Columbia abstained).

Media organizations subsequently analyzed the ballots and found that the originally proposed county-based recounts would have resulted in a different outcome (Bush victory) than a full statewide recount (Gore victory). Florida subsequently changed to new voting machines to avoid punch cards which had allowed dimpled cards or hanging chad.

Background

In the United States, each state conducts its own popular vote election for President and Vice President. The voters are actually voting for a slate of electors, each of whom pledges to vote for a particular candidate for each office, in the Electoral College. Article II, § 1, cl. 2 of the U.S. Constitution provides that each state legislature decides how electors are chosen. Early in U.S. history, most state legislatures directly appointed the slate of electors for each of their respective states. Today, state legislatures have enacted laws to provide for the selection of electors by popular vote within each state. While these laws vary, most states, including Florida, award all electoral votes to the candidate for either office who receives a plurality of the state's popular vote. Any candidate who receives an absolute majority of all electoral votes nationally (270 since 1963) wins the Presidential or Vice Presidential election.

Election 2000; Close-up view of satellite trucks parked by the Florida State Capitol during the 2000 Presidential election vote dispute

On November 8, 2000, the Florida Division of Elections reported that Bush won with 48.8% of the vote in Florida, a margin of victory of 1,784 votes. The margin of victory was less than 0.5% of the votes cast, so a statutorily-mandated automatic machine recount occurred. On November

10, with the machine recount finished in all but one county, Bush's margin of victory had decreased to 327. According to legal analyst Jeffrey Toobin, later analysis showed that a total of 18 counties—accounting for a quarter of all votes cast in Florida—did not carry out the legally mandated machine recount, but "[n]o one from the Gore campaign ever challenged" the notion that the machine recount had been completed. Florida's election laws allow a candidate to request a county to conduct a manual recount, and Gore requested manual recounts in four Florida counties: Volusia, Palm Beach, Broward and Miami-Dade, which are counties that traditionally vote Democratic and would be expected to garner more votes for Gore. Gore did not, however, request any recounts in counties that traditionally vote Republican. The four counties granted the request and began manual recounts. However, Florida law also required all counties to certify their election returns to the Florida Secretary of State within seven days of the election, and several of the counties conducting manual recounts did not believe they could meet this deadline. On November 14, the statutory deadline, the Florida Circuit Court ruled that the seven-day deadline was mandatory, but that the counties could amend their returns at a later date. The court also ruled that the Secretary, after "considering all attendant facts and circumstances," had discretion to include any late amended returns in the statewide certification. Before the 5 pm deadline on November 14, Volusia County completed its manual recount and certified its results. At 5 pm on November 14, Florida Secretary of State Katherine Harris announced that she had received the certified returns from all 67 counties, while Palm Beach, Broward, and Miami-Dade counties were still conducting manual recounts.

Harris issued a set of criteria by which she would determine whether to allow late filings, and she required any county seeking to make a late filing to submit to her, by 2 pm the following day, a written statement of the facts and circumstances justifying the late filing. Four counties submitted statements, and after reviewing the submissions Harris determined that none justified an extension of the filing deadline. She further announced that after she received the certified returns of the overseas absentee ballots from each county, she would certify the results of the presidential election on Saturday, November 18, 2000. On that date, she certified Bush the winner and litigation ensued.

Stay of the Florida recount

By December 8, 2000, there had been multiple court decisions regarding the presidential election in Florida and on that date the Florida Supreme Court, by a 4–3 vote, ordered a statewide manual recount. On December 9, the U.S. Supreme Court voted 5–4 to stay the Florida recount, because according to Justice Scalia:

It suffices to say that the issuance of the stay suggests that a majority of the Court, while not deciding the issues presented, believe that the petitioner has a substantial probability of success. The issue is not, as the dissent puts it, whether "counting every legally cast vote can constitute irreparable harm." One of the principal issues in the appeal we have accepted is precisely whether the votes that have been ordered to be counted are, under a reasonable interpretation of Florida law, "legally cast vote[s]." The counting of votes that are of questionable legality does in my view threaten irreparable harm to petitioner Bush, and to the country, by casting a cloud upon what he claims to be the legitimacy of his election. Count first, and rule upon legality afterwards, is not a recipe for producing election results that have the public acceptance democratic stability requires. The dissenters opined:

Counting every legally cast vote cannot constitute irreparable harm... Preventing the recount from being completed will inevitably cast a cloud on the legitimacy of the election.

The four dissenting justices argued that stopping the recount was an "unwise" violation of "three venerable rules of judicial restraint", namely respecting the opinions of state supreme courts, cautiously exercising jurisdiction when "another branch of the Federal Government" has a large measure of responsibility to resolve the issue, and avoiding making peremptory conclusions on federal constitutional law prior to a full presentation on the issue.

Rapid developments

Supporters for the Gore-Lieberman ticket outside the U.S. Supreme Court on December 11

The oral argument in Bush v. Gore occurred on December 11. Theodore Olson, a Washington, D.C. lawyer and future Solicitor General, delivered Bush's oral argument. New York lawyer David Boies argued for Gore.

During the brief period when the U.S. Supreme Court was deliberating on Bush v. Gore, the Florida Supreme Court provided clarifications that the U.S. Supreme Court had requested on December 4 in the case of Bush v. Palm Beach County Canvassing Board, 531 U.S. 70 (2000). Because of the extraordinary nature and argued urgency of the case, the U.S. Supreme Court issued its opinion in Bush v. Gore on December 12, 2000, less than a day after hearing oral argument.

Relevant law

The Equal Protection Clause of the Fourteenth Amendment, on which the decision in Bush v. Gore was based, states:

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

Article II, § 1, cl. 2 specifies the number of electors per state, and, most relevant to this case, specifies the manner in which those electors are selected, stipulating that:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors...

This clause arguably gives power to only one branch of Florida's state government (i.e., the state legislature).

3 U.S.C. § 5 regulates the "determination of controversy as to appointment of electors" in Presidential elections. Of particular relevance to this case was the so-called "safe harbor" provision, which allows states to appoint their electors without Congressional interference if done by a specified deadline:

If any State shall have provided ... for its final determination of ... the appointment of all or any of the electors of such State ... at least six days before the time fixed for the meeting of the electors, such determination ... shall be conclusive.

Since the electors were set to meet December 18, the "safe harbor" deadline was December 12, just one day after the Court heard oral arguments in this case.

According to 28 U.S.C. § 1257:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States...

Issues considered by the Court

The Court had to resolve two different questions to fully resolve the case:

Were the recounts, as they were being conducted, constitutional?

If the recounts were unconstitutional, what is the remedy?

Three days earlier, the five-Justice majority had ordered the recount stopped and the Court had to decide whether to restart it.

Equal Protection Clause

Bush argued that recounts in Florida violated the Equal Protection Clause of the Fourteenth Amendment, because Florida did not have a statewide vote recount standard. Each county was on its own to determine whether a given ballot was an acceptable one. Two voters could have marked their ballots in an identical manner, but the ballot in one county would be counted while the ballot in a different county would be rejected, due to the conflicting manual recount standards.

Gore argued that there was indeed a statewide standard, the "intent of the voter" standard, and that this standard was sufficient under the Equal Protection Clause. Furthermore, Gore argued that the consequence of ruling the Florida recount unconstitutional simply because it treated different voters differently would effectively render every state election unconstitutional and that each method has a different rate of error in counting votes. A voter in a "punch-card" county has a greater chance of having his vote undercounted than a voter in an "optical scanner" county. If Bush wins, Gore argued, every state would have to have one statewide method of recording votes to be constitutional.

Remedy

David Boies represented Gore

This was the most closely decided issue in the case. The arguments presented by counsel did not extensively address what the Court should do if the Court were to find an Equal Protection violation. However, Gore did argue briefly that the appropriate remedy would not be to cancel all recounts, but rather would be to order a proper recount.

Article II

Bush also argued that the Florida Supreme Court's ruling violated Article II, § 1, cl. 2 of the U.S. Constitution. Essentially, Bush argued that the Florida Supreme Court's interpretation of Florida law was so erroneous that their ruling had the effect of making new law. Since this "new law" had not been directed by the Florida legislature, it violated Article II. Bush argued that Article II gives the federal judiciary the power to interpret state election law in presidential elections to ensure that the intent of the state legislature is followed.

Gore argued that Article II presupposes judicial review and interpretation of state statutes, and that the Florida Supreme Court did nothing more than exercise the routine principles of statutory construction to reach its decision.

Decision

In brief, the breakdown of the decisions was:

Seven justices (the five Justice majority plus Souter and Breyer) agreed that there was an Equal Protection Clause violation in using different standards of counting in different counties.

Five justices agreed that December 12 (the date of the decision) was the deadline Florida had established for recounts (Rehnquist, O'Connor, Scalia, Kennedy, and Thomas in support; Stevens, Souter, Ginsburg, and Breyer opposed). Justices Souter and Breyer wanted to remand the case to the Florida Supreme Court to permit that court to establish uniform standards of what constituted a legal vote and then manually recount all ballots using those standards. Three justices (Rehnquist, Scalia and Thomas) argued that the Florida Supreme Court had acted contrary to the intent of the Florida legislature. Four justices (Stevens, Souter, Ginsburg and Breyer) specifically disputed this in their dissenting opinions, and the remaining two Justices (O'Connor and Kennedy) declined to join Rehnquist's concurrence on the matter.

Equal Protection Clause

The Supreme Court, in a per curiam opinion, ruled that the Florida Supreme Court's decision, calling for a statewide recount, violated the Equal Protection Clause of the Fourteenth Amendment. This ruling was by a 7–2 vote. The Court held that the Equal Protection Clause guarantees to individuals that their ballots cannot be devalued by "later arbitrary and disparate treatment". Even if the recount was fair in theory, it was unfair in practice. The record, as weighed by the Florida Supreme Court, suggested that different standards were seemingly applied to the recount from ballot to ballot, precinct to precinct, and county to county, even when identical types of ballots and machines were used.

According to the Court, the statewide standard (that a "legal vote" is "one in which there is a 'clear indication of the intent of the voter'") could not guarantee that each county would count the votes in a constitutionally permissible fashion. The Court stated that the per curiam opinion's applicability was "limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."

Remedy

The Court ruled 5–4 that no constitutionally valid recount could be completed by a December 12 "safe harbor" deadline. The Court asserted that "the Supreme Court of Florida has said that the legislature intended the State's electors to 'participat[e] fully in the federal electoral process,' as provided in 3 U.S.C. § 5." The Court therefore effectively ended the proposed recount, because "the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. §5."

Four justices (Justices Stevens, Ginsburg, Souter and Breyer) dissented as to stopping the recount. Two of those four dissenters (Justices Breyer and Souter) acknowledged that the counting up until December 9 had not conformed with Equal Protection requirements. However, Souter and Breyer favored remanding the case back to the Florida Supreme Court for the purpose of crafting specific guidelines for how to count disputed ballots, in contrast to the majority's decision to halt the recount altogether. The actual counting had ended with the December 9 injunction issued by the same five-justice majority, three days before any deadline.

The dissenting opinions strongly criticized the five justice majority for involving the Court in state-level affairs. Justice Stevens' dissent (joined by Justices Breyer and Ginsburg) concluded as follows:

What must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit. The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.

The per curiam opinion in Bush v. Gore did not technically dismiss the case, and instead "remanded for further proceedings not inconsistent with this opinion." Gore's attorneys therefore understood that they could fight on, and could petition the Florida Supreme Court to repudiate the notion that December 12 was final under Florida law. However, Gore dropped the case, because he was not optimistic about how the Florida justices would react to further arguments and, as one of his advisers put it, "the best Gore could hope for was a slate of disputed electors". In addition to this, Gore campaign chairman Bill Daley argued that fighting on was futile because even if the Florida Supreme Court defied the U.S. Supreme Court and ordered a new recount, "[t]he GOP would take them straight back to Washington, where the [U.S.] Supreme Court would repeat: 'You ain't going to count, okay? So quit bothering us.'"

On remand, the Florida Supreme Court issued an opinion on December 22, 2000, that did not dispute whether December 12 was the deadline for recounts under state law, although this was disputed in a concurring opinion by Florida Supreme Court Justice Leander Shaw who nevertheless expressed deference to the U.S. Supreme Court's view on this issue and who also argued that, in any case, the Florida Supreme Court would (in his opinion) be unable to craft a remedy which would satisfy all of the U.S. Supreme Court's equal protection, due process, and other concerns.

Article II

Chief Justice Rehnquist's concurring opinion, joined by Justices Scalia and Thomas, began by emphasizing that this was an unusual case in which the Constitution requires federal courts to assess whether a state supreme court has properly interpreted the will of the state legislature. Usually, federal courts do not make that type of assessment, and indeed the per curiam opinion in this case did not do so. After addressing this aspect of the case, Rehnquist examined and agreed with arguments that had been made by the dissenting justices of the Florida Supreme Court.

Name That Case for 400

A. US Supreme Court case determined the fundamental right to marry is guaranteed to same-sex couples

Q. Obergefell v. Hodges

Obergefell v. Hodges, 576 U.S. ___ (2015) (/ˈoʊbərgəfɛl/ OH-bər-gə-fel), is a landmark civil rights case in which the Supreme Court of the United States ruled that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The ruling meant that all fifty states must lawfully perform and recognize the marriages of same-sex couples on the same terms and conditions as the marriages of opposite-sex couples, with all the accompanying rights and responsibilities.

In November 2014, following a lengthy series of appeals court rulings from the Fourth, Seventh, Ninth, and Tenth Circuits that state-level bans on same-sex marriage were unconstitutional, the Sixth Circuit ruled that it was bound by Baker v. Nelson and found such bans to be constitutional. This created a split between circuits and led to an almost inevitable Supreme Court review.

Decided on June 26, 2015, Obergefell overturned Baker and requires all states to issue marriage licenses to same-sex couples and to recognize same-sex marriages validly performed in other jurisdictions. This established same-sex marriage throughout the United States and its territories. The Court examined the nature of fundamental rights guaranteed to all by the Constitution, the harm done to individuals by delaying the implementation of such rights while the democratic process plays out, and the evolving understanding of discrimination and inequality that has developed greatly since Baker.

Prior to Obergefell, thirty-six states, the District of Columbia, and Guam already issued marriage licenses to same-sex couples. The governor of Puerto Rico announced on June 26, 2015, that same-sex marriage would begin in that territory within 15 days, and on June 29 and June 30, the governors of the Northern Mariana Islands and the Virgin Islands (respectively) made similar announcements. The status of same-sex marriage in American Samoa remains uncertain.

Lawsuits in the district courts

The U.S. Supreme Court case of Obergefell v. Hodges is not the culmination of one lawsuit. Ultimately, it is the consolidation of six lower-court cases, originally representing sixteen same-sex couples, seven of their children, a widower, an adoption agency, and a funeral director. Those cases came from Michigan, Ohio, Kentucky, and Tennessee. All six federal district court rulings found for the same-sex couples and other claimants.

Michigan case: DeBoer v. Snyder

See also: DeBoer v. Snyder

One case came from Michigan, involving a female couple and their three children. April DeBoer and Jayne Rowse held a commitment ceremony in February 2007. They were foster parents. A son was born on January 25, 2009, and adopted by Rowse in November. A daughter was born on February 1, 2010, and adopted by DeBoer in April 2011. A second son was born on November 9, 2009, and adopted by Rowse in October 2011. Michigan law allowed adoption only by single people or married couples. Consequently, on January 23, 2012, DeBoer and Rowse filed a lawsuit in the United States District Court for the Eastern District of Michigan (Southern Division, Detroit), DeBoer v. Snyder, alleging Michigan's adoption law was unconstitutional. Richard Snyder, the lead defendant, was then governor of Michigan.

During a hearing on August 29, 2012, Judge Bernard A. Friedman expressed reservations regarding plaintiffs' cause of action, suggesting they amend their complaint to challenge the state's ban on same-sex marriage. The plaintiffs amended their complaint accordingly on September 7. During a hearing on March 7, 2013, Judge Friedman decided he would delay the case until the U.S. Supreme Court ruled in United States v. Windsor and Hollingsworth v. Perry, hoping for guidance. On October 16, Friedman set trial for February 25, 2014. The trial ended March 7. On March 21, Judge Friedman ruled for the plaintiffs, concluding that, "without some overriding legitimate interest, the state cannot use its domestic relations authority to legislate families out of existence. Having failed to establish such an interest in the context of same-sex marriage, the [state marriage ban] cannot stand."

Ohio cases

Obergefell v. Kasich

Outside the Supreme Court on the morning of June 26, 2015, James Obergefell (foreground, center) and attorney Al Gerhardstein (foreground, left) react to its historic decision.

Two cases came from Ohio, the first ultimately involving a male couple: a widower, and a funeral director. In June 2013, following the U.S. Supreme Court's decision in United States v. Windsor, James "Jim" Obergefell (/ˈoʊbərgəfɛl/ OH-bər-gə-fel) and John Arthur decided to get married to obtain legal recognition of their relationship. They married in Maryland on July 11. After learning that their state of residence, Ohio, would not recognize their marriage, they filed a lawsuit, Obergefell v. Kasich, in the United States District Court for the Southern District of Ohio (Western Division, Cincinnati) on July 19, 2013, alleging that the state discriminates against same-sex couples who have married lawfully out-of-state. The lead defendant was Ohio Governor John Kasich. Because one partner, John Arthur, was terminally ill and suffering from amyotrophic lateral sclerosis (ALS), they wanted the Ohio Registrar to identify the other partner, James Obergefell, as his surviving spouse on his death certificate, based on their marriage in Maryland. The local Ohio Registrar agreed that discriminating against the same-sex married couple was unconstitutional, but the state attorney general's office announced plans to defend Ohio's same-sex marriage ban.

As the case progressed, on July 22, District Judge Timothy S. Black granted the couple's motion, temporarily restraining the Ohio Registrar from accepting any death certificate unless it recorded the deceased's status at death as "married" and his partner as "surviving spouse". Black wrote that "[t]hroughout Ohio's history, Ohio law has been clear: a marriage solemnized outside of Ohio is valid in Ohio if it is valid where solemnized", and noted that certain marriages between cousins or minors, while unlawful if performed in Ohio, are recognized by the state if lawful when solemnized in other jurisdictions. Ohio Attorney General Mike DeWine indicated he would not appeal the preliminary order. On August 13, Black extended the temporary restraining order until the end of December and scheduled oral arguments on injunctive relief, which is permanent, for December 18.

Meanwhile, on July 22, 2013, David Michener and William Herbert Ives married in Delaware. They had three adoptive children. On August 27, William Ives died unexpectedly in Cincinnati, Ohio. His remains were being held at a Cincinnati funeral home pending the issuance of a death certificate, required before cremation, the deceased's desired funeral rite. As surviving spouse David Michener's name could not by Ohio law appear on the death certificate, he sought legal remedy, being added as a plaintiff in the case on September 3.

As the newly amended case moved forward, on September 25, Black granted a September 19 motion by the plaintiffs to dismiss the governor and the state attorney general as defendants, and to add funeral director Robert Grunn to the lawsuit so that he could obtain clarification of his legal obligations under Ohio law when serving clients with same-sex spouses, such as his client James Obergefell. Ohio Health Department Director Theodore Wymyslo was substituted as the lead defendant, and the case was restyled Obergefell v. Wymyslo. On October 22, plaintiff John

Arthur died. The state defendants moved to dismiss the case as moot. Judge Black, in an order dated November 1, denied the motion to dismiss. On December 23, Judge Black ruled that Ohio's refusal to recognize same-sex marriages from other jurisdictions was discriminatory and ordered Ohio to recognize same-sex marriages from other jurisdictions on death certificates. He wrote, "When a state effectively terminates the marriage of a same-sex couple married in another jurisdiction, it intrudes into the realm of private marital, family, and intimate relations specifically protected by the Supreme Court."

Henry v. Wymyslo

The second case from Ohio involved four couples, a child, and an adoption agency. Georgia Nicole Yorksmith and Pamela Yorksmith married in California on October 14, 2008. They had a son in 2010 and were expecting another child. In 2011, Kelly Noe and Kelly McCraken married in Massachusetts. They were expecting a child. Joseph J. Vitale and Robert Talmas married in New York on September 20, 2011. In 2013, they sought the services of the adoption agency, Adoption S.T.A.R., finally adopting a son on January 17, 2014, the same day Brittani Henry and Brittni Rogers married in New York. They, too, were expecting a son. The three female couples were living in Ohio, each anticipating the birth of a child later in 2014. Vitale and Talmas were living in New York with their adopted son, Child Doe, born in Ohio in 2013 and also a plaintiff through his parents. On February 10, 2014, the four legally married couples filed a lawsuit, Henry v. Wymyslo, also in the United States District Court for the Southern District of Ohio (Western Division, Cincinnati), to force the state to list both parents on their children's birth certificates. Adoption agency, Adoption S.T.A.R., sued due to the added and inadequate services Ohio law forced it to provide to same-sex parents adopting in the state. Theodore Wymyslo, the lead defendant, was then director of the Ohio Department of Health.

As the case moved forward, the plaintiffs amended their complaint to ask the court to declare Ohio's recognition ban on same-sex marriage unconstitutional. Judge Black gave the state time to prepare its appeal of his decision by announcing on April 4 that he would issue an order on April 14 requiring Ohio to recognize same-sex marriages from other jurisdictions. Following the resignation of the lead defendant, Ohio's director of health, Ted Wymyslo, for reasons unrelated to the case, Lance Himes became interim director, and the case was restyled Henry v. Himes. On April 14, Black ruled that Ohio must recognize same-sex marriages from other jurisdictions, and, on April 16, stayed enforcement of his ruling, except for the birth certificates sought by the plaintiffs.

Kentucky cases

Bourke v. Beshear

Plaintiffs Gregory Bourke (left) and Michael DeLeon (right) celebrate outside the Supreme Court building on June 26, 2015.

Two cases came from Kentucky, the first ultimately involving four same-sex couples and their six children. Gregory Bourke and Michael DeLeon married in Ontario, Canada, on March 29, 2004. They had two children: Plaintiff I.D., a fourteen-year-old girl, and Plaintiff I.D., a fifteen-year-old boy. Randell Johnson and Paul Campion married in California on July 3, 2008. They had four children: Plaintiffs T.J.-C. and T.J.-C., twin eighteen-year-old boys, Plaintiff D.J.-C., a fourteen-year-old boy, and Plaintiff M.J.-C., a ten-year-old girl. Jimmy Meade and Luther Barlowe married in Iowa on July 30, 2009. Kimberly Franklin and Tamera Boyd married in Connecticut on July 15, 2010. All resided in Kentucky. On July 26, 2013, Bourke and DeLeon, and their two children through them, filed a lawsuit, Bourke v. Beshear, in the United States District Court for the Western District of Kentucky (Louisville Division), challenging Kentucky's bans on same-sex marriage and the recognition of same-sex marriages from other jurisdictions. Steve Beshear, the lead defendant, was then governor of Kentucky.

Subsequently, on August 16, the complaint was amended to bring Johnson and Campion, their four children through them, and Meade and Barlowe into the case, again challenging the state's bans on same-sex marriage and the recognition of same-sex marriages from other jurisdictions. On November 1, the complaint was amended again to bring Franklin and Boyd into the case, now challenging only Kentucky's ban on the recognition of same-sex marriages from other jurisdictions. Originally, the couple had filed their own lawsuit, Franklin v. Beshear, with the United States District Court for the Eastern District of Kentucky, but a change of venue was ordered for convenience, with the intent formally to consolidate the case with Bourke. Consolidation never occurred, and that separate case was dismissed for failure to raise new claims. On February 12, 2014, Judge John G. Heyburn II issued the court's decision: "In the end, the Court concludes that Kentucky's denial of recognition for valid same-sex marriages violates the United States Constitution's guarantee of equal protection under the law, even under the most deferential standard of review. Accordingly, Kentucky's statutes and constitutional amendment that mandate this denial are unconstitutional."

Love v. Beshear

The second case from Kentucky, Love v. Beshear, involved two male couples. Maurice Blanchard and Dominique James held a religious marriage ceremony on June 3, 2006. Kentucky county clerks repeatedly refused them marriage licenses. Timothy Love and Lawrence Ysunza had been living together as a couple for thirty years when, on February 13, 2014, they were refused a marriage license at the Jefferson County Clerk's office. On February 14, the next day, the couples submitted a motion to join Bourke v. Beshear, challenging the state's ban on same-sex marriage. The motion was granted on February 27, and the case was bifurcated, the instant action restyled as Love v. Beshear, on February 28. On July 1, 2014, Judge Heyburn issued his ruling. He found "homosexual persons constitute a quasi-suspect class", and ordered that Kentucky's laws banning same-sex marriage "violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and they are void and unenforceable." In the course of assessing the state's arguments for the bans, he stated, "These arguments are not those of serious people."

Tennessee case: Tanco v. Haslam

One case came from Tennessee, involving four same-sex couples. Joy "Johno" Espejo and Matthew Mansell married in California on August 5, 2008. On September 25, 2009, they adopted two foster children. After Mansell's job was transferred to the state, they relocated to Franklin, Tennessee, in May 2012. Kellie Miller and Vanessa DeVillez married in New York on July 24, 2011, later moving to Tennessee. Army Reservist Sergeant First Class Ijpe DeKoe and Thomas Kostura married in New York on August 4, 2011. In May 2012, after completing a tour of duty in Afghanistan, Sergeant DeKoe was restationed in Memphis, Tennessee, where the couple subsequently relocated. On September 3, 2013, the Department of Defense began recognizing their marriage, but the state did not. Valeria Tanco and Sophia Jesty married in New York on September 9, 2011, then moved to Tennessee, where they were university professors. They were expecting their first child in 2014. On October 21, 2013, wishing to have their out-of-state marriages recognized in Tennessee, the four couples filed a lawsuit, Tanco v. Haslam, in the United States District Court for the Middle District of Tennessee (Nashville Division). William Edwards Haslam, the lead defendant, was then governor of Tennessee. As the case progressed, on November 19, 2013, the plaintiffs moved for a preliminary injunction enjoining the state from applying its marriage recognition ban against them. On March 10, 2014, plaintiff couple Kellie Miller and Vanessa DeVillez withdrew from the case. On March 14, Judge Aleta Arthur Trauger granted a preliminary injunction requiring the state to recognize the marriages of the three plaintiff couples. She wrote, "At this point, all signs indicate that, in the eyes of the United States Constitution, the plaintiffs' marriages will be placed on an equal footing with those of heterosexual couples and that proscriptions against same-sex marriage will soon become a footnote in the annals of American history." The state immediately filed a motion to stay this ruling, but, on March 20, Judge Trauger denied the request, reasoning that "the court's order does not open the floodgates for same-sex couples to marry in Tennessee ... [and] applies only to the three same-sex couples at issue in this case."

Reversal by the Sixth Circuit

Judge Jeffrey Sutton wrote the Sixth Circuit's majority opinion upholding same-sex marriage bans, causing the circuit split that helped trigger Supreme Court review.

The six decisions of the four federal district courts were appealed to the United States Court of Appeals for the Sixth Circuit. Ohio's director of health appealed Obergefell v. Wymyslo on January 16, 2014. The governor of Tennessee appealed Tanco v. Haslam on March 18. On March 21, the governor of Michigan appealed DeBoer v. Snyder. The governor of Kentucky appealed Bourke v. Beshear and Love v. Beshear on March 18 and July 8, respectively. And on May 9 Ohio's director of health appealed Henry v. Himes.

Subsequently, on May 20, the Sixth Circuit consolidated Obergefell v. Himes with Henry v. Himes for the purposes of briefing and oral argument. (On April 15, after Ohio's governor, John Kasich, appointed Lance Himes interim health director on February 21, Obergefell was restyled Obergefell v. Himes.) Upon prior motion by the parties, the Sixth Circuit also consolidated Bourke v. Beshear and Love v. Beshear on July 16. On August 6, the three-judge panel consisting of Judges Jeffrey Sutton, Deborah L. Cook, and Martha Craig Daughtrey heard oral arguments in all four cases. On August 11, Richard Hodges, by the appointment of Ohio governor John Kasich, succeeded Himes as Ohio's health director, and Obergefell was again retitled, this time as its final iteration of Obergefell v. Hodges.

On November 6, 2014, in a decision styled DeBoer v. Snyder, the Sixth Circuit ruled 2–1 that Ohio's ban on same-sex marriage did not violate the U.S. Constitution. The court said it was bound by the U.S. Supreme Court's 1972 action in a similar case, Baker v. Nelson, which dismissed a same-sex couple's marriage claim "for want of a substantial federal question". Writing for the majority, Judge Sutton also dismissed the arguments made on behalf of same-sex couples in this case: "Not one of the plaintiffs' theories, however, makes the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters."

Dissenting, Judge Daughtrey wrote:

Because the correct result is so obvious, one is tempted to speculate that the majority has purposefully taken the contrary position to create the circuit split regarding the legality of same-sex marriage that could prompt a grant of certiorari by the Supreme Court and an end to the uncertainty of status and the interstate chaos that the current discrepancy in state laws threatens.

Before the Supreme Court

Petitions for writs of certiorari

Claimants from each of the six district court cases appealed to the Supreme Court of the United States. On November 14, 2014, the same-sex couples, widowers, child plaintiff, and funeral director in DeBoer v. Snyder, Obergefell v. Hodges, and Tanco v. Haslam filed petitions for writs of certiorari with the Court. Adoption agency Adoption S.T.A.R. did not petition. The same-sex couples in Bourke v. Beshear filed their petition for a writ of certiorari with the Court on November 18. The DeBoer petitioners presented the Court with the question of whether denying same-sex couples the right to marry violated the Fourteenth Amendment. The Obergefell petitioners asked the Court to consider whether Ohio's refusal to recognize marriages from other jurisdictions violated the Fourteenth Amendment's guarantees of due process and equal protection, and whether the state's refusal to recognize the adoption judgment of another state violated the U.S. Constitution's Full Faith and Credit Clause. The Tanco petitioners asked the Court to consider three questions: whether denying same-sex couples the right to marry, including recognition of out-of-state marriages, violated the Due Process or Equal Protections Clauses of the Fourteenth Amendment; whether refusing to recognize their out-of-state marriages violated same-sex couples' right to interstate travel; and whether Baker v. Nelson (1972), summarily dismissing same-sex couples' marriage claims, remained binding precedent. Lastly, the Bourke petitioners posed to the Court two questions: whether a state violates the Due Process or Equal Protection Clauses of the Fourteenth Amendment by prohibiting same-sex couples to marry, and whether it does so by refusing to recognize out-of-state same-sex marriages.

Merits briefs

On January 16, 2015, the U.S. Supreme Court consolidated the four same-sex marriage cases challenging state laws that prohibited same-sex marriage—DeBoer v. Snyder (Michigan), Obergefell v. Hodges (Ohio), Bourke v. Beshear (Kentucky), and Tanco v. Haslam (Tennessee)—and agreed to review the case. It set a briefing schedule to be completed April 17. The Court ordered briefing and oral argument on the following questions:

Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

The Court also told the parties to each of the four cases to address only the questions raised in their particular case. Thus, Obergefell raises only the second question, the recognition of same-sex marriages from other jurisdictions.

The case had 148 amici curiae briefs submitted, more than any other U.S. Supreme Court case.

Oral argument

Oral arguments in the case were heard on April 28, 2015. The plaintiffs were represented by civil rights lawyer Mary Bonauto and Washington, D.C. lawyer Douglas Hallward-Driemeier. U.S. Solicitor General Donald B. Verrilli Jr., representing the United States, also argued for the same-sex couples. The states were represented by former Michigan Solicitor General John J. Bursch and Joseph R. Whalen, an associate solicitor general from Tennessee. Of the nine justices, all except Clarence Thomas made comments and asked questions, giving clues as to their positions on the Constitution and the future of same-sex marriage. While the questions and comments of the justices during oral arguments are an imperfect indicator of their final decisions, the justices appeared sharply divided in their approaches to this issue, splitting as they often do along ideological lines, with Justice Anthony Kennedy being pivotal. It was thought Chief Justice John Roberts could be pivotal as well. Despite his past views, and his dissent in Windsor, Roberts made comments during oral argument suggesting that the bans in question may constitute sex discrimination. In his opinion, however, he argued that same-sex marriage bans were constitutional.

Opinion of the Court

On the morning of June 26, 2015 outside the Supreme Court, the crowd celebrates the Court's decision.

On June 26, 2015, the U.S. Supreme Court held in a 5–4 decision that the Fourteenth Amendment requires all states to grant same-sex marriages and recognize same-sex marriages granted in other states. The Court overruled its prior decision in Baker v. Nelson, which the Sixth Circuit had invoked as precedent.

The Obergefell v. Hodges decision came on the second anniversary of the United States v. Windsor ruling that struck down Section 3 of the Defense of Marriage Act (DOMA), which denied federal recognition to same-sex marriages. It also came on the twelfth anniversary of Lawrence v. Texas, which struck down sodomy laws in 13 states. The Obergefell decision was issued on the second-to-last decision day of the Court's term; and, as late as 9:59 a.m. in the morning of the decision, same sex couples were unable to marry in many states.

The justices' opinions in Obergefell are consistent with their opinions in Windsor which rejected DOMA's recognition of only opposite-sex marriages for certain purposes under federal law. In both cases, Justice Kennedy authored the majority opinions and was considered the "swing vote".

Chief Justice Roberts and Justices Scalia, Thomas, and Alito each wrote a separate dissenting opinion. The Chief Justice read part of his dissenting opinion from the bench, his first time doing so since joining the Court in 2005.

Majority opinion

Justice Anthony Kennedy authored the Court's opinion declaring same-sex couples have the right to marry.

Justice Anthony Kennedy authored the majority opinion and was joined by Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan. The majority held that state same-sex marriage bans are a violation of the Fourteenth Amendment's Due Process and Equal Protection Clauses.

"The Constitution promises liberty to all within its reach," the Court declared, "a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity." Citing Griswold v. Connecticut, the Court affirmed that the fundamental rights found in the Fourteenth Amendment's Due Process Clause "extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs", but the "identification and protection" of these fundamental rights "has not been reduced to any formula." As the Supreme Court has found in cases such as Loving v. Virginia, Zablocki v. Redhail, and Turner v. Safley, this extension includes a fundamental right to marry.

The Court rejected respondent states' framing of the issue as whether there were a "right to same-sex marriage", insisting its precedents "inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right." Indeed, the majority averred, "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied." Citing its prior decisions in Loving v. Virginia and Lawrence v. Texas, the Court framed the issue accordingly in Obergefell.

The Court listed four distinct reasons why the fundamental right to marry applies to same-sex couples, citing United States v. Windsor in support throughout its discussion. First, "the right to personal choice regarding marriage is inherent in the concept of individual autonomy." Second, "the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals", a principle applying equally to same-sex couples.

Third, the fundamental right to marry "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education"; as same-sex couples have children and families, they are deserving of this safeguard—though the right to marry in the United States has never been conditioned on procreation. Fourth, and lastly, "marriage is a keystone of our social order", and "[t]here is no difference between same- and opposite-sex couples with respect to this principle"; consequently, preventing same-sex couples from marrying puts them at odds with society, denies them countless benefits of marriage, and introduces instability into their relationships for no justifiable reason.

The Court noted the relationship between the liberty of the Due Process Clause and the equality of the Equal Protection Clause and determined that same-sex marriage bans violated the latter. Concluding that the liberty and equality of same-sex couples was significantly burdened, the Court struck down same-sex marriage bans for violating both clauses, holding that same-sex couples may exercise the fundamental right to marry in all fifty states.

Due to the "substantial and continuing harm" and the "instability and uncertainty" caused by state marriage laws differing with regard to same-sex couples, and because respondent states had conceded that a ruling requiring them to marry same-sex couples would undermine their refusal to hold valid same-sex marriages performed in other states, the Court also held that states must recognize same-sex marriages legally performed in other states.

Addressing respondent states' argument, the Court emphasized that, while the democratic process may be an appropriate means for deciding issues such as same-sex marriage, no individual has to rely solely on the democratic process to exercise a fundamental right. "An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act", for "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." Furthermore, to rule against same-sex couples in this case, letting the democratic process play out as "a cautious approach to recognizing and protecting fundamental rights" would harm same-sex couples in the interim.

Additionally, the Court rejected the notion that allowing same-sex couples to marry harms the institution of marriage, leading to fewer opposite-sex marriages through a severing of the link between procreation and marriage, calling the notion "counterintuitive" and "unrealistic". Instead, the Court stated that married same-sex couples "would pose no risk of harm to themselves or third parties". The majority also stressed that the First Amendment protects those who disagree with same-sex marriage.

In closing, Justice Kennedy wrote for the Court:

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

Dissenting opinions

Chief Justice Roberts

In his dissent, Chief Justice John Roberts argued same-sex marriage bans did not violate the Constitution.

Chief Justice John Roberts wrote a dissenting opinion, which was joined by Justices Scalia and Thomas. Roberts accepted substantive due process, by which fundamental rights are protected through the Due Process Clause, but warned it has been misused over time to expand perceived fundamental rights, particularly in Dred Scott v. Sandford and Lochner v. New York. Roberts stated that no prior decision had changed the core component of marriage, that it be between one man and one woman; consequently, same-sex marriage bans did not violate the Due Process Clause. Roberts also rejected the notion that same-sex marriage bans violated a right to privacy, because they involved no government intrusion or subsequent punishment. Addressing the Equal Protection Clause, Roberts stated that same-sex marriage bans did not violate the clause because they were rationally related to a governmental interest: preserving the traditional definition of marriage.

More generally, Roberts stated that marriage, which he proposed had always had a "universal definition" as "the union of a man and a woman", arose to ensure successful childrearing. Roberts criticized the majority opinion for relying on moral convictions rather than a constitutional basis, and for expanding fundamental rights without caution or regard for history. He also suggested the majority opinion could be used to expand marriage to include legalized polygamy. Roberts chided the majority for overriding the democratic process and for using the judiciary in a way that was not originally intended. According to Roberts, supporters of same-sex marriage cannot win "true acceptance" for their side because the debate has now been closed. Roberts also suggested the majority's opinion will ultimately lead to consequences for religious liberty, and he found the Court's language unfairly attacks opponents of same-sex marriage.

Justice Scalia

Justice Antonin Scalia wrote a dissenting opinion, which was joined by Justice Thomas. Scalia stated that the Court's decision effectively robs the people of "the freedom to govern themselves", noting that a rigorous debate on same-sex marriage had been taking place and that, by deciding the issue nationwide, the democratic process had been unduly halted. Addressing the claimed Fourteenth Amendment violation, Scalia asserted that, because a same-sex marriage ban would not have been considered unconstitutional at the time of the Fourteenth Amendment's adoption, such bans are not unconstitutional today. He claimed there was "no basis" for the Court's decision striking down legislation that the Fourteenth Amendment does not expressly forbid, and directly attacked the majority opinion for "lacking even a thin veneer of law". Lastly, Scalia faulted the actual writing in the opinion for "diminish[ing] this Court's reputation for clear thinking and sober analysis" and for "descend[ing] from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie."

Justice Thomas

Justice Clarence Thomas wrote a dissent rejecting substantive due process.

Justice Clarence Thomas wrote a dissenting opinion, which was joined by Justice Scalia. Thomas rejected the principle of substantive due process, which he claimed "invites judges to do exactly what the majority has done here—roa[m] at large in the constitutional field guided only by their personal views as to the fundamental rights protected by that document"; in doing so, the judiciary strays from the Constitution's text, subverts the democratic process, and "exalts judges at the expense of the People from whom they derive their authority." Thomas argued that the only liberty that falls under Due Process Clause protection is freedom from "physical restraint". Furthermore, Thomas insisted that "liberty has long been understood as individual freedom from governmental action, not as a right to a particular governmental entitlement" such as a marriage license. According to Thomas, the majority's holding also undermines the political process and threatens religious liberty. Lastly, Thomas took issue with the majority's view that marriage advances the dignity of same-sex couples. In his view, government is not capable of bestowing dignity; rather, dignity is a natural right that is innate within every person, a right that cannot be taken away even through slavery and internment camps.

Justice Alito

Justice Samuel Alito wrote a dissenting opinion, which was joined by Justices Scalia and Thomas. Invoking Washington v. Glucksberg, in which the Court stated the Due Process Clause protects only rights and liberties that are "deeply rooted in this Nation's history and tradition", Alito claimed any "right" to same-sex marriage would not meet this definition; he chided the justices in the majority for going against judicial precedent and long-held tradition. Alito defended the rationale of the states, accepting the premise that same-sex marriage bans serve to promote procreation and the optimal childrearing environment. Alito expressed concern that the majority's opinion would be used to attack the beliefs of those who disagree with same-sex marriage, who "will risk being labeled as bigots and treated as such by governments, employers, and schools", leading to "bitter and lasting wounds". Expressing concern for judicial abuse, Alito concluded, "Most Americans—understandably—will cheer or lament today's decision because of their views on the issue of same-sex marriage. But all Americans, whatever their thinking on that issue, should worry about what the majority's claim of power portends."

Name That Case for 500

A. US Supreme Court case that invalidated state laws prohibiting interracial marriage.

Q. Loving v. Virginia

Loving v. Virginia, 388 U.S. 1 (1967) is a landmark civil rights decision of the United States Supreme Court, which invalidated laws prohibiting interracial marriage.

The case was brought by Mildred Loving (née Jeter), a woman of color, and Richard Loving, a white man, who had been sentenced to a year in prison in Virginia for marrying each other. Their marriage violated the state's anti-miscegenation statute, the Racial Integrity Act of 1924, which prohibited marriage between people classified as "white" and people classified as "colored". The Supreme Court's unanimous decision determined that this prohibition was unconstitutional, overruling Pace v. Alabama (1883) and ending all race-based legal restrictions on marriage in the United States.

The decision was followed by an increase in interracial marriages in the U.S., and is remembered annually on Loving Day, June 12. It has been the subject of several songs and three movies, including the 2016 film Loving. Beginning in 2013, it was cited as precedent in U.S. federal court decisions holding restrictions on same-sex marriage in the United States unconstitutional, including in the 2015 Supreme Court decision Obergefell v. Hodges.

Background

Anti-miscegenation laws in the United States

Anti-miscegenation laws in the United States had been in place in certain states since colonial days. Marriage to a slave was never legal. In the Reconstruction Era in 1865, the Black Codes across the seven states of the lower South made intermarriage illegal. The new Republican legislatures in six states repealed the restrictive laws. After the Democrats returned to power, the restriction was reimposed.

A major concern was how to draw the line between black and white in a society in which white men had many children with black slave women. On the one hand, a person's reputation as black or white was usually decisive in practical matters. On the other hand, most laws used a "one drop of blood" rule, which meant that one black ancestor made a person black in the view of the law.

Plaintiffs

Mildred Delores Loving (née Jeter; July 22, 1939 – May 2, 2008) was the daughter of Musial (Byrd) Jeter and Theoliver Jeter. Mildred's racial identity has been a point of confusion. She has been noted as self-identifying as Indian-Rappahannock, but was also reported as being of Cherokee, Portuguese, and African American ancestry. During the trial, it seemed clear that she identified herself as black, especially as far as her own lawyer was concerned. However, upon her arrest, the police report identifies her as "Indian." She said in a 2004 interview, "I have no black ancestry. I am Indian-Rappahannock.". A possible contributing factor is that it was seen at the time of her arrest as advantageous to be "anything but black." There was an ingrained history in the state of the denial of African ancestry. Additionally, the frequent racial mixing of Central Point, where she lived, could have contributed to this idea of fluid racial identity. Mildred was known as a quiet and humble woman. She was born and raised in the same rural Virginia community as her husband, Richard.

Richard Perry Loving (October 29, 1933 – June 29, 1975) was a white man, and the son of Lola (Allen) Loving and Twillie Loving. He was a construction worker. The 1830 census marks Lewis Loving, Richard's paternal ancestor, as having owned seven slaves. Richard's grandfather, T.P. Farmer, fought for the Confederacy in the Civil War.

Their families both lived in Caroline County, Virginia. The county adhered to strict Jim Crow segregation laws but Central Point had been a visible mixed-race community since the 19th century. Richard's father worked for one of the wealthiest black men in the county for 25 years. Richard's closest companions were black, including those he drag-raced with and Mildred's older brothers. The couple met in high school and fell in love. Richard moved into the Jeter household when Mildred became pregnant.

After the Supreme Court case, the couple moved back to Central Point, where Richard built them a house. The couple had three children: Donald, Peggy, and Sidney. Richard Loving died aged 41 in 1975, when a drunk driver struck his car in Caroline County, Virginia. Mildred Loving lost her right eye in the same accident. She died of pneumonia on May 2, 2008, in her home in Central Point, aged 68.

Criminal proceedings

At the age of 18, Mildred became pregnant. In June 1958, the couple traveled to Washington, D.C. to marry, thereby evading Virginia's Racial Integrity Act of 1924, which made marriage between whites and non-whites a crime. They returned to the small town of Central Point, Virginia. Based on an anonymous tip, local police raided their home in the early morning hours of July 11, 1958, hoping to find them having sex, given that interracial sex was then also illegal in Virginia. When the officers found the Lovings sleeping in their bed, Mildred pointed out their marriage certificate on the bedroom wall. They were told the certificate was not valid in the Commonwealth.

The Lovings were charged under Section 20-58 of the Virginia Code, which prohibited interracial couples from being married out of state and then returning to Virginia, and Section 20-59, which classified miscegenation as a felony, punishable by a prison sentence of between one and five years.

On January 6, 1959, the Lovings pled guilty to "cohabiting as man and wife, against the peace and dignity of the Commonwealth." They were sentenced to one year in prison, with the sentence suspended on condition that the couple leave Virginia and not return together for at least 25 years. After their conviction, the couple moved to the District of Columbia.

Appellate proceedings

In 1964, frustrated by their inability to travel together to visit their families in Virginia, as well as their social isolation and financial difficulties in Washington, Mildred Loving wrote in protest to Attorney General Robert F. Kennedy. Kennedy referred her to the American Civil Liberties Union (ACLU). The ACLU assigned volunteer cooperating attorneys Bernard S. Cohen and Philip J. Hirschkop, who filed a motion on behalf of the Lovings in the Virginia Caroline County Circuit Court, that requested the court to vacate the criminal judgments and set aside the

Lovings' sentences on the grounds that the Virginia miscegenation statutes ran counter to the Fourteenth Amendment's Equal Protection Clause.

On October 28, 1964, after waiting almost a year for a response to their motion, the ACLU attorneys brought a class action suit in the U.S. District Court for the Eastern District of Virginia. This prompted the county court judge in the case, Leon M. Bazile, to issue a ruling on the long-pending motion to vacate. Echoing Johann Friedrich Blumenbach's 18th-century interpretation of race, the local court wrote:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

On January 22, 1965, a three-judge district court panel postponed decision on the federal class-action case while the Lovings appealed Judge Bazile's decision on constitutional grounds to the Virginia Supreme Court. Justice Harry L. Carrico (later Chief Justice of the Court) wrote an opinion for the court upholding the constitutionality of the anti-miscegenation statutes. While he upheld their criminal convictions, he directed that their sentence be modified. Carrico cited as authority the Virginia Supreme Court's decision in Naim v. Naim (1955) and argued that the Lovings' case was not a violation of the Equal Protection Clause because both the white and the non-white spouse were punished equally for the crime of miscegenation, an argument similar to that made by the United States Supreme Court in 1883 in Pace v. Alabama.

The Lovings, still supported by the ACLU, appealed the decision to the United States Supreme Court, where Virginia was represented by Robert McIlwaine of the state's attorney general's office. The Lovings did not attend the oral arguments in Washington, but one of their lawyers, Bernard S. Cohen, conveyed the message he had been given by Richard Loving: "Mr. Cohen, tell the Court I love my wife, and it is just unfair that I can't live with her in Virginia."

Precedents

Before Loving v. Virginia, there had been several cases on the subject of interracial sexual relations. Within the state of Virginia, on Oct. 3, 1878, in Kinney v. The Commonwealth, the Supreme Court of Virginia ruled that the marriage legalized in Washington, D.C. between Andrew Kinney, a black man, and Mahala Miller, a white woman, was “invalid” in Virginia. In the national case of Pace v. Alabama (1883), the Supreme Court of the United States ruled that the conviction of an Alabama couple for interracial sex, affirmed on appeal by the Alabama Supreme Court, did not violate the Fourteenth Amendment. Interracial marital sex was deemed a felony, whereas extramarital sex ("adultery or fornication") was only a misdemeanor. On appeal, the United States Supreme Court ruled that the criminalization of interracial sex was not a violation of the equal protection clause because whites and non-whites were punished in equal measure for the offense of engaging in interracial sex. The court did not need to affirm the constitutionality of the ban on interracial marriage that was also part of Alabama's anti-miscegenation law, since the plaintiff, Mr. Pace, had chosen not to appeal that section of the law. After Pace v. Alabama, the constitutionality of anti-miscegenation laws banning marriage and sex between whites and non-whites remained unchallenged until the 1920s.

In Kirby v. Kirby (1921), Mr. Kirby asked the state of Arizona for an annulment of his marriage. He charged that his marriage was invalid because his wife was of "negro" descent, thus violating the state's anti-miscegenation law. The Arizona Supreme Court judged Mrs. Kirby's race by observing her physical characteristics and determined that she was of mixed race, therefore granting Mr. Kirby's annulment.

In the Monks case (Estate of Monks, 4. Civ. 2835, Records of California Court of Appeals, Fourth district), the Superior Court of San Diego County in 1939 decided to invalidate the marriage of Marie Antoinette and Allan Monks because she was deemed to have "one eighth negro blood". The court case involved a legal challenge over the conflicting wills that had been left by the late Allan Monks; an old one in favor of a friend named Ida Lee, and a newer one in favor of his wife. Lee's lawyers charged that the marriage of the Monkses, which had taken place in Arizona, was invalid under Arizona state law because Marie Antoinette was "a Negro" and Alan had been white. Despite conflicting testimony by various expert witnesses, the judge defined Mrs. Monks' race by relying on the anatomical "expertise" of a surgeon. The judge ignored the arguments of an anthropologist and a biologist that it was impossible to tell a person's race from physical characteristics.

Monks then challenged the Arizona anti-miscegenation law itself, taking her case to the California Court of Appeals, Fourth District. Monks' lawyers pointed out that the anti-miscegenation law effectively prohibited Monks as a mixed-race person from marrying anyone: "As such, she is prohibited from marrying a negro or any descendant of a negro, a Mongolian or an Indian, a Malay or a Hindu, or any descendants of any of them. Likewise ... as a descendant of a negro she is prohibited from marrying a Caucasian or a descendant of a Caucasian. ..." The Arizona anti-miscegenation statute thus prohibited Monks from contracting a valid marriage in Arizona, and was therefore an unconstitutional constraint on her liberty. However, the court dismissed this argument as inapplicable, because the case presented involved not two mixed-race spouses but a mixed-race and a white spouse: "Under the facts presented the appellant does not have the benefit of assailing the validity of the statute." Dismissing Monks' appeal in 1942, the United States Supreme Court refused to reopen the issue.

The turning point came with Perez v. Sharp (1948), also known as Perez v. Lippold. In Perez, the Supreme Court of California recognized that bans on interracial marriage violated the Fourteenth Amendment of the Federal Constitution.

Decision

The U.S. Supreme Court overturned the Lovings' convictions in a unanimous decision dated June 12, 1967, dismissing the Commonwealth of Virginia's argument that a law forbidding both white and black persons from marrying persons of another race and providing identical penalties to white and black violators could not be construed as racially discriminatory. The court ruled that Virginia's anti-miscegenation statute violated both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.

Chief Justice Earl Warren's opinion for the unanimous court held that:

Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. ... To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discrimination. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.

The court concluded that anti-miscegenation laws were racist and had been enacted to perpetuate white supremacy:

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.

Associate Justice Potter Stewart filed a brief concurring opinion. He reiterated his opinion from McLaughlin v. Florida that "it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor."

Supreme Court Decisions for 100

A. Legalized abortion nationwide.

Q. What is Roe v. Wade?

Roe v. Wade, 410 U.S. 113 (1973), is a landmark decision issued in 1973 by the United States Supreme Court on the issue of the constitutionality of laws that criminalized or restricted access to abortions. The Court ruled 7–2 that a right to privacy under the Due Process Clause of the 14th Amendment extended to a woman's decision to have an abortion, but that this right must be balanced against the state's interests in regulating abortions: protecting women's health and protecting the potentiality of human life. Arguing that these state interests became stronger over the course of a pregnancy, the Court resolved this balancing test by tying state regulation of abortion to the third trimester of pregnancy.

Later, in Planned Parenthood v. Casey (1992), the Court rejected Roe's trimester framework while affirming its central holding that a woman has a right to abortion until fetal viability. The Roe decision defined "viable" as "potentially able to live outside the mother's womb, albeit with artificial aid." Justices in Casey acknowledged that viability may occur at 23 or 24 weeks, or sometimes even earlier, in light of medical advances.

In disallowing many state and federal restrictions on abortion in the United States, Roe v. Wade prompted a national debate that continues today about issues including whether, and to what extent, abortion should be legal, who should decide the legality of abortion, what methods the Supreme Court should use in constitutional adjudication, and what the role should be of religious and moral views in the political sphere. Roe v. Wade reshaped national politics, dividing much of the United States into pro-life and pro-choice camps, while activating grassroots movements on both sides.

Background

History of abortion laws in the United States

According to the Court, "the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage." Providing a historical analysis on abortion, Justice Harry Blackmun noted that abortion was "resorted to without scruple" in Greek and Roman times. Blackmun also addressed the permissive and restrictive abortion attitudes and laws throughout history, noting the disagreements among leaders (of all different professions) in those eras and the formative laws and cases. In the United States, in 1821, Connecticut passed the first state statute criminalizing abortion. Every state had abortion legislation by 1900. In the United States, abortion was sometimes considered a common law crime, though Justice Blackmun would conclude that the criminalization of abortion did not have "roots in the English common-law tradition." Rather than arresting the women having the abortions, legal officials were more likely to interrogate these women to obtain evidence against the abortion provider in order to close down that provider's business.

Prior history of the case

In June 1969, 21-year-old Norma McCorvey discovered she was pregnant with her third child. She returned to Dallas, Texas, where friends advised her to assert falsely that she had been raped in order to obtain a legal abortion (with the understanding that Texas law allowed abortion in cases of rape and incest). However, this scheme failed because there was no police report documenting the alleged rape. In any case, the Texas statute allowed abortion only ”for the purpose of saving the life of the mother”. She attempted to obtain an Illegal abortion, but found that the unauthorized facility had been closed down by the police. Eventually, she was referred to attorneys Linda Coffee and Sarah Weddington. (McCorvey would end up giving birth before the case was decided, and the child was put up for adoption.)

In 1970, Coffee and Weddington filed suit in the United States District Court for the Northern District of Texas on behalf of McCorvey (under the alias Jane Roe). The defendant in the case was Dallas County District Attorney Henry Wade, who represented the State of Texas. McCorvey was no longer claiming her pregnancy was a result of rape, and later acknowledged that she had lied about having been raped. "Rape" is not mentioned in the judicial opinions in the case.

On June 17, 1970, a three-judge panel of the District Court, consisting of Northern District of Texas Judges Sarah T. Hughes, William McLaughlin Taylor Jr. and Fifth Circuit Court of Appeals Judge Irving Loeb Goldberg, unanimously declared the Texas law unconstitutional, finding that it violated the right to privacy found in the Ninth Amendment. In addition, the court relied on Justice Arthur Goldberg's 1965 concurrence in Griswold v. Connecticut. The court, however, declined to grant an injunction against enforcement of the law.

In 1971, Shirley Wheeler was charged with manslaughter after Florida hospital staff reported her illegal abortion to the police. She received a sentence of two years' probation and under her probation, she had to move back into her parents' house in North Carolina. The Boston Women's Abortion Coalition held a rally for Wheeler in Boston to raise money and awareness of her charges as well as had staff members from the Women's National Abortion Action Coalition (WONAAC) speak at the rally. Wheeler was possibly the first woman to be held criminally responsible for submitting to an abortion. Her conviction was overturned by the Florida Supreme Court.

Before the Supreme Court

Roe v. Wade reached the Supreme Court on appeal in 1970. The justices delayed taking action on Roe and a closely related case, Doe v. Bolton, until they had decided Younger v. Harris (because they felt the appeals raised difficult questions on judicial jurisdiction) and United States v. Vuitch (in which they considered the constitutionality of a District of Columbia statute that criminalized abortion except where the mother's life or health was endangered). In Vuitch, the Court narrowly upheld the statute, though in doing so, it treated abortion as a medical procedure and stated that physicians must be given room to determine what constitutes a danger to (physical or mental) health. The day after they announced their decision in Vuitch, they voted to hear both Roe and Doe.

Arguments were scheduled by the full Court for December 13, 1971. Before the Court could hear the oral arguments, Justices Hugo Black and John Marshall Harlan II retired. Chief Justice Warren Burger asked Justice Potter Stewart and Justice Blackmun to determine whether Roe and Doe, among others, should be heard as scheduled. According to Blackmun, Stewart felt that the cases were a straightforward application of Younger v. Harris, and they recommended that the Court move forward as scheduled.

In his opening argument in defense of the abortion restrictions, attorney Jay Floyd made what was later described as the "worst joke in legal history." Appearing against two female lawyers, Floyd began, "Mr. Chief Justice and may it please the Court. It's an old joke, but when a man argues against two beautiful ladies like this, they are going to have the last word." His remark was met with cold silence; one observer thought that Chief Justice Burger "was going to come right off the bench at him. He glared him down."

After a first round of arguments, all seven justices tentatively agreed that the Texas law should be struck down, but on varying grounds. Burger assigned the role of writing the Court's opinion in Roe (as well as Doe) to Blackmun, who began drafting a preliminary opinion that emphasized what he saw as the Texas law's vagueness. (At this point, Black and Harlan had been replaced by Justices William Rehnquist and Lewis F. Powell Jr., but they arrived too late to hear the first round of arguments.) But Blackmun felt that his opinion did not adequately reflect his liberal colleagues' views. In May 1972, he proposed that the case be reargued. Justice William O. Douglas threatened to write a dissent from the reargument order (he and the other liberal justices were suspicious that Rehnquist and Powell would vote to uphold the statute), but was coaxed out of the action by his colleagues, and his dissent was merely mentioned in the reargument order without further statement or opinion. The case was reargued on October 11, 1972. Weddington continued to represent Roe, and Texas Assistant Attorney General Robert C. Flowers replaced Jay Floyd for Texas.

Blackmun continued to work on his opinions in both cases over the summer recess, even though there was no guarantee that he would be assigned to write them again. Over the recess, he spent a week researching the history of abortion at the Mayo Clinic in Minnesota, where he had worked in the 1950s. After the Court heard the second round of arguments, Powell said he would agree with Blackmun's conclusion but pushed for Roe to be the lead of the two abortion cases being considered. Powell also suggested that the Court strike down the Texas law on privacy grounds. Justice Byron White was unwilling to sign on to Blackmun's opinion, and Rehnquist had already decided to dissent.

Supreme Court decision

The Court issued its decision on January 22, 1973, with a 7-to-2 majority vote in favor of Roe. Justices Burger, Douglas, and Stewart filed concurring opinions, and Justice White filed a dissenting opinion in which Justice Rehnquist joined. Burger's, Douglas's, and White's opinions were issued along with the Court's opinion in Doe v. Bolton (announced on the same day as Roe v. Wade). The Court deemed abortion a fundamental right under the United States Constitution, thereby subjecting all laws attempting to restrict it to the standard of strict scrutiny.

Right to privacy

The Court declined to adopt the district court's Ninth Amendment rationale, and instead asserted that the "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." Douglas, in his concurring opinion in the companion case, Doe, stated more emphatically, "The Ninth Amendment obviously does not create federally enforceable rights."

Justice Blackmun's majority opinion explicitly rejected a fetal "right to life" argument. The Court instead recognized the right to an abortion as a fundamental right included within the guarantee of personal privacy. As a result, regulations limiting abortion had to be justified by a "compelling state interest," and legislative enactments regulating abortion had to be narrowly tailored to meet the compelling interests; in other words, Justice Blackmun applied a strict scrutiny analysis to abortion regulations.

While acknowledging that the right to abortion was not unlimited, Justice Blackmun, speaking for the Court, created a trimester framework to balance the fundamental right to abortion with the government's two legitimate interests: protecting the mother's health and protecting the "potentiality of human life." The trimester framework addressed when a woman's fundamental right to abortion would be absolute, and when the state's interests would become compelling. In the first trimester, when it was believed that the procedure was safer than childbirth, the Court left the decision to abort completely to the woman and her physician. From approximately the end of the first trimester until fetal viability, the state's interest in protecting the health of the mother would become "compelling." At that time, the state could regulate the abortion procedure if the regulation "reasonably relate[d] to the "preservation and protection of maternal health." At the point of viability, which the Court believed to be in the third trimester, the state's interest in "potential life" would become compelling, and the state could regulate abortion to protect "potential life." At that point, the state could even forbid abortion so long as it made an exception to preserve the life or health of the mother. The Court added that the primary right being preserved in the Roe decision was that of the physician to practice medicine freely absent a compelling state interest – not women's rights in general. In 1992, however, the plurality of Justices Sandra Day O'Connor, David Souter, and Anthony Kennedy made a subtle move away from the physician's-rights approach of Roe and toward a patient's-rights approach in Planned Parenthood of Southeastern Pennsylvania v. Casey. The plurality in Casey, explicitly confirming that women had a constitutional right to abortion and further upholding the "essential holding" of Roe, stated that women had a right to choose abortion before viability and that this right could not be unduly interfered with by the state. They asserted that this right was rooted in the Due Process Clause of the Fourteenth Amendment.

Prior to the decision, the justices discussed the trimester framework at great length. Justice Powell had suggested that the point where the state could intervene be placed at viability, which Justice Thurgood Marshall supported as well. In an internal memo to the other justices before the majority decision was published, Justice Blackmun wrote: "You will observe that I have concluded that the end of the first trimester is critical. This is arbitrary, but perhaps any other selected point, such as quickening or viability, is equally arbitrary." Roe supporters are quick to point out, however, that the memo only reflects Blackmun's uncertainty about the timing of the trimester framework, not the framework or the holding itself. In his opinion, Blackmun also clearly explained how he had reached the trimester framework – scrutinizing history, common law, the Hippocratic Oath, medical knowledge, and the positions of medical organizations. Justice Blackmun's trimester framework was later rejected by the O'Connor–Souter–Kennedy plurality in Casey, in favor of the "undue burden" analysis still employed by the Court. Contrary to Blackmun, Justice Douglas preferred the first-trimester line. Justice Stewart said the lines were "legislative" and wanted more flexibility and consideration paid to state legislatures, though he joined Blackmun's decision. Justice William J. Brennan Jr. proposed abandoning frameworks based on the age of the fetus and instead allowing states to regulate the procedure based on its safety for the mother.

The majority opinion allowed states to protect fetal life after viability even though a fetus is not a person within the meaning of the Fourteenth Amendment.

Justiciability

An aspect of the decision that attracted comparatively little attention was the Court's disposition of the issues of standing and mootness. Under the traditional interpretation of these rules, Jane Roe's appeal was "moot" because she had already given birth to her child and thus would not be affected by the ruling; she also lacked "standing" to assert the rights of other pregnant women. As she did not present an "actual case or controversy" (a grievance and a demand for relief), any opinion issued by the Supreme Court would constitute an advisory opinion, a practice forbidden by Article III of the United States Constitution.

The Court concluded that the case came within an established exception to the rule: one that allowed consideration of an issue that was "capable of repetition, yet evading review." This phrase had been coined in 1911 by Justice Joseph McKenna in Southern Pacific Terminal Co. v. ICC. Blackmun's opinion quoted McKenna and noted that pregnancy would normally conclude more quickly than an appellate process: "If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied."

Dissents

Justices White and Rehnquist wrote emphatic dissenting opinions. White wrote:

I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant women and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the woman, on the other hand. As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but, in my view, its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court.

White asserted that the Court "values the convenience of the pregnant mother more than the continued existence and development of the life or potential life that she carries." Though he suggested that he "might agree" with the Court's values and priorities, he wrote that he saw "no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States." White criticized the Court for involving itself in the issue of abortion by creating "a constitutional barrier to state efforts to protect human life and by investing mothers and doctors with the constitutionally protected right to exterminate it." He would have left this issue, for the most part, "with the people and to the political processes the people have devised to govern their affairs."

Rehnquist elaborated on several of White's points, asserting that the Court's historical analysis was flawed:

To reach its result, the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment. As early as 1821, the first state law dealing directly with abortion was enacted by the Connecticut Legislature. By the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion. While many States have amended or updated their laws, 21 of the laws on the books in 1868 remain in effect today.

From this historical record, Rehnquist concluded, "There apparently was no question concerning the validity of this provision or of any of the other state statutes when the Fourteenth Amendment was adopted." Therefore, in his view, "the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter."

Supreme Court Decisions for 200

A. Court case that established the federal government's implied powers over the states.

Q. McCulloch v. Maryland

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), was a decision by the Supreme Court of the United States. The state of Maryland had attempted to impede operation of a branch of the Second Bank of the United States by imposing a tax on all notes of banks not chartered in Maryland. Though the law, by its language, was generally applicable to all banks not chartered in Maryland, the Second Bank of the United States was the only out-of-state bank then existing in Maryland, and the law was recognized in the court's opinion as having specifically targeted the Bank of the United States. The Court invoked the Necessary and Proper Clause of the Constitution, which allowed the Federal government to pass laws not expressly provided for in the Constitution's list of express powers, provided those laws are in useful furtherance of the express powers of Congress under the Constitution.

This case established two important principles in constitutional law. First, the Constitution grants to Congress implied powers for implementing the Constitution's express powers, in order to create a functional national government. Second, state action may not impede valid constitutional exercises of power by the Federal government.

Background

On April 10, 1816, the Congress of the United States passed an act titled "An Act to Incorporate the Subscribers to the Bank of the United States", which provided for the incorporation of the Second Bank of the United States. The Bank first went into full operation in Philadelphia, Pennsylvania. In 1817, the Bank opened a branch in Baltimore, Maryland, and transacted and carried on business as a branch of the Bank of the United States by issuing bank notes, discounting promissory notes, and performing other operations usual and customary for banks to do and perform. Both sides of the litigation admitted that the President, directors, and company of the Bank had no authority to establish the Baltimore branch, or office of discount and deposit, other than the fact that Maryland had adopted the Constitution of the United States.

On February 11, 1818, the General Assembly of Maryland passed an act titled, "an act to impose a tax on all banks, or branches thereof, in the State of Maryland, not chartered by the legislature":

Be it enacted by the General Assembly of Maryland that if any bank has established or shall, without authority from the State first had and obtained establish any branch, office of discount and deposit, or office of pay and receipt in any part of this State, it shall not be lawful for the said branch, office of discount and deposit, or office of pay and receipt to issue notes, in any manner, of any other denomination than five, ten, twenty, fifty, one hundred, five hundred and one thousand dollars, and no note shall be issued except upon stamped paper of the following denominations; that is to say, every five dollar note shall be upon a stamp of ten cents; every ten dollar note, upon a stamp of twenty cents; every twenty dollar note, upon a stamp of thirty cents; every fifty dollar note, upon a stamp of fifty cents; every one hundred dollar note, upon a stamp of one dollar; every five hundred dollar note, upon a stamp of ten dollars; and every thousand dollar note, upon a stamp of twenty dollars; which paper shall be furnished by the Treasurer of the Western Shore, under the direction of the Governor and Council, to be paid for upon delivery; provided always that any institution of the above description may relieve itself from the operation of the provisions aforesaid by paying annually, in advance, to the Treasurer of the Western Shore, for the use of State, the sum of $15,000.

And be it enacted that the President, cashier, each of the directors and officers of every institution established or to be established as aforesaid, offending against the provisions aforesaid shall forfeit a sum of $500 for each and every offence, and every person having any agency in circulating any note aforesaid, not stamped as aforesaid directed, shall forfeit a sum not exceeding $100, every penalty aforesaid to be recovered by indictment or action of debt in the county court of the county where the offence shall be committed, one-half to the informer and the other half to the use of the State...

James William McCulloch, head of the Baltimore Branch of the Second Bank of the United States, refused to pay the tax and the bank was represented by Daniel Webster. The lawsuit was filed by John James, an informer who sought to collect one half of the fine as provided for by the statute. The case was appealed to the Maryland Court of Appeals where the state of Maryland argued that "the Constitution is silent on the subject of banks." It was Maryland's contention that because the Constitution did not specifically state that the federal government was authorized to charter a bank, the Bank of the United States was unconstitutional. The court upheld Maryland. The case was then appealed to the Supreme Court.

Supreme Court decision

The Court determined that Congress did have the power to create the Bank. Chief Justice Marshall supported this conclusion with four main arguments. First, he argued that historical practice established Congress' power to create the Bank. Marshall invoked the first Bank of the United States history as authority for the constitutionality of the second bank. The first Congress enacted the bank after great debate and that it was approved by an executive "with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast."

Second, Chief Justice Marshall refuted the argument that states retain ultimate sovereignty because they ratified the constitution. "The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion." Marshall contended that it was the people who ratified the Constitution and thus the people are sovereign, not the states.

Third, Marshall addressed the scope of congressional powers under Article I. The Court broadly described Congress' authority before addressing the necessary and proper clause. Marshall admitted that the Constitution does not enumerate a power to create a central Bank but said that this is not dispositive as to Congress's power to establish such an institution. Chief Justice Marshall wrote, "In considering this question, then, we must never forget, that it is a constitution we are expounding."

Fourth, Marshall supported the Court's opinion textually by invoking the Necessary and Proper Clause, which permits Congress to seek an objective while exercising its enumerated powers so long as the objective is not forbidden by the Constitution. In liberally interpreting the Necessary and Proper Clause, the Court rejected Maryland's narrow interpretation of the clause, which purported that the word "necessary" in the Necessary and Proper Clause meant that Congress could only pass those laws that were absolutely essential in the execution of its enumerated powers. The Court rejected this argument, on the grounds that many of the enumerated powers of Congress under the Constitution would be useless if only those laws deemed essential to a power's execution could be passed. Marshall also noted that the Necessary and Proper Clause is listed within the powers of Congress, not the limitations.

The Court held that for these reasons, the word "necessary" in the Necessary and Proper Clause (elastic clause) does not refer to the only way of doing something, but rather applies to various procedures for implementing all constitutionally-established powers. "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

This principle had been established many years earlier by Alexander Hamilton:

[A] criterion of what is constitutional, and of what is not so ... is the end, to which the measure relates as a mean. If the end be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the Constitution, it may safely be deemed to come within the compass of the national authority. There is also this further criterion which may materially assist the decision:

Does the proposed measure abridge a pre-existing right of any State, or of any individual? If it does not, there is a strong presumption in favour of its constitutionality....

Chief Justice Marshall also determined that Maryland may not tax the bank without violating the Constitution. The Court voided the tax on the grounds that it was unconstitutional. The opinion stated that Congress has implied powers that need to be related to the text of the Constitution, but need not be enumerated within the text. This case was a seminal moment in the formation of a balance between federalism, federal power, and states' powers. Chief Justice Marshall also explained in this case that the Necessary and Proper Clause does not require that all federal laws be necessary and proper and that federal laws that are enacted directly pursuant to one of the express, enumerated powers granted by the Constitution need not comply with the Necessary and Proper Clause, holding that the clause "purport[s] to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted."

Supreme Court Decisions for 300

A. Case allowed for the use of symbolic speech, as long as it nonviolent.

Q. Tinker v Des Moines

The controversy within the legal community over Justice Hunt's directed verdict continued for years. In 1882, a month after Justice Hunt's retirement from the Supreme Court, a circuit court judge ruled that it was wrong for a judge to direct a jury to deliver a verdict of guilty. In 1895, in Sparf v. United States, the Supreme Court ruled that a federal judge could not direct a jury to return a guilty verdict in a criminal trial.

Background of the case

In 1965, Des Moines, Iowa residents John F. Tinker (15 years old), his siblings Mary Beth Tinker (13 years old), Hope Tinker (11 years old), and Paul Tinker (8 years old), along with their friend Christopher Eckhardt (16 years old) decided to wear black armbands to their schools (high school for John and Christopher, junior high for Mary Beth, elementary school for Hope and Paul) in protest of the Vietnam War and supporting the Christmas Truce called for by Senator Robert F. Kennedy. The principals of the Des Moines schools learned of the plan and met on December 14 to create a policy that stated that school children wearing an armband would be asked to remove it immediately. Students violating the policy would be suspended and allowed to return to school after agreeing to comply with it. The participants decided to violate this policy. Mary Beth Tinker and Christopher Eckhardt were suspended from school for wearing the armbands on December 16 and John Tinker was suspended for doing the same on the following day. (The two youngest participants were not punished.) Mary Beth, Christopher, and John were suspended from school until after January 1, 1966, when their protest had been scheduled to end.

A suit was filed after the Iowa Civil Liberties Union approached the Tinker family and the ACLU agreed to help with the lawsuit. The children's fathers filed suit in the U.S. District Court, which upheld the decision of the Des Moines school board. A tie vote in the U.S. Court of Appeals for the 8th Circuit meant that the U.S. District Court's decision continued to stand, and forced the Tinkers and Eckhardts to appeal to the Supreme Court directly. The case was argued before the court on November 12, 1968.

The case was funded by Des Moines residents Louise Noun, then the president of the Iowa Civil Liberties Union, and her brother, Joseph Rosenfield, a businessman.

Legal precedents and issues

Previous decisions, such as West Virginia State Board of Education v. Barnette, had established that students did have some constitutional protections in public school. This case was the first time that the court set forth standards for safeguarding public school students' free speech rights. This case involved symbolic speech, which was first recognized in Stromberg v. California.

The Court's decision

Majority opinion

The court's 7–2 decision held that the First Amendment applied to public schools, and that administrators would have to demonstrate constitutionally valid reasons for any specific regulation of speech in the classroom. The court observed, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Justice Abe Fortas wrote the majority opinion, holding that the speech regulation at issue in Tinker was "based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation's part in the conflagration in Vietnam." The Court held that for school officials to justify censoring speech, they "must be able to show that [their] action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," that the conduct that would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." The Court found that the actions of the Tinkers in wearing armbands did not cause disruption and held that their activity represented constitutionally protected symbolic speech.

Dissents

Justices Hugo Black and John M. Harlan II dissented. Black, who had long believed that disruptive "symbolic speech" was not constitutionally protected, wrote, "While I have always believed that under the First and Fourteenth Amendments neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases." Black argued that the Tinkers' behavior was indeed disruptive and declared, "I repeat that if the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary."

Harlan dissented on the grounds that he "[found] nothing in this record which impugns the good faith of respondents in promulgating the armband regulation."

Subsequent jurisprudence

Tinker remains a viable and frequently cited Court precedent, though Court decisions have determined limitations on the scope of student free speech rights. In Bethel School District v. Fraser, a 1986 case, the Supreme Court held that a high school student's sexual innuendo-laden speech during a student assembly was not constitutionally protected. Though Fraser applies the Tinker test of disruption to school decorum, if not undermining of educational mission, the effect is to make an exception to Tinker for "indecent" speech. Hazelwood v. Kuhlmeier, where the court ruled that schools have the right to regulate, for legitimate educational reasons, the content of non-forum, school-sponsored newspapers, also limits Tinker's application. The Court in Hazelwood clarified that both Fraser and Hazelwood were decided under the doctrine of Perry Education Association v. Perry Local Educators Association. Such a distinction keeps undisturbed the Material Disruption doctrine of Tinker, while deciding certain student free speech cases under the Nonpublic Forum doctrine of Perry. In Morse v. Frederick, the so-called "Bong Hits For Jesus" case of 2007, the Court held that schools may, consistent with the First Amendment, restrict student speech at a school-sponsored event, even those events occurring off school grounds, when that speech is reasonably viewed as promoting illegal drug use. In 2013, the full U.S. Court of Appeals for the Third Circuit re-heard a case en banc that had been argued before a panel of three of its judges, considering whether middle school students involved in a charitable effort—a breast cancer awareness drive—could be prohibited from wearing bracelets imprinted with "I ♥ Boobies! (Keep a Breast)". The Third Circuit cited Tinker when ruling that the school's ban on the bracelets violated the students' right to free speech because the bracelets were not plainly offensive or disruptive and were speech conducted to raise awareness of a social issue. The Supreme Court later declined to take up the case.

Supreme Court Decisions for 400

A. Lawsuits based on libel or defamation must show intent or recklessness.

Q. New York Times v. Sullivan

New York Times Co. v. Sullivan, 376 U.S. 254 (1964), was a landmark United States Supreme Court case that established the actual malice standard, which has to be met before press reports about public officials can be considered to be libel; and hence allowed free reporting of the civil rights campaigns in the southern United States. It is one of the key decisions supporting the freedom of the press. The actual malice standard requires that the plaintiff in a defamation case, if that person is a public official or public figure, prove that the publisher of the statement in question knew that the statement was false or acted in reckless disregard of its truth or falsity. Because of the extremely high burden of proof on the plaintiff, and the difficulty of proving the defendant's knowledge and intentions, such claims by public figures rarely prevail.

Before this decision, there were nearly US $300,000,000 in libel actions from the Southern states outstanding against news organizations, as part of a focused effort by Southern officials to use defamation lawsuits as a means of preventing critical coverage of civil rights issues in out-of-state publications. The Supreme Court's decision, and its adoption of the actual malice standard, reduced the financial hazard from potential defamation claims, and thus countered the efforts by public officials to use these claims to suppress political criticism.

Background

On March 29, 1960, The New York Times carried a full-page advertisement titled "Heed Their Rising Voices", paid for by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South." In the advertisement, the Committee solicited funds to defend Martin Luther King, Jr., against an Alabama perjury indictment. The advertisement described actions against civil rights protesters, some of them inaccurately, some of which involved the police force of Montgomery, Alabama. Referring to the Alabama State Police, the advertisement stated: "They have arrested [King] seven times...." However, at that point, he had been arrested four times. Although African-American students staged a demonstration on the State Capitol steps, they sang The Star-Spangled Banner, not My Country, 'Tis of Thee. Although the Montgomery Public Safety commissioner, L. B. Sullivan, was not named in the advertisement, Sullivan argued that the inaccurate criticism of actions by the police was defamatory to him as well because it was his duty to supervise the police department.

Because Alabama law denied public officers recovery of punitive damages in a libel action on their official conduct unless they first made a written demand for a public retraction and the defendant failed or refused to comply, Sullivan sent such a request. The Times did not publish a retraction in response to the demand. Instead, its lawyers wrote a letter stating, among other things, that "we... are somewhat puzzled as to how you think the statements in any way reflect on you," and "you might, if you desire, let us know in what respect you claim that the statements in the advertisement reflect on you."

Sullivan did not respond but instead filed a libel suit a few days later. He also sued four African-American ministers mentioned in the ad: Ralph Abernathy, S.S. Seay, Sr., Fred Shuttlesworth, and Joseph Lowery.

Sullivan won $500,000 in an Alabama court judgment.

The Times subsequently published a retraction of the advertisement upon the demand of Governor John Patterson of Alabama, who alleged the publication charged him with "grave misconduct and... improper actions and omissions as Governor of Alabama and ex officio chairman of the State Board of Education of Alabama." When asked to explain why there had been a retraction for the Governor but not for Sullivan, the Secretary of the Times testified:

We did that because we didn't want anything that was published by the Times to be a reflection on the State of Alabama and the Governor was, as far as we could see, the embodiment of the State of Alabama and the proper representative of the state and, furthermore, we had by that time learned more of the actual facts which the ad purported to recite and, finally, the ad did refer to the action of the state authorities and the Board of Education presumably of which the Governor is the ex officio chairman ...

However, the Secretary also testified he did not think that "any of the language in there referred to Mr. Sullivan."

Constitutional law scholar Herbert Wechsler successfully argued the case before the United States Supreme Court. Louis M. Loeb, a partner at the firm of Lord Day & Lord who served as chief counsel to the Times from 1948 to 1967, was among the authors of the brief of the Times.

Loeb later called the libel cases he argued for The New York Times "the heaviest responsibility I've ever had since I began practicing law."

Decision

The Supreme Court held that news publications could not be sued for libel by public officials unless the plaintiffs were able to establish actual malice in the false reporting of a news story. The Court ruled for The Times, 9–0. The rule of law applied by the Alabama courts was found constitutionally deficient for its failure to provide safeguards for freedom of speech and of the press, as required by the First and Fourteenth Amendment. The decision further held that even with the proper safeguards, the evidence presented in the case was insufficient to support a judgment for Sullivan. In sum the court ruled that "the First Amendment protects the publication of all statements, even false ones, about the conduct of public officials except when statements are made with actual malice (with knowledge that they are false or in reckless disregard of their truth or falsity)."

The decision allowed newspapers more freedom to report on the widespread chaos and police abuse during the Civil Rights Movement.

Common law malice

The Court held that a public official suing for defamation must prove that the statement in question was made with actual malice. That phrase refers to knowledge or reckless lack of investigation, rather than its ordinary meaning of malicious intent. In his concurring opinion, Justice Black explained, "'Malice,' even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment."

The term "malice" came from existing libel law, rather than being invented in the case. In many jurisdictions, including Alabama, where the case arose, proof of "actual malice" (actual knowledge of falsity, or reckless disregard for the truth) was require for punitive damages other increased penalties. Since a writer's malicious intent is hard to prove, proof that the writer knowingly published a falsehood was generally accepted as proof of malice, under the assumption that only a person with ill intent would knowingly publish something false. In Hoeppner v. Dunkirk Printing Co., 254 N.Y. 95 (1930), similarly, the court said:

The plaintiff alleges that this criticism of him and of his work was not fair and was not honest; it was published with actual malice, ill will and spite. If he establishes this allegation, he has made out a cause of action. No comment or criticism, otherwise libelous, is fair or just comment on a matter of public interest if it be made through actual ill will and malice. (p. 106)

Supreme Court Decisions for 500

A. The Court determined that the need to protect the country was a greater priority than the individual rights of the Japanese and Japanese Americans.

Q. What is Korematsu v. United States?

Korematsu v. United States, 323 U.S. 214 (1944), was a landmark United States Supreme Court case concerning the constitutionality of Executive Order 9066, which ordered Japanese Americans into internment camps during World War II regardless of citizenship.

In a 6–3 decision, the Court sided with the government, ruling the exclusion order was constitutional. Six of the eight appointees of President Franklin Roosevelt sided with Roosevelt. The two others and the lone Herbert Hoover appointee, Owen Roberts, dissented.

The majority opinion was written by Supreme Court justice Hugo Black and held that the need to protect against espionage outweighed the rights of Americans of Japanese descent, such as Korematsu. The Court limited its decision to the validity of the exclusion orders: "The provisions of other orders requiring persons of Japanese ancestry to report to assembly centers and providing for the detention of such persons in assembly and relocation centers were separate, and their validity is not in issue in this proceeding."

During the case, Solicitor General Charles Fahy is alleged to have suppressed evidence by keeping from the Court a report from the Office of Naval Intelligence that there was no evidence that Japanese Americans were acting as spies or sending signals to enemy submarines.

The decision in Korematsu v. United States has been controversial. Korematsu's conviction for evading internment was overturned on November 10, 1983, after Korematsu challenged the earlier decision by filing for a writ of coram nobis. In a ruling by Judge Marilyn Hall Patel, the United States District Court for the Northern District of California granted the writ (thus voiding Korematsu's original conviction) because in Korematsu's original case, the government had knowingly submitted false information to the Supreme Court that had a material effect on the Supreme Court's decision.

The Korematsu decision has not been explicitly overturned, but in 2011, the Department of Justice filed an official notice conceding that the Solicitor General's defense of the internment policy at the time had been in error. However, the Court's opinion remains significant: it was the first instance of the Supreme Court applying the strict scrutiny standard to racial discrimination by the government. Also, it was one of only a handful of cases in which the Court held that the government had met that standard.

Constitutional scholars like Bruce Fein and Noah Feldman have compared Korematsu to Dred Scott v. Sandford and Plessy v. Ferguson, respectively, in arguing it has become an example of Richard Primus's "Anti-Canon", a term for those cases which are so flawed that they are now taken as exemplars of bad legal decision making. The decision has been described as "an odious and discredited artifact of popular bigotry" and as "a stain on American jurisprudence". Feldman summarized the case's "uniquely bad legal status means it's not precedent even though it hasn't been overturned".

Introduction

Japanese American Assembly Center at Tanforan race track, San Bruno

Shortly after the second wave of the attack on Pearl Harbor, Japanese pilot Shigenori Nishikaichi crashlanded his aircraft on the Hawaiian island of Niihau. Although island locals did not yet know of the attack, they were aware of the likelihood of war between the United States and Japan and so quickly detained the pilot and seized the documents that he was carrying. Three American citizens of Japanese descent who lived on the island (Ishimatsu Shintani and Yoshio and Irene Harada) were informed of the detained pilot as they were the only island residents who could speak both Japanese and English.

All had been born in the US. Shintani was a Japanese-born immigrant (issei), and the Haradas were American-born children of such immigrants (nisei). Awaiting the arrival of the island's owner so that they could decide what to do next, the islanders housed Nishikaichi with the Japanese-Americans but provided a detail of four sentries for additional security.

Five days later, the Haradas aided Nishikaichi in an escape attempt and took some islanders hostage as Shintani attempted to retrieve the documents that had been seized. As the captors became fatigued, the hostages attacked, killing Nishikaichi. Realizing that the escape plan had failed, Yoshio Harada then committed suicide. Historian Gordon Prange notes that it was "the rapidity with which the three resident Japanese went over to the pilot's cause" that troubled the Hawaiians. "The more pessimistic among them cited the Niʻihau incident as proof that no one could trust any Japanese, even if an American citizen, not to go over to Japan if it appeared expedient." A U.S. Navy report issued in late January 1942 concluded that the Niihau incident evidenced the "likelihood that Japanese residents previously believed loyal to the United States may aid Japan."

About three weeks after the publication of the Navy report, on February 19, 1942, Roosevelt issued Executive Order 9066, authorizing the War Department to create military areas from which any or all Americans might be excluded, and to provide for the necessary transport, lodging, and feeding of persons displaced from such areas. On March 2, 1942, the U.S. Army Lieutenant General John L. DeWitt, commander of the Western Defense Command, issued Public Proclamation No. 1, demarcating western military areas and the exclusion zones therein, and directing any "Japanese, German, or Italian aliens" and any person of Japanese descent to inform the U.S. Postal Service of any changes of residence. Further military areas and zones were demarcated in Public Proclamation No. 2.

In the meantime, Secretary of War Henry L. Stimson mailed to Senator Robert Rice Reynolds and U.S. House Speaker Sam Rayburn draft legislation authorizing the enforcement of Executive Order 9066. By March 21, Congress had enacted the proposed legislation, which Roosevelt signed into law.

On March 24, 1942, Western Defense Command began issuing Civilian Exclusion orders, commanding that "all persons of Japanese ancestry, including aliens and non-aliens" report to designated assembly points. With the issuance of Civilian Restrictive Order No. 1 on May 19, 1942, Japanese Americans were forced to move into relocation camps.

Fred Korematsu was a Japanese-American man who decided to stay in San Leandro, California; he knowingly violated Civilian Exclusion Order No. 34 of the U.S. Army, even undergoing plastic surgery in an attempt to conceal his identity. He argued that the Executive Order 9066 was unconstitutional and that it violated the Fifth Amendment to the United States Constitution. The Fifth Amendment was selected over the Fourteenth Amendment due to the lack of federal protections in the Fourteenth Amendment. He was arrested and convicted. No question was raised as to Korematsu's loyalty to the United States. The Circuit Court of Appeals affirmed the conviction, and the Supreme Court granted certiorari.

Decision

The decision of the case, written by Justice Hugo Black, found the case largely indistinguishable from the previous year's Hirabayashi v. United States decision, and rested largely on the same principle: deference to Congress and the military authorities, particularly in light of the uncertainty following Pearl Harbor. Justice Black further denied that the case had anything to do with racial prejudice:

"Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and, finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this."

Felix Frankfurter's concurrence

Justice Frankfurter's concurrence may be read here in its entirety:

"According to my reading of Civilian Exclusion Order No. 34, it was an offense for Korematsu to be found in Military Area No. 1, the territory wherein he was previously living, except within the bounds of the established Assembly Center of that area. Even though the various orders issued by General DeWitt be deemed a comprehensive code of instructions, their tenor is clear, and not contradictory. They put upon Korematsu the obligation to leave Military Area No. 1, but only by the method prescribed in the instructions, i.e., by reporting to the Assembly Center. I am unable to see how the legal considerations that led to the decision in Hirabayashi v. United States, 320 U.S. 81, fail to sustain the military order which made the conduct now in controversy a crime. And so I join in the opinion of the Court, but should like to add a few words of my own.

"The provisions of the Constitution which confer on the Congress and the President powers to enable this country to wage war are as much part of the Constitution as provisions looking to a nation at peace. And we have had recent occasion to quote approvingly the statement of former Chief Justice Hughes that the war power of the Government is "the power to wage war successfully". Hirabayashi v. United States, supra, at 93, and see Home Bldg. & L. Assn. v. Blaisdell, 290 U.S. 398, 426. Therefore, the validity of action under the war power must be judged wholly in the context of war. That action is not to be stigmatized as lawless because like action in times of peace would be lawless. To talk about a military order that expresses an allowable judgment of war needs by those entrusted with the duty of conducting war as "an unconstitutional order" is to suffuse a part of the Constitution with an atmosphere of unconstitutionality. The respective spheres of action of military authorities and of judges are, of course, very different. But, within their sphere, military authorities are no more outside the bounds of obedience to the Constitution than are judges within theirs. "The war power of the United States, like its other powers ... is subject to applicable constitutional limitations", Hamilton v. Kentucky Distilleries Co., 251 U.S. 146, 156. To recognize that military orders are "reasonably expedient military precautions" in time of war, and yet to deny them constitutional legitimacy, makes of the Constitution an instrument for dialectic subtleties not reasonably to be attributed to the hard-headed Framers, of whom a majority had had actual participation in war. If a military order such as that under review does not transcend the means appropriate for conducting war, such action by the military is as constitutional as would be any authorized action by the Interstate Commerce Commission within the limits of the constitutional power to regulate commerce. And, being an exercise of the war power explicitly granted by the Constitution for safeguarding the national life by prosecuting war effectively, I find nothing in the Constitution which denies to Congress the power to enforce such a valid military order by making its violation an offense triable in the civil courts. Compare Interstate Commerce Commission v. Brimson, 154 U.S. 447; 155 U.S. 3, and Monongahela Bridge Co. v. United States, 216 U.S. 177. To find that the Constitution does not forbid the military measures now complained of does not carry with it approval of that which Congress and the Executive did. That is their business, not ours."

Murphy's dissent

Justice Frank Murphy issued a vehement dissent, saying that the exclusion of Japanese "falls into the ugly abyss of racism", and resembles "the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy." He also compared the treatment of Japanese Americans with the treatment of Americans of German and Italian ancestry, as evidence that race, and not emergency alone, led to the exclusion order which Korematsu was convicted of violating:

"I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting, but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must, accordingly, be treated at all times as the heirs of the American experiment, and as entitled to all the rights and freedoms guaranteed by the Constitution."

Justice Murphy's two uses of the term "racism" in this opinion, along with two additional uses in his concurrence in Steele v Louisville & Nashville Railway Co, decided the same day, are among the first appearances of the word "racism" in a United States Supreme Court opinion. The first appearance was in Justice Murphy's concurrence in Ex parte Endo, 323 U.S. 283 (1944). The term was also used in other cases, such as Duncan v. Kahanamoku, 327 U.S. 304 (1946) and Oyama v. California, 332 U.S. 633 (1948). It then disappeared from the court's lexicon for 18 years—it reappeared in Brown v. Louisiana, 383 U.S. 131 (1966). It did not appear in Loving v. Virginia, 388 U.S. 1 (1967), even though that case did talk about racial discrimination and interracial marriages.

Roberts's dissent

Justice Roberts's dissent also acknowledges the racism inherent in the case although he does not use the word. He recognized that the defendant was being punished based solely upon his ancestry:

"This is not a case of keeping people off the streets at night, as was Hirabayashi v. United States, 320 U.S. 81, nor a case of temporary exclusion of a citizen from an area for his own safety or that of the community, nor a case of offering him an opportunity to go temporarily out of an area where his presence might cause danger to himself or to his fellows. On the contrary, it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. If this be a correct statement of the facts disclosed by this record, and facts of which we take judicial notice, I need hardly labor the conclusion that Constitutional rights have been violated."

Jackson's dissent

By contrast, Justice Robert Jackson's dissent argued that "defense measures will not, and often should not, be held within the limits that bind civil authority in peace", and that it would perhaps be unreasonable to hold the military, who issued the exclusion order, to the same standards of constitutionality that apply to the rest of the government. "In the very nature of things", he wrote, "military decisions are not susceptible of intelligent judicial appraisal." He acknowledged the Court's powerlessness in that regard, writing that "courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint."

He nonetheless dissented, writing that, even if the courts should not be put in the position of second-guessing or interfering with the orders of military commanders, that does not mean that they should have to ratify or enforce those orders if they are unconstitutional. Jackson writes, "I do not think [the civil courts] may be asked to execute a military expedient that has no place in law under the Constitution. I would reverse the judgment and discharge the prisoner." Indeed, he warns that the precedent of Korematsu might last well beyond the war and the internment:

"A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period, a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes."

Jackson acknowledged the racial issues at hand, writing:

"Korematsu was born on our soil, of parents born in Japan. The Constitution makes him a citizen of the United States by nativity and a citizen of California by residence. No claim is made that he is not loyal to this country. There is no suggestion that apart from the matter involved here he is not law abiding and well disposed. Korematsu, however, has been convicted of an act not commonly a crime. It consists merely of being present in the state whereof he is a citizen, near the place where he was born, and where all his life he has lived. [...] [H]is crime would result, not from anything he did, said, or thought, different than they, but only in that he was born of different racial stock. Now, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. Even if all of one's antecedents had been convicted of treason, the Constitution forbids its penalties to be visited upon him. But here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign. If Congress in peace-time legislation should enact such a criminal law, I should suppose this Court would refuse to enforce it.

Subsequent history

2011 DOJ admission of error

On May 20, 2011, Acting Solicitor General Neal Katyal released an unusual statement denouncing one of his predecessors, Solicitor General Charles H. Fahy. He accused Fahy of having "suppressed critical evidence" in the Hirabayashi and Korematsu cases before the Supreme Court during World War II.

The historical record shows that the allegedly suppressed document, known as the Ringle Report, did not originate within "the Office of Naval Intelligence", but was written by a junior intelligence officer in the field and was specifically disavowed by the Office of the Chief of Naval Operations in a letter to the FBI dated February 14, 1942. The letter enclosed a copy of the report, and stated that the report "…does not represent the final and official opinion of the Office of Naval Intelligence." Only two years after the "internment" did the FCC and FBI officially state they had found no evidence of collaborationist radio transmissions by Japanese Americans being sent from the West Coast, but they did find some evidence of such illicit radio transmissions from Hawaii. Accordingly, it was long felt that any suspicion of "suppression of evidence" by Solicitor General Fahy was ill-advised. Korematsu's vindication in 1983, however, was a ruling that the internment was fatally flawed.

Katyal remarked in 2011 that, in the pre-war era of ethnic segregation in public accommodations, which on the West Coast included wide refusal of equal treatment of "Japs", the Chief's office was easily prejudiced to disavow the Ringle Report in its 1942 letter. He noted that Fahy's subordinates had actually alerted Fahy in writing that failing to investigate that report, or at least to disclose its existence in the briefs or argument in the Supreme Court, "might approximate the suppression of evidence". Thus, Katyal concluded that Mr. Fahy "did not inform the Court that a key set of allegations used to justify the internment" had been doubted, if not fully discredited, within the government's own agencies.

Katyal therefore announced his office's filing of a formal "admission of error" negating the precedent value of the Supreme Court decision the government had thereby won. He reaffirmed the extraordinary duty of the Solicitor General to address the Court with "absolute candor," due to the "special credence" the Court explicitly grants to his court submissions.