documents in
american legal history since 1876

“There is nothing new in the world except the history you do not know.”

Harry S Truman (1884–1972)

“A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect.”

Sir Walter Scott (1771–1832)

“History is a doomed enterprise that we happily pursue because of the thrill of the hunt, because exploration of the past is such fun, because of the intellectual challenges involved, because a nation needs to know its own history.”

Arthur M. Schlesinger, Jr. (1917-2007), U.S. historian

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I. INTRODUCTION

OLIVER WENDELL HOLMES, JR.
THE COMMON LAW 1-2 (1881)

*** The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.

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OLIVER WENDELL HOLMES, JR., THE PATH OF THE LAW,
10 HARV. L. REV. 457, 469 (1897)

*** The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened skepticism, that is, toward a deliberate reconsideration of the worth of those rules. ***

A. History As An Ongoing Debate

History is, indeed, an argument without end.

Arthur M. Schlesinger, Jr. (1917-2007), U.S. historian

History is never a closed book or a final verdict. It is forever in the making.

Arthur M. Schlesinger, Jr. (1917-2007), U.S. historian

The story of the American past *** has undergone a remarkable transformation in recent decades. The past itself has not changed, of course; but the way Americans
understand it has changed dramatically. And in the wake of those changes have come both new forms of presentation and bitter controversies.

*Alan Brinkley (1949-    ), U.S. historian*

[All historians are prisoners of their own experience. We bring to history the preconceptions of our personalities and of our age. We cannot seize on ultimate and absolute truths. So the historian is committed to a doomed enterprise – the quest for an unattainable objectivity.

Conceptions of the past are far from stable. They are perennially revised by the urgencies of the present. When new urgencies arise in our own times and lives, the historian’s spotlight shifts, probing at last into the darkness, throwing into sharp relief things that were always there but that earlier historians had carelessly excised from the collective memory. New voices ring out of the historical dark and demand to be heard.

*Arthur M. Schlesinger, Jr. (1917-2007), U.S. historian*

History is, strictly speaking, the study of questions; the study of answers belongs to anthropology and sociology.

*W.H. (Wystan Hugh) Auden (1907–1973), Anglo-American poet*

The often repeated saying that those who forget the lessons of history are doomed to repeat them has a lot of truth in it. But what are 'the lessons of history'? The very attempt at definition furnishes ground for new conflicts. History is not a recipe book; past events are never replicated in the present in quite the same way. Historical events are infinitely variable and their interpretations are a constantly shifting process. There are no certainties to be found in the past.

*Gerda Lerner (1920-    ), U.S. historian*

"History" is a Greek word which means, literally, just "investigation."

*Arnold J. Toynbee (1889-1975), British historian*

History is the great propagator of doubt.

*A.J.P. Taylor (1906-1990), British historian*
The one duty we owe to history is to rewrite it.

Oscar Wilde (1854-1900), Irish playwright, novelist and poet

The great strength of history in a free society is its capacity for self-correction.

Arthur M. Schlesinger, Jr. (1917-2007), U.S. historian

History will die if not irritated. The only service I can do to my profession is to serve as a flea.

Henry Adams (1838-1918), U.S. historian, journalist and novelist

History has to be rewritten because history is the selection of those threads of causes or antecedents that we are interested in.

Oliver Wendell Holmes, Jr. (1841-1935), U.S. Supreme Court Justice

B. Understanding Contemporary Legal Issues

We remain imprisoned by the past as long as we deny its influence in the present.


The disadvantage of men not knowing the past is that they do not know the present. History is a hill or high point of vantage, from which alone men see the town in which they live or the age in which they are living.

G.K. (Gilbert Keith) Chesterton (1874–1936), British author

History is a guide to navigation in perilous times. History is who we are and why we are the way we are.

David C. McCullough (1933– ), U.S. historian

If you would understand anything, observe its beginning and its development.

Aristotle (384 B.C - 322 B.C.), Greek philosopher

You must always know the past, for there is no real Was, there is only Is.

William Faulkner (1897-1962), U.S. novelist
The past is never dead; it's not even past.

*William Faulkner (1897-1962), U.S. novelist*

American history is longer, larger, more various, more beautiful, and more terrible than anything anyone has ever said about it.

*James Baldwin (1924–1987), U.S. author*

History, despite its wrenching pain, cannot be unlived, but if faced with courage, need not be lived again.

*Maya Angelou (1928-   ), U.S. poet, memorist and actress*

Loyalty to our ancestors does not include loyalty to their mistakes.

*George Santayana (1863-1952), Spanish, American poet and essayist*

History repeats itself. That's one of the things wrong with history.

*Clarence Darrow (1857-1938), U.S. lawyer*

[E]very event has had its cause, and nothing, not the least wind that blows, is accident or causeless. To understand what happens now one must find the cause, which may be very long ago in its beginning, but is surely there, and therefore a knowledge of history as detailed as possible is essential if we are to comprehend the past and be prepared for the future.

*Pearl S. Buck (1892–1973), U.S. novelist*

C. Understanding the Meaning of Law and Contemporary Legal Institutions

A page of history is worth a volume of logic.

*Oliver Wendell Holmes, Jr. (1841-1935), U.S. Supreme Court Justice*
History is that which has happened and that which goes on happening in time. But also it is the stratified record upon which we set our feet, the ground beneath us; and the deeper the roots of our being go down into the layers that lie below and beyond the confines of our ego, yet at the same time feed and condition it, . . . the heavier is our life with thought and the weightier is the soul of our flesh.

*Thomas Mann (1875-1955), German novelist, essayist and social critic*

History isn't really about the past -- settling old scores. It's about defining the present and who we are.

*Ken Burns (1953 - ), U.S. documentary film maker*

[I]n the end, a nation’s history must be both the guide and the domain not so much of its historians as its citizens.

*Arthur M. Schlesinger, Jr. (1917-2007), U.S. historian*

The [Supreme] Court is not an organism disassociated from the conditions and history of the times in which it exists. It does not formulate and deliver its opinions in a legal vacuum. Its Judges are not abstract and impersonal oracles, but are men whose views are necessarily, though by no conscious intent, affected by inheritance, education and environment and by the impact of history past and present * * *.


*** American law is a reflection of what goes on in American society in general. The reflection may not be exact; it may be like the reflection of a face in a slow moving river, somewhat refracted and distorted. But it is a reflection nonetheless.

*Lawrence M. Friedman, (1930- ), U.S. historian*

**D. Illuminating the Past and the Future**

When the past no longer illuminates the future, the spirit walks in darkness.

*Alexis de Tocqueville (1805-1859), French historian and political theorist*

The longer you look back, the farther you can look forward.

*Winston S. Churchill (1874-1965), British Prime Minister*
Life must be lived forward, but it can only be understood backward.

_Søren Kierkegaard (1813-1855), Danish philosopher and theologian_

I have but one lamp by which my feet are guided, and that is the lamp of experience. I know no way of judging of the future but by the past.

_Edward Gibbon (1737-1794), British historian_

Those who cannot learn from history are doomed to repeat it.

_George Santayana (1863-1952)_

[H]istory is to the nation as memory is to the individual. As persons deprived of memory become disoriented and lost, not knowing where they have been and where they are going, so a nation denied a conception of the past will be disabled in dealing with its present and its future.

_Arthur M. Schlesinger, Jr. (1917-2007), U.S. historian_

We can be almost certain of being wrong about the future, if we are wrong about the past.

_G.K. (Gilbert Keith) Chesterton (1874–1936), British author_

History teaches everything, even the future.

_Alphonse de Lamartine (1790-1869), French writer, poet and politician_

A new future requires a new past.

_Eric Foner (1943-   ), U.S. historian_

One faces the future with one's past.

_Pearl S. Buck (1892–1973), U.S. novelist_

History by apprising them [students] of the past will enable them to judge of the future; it will avail them of the experience of other times and other nations; it will qualify them as judges of the actions and designs of men; it will enable them to know
ambition under every disguise it may assume; and knowing it, to defeat its views.

*Thomas Jefferson (1743–1826), U.S. President and legal philosopher*

The principal office of history I take to be this: to prevent virtuous actions from being forgotten, and that evil words and deeds should fear an infamous reputation with posterity.

*Tacitus (c. 55–117), Roman historian*

History repeats itself because no one was listening the first time.

*Anonymous*

Fellow-citizens, we cannot escape history.

*Abraham Lincoln (1809–1865) (Annual message to Congress, Dec. 1, 1862)*

The very ink with which all history is written is merely fluid prejudice.

*Mark Twain (1835-1910), U.S. humorist, satirist, writer and lecturer*

In history, a great volume is unrolled for our instruction, drawing the materials of future wisdom from the past errors and infirmities of mankind.

*Edmund Burke (1729-1797), Anglo-Irish statesman, author, orator, political theorist, and philosopher*

History cannot give us a program for the future, but it can give us a fuller understanding of ourselves, and of our common humanity, so that we can better face the future.

*Robert Penn Warren (1905-1989), U.S. novelist, poet and literary critic*

Whoever wishes to foresee the future must consult the past; for human events ever resemble those of preceding times. This arises from the fact that they are produced by men who ever have been, and ever shall be, animated by the same passions, and thus they necessarily have the same results.

*Niccolo Machiavelli (1469-1527), Italian political philosopher, poet and
playwright

If the past has been an obstacle and a burden, knowledge of the past is the safest and the surest emancipation.

Lord Acton (1834-1902), British historian

The past does not repeat itself, but it rhymes.

Mark Twain (1835-1910), U.S. humorist, satirist, writer and lecturer

We are made wise not by the recollection of our past, but by the responsibility for our future.

George Bernard Shaw (1856-1950), Irish playwright

We have need of history in its entirety, not to fall back into it, but to see if we can escape from it.

José Ortega y Gasset (1883–1955), Spanish essayist, philosopher

Men make history and not the other way around. In periods where there is no leadership, society stands still. Progress occurs when courageous, skillful leaders seize the opportunity to change things for the better.

Harry S Truman (1884–1972)

Most of the problems a President has to face have their roots in the past.

Harry S Truman (1884–1972)

Who controls the past controls the future: who controls the present controls the past.

George Orwell (1903-1950), 1984

History will be kind to me for I intend to write it.

Winston S. Churchill (1874-1965), British Prime Minister
E. History as Commentary

Honest history is the weapon of freedom.

_Arthur M. Schlesinger, Jr. (1917-2007), U.S. historian_

It is the true office of history to represent the events themselves, together with the counsels, and to leave the observations and conclusions thereupon to the liberty and faculty of every man’s judgement.

_Sir Francis Bacon (1561-1626), British philosopher, essayist, statesman_

A good writer of history is a guy who is suspicious. Suspicion marks the real difference between the man who wants to write honest history and the one who’d rather write a good story.

_Jim Bishop (1907-87), U.S. journalist and author_

History, we can confidently assert, is useful in the sense that art and music, poetry and flowers, religion and philosophy are useful. Without it -- as with these -- life would be poorer and meaner; without it we should be denied some of those intellectual and moral experiences which give meaning and richness to life. Surely it is no accident that the study of history has been the solace of many of the noblest minds of every generation.

_Henry Steele Commager (1902-1998), U.S. historian_

All history is but a romance, unless it is studied as an example.

_George Croly (1780-1860), Irish poet, novelist and historian_

History makes us some amends for the shortness of life.

_Philip Skelton (1707-1787). Irish minister_

History does not usually make real sense until long afterward.

_Bruce Catton (1899-1978), U.S. historian_
History does not belong to us; we belong to it.

*Hans-Georg Gadamer (1900-2002), German philosopher*

Nothing capable of being memorized is history.

*R. G. (Robin George) Collingwood (1889-1943), British philosopher and historian*

Historical awareness is a kind of resurrection.

*William Least Heat Moon (1940- ), U.S. travel writer*

History at its best is vicarious experience.

*Edmund S. Morgan (1916- ), U.S. historian*

Who does not know history’s first law to be that an author must not dare to tell anything but the truth? And its second that he must make bold to tell the whole truth? That there must be no suggestion of partiality anywhere in his writings? Nor of malice?

*Marcus Tullius Cicero (106–43 B.C.), Roman orator, philosopher and statesman*

The whole value of history, of biography, is to increase my self-trust, by demonstrating what man can be and do.

*Ralph Waldo Emerson (1803–1882), U.S. essayist, poet, philosopher*

History is Philosophy teaching by examples.

*Thucydides (ca. 460 B.C.- ca. 400 B.C.), Greek historian*

The supreme purpose of history is a better world.

*Herbert Hoover (1874-1964), U.S. President*

Man in a word has no nature; what he has . . . is history.

*Jose Ortega y Gasset (1883-1955), Spanish philosopher*
The best thing which we derive from history is the enthusiasm that it raises in us.

Johann Wolfgang Goethe (1749-1832), German poet, novelist and philosopher

[History is] not a burden on the memory but an illumination of the soul.

Lord Acton (1834-1902), English historian

II. AMERICAN LEGAL HISTORY SINCE 1876

BRADWELL v. ILLINOIS

Supreme Court of the United States, 1872.
83 U.S. 130.

MR. JUSTICE MILLER delivered the opinion of the court.

The record in this case is not very perfect, but it may be fairly taken that the plaintiff asserted her right to a license [to practice law in Illinois] on the grounds, among others, that she was a citizen of the United States, and that having been a citizen of Vermont at one time, she was, in the State of Illinois, entitled to any right granted to citizens of the latter State.

* * *

As regards the provision of the Constitution that citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States [Art. IV § 2], the plaintiff in her affidavit has stated very clearly a case to which it is inapplicable.

The protection designed by that clause, as has been repeatedly held, has no application to a citizen of the State whose laws are complained of.* * *

* * *

The fourteenth amendment declares that citizens of the United States are citizens of the State within which they reside; therefore the plaintiff was, at the time of making her application, a citizen of the United States and a citizen of the State of Illinois.

* * *

* * * In regard to [the fourteenth] amendment counsel for the plaintiff in this court truly says that there are certain privileges and immunities which belong to a
citizen of the United States as such. * * *

In this latter proposition we are not able to concur with counsel. We agree with him that there are privileges and immunities belonging to citizens of the United States, in that relation and character, and that it is these and these alone which a State is forbidden to abridge. But the right to admission to practice in the courts of a State is not one of them. This right in no sense depends on citizenship of the United States. * * *

The opinion just delivered in the Slaughter-House Cases renders elaborate argument in the present case unnecessary; for, unless we are wholly and radically mistaken in the principles on which those cases are decided, the right to control and regulate the granting of license to practice law in the courts of a State is one of those powers which are not transferred for its protection to the Federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license.

* * *

JUDGMENT AFFIRMED.

Mr. JUSTICE BRADLEY: [concurring in the judgment] * * *

The claim of the plaintiff, who is a married woman, to be admitted to practice as an attorney and counsellor-at-law, is based upon the supposed right of every person, man or woman, to engage in any lawful employment for a livelihood. * * *

* * *

It certainly cannot be affirmed, as an historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States. One of these is, that a married woman is incapable, without her
husband's consent, of making contracts which shall be binding on her or him. This very incapacity was one circumstance which the Supreme Court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counsellor.

It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.

The humane movements of modern society, which have for their object the multiplication of avenues for woman’s advancement, and of occupations adapted to her condition and sex, have my heartiest concurrence. But I am not prepared to say that it is one of her fundamental rights and privileges to be admitted into every office and position, including those which require highly special qualifications and demanding special responsibilities. In the nature of things it is not every citizen of every age, sex, and condition that is qualified for every calling and position. It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the State; and, in my opinion, in view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex.

* * *

MR. JUSTICE SWAYNE and MR. JUSTICE FIELD concurred in the foregoing opinion of Mr. JUSTICE BRADLEY.

THE CHIEF JUSTICE dissented from the judgment of the court, and from all the opinions.

MINOR v. HAPPERSETT
Supreme Court of the United States, 1874.
88 U.S. 162.

The CHIEF JUSTICE delivered the opinion of the court.

The question is presented in this case, whether, since the adoption of the fourteenth amendment, a woman, who is a citizen of the United States and of the State of Missouri, is a voter in that State, notwithstanding the provision of the constitution and laws of the State, which confine the right of suffrage to men alone. We might, perhaps, decide the case upon other grounds, but this question is fairly made. * * * It is contended that the provisions of the constitution and laws of the State of Missouri which confine the right of suffrage and registration therefor to men, are in violation of the Constitution of the United States, and therefore void. The argument is, that as a woman, born or naturalized in the United States and subject to the jurisdiction thereof, is a citizen of the United States and of the State in which she resides, she has the right of suffrage as one of the privileges and immunities of her citizenship, which the State cannot by its laws or constitution abridge.

* * *

Being unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon any one, and that the constitutions and laws of the several States which commit that important trust to men alone are not necessarily void, we

AFFIRM THE JUDGMENT.

“KILL THE INDIAN, AND SAVE THE MAN”: CAPT. RICHARD H. PRATT ON THE EDUCATION OF NATIVE AMERICANS (1892)

Beginning in 1887, the federal government attempted to “Americanize” Native Americans, largely through the education of Native youth. By 1900 thousands of Native Americans were studying at almost 150 boarding schools around the United States. The U.S. Training and Industrial School founded in 1879 at Carlisle Barracks, Pennsylvania, was the model for most of these schools. Boarding schools like Carlisle provided vocational and manual training and sought to systematically strip away tribal culture. They insisted that students drop their Indian names, forbade the speaking of native languages, and cut off their long hair. Not surprisingly, such schools often met fierce resistance from Native American parents and youth. But some Indian young people responded positively, or at least ambivalently, to the boarding schools, and the schools also fostered a sense of shared Indian identity that transcended tribal
boundaries. The following excerpt (from a paper read by Carlisle founder Capt. Richard H. Pratt at an 1892 convention) spotlights Pratt’s pragmatic and frequently brutal methods for “civilizing” the “savages,” including his analogies to the education and “civilizing” of African Americans.

A great general has said that the only good Indian is a dead one, and that high sanction of his destruction has been an enormous factor in promoting Indian massacres. In a sense, I agree with the sentiment, but only in this: that all the Indian there is in the race should be dead. Kill the Indian in him, and save the man.

We are just now making a great pretence of anxiety to civilize the Indians. I use the word “pretence” purposely, and mean it to have all the significance it can possibly carry. Washington believed that commerce freely entered into between us and the Indians would bring about their civilization, and Washington was right. He was followed by Jefferson, who inaugurated the reservation plan. Jefferson’s reservation was to be the country west of the Mississippi; and he issued instructions to those controlling Indian matters to get the Indians there, and let the Great River be the line between them and the whites. Any method of securing removal - persuasion, purchase, or force - was authorized.

Jefferson’s plan became the permanent policy. The removals have generally been accomplished by purchase, and the evils of this are greater than those of all the others combined. . . .

It is a sad day for the Indians when they fall under the assaults of our troops, as in the Piegan massacre, the massacre of Old Black Kettle and his Cheyennes at what is termed “the battle of the Washita,” and hundreds of other like places in the history of our dealings with them; but a far sadder day is it for them when they fall under the baneful influences of a treaty agreement with the United States whereby they are to receive large annuities, and to be protected on reservations, and held apart from all association with the best of our civilization. The destruction is not so speedy, but it is far more general. The history of the Miamis and Osages is only the true picture of all other tribes.

“Put yourself in his place” is as good a guide to a proper conception of the Indian and his cause as it is to help us to right conclusions in our relations with other men. For many years we greatly oppressed the black man, but the germ of human liberty remained among us and grew, until, in spite of our irregularities, there came from the lowest savagery into intelligent manhood and freedom among us more than seven millions of our population, who are to-day an element of industrial value with which
we could not well dispense. However great this victory has been for us, we have not yet fully learned our lesson nor completed our work; nor will we have done so until there is throughout all of our communities the most unequivocal and complete acceptance of our own doctrines, both national and religious. Not until there shall be in every locality throughout the nation a supremacy of the Bible principle of the brotherhood of man and the fatherhood of God, and full obedience to the doctrine of our Declaration that “we hold these truths to be self-evident, that all men are created free and equal, with certain inalienable rights,” and of the clause in our Constitution which forbids that there shall be “any abridgment of the rights of citizens on account of race, color, or previous condition.” I leave off the last two words “of servitude,” because I want to be entirely and consistently American.

Inscrutable are the ways of Providence. Horrible as were the experiences of its introduction, and of slavery itself, there was concealed in them the greatest blessing that ever came to the Negro race—seven millions of blacks from cannibalism in darkest Africa to citizenship in free and enlightened America; not full, not complete citizenship, but possible—probable—citizenship, and on the highway and near to it.

There is a great lesson in this. The schools did not make them citizens, the schools did not teach them the language, nor make them industrious and self-supporting. Denied the right of schools, they became English-speaking and industrious through the influences of association. Scattered here and there, under the care and authority of individuals of the higher race, they learned self-support and something of citizenship, and so reached their present place. No other influence or force would have so speedily accomplished such a result. Left in Africa, surrounded by their fellow-savages, our seven millions of industrious black fellow-citizens would still be savages. Transferred into these new surroundings and experiences, behold the result. They became English-speaking and civilized, because forced into association with English-speaking and civilized people; became healthy and multiplied, because they were property; and industrious, because industry, which brings contentment and health, was a necessary quality to increase their value.

The Indians under our care remained savage, because forced back upon themselves and away from association with English-speaking and civilized people, and because of our savage example and treatment of them. . . .

We have never made any attempt to civilize them with the idea of taking them into the nation, and all of our policies have been against citizenizing and absorbing them. Although some of the policies now prominent are advertised to carry them into citizenship and consequent association and competition with other masses of the nation, they are not, in reality, calculated to do this.
We are after the facts. Let us take the Land in Severalty Bill. Land in severalty, as administered, is in the way of the individualizing and civilization of the Indians, and is a means of holding the tribes together. Land in severalty is given to individuals adjoining each other on their present reservations. And experience shows that in some cases, after the allotments have been made, the Indians have entered into a compact among themselves to continue to hold their lands in common as a reservation. The inducement of the bill is in this direction. The Indians are not only invited to remain separate tribes and communities, but are practically compelled to remain so. The Indian must either cling to his tribe and its locality, or take great chances of losing his rights and property.

The day on which the Land in Severalty Bill was signed was announced to be the emancipation day for the Indians. The fallacy of that idea is so entirely demonstrated that the emancipation assumption is now withdrawn.

We shall have to go elsewhere, and seek for other means besides land in severalty to release these people from their tribal relations and to bring them individually into the capacity and freedom of citizens.

Just now that land in severalty is being retired as the one all-powerful leverage that is going to emancipate and bring about Indian civilization and citizenship, we have another plan thrust upon us which has received great encomium from its authors, and has secured the favor of Congress to the extent of vastly increasing appropriations. This plan is calculated to arrest public attention, and to temporarily gain concurrence from everybody that it is really the panacea for securing citizenship and equality in the nation for the Indians. In its execution this means purely tribal schools among the Indians; that is, Indian youth must continue to grow up under the pressure of home surroundings. Individuals are not to be encouraged to get out and see and learn and join the nation. They are not to measure their strength with the other inhabitants of the land, and find out what they do not know, and thus be led to aspire to gain in education, experience, and skill,—those things that they must know in order to become equal to the rest of us. A public school system especially for the Indians is a tribal system; and this very fact says to them that we believe them to be incompetent, that they must not attempt to cope with us. Such schools build up tribal pride, tribal purposes, and tribal demands upon the government. They formulate the notion that the government owes them a living and vast sums of money; and by improving their education on these lines, but giving no other experience and leading to no aspirations beyond the tribe, leaves them in their chronic condition of helplessness, so far as reaching the ability to compete with the white race is concerned. It is like attempting to make a man well by always telling him he is sick. We have only to look at the tribes
who have been subject to this influence to establish this fact, and it makes no
difference where they are located. All the tribes in the State of New York have been
trained in tribal schools; and they are still tribes and Indians, with no desire among
the masses to be anything else but separate tribes.

The five civilized tribes of the Indian Territory—Cherokees, Choctaws, Chickasaws,
Creeks, and Seminoles—have had tribal schools until it is asserted that they are
civilized; yet they have no notion of joining us and becoming a part of the United
States. Their whole disposition is to prey upon and hatch up claims against the
government, and have the same lands purchased and repurchased and purchased
again, to meet the recurring wants growing out of their neglect and inability to make
use of their large and rich estate. * * *

Indian schools are just as well calculated to keep the Indians intact as Indians as
Catholic schools are to keep the Catholics intact. Under our principles we have
established the public school system, where people of all races may become unified in
every way, and loyal to the government; but we do not gather the people of one nation
into schools by themselves, and the people of another nation into schools by
themselves, but we invite the youth of all peoples into all schools. We shall not succeed
in Americanizing the Indian unless we take him in in exactly the same way. I do not
care if abundant schools on the plan of Carlisle are established. If the principle we
have always had at Carlisle—of sending them out into families and into the public
schools—were left out, the result would be the same, even though such schools were
established, as Carlisle is, in the centre of an intelligent and industrious population,
and though such schools were, as Carlisle always has been, filled with students from
many tribes. Purely Indian schools say to the Indians: “You are Indians, and must
remain Indians. You are not of the nation, and cannot become of the nation. We do not
want you to become of the nation.”

Before I leave this part of my subject I feel impelled to lay before you the facts, as I
have come to look at them, of another influence that has claimed credit, and always
has been and is now very dictatorial, in Indian matters; and that is the missionary as
a citizenizing influence upon the Indians. The missionary goes to the Indian; he learns
the language; he associates with him; he makes the Indian feel he is friendly, and has
great desire to help him; he even teaches the Indian English. But the fruits of his labor,
by all the examples that I know, have been to strengthen and encourage him to remain
separate and apart from the rest of us. Of course, the more advanced, those who have
a desire to become civilized, and to live like white men, who would with little
encouragement go out into our communities, are the first to join the missionary’s
forces. They become his lieutenants to gather in others. The missionary must
necessarily hold on to every help he can get to push forward his schemes and plans, so
that he may make a good report to his Church; and, in order to enlarge his work and make it a success, he must keep his community together. Consequently, any who care to get out into the nation, and learn from actual experience what it is to be civilized, what is the full length and breadth and height and depth of our civilization, must stay and help the missionary. The operation of this has been disastrous to any individual escape from the tribe, has vastly and unnecessarily prolonged the solution of the question, and has needlessly cost the charitable people of this country large sums of money, to say nothing of the added cost to the government, the delay in accomplishing their civilization, and their destruction caused by such delay.

If, as sometimes happens, the missionary kindly consents to let or helps one go out and get these experiences, it is only for the purpose of making him a preacher or a teacher or help of some kind; and such a one must, as soon as he is fitted, and much sooner in most cases, return to the tribe and help the missionary to save his people. The Indian who goes out has public charitable aid through his school course, forfeits his liberty, and is owned by the missionary. In all my experience of twenty-five years I have known scarcely a single missionary to heartily aid or advocate the disintegration of the tribes and the giving of individual Indians rights and opportunities among civilized people. There is this in addition: that the missionaries have largely assumed to dictate to the government its policy with tribes, and their dictations have always been along the lines of their colonies and church interests, and the government must gauge its actions to suit the purposes of the missionary, or else the missionary influences are at once exerted to defeat the purposes of the government. The government, by paying large sums of money to churches to carry on schools among Indians, only builds for itself opposition to its own interests. * * *

We make our greatest mistake in feeding our civilization to the Indians instead of feeding the Indians to our civilization. America has different customs and civilizations from Germany. What would be the result of an attempt to plant American customs and civilization among the Germans in Germany, demanding that they shall become thoroughly American before we admit them to the country? Now, what we have all along attempted to do for and with the Indians is just exactly that, and nothing else. We invite the Germans to come into our country and communities, and share our customs, our civilization, to be of it; and the result is immediate success. Why not try it on the Indians? Why not invite them into experiences in our communities? Why always invite and compel them to remain a people unto themselves?

It is a great mistake to think that the Indian is born an inevitable savage. He is born a blank, like all the rest of us. Left in the surroundings of savagery, he grows to possess a savage language, superstition, and life. We, left in the surroundings of civilization, grow to possess a civilized language, life, and purpose. Transfer the infant
white to the savage surroundings, he will grow to possess a savage language, superstition, and habit. Transfer the savage-born infant to the surroundings of civilization, and he will grow to possess a civilized language and habit. These results have been established over and over again beyond all question; and it is also well established that those advanced in life, even to maturity, of either class, lose already acquired qualities belonging to the side of their birth, and gradually take on those of the side to which they have been transferred.

As we have taken into our national family seven millions of Negroes, and as we receive foreigners at the rate of more than five hundred thousand a year, and assimilate them, it would seem that the time may have arrived when we can very properly make at least the attempt to assimilate our two hundred and fifty thousand Indians, using this proven potent line, and see if that will not end this vexed question and remove them from public attention, where they occupy so much more space than they are entitled to either by numbers or worth.

The school at Carlisle is an attempt on the part of the government to do this. Carlisle has always planted treason to the tribe and loyalty to the nation at large. It has preached against colonizing Indians, and in favor of individualizing them. It has demanded for them the same multiplicity of chances which all others in the country enjoy. Carlisle fills young Indians with the spirit of loyalty to the stars and stripes, and then moves them out into our communities to show by their conduct and ability that the Indian is no different from the white or the colored, that he has the inalienable right to liberty and opportunity that the white and the negro have. Carlisle does not dictate to him what line of life he should fill, so it is an honest one. It says to him that, if he gets his living by the sweat of his brow, and demonstrates to the nation that he is a man, he does more good for his race than hundreds of his fellows who cling to their tribal communistic surroundings.

No evidence is wanting to show that, in our industries, the Indian can become a capable and willing factor if he has the chance. What we need is an Administration which will give him the chance. The Land in Severalty Bill can be made far more useful than it is, but it can be made so only by assigning the land so as to intersperse good, civilized people among them. If, in the distribution, it is so arranged that two or three white families come between two Indian families, then there would necessarily grow up a community of fellowship along all the lines of our American civilization that would help the Indian at once to his feet. Indian schools must, of necessity, be for a time, because the Indian cannot speak the language, and he knows nothing of the habits and forces he has to contend with; but the highest purpose of all Indian schools ought to be only to prepare the young Indian to enter the public and other schools of the country. And immediately he is so prepared, for his own good and the good of the country, he
should be forwarded into these other schools, there to temper, test, and stimulate his brain and muscle into the capacity he needs for his struggle for life, in competition with us. The missionary can, if he will, do far greater service in helping the Indians than he has done; but it will only be by practising the doctrine he preaches. As his work is to lift into higher life the people whom he serves, he must not, under any pretence whatsoever, give the lie to what he preaches by discountenancing the right of any individual Indian to go into higher and better surroundings, but, on the contrary, he should help the Indian to do that. If he fails in thus helping and encouraging the Indian, he is false to his own teaching. An examination shows that no Indians within the limits of the United States have acquired any sort of capacity to meet and cope with the whites in civilized pursuits who did not gain that ability by going among the whites and out from the reservations, and that many have gained this ability by so going out.

Theorizing citizenship into people is a slow operation. What a farce it would be to attempt teaching American citizenship to the negroes in Africa. They could not understand it; and, if they did, in the midst of such contrary influences, they could never use it. Neither can the Indians understand or use American citizenship theoretically taught to them on Indian reservations. They must get into the swim of American citizenship. They must feel the touch of it day after day, until they become saturated with the spirit of it, and thus become equal to it.

When we cease to teach the Indian that he is less than a man; when we recognize fully that he is capable in all respects as we are, and that he only needs the opportunities and privileges which we possess to enable him to assert his humanity and manhood; when we act consistently towards him in accordance with that recognition; when we cease to fetter him to conditions which keep him in bondage, surrounded by retrogressive influences; when we allow him the freedom of association and the developing influences of social contact—then the Indian will quickly demonstrate that he can be truly civilized, and he himself will solve the question of what to do with the Indian.

Source:


**MULLER v. OREGON**
MR. JUSTICE BREWER delivered the opinion of the court.

On February 19, 1903, the legislature of the state of Oregon passed an act, the first section of which is in these words:

“SEC. 1. That no female shall be employed in any mechanical establishment, or factory, or laundry in this state more than ten hours during any one day. The hours of work may be so arranged as to permit the employment of females at any time so that they shall not work more than ten hours during the twenty-four hours of any one day.”

[Defendant was charged with violating the act.] A trial resulted in a verdict against the defendant, who was sentenced to pay a fine of $10. The supreme court of the state affirmed the conviction * * *

It is the law of Oregon that women, whether married or single, have equal contractual and personal rights with men. * * *

It thus appears that, putting to one side the elective franchise, in the matter of personal and contractual rights they stand on the same plane as the other sex. Their rights in these respects can no more be infringed than the equal rights of their brothers. * * * [Lochner v. New York, 198 U. S. 45 (1905)] is invoked by plaintiff in error as decisive of the question before us. But this assumes that the difference between the sexes does not justify a different rule respecting a restriction of the hours of labor.

* * *

* * * In the brief filed by Mr. Louis D. Brandeis for the defendant in error is a very copious collection of all these matters, an epitome of which is found in the margin.¹

¹ The following legislation of the states imposes restriction in some form or another upon the hours of labor that may be required of women: [citing the statutes of nineteen states].

In foreign legislation Mr. Brandeis calls attention to these statutes: [citing statutes from Great Britain, France, Switzerland, Austria, Holland, and Germany].

Then follow extracts from over ninety reports of committees, bureaus of statistics, commissioners of hygiene, inspectors of factories, both in this country and in Europe, to the effect that long hours of labor are dangerous for women, primarily because of their special physical organization. The matter is discussed in these reports in different aspects, but
The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. * * *

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the schoolroom are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal, and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for
protection; that her physical structure and a proper discharge of her maternal
functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. The
limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation, and upholds that which is designed to compensate for some of the burdens which rest upon her.

* * *

For these reasons, and without questioning in any respect the decision in
_Lochner v. New York_, we are of the opinion that it cannot be adjudged that the act in question is in conflict with the Federal Constitution, so far as it respects the work of a female in a laundry, and the judgment of the Supreme Court of Oregon is

Affirmed.

**ESPIONAGE ACT OF 1917**

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled

* * *

**Section 3**

Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.

**Section 4**

If two or more persons conspire to violate the provisions of section two or three of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in
the case of the doing of the act the accomplishment of which is the object of such
conspiracy. Except as above provided conspiracies to commit offences under this title
shall be punished as provided by section thirty-seven of the Act to codify, revise, and
amend the penal laws of the United States approved March fourth, nineteen hundred
and nine.

***

SEDITION ACT OF 1918

Section 3.

Whoever, when the United States is at war, shall willfully make or convey false reports
or false statements with intent to interfere with the operation or success of the military
or naval forces of the United States, or to promote the success of its enemies, or shall
willfully make or convey false reports or false statements, or say or do anything except
by way of bona fide and not disloyal advice to an investor or investors, with intent to
obstruct the sale by the United States of bonds or other securities of the United States
or the making of loans by or to the United States, and whoever when the United States
is at war, shall willfully cause or attempt to cause, or incite or attempt to incite,
insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces
of the United States, or shall willfully obstruct or attempt to obstruct the recruiting or
enlistment services of the United States, and whoever, when the United States is at
war, shall willfully utter, print, write or publish any 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 of the United States, or the uniform of the Army or Navy of the United
States into contempt, scorn, contumely, or disrepute, or shall willfully utter, print,
write, or publish any language intended to incite, provoke, or encourage resistance to
the United States, or to promote the cause of its enemies, or shall willfully display the
flag of any foreign enemy, or shall willfully by utterance, writing, printing, publication,
or language spoken, urge, incite, or advocate any curtailment of production in this
country of any thing or things, product or products, necessary or essential to the
prosecution of the war in which the United States may be engaged, with intent by such
curtailment to cripple or hinder the United States in the prosecution of war, and
whoever shall willfully advocate, teach, defend, or suggest the doing of any of the acts
or things in this section enumerated, and whoever shall by word or act support or favor
the cause of any country with which the United States is at war or by word or act
oppose the cause of the United States therein, shall be punished by a fine of not more
than $10,000 or the imprisonment for not more than twenty years, or both: Provided,
That any employee or official of the United States Government who commits any
disloyal act or utters any unpatriotic or disloyal language, or who, in an abusive and
violent manner criticizes the Army or Navy or the flag of the United States shall be at
once dismissed from the service....

**Section 4.**
When the United States is at war, the Postmaster General may, upon evidence satisfactory to him that any person or concern is using the mails in violation of any of the provisions of this Act, instruct the postmaster at any post office at which mail is received addressed to such person or concern to return to the postmaster at the office at which they were originally mailed all letters or other matter so addressed, with the words "Mail to this address undeliverable under Espionage Act" plainly written or stamped upon the outside thereof, and all such letters or other matter so returned to such postmasters shall be by them returned to the senders thereof under such regulations as the Postmaster General may prescribe.

EUGENE V. DEBS, SPEECH AT CANTON, OHIO, JUNE 16, 1918

*** Wars throughout history have been waged for conquest and plunder. In the Middle Ages when the feudal lords who inhabited the castles whose towers may still be seen along the Rhine concluded to enlarge their domains, to increase their power, their prestige and their wealth they declared war upon one another. But they themselves did not go to war any more than the modern feudal lords, the barons of Wall Street go to war.

The feudal barons of the Middle Ages, the economic predecessors of the capitalists of our day, declared all wars. And their miserable serfs fought all the battles. The poor, ignorant serfs had been taught to revere their masters; to believe that when their masters declared war upon one another, it was their patriotic duty to fall upon one another and to cut one another's throats for the profit and glory of the lords and barons who held them in contempt. And that is war in a nutshell. The master class has always declared the wars; the subject class has always fought the battles. The master class has had all to gain and nothing to lose, while the subject class has had nothing to gain and all to lose – especially their lives.

They have always taught and trained you to believe it to be your patriotic duty to go to war and to have yourselves slaughtered at their command. But in all the history of the world you, the people, have never had a voice in declaring war, and strange as it certainly appears, no war by any nation in any age has ever been declared by the people.

And here let me emphasize the fact – and it cannot be repeated too often – that the working class who fight all the battles, the working class who make the supreme sacrifices, the working class who freely shed their blood and furnish the corpses, have
never yet had a voice in either declaring war or making peace. It is the ruling class that invariably does both. They alone declare war and they alone make peace. Yours not to reason why; Yours but to do and die. That is their motto and we object on the part of the awakening workers of this nation. If war is right let it be declared by the people. You who have your lives to lose, you certainly above all others have the right to decide the momentous issue of war or peace. * * * You need at this time especially to know that you are fit for something better than slavery and cannon fodder. You need to know that you were not created to work and produce and impoverish yourself to enrich an idle exploiter. You need to know that you have a mind to improve, a soul to develop, and a manhood to sustain.* * *

They are continually talking about your patriotic duty. It is not their but your patriotic duty that they are concerned about. There is a decided difference. Their patriotic duty never takes them to the firing line or chucks them into the trenches. And now among other things they are urging you to "cultivate" war gardens, while at the same time a government war report just issued shows that practically 52 percent of the arable, tillable soil is held out of use by the landlords, speculators and profiteers. They themselves do not cultivate the soil. Nor do they allow others to cultivate it. They keep it idle to enrich themselves, to pocket the millions of dollars of unearned increment....And now for all of us to do our duty! The clarion call is ringing in our ears and we cannot falter without being convicted of treason to ourselves and to our great cause.

Do not worry over the charge of treason to your masters, but be concerned about the treason that involves yourselves. Be true to yourself and you cannot be a traitor to any good cause on earth.

* * * *

HAMMER v. DAGENHART

Supreme Court of the United States, 1918.
247 U.S. 251.

MR. JUSTICE DAY delivered the opinion of the court.

A bill was filed in the United States District Court for the Western District of North Carolina by a father in his own behalf and as next friend of his two minor sons, one under the age of fourteen years and the other between the ages of fourteen and sixteen years, employéés in a cotton mill at Charlotte, North Carolina, to enjoin the enforcement of the act of Congress intended to prevent interstate commerce in the products of child labor.
The controlling question for decision is: Is it within the authority of Congress in regulating commerce among the states to prohibit the transportation in interstate commerce of manufactured goods, the product of a factory in which, within thirty days prior to their removal therefrom, children under the age of fourteen have been employed or permitted to work, or children between the ages of fourteen and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of 7 o'clock P.M., or before the hour of 6 o'clock A.M.?

***

*** The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the states who employ children within the prohibited ages. The act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states. The goods shipped are of themselves harmless. The act permits them to be freely shipped after thirty days from the time of their removal from the factory. When offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to federal control under the commerce power.

Commerce “consists of intercourse and traffic * * * and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities.” The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped, or used in interstate commerce, make their production a part thereof.

***

It is further contended that the authority of Congress may be exerted to control interstate commerce in the shipment of child-made goods because of the effect of the circulation of such goods in other states where the evil of this class of labor has been recognized by local legislation, and the right to thus employ child labor has been more rigorously restrained than in the state of production. In other words, that the unfair competition, thus engendered, may be controlled by closing the channels of interstate commerce to manufacturers in those states where the local laws do not meet what Congress deems to be the more just standard of other states.

There is no power vested in Congress to require the states to exercise their police power so as to prevent possible unfair competition. Many causes may co-operate to give one state, by reason of local laws or conditions, an economic advantage over others. The commerce clause was not intended to give to Congress a general authority to equalize such conditions. * * *
The grant of power of Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture.

The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the Tenth Amendment to the Constitution.

***

*** The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the nation by the federal Constitution.

*** The power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government. To sustain this statute would not be in our judgment a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the States.

***

For these reasons we hold that this law exceeds the constitutional authority of Congress. It follows that the decree of the District Court must be

Affirmed.

MR. JUSTICE HOLMES, dissenting.

***

*** The statute confines itself to prohibiting the carriage of certain goods in interstate or foreign commerce. Congress is given power to regulate such commerce in unqualified terms. It would not be argued today that the power to regulate does not include the power to prohibit. Regulation means the prohibition of something, and when interstate commerce is the matter to be regulated I cannot doubt that the regulation may prohibit any part of such commerce that Congress sees fit to forbid. *

***

The question then is narrowed to whether the exercise of its otherwise constitutional power by Congress can be pronounced unconstitutional because of its possible reaction upon the conduct of the States in a matter upon which I have admitted that they are free from direct control. I should have thought that that matter
had been disposed of so fully as to leave no room for doubt. * * *

* * *

[I]f there is any matter upon which civilized countries have agreed -- far more unanimously than they have with regard to intoxicants and some other matters over which this country is now emotionally aroused -- it is the evil of premature and excessive child labor. I should have thought that if we were to introduce our own moral conceptions where is my opinion they do not belong, this was preeminently a case for upholding the exercise of all its powers by the United States.

But I had thought that the propriety of the exercise of a power admitted to exist in some cases was for the consideration of Congress alone and that this Court always had disavowed the right to intrude its judgment upon questions of policy or morals. It is not for this Court to pronounce when prohibition is necessary to regulation if it ever may be necessary – to say that it is permissible as against strong drink but not as against the product of ruined lives.

The Act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the State line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the States but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the States. Instead of being encountered by a prohibitive tariff at her boundaries the State encounters the public policy of the United States which it is for Congress to express. The public policy of the United States is shaped with a view to the benefit of the nation as a whole. * * * The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking State. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command.

MR. JUSTICE McKENNA, MR. JUSTICE BRANDEIS, and MR. JUSTICE CLARKE concur in this opinion.
Mr. Justice CLARKE delivered the opinion of the Court.

On a single indictment, containing four counts, the five plaintiffs in error, hereinafter designated the defendants, were convicted of conspiring to violate provisions of the Espionage Act of Congress.

Each of the first three counts charged the defendants with conspiring, when the United States was at war with the Imperial Government of Germany, to unlawfully utter, print, write and publish: In the first count, “disloyal, scurrilous and abusive language about the form of government of the United States;” in the second count, language “intended to bring the form of government of the United States into contempt, scorn, contumely, and disrepute;” and in the third count, language “intended to incite, provoke and encourage resistance to the United States in said war.” The charge in the fourth count was that the defendants conspired “when the United States was at war with the Imperial German Government, * * * unlawfully and willfully, by utterance, writing, printing and publication to urge, incite and advocate curtailment of production of things and products, to wit, ordnance and ammunition, necessary and essential to the prosecution of the war.” The offenses were charged in the language of the act of Congress.

It was charged in each count of the indictment that it was a part of the conspiracy that the defendants would attempt to accomplish their unlawful purpose by printing, writing and distributing in the city of New York many copies of a leaflet or circular, printed in the English language, and of another printed in the Yiddish language, copies of which, properly identified, were attached to the indictment.

All of the five defendants were born in Russia. They were intelligent, had considerable schooling, and at the time they were arrested they had lived in the United States terms varying from five to ten years, but none of them had applied for naturalization. Four of them testified as witnesses in their own behalf, and of these three frankly avowed that they were “rebels,” “revolutionists,” “anarchists,” that they did not believe in government in any form, and they declared that they had no interest whatever in the government of the United States. The fourth defendant testified that he was a “Socialist” and believed in “a proper kind of government, not capitalistic,” but in his classification the government of the United States was “capitalistic.”
It was admitted on the trial that the defendants had united to print and distribute the described circulars and that 5,000 of them had been printed and distributed about the 22d day of August, 1918. * * * The circulars were distributed, some by throwing them from a window of a building where one of the defendants was employed and others secretly, in New York City.

* * *

On the record thus described it is argued, somewhat faintly, that the acts charged against the defendants were not unlawful because within the protection of that freedom of speech and of the press which is guaranteed by the First Amendment to the Constitution of the United States, and that the entire Espionage Act is unconstitutional because in conflict with that amendment.

This contention is sufficiently discussed and is definitely negatived in *Schenck v. United States* * *.

* * *

It will not do to say, as is now argued, that the only intent of these defendants was to prevent injury to the Russian cause. Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce. Even if their primary purpose and intent was to aid the cause of the Russian Revolution, the plan of action which they adopted necessarily involved, before it could be realized, defeat of the war program of the United States, for the obvious effect of this appeal, if it should become effective, as they hoped it might, would be to persuade persons of character such as those whom they regarded themselves as addressing, not to aid government loans and not to work in ammunition factories, where their work would produce “bullets, bayonets, cannon” and other munitions of war, the use of which would cause the “murder” of Germans and Russians.

* * *

[W]hile the immediate occasion for this particular outbreak of lawlessness, on the part of the defendant alien anarchists, may have been resentment caused by our government sending troops into Russia as a strategic operation against the Germans on the eastern battle front, yet the plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing and if possible defeating the military plans of the government in Europe. * * *

Affirmed.
MR. JUSTICE HOLMES, dissenting.

* * *

I never have seen any reason to doubt that the questions of law that alone were before this court in the cases of *Schenck*, *Frohwerk*, and *Debs*, were rightly decided. I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times.

But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so. * * *

* * *

In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them. Even if I am technically wrong and enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper; I will add, even if what I think the necessary intent were shown; the most nominal punishment seems to me all that possible could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow -- a creed that I believe to be the creed of ignorance and immaturity when honestly held, as I see no reason to doubt that it was held here but which, although made the subject of examination at the trial, no one has a right even to consider in dealing with the charges before the Court.

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good
desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798 by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law abridging the freedom of speech." Of course I am speaking only of expressions of opinion and exhortations, which were all that were uttered here, but I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States.

Mr. Justice BRANDEIS concurs with the foregoing opinion.

SCHAEFER v. UNITED STATES

Supreme Court of the United States, 1920.
251 U.S. 466.

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Mr. Justice BRANDEIS delivered the following [dissenting] opinion, in which Mr. Justice HOLMES concurred:

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The extent to which Congress may, under the Constitution, interfere with free speech, was in Schenck v. United States, declared by a unanimous court to be this: "The question in every case is whether the words *** are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."
This is a rule of reason. Correctly applied, it will preserve the right of free
speech both from suppression by tyrannous, well-meaning majorities, and from abuse
by irresponsible, fanatical minorities. Like many other rules for human conduct, it can
be applied correctly only by the exercise of good judgment; and to the exercise of good
judgment calmness is, in times of deep feeling and on subjects which excite passion, as
essential as fearlessness and honesty. The question whether in a particular instance
the words spoken or written fall within the permissible curtailment of free speech is,
under the rule enunciated by this court, one of degree; and because it is a question of
degree the field in which the jury may exercise its judgment is necessarily a wide one.
But its field is not unlimited. The trial provided for is one by judge and jury, and the
judge may not abdicate his function. If the words were of such a nature and were used
under such circumstances that men, judging in calmness, could not reasonably say that
they created a clear and present danger that they would bring about the evil which
Congress sought and had a right to prevent, then it is the duty of the trial judge to
withdraw the case from the consideration of the jury; and, if he fails to do so, it is the
duty of the appellate court to correct the error. In my opinion, no jury acting in
calmness could reasonably say that any of the publications set forth in the indictment
was of such a character or was made under such circumstances as to create a clear and
present danger, either that they would obstruct recruiting or that they would promote
the success of the enemies of the United States. That they could have interfered with
the military or naval forces of the United States or have caused insubordination,
disloyalty, mutiny, or refusal of duty in its military or naval services was not even
suggested; and there was no evidence of conspiracy, except the co-operation of editors
and business manager in issuing the publications complained of.

The nature and possible effect of a writing cannot be properly determined by
culling here and there a sentence and presenting it separated from the context. In
making such determination, it should be read as a whole; at least, if it is short, like
these news items and editorials. Sometimes it it is necessary to consider, in connection
with it, other evidence which may enlarge or otherwise control its meaning, or which
may show that it was circulated under circumstances which gave it a peculiar
significance or effect.

It is not apparent on a reading of this article – which is not unlike many reprints
from the press of Germany to which our patriotic societies gave circulation in order to
arouse the American fighting spirit – how it could rationally be held to tend even
remotely or indirectly to obstruct recruiting. But as this court has declared, the
test to be applied-as in the case of criminal attempts and incitements-is not the remote
or possible effect. There must be the clear and present danger. Certainly men, judging
in calmness and with this test presented to them, could not reasonably have said that
this coarse and heavy humor immediately threatened the success of recruiting.
The constitutional right of free speech has been declared to be the same in peace and in war. In peace, too, men may differ widely as to what loyalty to our country demands; and an intolerant majority, swayed by passion or by fear, may be prone in the future, as it has often been in the past to stamp as disloyal opinions with which it disagrees. Convictions such as these, besides abridging freedom of speech, threaten freedom of thought and of belief.

ADKINS v. CHILDREN'S HOSPITAL

Supreme Court of the United States, 1923.
[Argued for appellants Adkins et al. by Felix Frankfurter]
261 U.S. 525.

Mr. Justice SUTHERLAND delivered the opinion of the Court.

The question presented for determination by these appeals is the constitutionality of the Act of September 19, 1918, providing for the fixing of minimum wages for women and children in the District of Columbia.

There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception, and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances.

In the Muller Case the validity of an Oregon statute, forbidding the employment of any female in certain industries more than 10 hours during any one day was upheld. The decision proceeded upon the theory that the difference between the sexes may
justify a different rule respecting hours of labor in the case of women than in the case of men. It is pointed out that these consist in differences of physical structure, especially in respect of the maternal functions, and also in the fact that historically woman has always been dependent upon man, who has established his control by superior physical strength. *** But the ancient inequality of the sexes, otherwise than physical, as suggested in the Muller Case has continued “with diminishing intensity.” In view of the great -- not to say revolutionary -- changes which have taken place since that utterance, in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point. In this aspect of the matter, while the physical differences must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, we cannot accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships. In passing, it may be noted that the instant statute applies in the case of a woman employer contracting with a woman employee as it does when the former is a man.

***

*** [T]he statute in question *** is simply and exclusively a price-fixing law, confined to adult women (for we are not now considering the provisions relating to minors), who are legally as capable of contracting for themselves as men. It forbids two parties having lawful capacity -- under penalties as to the employer -- to freely contract with one another in respect of the price for which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree, even though the consequence may be to oblige one to surrender a desirable engagement and the other to dispense with the services of a desirable employee. ***

***

Finally, it may be said that if, in the interest of the public welfare, the police power may be invoked to justify the fixing of a minimum wage, it may, when the public welfare is thought to require it, be invoked to justify a maximum wage. The power to fix high wages connotes, by like course of reasoning, the power to fix low wages. If, in the face of the guaranties of the Fifth Amendment, this form of legislation shall be legally justified, the field for the operation of the police power will have been widened to a great and dangerous degree. ***

***

It follows, from what has been said, that the act in question passes the limit prescribed by the Constitution ***.
MR. JUSTICE BRANDEIS took no part in the consideration or decision of these cases.

MR. CHIEF JUSTICE TAFT, dissenting. [omitted]

MR. JUSTICE HOLMES, dissenting.

***

The earlier decisions upon the same words in the Fourteenth Amendment began within our memory and went no farther than an unpretentious assertion of the liberty to follow the ordinary callings. Later that innocuous generality was expanded into the dogma, Liberty of Contract. Contract is not specially mentioned in the text that we have to construe. It is merely an example of doing what you want to do, embodied in the word liberty. But pretty much all law consists in forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts. ***

I confess that I do not understand the principle on which the power to fix a minimum for the wages of women can be denied by those who admit the power to fix a maximum for their hours of work. I fully assent to the proposition that here as elsewhere the distinctions of the law are distinctions of degree, but I perceive no difference in the kind or degree of interference with liberty, the only matter with which we have any concern, between the one case and the other. The bargain is equally affected whichever half you regulate. Muller v. Oregon, I take it, is as good law today as it was in 1908. It will need more than the Nineteenth Amendment to convince me that there are no differences between men and women, or that legislation cannot take those differences into account. I should not hesitate to take them into account if I thought it necessary to sustain this Act. I had supposed that it was not necessary, and that Lochner v. New York would be allowed a deserved repose.

This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum requirement of health and right living. It is safe to assume that women will not be employed at even the lowest wages allowed unless they earn them, or unless the employer's business can sustain the burden. In short the law in its character and operation is like hundreds of so-called police laws that have been upheld. *** The criterion of constitutionality is not whether we believe the law to be for the public good. ***
MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a writ of error to review a judgment of the Supreme Court of Appeals of the State of Virginia, affirming a judgment of the Circuit Court of Amherst County, by which the defendant in error, the superintendent of the State Colony for Epileptics and Feeble Minded, was ordered to perform the operation of salpingectomy upon Carrie Buck, the plaintiff in error, for the purpose of making her sterile. The case comes here upon the contention that the statute authorizing the judgment is void under the Fourteenth Amendment as denying to the plaintiff in error due process of law and the equal protection of the laws.

Carrie Buck is a feeble minded white woman who was committed to the State Colony in due form. She is the daughter of a feeble-minded mother in the same institution, and the mother of an illegitimate feeble-minded child. She was eighteen years old at the time of the trial of her case in the Circuit Court in the latter part of 1924. An Act of Virginia approved March 20, 1924 recites that the health of the patient and the welfare of society may be promoted in certain cases by the sterilization of mental defectives, under careful safeguard, etc.; that the sterilization may be effected in males by vasectomy and in females by salpingectomy, without serious pain or substantial danger to life; that the Commonwealth is supporting in various institutions many defective persons who if now discharged would become a menace but if incapable of procreating might be discharged with safety and become self-supporting with benefit to themselves and to society; and that experience has shown that heredity plays an important part in the transmission of insanity, imbecility, etc. The statute then enacts that whenever the superintendent of certain institutions including the abovenamed State Colony shall be of opinion that it is for the best interest of the patients and of society that an inmate under his care should be sexually sterilized, he may have the operation performed upon any patient afflicted with hereditary forms of insanity, imbecility, etc., on complying with the very careful provisions by which the act protects the patients from possible abuse.

***

*** We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is
better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.

But, it is said, however it might be if this reasoning were applied generally, it fails when it is confined to the small number who are in the institutions named and is not applied to the multitudes outside. It is the usual last resort of constitutional arguments to point out shortcomings of this sort. But the answer is that the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow. Of course so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached.

Judgment affirmed.

MR. JUSTICE BUTLER dissents.

FRANKLIN D. ROOSEVELT COURT-PACKING PLAN
Fireside Chat on Reorganization of the Judiciary, March 9, 1937

* * *

I want to talk with you very simply tonight about the need for present action in this crisis -- the need to meet the unanswered challenge of one-third of a nation ill-nourished, ill-clad, ill-housed.

Last Thursday I described the American form of government as a three-horse team provided by the Constitution to the American people so that their field might be plowed. The three horses are, of course, the three branches of government -- the Congress, the executive, and the courts. Two of the horses, the Congress and the executive, are pulling in unison today; the third is not. ** *

It is the American people themselves who are in the driver's seat. It is the American people themselves who want the furrow plowed. It is the American people themselves who expect the third horse to fall in unison with the other two.

** *

For nearly twenty years there was no conflict between the Congress and the Court. Then in 1803 Congress passed a statute which the Court said violated an express provision of the Constitution. The Court claimed the power to declare it unconstitutional and did so declare it. But a little later the Court itself admitted that
it was an extraordinary power to exercise * * *.

But since the rise of the modern movement for social and economic progress through legislation, the Court has more and more often and more and more boldly asserted a power to veto laws passed by the Congress and by state legislatures in complete disregard of this original limitation which I have just read.

In the last four years the sound rule of giving statutes the benefit of all reasonable doubt has been cast aside. The Court has been acting not as a judicial body, but as a policymaking body.

* * *

[I]t is perfectly clear that, as Chief Justice Hughes has said, "We are under a Constitution, but the Constitution is what the judges say it is."

The Court in addition to the proper use of its judicial functions has improperly set itself up as a third house of the Congress -- a super-legislature, as one of the justices has called it -- reading into the Constitution words and implications which are not there, and which were never intended to be there.

We have, therefore, reached the point as a nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution and not over it. In our courts we want a government of laws and not of men.

I want -- as all Americans want -- an independent judiciary as proposed by the framers of the Constitution. That means a Supreme Court that will enforce the Constitution as written, that will refuse to amend the Constitution by the arbitrary exercise of judicial power -- in other words by judicial say-so. It does not mean a judiciary so independent that it can deny the existence of facts which are universally recognized.

* * *

What is my proposal? It is simply this: whenever a judge or justice of any federal court has reached the age of seventy and does not avail himself of the opportunity to retire on a pension, a new member shall be appointed by the president then in office, with the approval, as required by the Constitution, of the Senate of the United States.

That plan has two chief purposes. By bringing into the judicial system a steady and continuing stream of new and younger blood, I hope, first, to make the
administration of all federal justice, from the bottom to the top, speedier and, therefore, less costly; secondly, to bring to the decision of social and economic problems younger men who have had personal experience and contact with modern facts and circumstances under which average men have to live and work. This plan will save our national Constitution from hardening of the judicial arteries.

* * *

The statute would apply to all the courts in the federal system. There is general approval so far as the lower federal courts are concerned. The plan has met opposition only so far as the Supreme Court of the United States itself is concerned. But, my friends, if such a plan is good for the lower courts, it certainly ought to be equally good for the highest Court, from which there is no appeal.

Those opposing this plan have sought to arouse prejudice and fear by crying that I am seeking to "pack" the Supreme Court and that a baneful precedent will be established.

What do they mean by the words "packing the Supreme Court?" Let me answer this question with a bluntness that will end all honest misunderstanding of my purposes.

If by that phrase "packing the Court" it is charged that I wish to place on the bench spineless puppets who would disregard the law and would decide specific cases as I wished them to be decided, I make this answer: that no president fit for his office would appoint, and no Senate of honorable men fit for their office would confirm, that kind of appointees to the Supreme Court.

But if by that phrase the charge is made that I would appoint and the Senate would confirm justices worthy to sit beside present members of the Court, who understand modern conditions, that I will appoint justices who will not undertake to override the judgment of the Congress on legislative policy, that I will appoint justices who will act as justices and not as legislators -- if the appointment of such justices can be called "packing the Courts," then I say that I and with me the vast majority of the American people favor doing just that thing -- now.

* * *

It is the clear intention of our public policy to provide for a constant flow of new and younger blood into the judiciary. Normally every president appoints a large number of district and circuit judges and a few members of the Supreme Court. * * *

Such a succession of appointments should have provided a Court well balanced as to age. But chance and the disinclination of individuals to leave the Supreme bench
have now given us a Court in which five justices will be over seventy-five years of age before next June and one over seventy. Thus a sound public policy has been defeated.

So I now propose that we establish by law an assurance against any such ill-balanced Court in the future. I propose that hereafter, when a judge reaches the age of seventy, a new and younger judge shall be added to the Court automatically. In this way I propose to enforce a sound public policy by law instead of leaving the composition of our federal courts, including the highest, to be determined by chance or the personal decision of individuals.

***

* * * Our difficulty with the Court today rises not from the Court as an institution but from human beings within it. But we cannot yield our constitutional destiny to the personal judgment of a few men who, being fearful of the future, would deny us the necessary means of dealing with the present.

This plan of mine is no attack on the Court; it seeks to restore the Court to its rightful and historic place in our system of constitutional government and to have it resume its high task of building anew on the Constitution "a system of living law." The Court itself can best undo what the Court has done.

I have thus explained to you the reasons that lie behind our efforts to secure results by legislation within the Constitution. I hope that thereby the difficult process of constitutional amendment may be rendered unnecessary. But let us examine that process.

***

I believe that it would take months or years to get substantial agreement upon the type and language of an amendment. It would take months and years thereafter to get a two-thirds majority in favor of that amendment in both houses of the Congress.

Then would come the long course of ratification by three-quarters of all the states. No amendment which any powerful economic interests or the leaders of any powerful political party have had reason to oppose has ever been ratified within anything like a reasonable time. And remember that thirteen states which contain only 5 percent of the voting population can block ratification even though the thirty-five states with 95 percent of the population are in favor of it.

***

And remember one thing more. Even if an amendment were passed, and even if in the years to come it were to be ratified, its meaning would depend upon the kind of justices who would be sitting on the Supreme Court bench. For an amendment, like the rest of the Constitution, is what the justices say it is rather than what its framers or you might hope it is.
I am in favor of action through legislation:

First, because I believe it can be passed at this session of the Congress.

Second, because it will provide a reinvigorated, liberal-minded judiciary necessary to furnish quicker and cheaper justice from bottom to top.

Third, because it will provide a series of federal courts willing to enforce the Constitution as written, and unwilling to assert legislative powers by writing into it their own political and economic policies.

During the past half-century the balance of power between the three great branches of the federal government has been tipped out of balance by the courts in direct contradiction of the high purposes of the framers of the Constitution. It is my purpose to restore that balance. You who know me will accept my solemn assurance that in a world in which democracy is under attack, I seek to make American democracy succeed. You and I will do our part.

[Source: http://www.hpol.org/fdr/chat/]

CHIEF JUSTICE CHARLES EVANS HUGHES,
LETTER TO SENATOR BURTON K. WHEELER
CONCERNING THE ROOSEVELT COURT-PACKING PLAN

March 22, 1937

* * *

The Supreme Court is fully abreast of its work. When we rose on March 15th (for the present recess) we had heard arguments in cases in which certiorari had been granted only four weeks before -- February 15. During the current term * * * we have heard arguments on the merits in 150 cases * * * and we have 28 cases * * * awaiting argument. We shall be able to hear all these cases, and such others as may come up for argument, before our adjournment for the term. There is no congestion of cases upon our calendar. This gratifying condition has obtained for several years. We have been able for several Terms to adjourn after disposing of all cases which are ready to be heard.

An increase in the number of Justices of the Supreme Court apart from any question of policy, which I do not discuss, would not promote the efficiency of the Court. . . . There would be more judges to hear, more judges to confer, more judges to
discuss, more judges to be convinced and to decide. The present number of Justices is thought to be large enough so far as the prompt, adequate, and efficient conduct of the work of the Court is concerned * * *.

* * *

On account of the shortness of time I have not been able to consult with the members of the Court generally with respect to the foregoing statement, but I am confident that it is in accord with the views of the justices. I should say, however, that I have been able to consult with Mr. Justice Van Devanter and Mr. Justice Brandeis, and I am at liberty to say that the statement is approved by them.

[Source: Reorganization of the Federal Judiciary: Hearings on S. 1392 Before the Senate Comm. on the Judiciary, 75th Cong. 485-86 (1937)]

MISSOURI CONSTITUTION OF 1875 (1939)

Art. XI § 1: “A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this State between the ages of six and twenty years.”

Art. XI § 3: “Separate free public schools shall be established for the education of children of African descent.”

REVISED STATUTES OF MISSOURI (1934)

Sec. 10349. Separate schools for white and colored children.—Separate free schools shall be established for the education of children of African descent; and it shall hereinafter be unlawful for any colored child to attend any white school, or for any white child to attend a colored school.

Sec. 10350. Board of directors authorized to establish school for colored children.—When there are within any district in this state eight or more colored children of school age, as shown by the last enumeration, the board of directors of such school district shall be and they are hereby authorized and required to establish and maintain within such school district a separate free school for said colored children or in lieu thereof shall pay the transportation and the tuition charges to any district in the county wherein a school is maintained for colored children: Provided, if the number of colored children enumerated is less than eight they shall have the privilege and are entitled to attend school in the nearest district in the county wherein a school is maintained for colored children and the transportation and tuition charges incurred shall be paid; said transportation shall not exceed five dollars per month and tuition
charges shall not exceed the pro rata cost of instruction. * * *: Provided further, that the length of the school term for said colored children and the advantages and privileges thereof, shall be the same as are provided for other schools of corresponding grade within such school district, and the board of directors shall in all cases conduct, manage and control said school as other schools of the district are conducted, managed and controlled; and all indebtedness incurred by said board of directors in providing suitable buildings, employing teachers and maintaining said school shall be paid out of the appropriate funds of the district, upon warrants ordered and issued in conformity with the provisions of section 10429: Provided further, that if there be no school building in such school district for said colored children, the board of directors shall be and they are hereby authorized and required to rent suitable buildings and properly furnish the same, and all expenses necessarily incurred shall be paid out of any funds to the credit of the building and incidental funds of such school district: Provided further, the boards of directors of two or more districts may establish a joint colored school, the expense of maintaining said school to be borne by the districts establishing same, in proportion to the number of colored children enumerated in each. The control of said school shall be vested in the board of directors of the district in which said colored children attend: Provided further, that should any board of directors neglect or refuse to comply with the provisions of this section, such school district shall be deprived of any part of the public school funds so long as the provisions of this section are not complied with.

MISSOURI ex rel. GAINES v. CANADA

Supreme Court of the United States, 1938.
305 U.S. 337.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the court.

Petitioner Lloyd Gaines, a negro, was refused admission to the School of Law of the State University of Missouri. Asserting that this refusal constituted a denial by the State of the equal protection of the laws in violation of the Fourteenth Amendment of the Federal Constitution, petitioner brought this action for mandamus to compel the curators of the University to admit him. On final hearing, an alternative writ was quashed and a peremptory writ was denied by the Circuit Court. The Supreme Court of the State affirmed the judgment. We granted certiorari.

Petitioner is a citizen of Missouri. In August, 1935, he was graduated with the degree of Bachelor of Arts at the Lincoln University, an institution maintained by the State of Missouri for the higher education of negroes. That University has no law school. Upon the filing of his application for admission to the law school of the
University of Missouri, the registrar advised him to communicate with the president of Lincoln University and the latter directed petitioner's attention to Section 9622 of the Revised Statutes of Missouri (1929), Mo.St.Ann. s 9622, p. 7328, providing as follows:

"Sec. 9622. * * * Pending the full development of the Lincoln university, the board of curators shall have the authority to arrange for the attendance of negro residents of the state of Missouri at the university of any adjacent state to take any course or to study any subjects provided for at the state university of Missouri, and which are not taught at the Lincoln university and to pay the reasonable tuition fees for such attendance; provided that whenever the board of curators deem it advisable they shall have the power to open any necessary school or department."

Petitioner was advised to apply to the State Superintendent of Schools for aid under that statute. It was admitted on the trial that petitioner's "work and credits at the Lincoln University would qualify him for admission to the School of Law of the University of Missouri if he were found otherwise eligible". He was refused admission upon the ground that it was "contrary to the constitution, laws and public policy of the State to admit a negro as a student in the University of Missouri". It appears that there are schools of law in connection with the state universities of four adjacent States, Kansas, Nebraska, Iowa and Illinois, where non-resident negroes are admitted.

The clear and definite conclusions of the state court in construing the pertinent state legislation narrow the issue. The action of the curators, who are representatives of the State in the management of the state university, must be regarded as state action. The state constitution provides that separate free public schools shall be established for the education of children of African descent, and by statute separate high school facilities are supplied for colored students equal to those provided for white students. While there is no express constitutional provision requiring that the white and negro races be separated for the purpose of higher education, the state court on a comprehensive review of the state statutes held that it was intended to separate the white and negro races for that purpose also. Referring in particular to Lincoln University, the court deemed it to be clear "that the Legislature intended to bring the Lincoln University up to the standard of the University of Missouri, and give to the whites and negroes an equal opportunity for higher education -- the whites at the University of Missouri, and the negroes at Lincoln University". Further, the court concluded that the provisions of Section 9622 (above quoted) to the effect that negro residents "may attend the university of any adjacent State with their tuition paid, pending the full development of Lincoln University", made it evident "that the Legislature did not intend that negroes and whites should attend the same university in this State". In that view it necessarily followed that the curators of the University
of Missouri acted in accordance with the policy of the State in denying petitioner admission to its School of Law upon the sole ground of his race.

***

The state court stresses the advantages that are afforded by the law schools of the adjacent States -- Kansas, Nebraska, Iowa and Illinois -- which admit non-resident negroes. The court considered that these were schools of high standing where one desiring to practice law in Missouri can get “as sound, comprehensive, valuable legal education” as in the University of Missouri; that the system of education in the former is the same as that in the latter and is designed to give the students a basis for the practice of law in any State where the Anglo-American system of law obtains; that the law school of the University of Missouri does not specialize in Missouri law and that the course of study and the case books used in the five schools are substantially identical. Petitioner insists that for one intending to practice in Missouri there are special advantages in attending a law school there, both in relation to the opportunities for the particular study of Missouri law and for the observation of the local courts, and also in view of the prestige of the Missouri law school among the citizens of the State, his prospective clients. Proceeding with its examination of relative advantages, the state court found that the difference in distances to be traveled afforded no substantial ground of complaint and that there was an adequate appropriation to meet the full tuition fees which petitioner would have to pay.

We think that these matters are beside the point. The basic consideration is not as to what sort of opportunities, other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color. The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State. The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race. The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination.

The equal protection of the laws is “a pledge of the protection of equal laws”. *Yick Wo v. Hopkins*, 118 U.S. 356 [1886]. Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is,
within its own jurisdiction. It is there that the equality of legal right must be maintained. That obligation is imposed by the Constitution upon the States severally as governmental entities,--each responsible for its own laws establishing the rights and duties of persons within its borders. It is an obligation the burden of which cannot be cast by one State upon another, and no State can be excused from performance by what another State may do or fail to do. That separate responsibility of each State within its own sphere is of the essence of statehood maintained under our dual system. It seems to be implicit in respondents' argument that if other States did not provide courses for legal education, it would nevertheless be the constitutional duty of Missouri when it supplied such courses for white students to make equivalent provision for negroes. But that plain duty would exist because it rested upon the State independently of the action of other States. We find it impossible to conclude that what otherwise would be an unconstitutional discrimination, with respect to the legal right to the enjoyment of opportunities within the State, can be justified by requiring resort to opportunities elsewhere. That resort may mitigate the inconvenience of the discrimination but cannot serve to validate it.

** * * *

Nor can we regard the fact that there is but a limited demand in Missouri for the legal education of negroes as excusing the discrimination in favor of whites. * * *

Here, petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity.

** * * *

The judgment of the Supreme Court of Missouri is reversed and the cause is remanded for further proceedings not inconsistent with this opinion. It is so ordered.

Reversed and remanded.

Separate opinion of MR. JUSTICE McREYNOLDS.

Considering the disclosures of the record, the Supreme Court of Missouri arrived at a tenable conclusion and its judgment should be affirmed. That court well understood the grave difficulties of the situation and rightly refused to upset the settled legislative policy of the State by directing a mandamus.

** * * *

For a long time Missouri has acted upon the view that the best interest of her people demands separation of whites and negroes in schools. Under the opinion just announced, I presume she may abandon her law school and thereby disadvantage her
white citizens without improving petitioner's opportunities for legal instruction; or she may break down the settled practice concerning separate schools and thereby, as indicated by experience, damnify both races. Whether by some other course it may be possible for her to avoid condemnation is matter for conjecture.

The State has offered to provide the negro petitioner opportunity for study of the law -- if perchance that is the thing really desired -- paying his tuition at some nearby school of good standing. This is far from unmistakable disregard of his rights and in the circumstances is enough to satisfy any reasonable demand for specialized training. It appears that never before has a negro applied for admission to the Law School and none has ever asked that Lincoln University provide legal instruction.

The problem presented obviously is a difficult and highly practical one. A fair effort to solve it has been made by offering adequate opportunity for study when sought in good faith. The State should not be unduly hampered through theorization inadequately restrained by experience.

* * *

MR. JUSTICE BUTLER concurs in the above views.

WEST VIRGINIA BOARD OF EDUCATION v. BARNETTE

Supreme Court of the United States, 1943.
[Argued Mar. 11, 1943; Decided June 14, 1943 (Flag Day)]
319 U.S. 624.

MR. JUSTICE JACKSON delivered the opinion of the Court.

* * *

The Board of Education on January 9, 1942, adopted a resolution containing recitals taken largely from the Court's Minersville School District v. Gobitis [310 U.S. 586 (1940)] opinion and ordering that the salute to the flag become "a regular part of the program of activities in the public schools," that all teachers and pupils "shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an Act of insubordination, and shall be dealt with accordingly.

* * *

Failure to conform is "insubordination" dealt with by expulsion. Readmission is denied by statute until compliance. Meanwhile the expelled child is "unlawfully absent" and may be proceeded against as a delinquent. His parents or guardians are liable to prosecution, and if convicted are subject to fine not exceeding $50 and jail term
not exceeding thirty days.

Appellees, citizens of the United States and of West Virginia, brought suit in the United States District Court for themselves and others similarly situated asking its injunction to restrain enforcement of these laws and regulations against Jehovah's Witnesses. The Witnesses are an unincorporated body teaching that the obligation imposed by law of God is superior to that of laws enacted by temporal government. Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: “Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them.” They consider that the flag is an “image” within this command. For this reason they refuse to salute it.

Children of this faith have been expelled from school and are threatened with exclusion for no other cause. Officials threaten to send them to reformatories maintained for criminally inclined juveniles. Parents of such children have been prosecuted and are threatened with prosecutions for causing delinquency.

** **

The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.

** **

There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical reiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it,
and what is one man's comfort and inspiration is another's jest and scorn.

* * * Here it is the State that employs a flag as a symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights.

It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning. It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. But here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.

Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad or merely innocuous. Any credo of nationalism is likely to include what some disapprove or to omit what others think essential, and to give off different overtones as it takes on different accents or interpretations. If official power exists to coerce acceptance of any patriotic creed, what it shall contain cannot be decided by courts, but must be largely discretionary with the ordaining authority, whose power to prescribe would no doubt include power to amend. Hence validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.

Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional
liberty of the individual. It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.

The *Gobitis* decision, however, assumed, as did the argument in that case and in this, that power exists in the State to impose the flag salute discipline upon school children in general. *** We examine rather than assume existence of this power and, against this broader definition of issues in this case, re-examine specific grounds assigned for the *Gobitis* decision.

1. It was said that the flag-salute controversy confronted the Court with “the problem which Lincoln cast in memorable dilemma: “Must a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence?” and that the answer must be in favor of strength.

   We think these issues may be examined free of pressure or restraint growing out of such considerations.

   It may be doubted whether Mr. Lincoln would have thought that the strength of government to maintain itself would be impressively vindicated by our confirming power of the state to expel a handful of children from school. Such oversimplification, so handy in political debate, often lacks the precision necessary to postulates of judicial reasoning. If validly applied to this problem, the utterance cited would resolve every issue of power in favor of those in authority and would require us to override every liberty thought to weaken or delay execution of their policies.

   Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.

   The subject now before us exemplifies this principle. Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction. If it is to impose any ideological discipline, however, each party or denomination must seek to control, or failing that, to weaken the influence of the educational system. Observance of the limitations of the Constitution will not weaken government in the field appropriate for its exercise.
2. It was also considered in the *Gobitis* case that functions of educational officers in states, counties and school districts were such that to interfere with their authority “would in effect make us the school board for the country.”

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures -- Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

* * *

3. The *Gobitis* opinion reasoned that this is a field “where courts possess no marked and certainly no controlling competence,” that it is committed to the legislatures as well as the courts to guard cherished liberties and that it is constitutionally appropriate to “fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena,” since all the “effective means of inducing political changes are left free.”

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

* * *

Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. True, the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. These principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs. We must transplant these rights to a soil in which the laissez-faire concept or principle of non-interference has withered at least as to economic affairs, and social
advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls. These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

4. Lastly, and this is the very heart of the Gobitis opinion, it reasons that “National unity is the basis of national security,” that the authorities have “the right to select appropriate means for its attainment,” and hence reaches the conclusion that such compulsory measures toward “national unity” are constitutional. Upon the verity of this assumption depends our answer in this case.

National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort * * *

Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the
Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

The decision of this Court in *Minersville School District v. Gobitis* and the holdings of those few *per curiam* decisions which preceded and foreshadowed it are overruled, and the judgment enjoining enforcement of the West Virginia Regulation is Affirmed.

MR. JUSTICE ROBERTS and MR. JUSTICE REED adhere to the views expressed by the Court in *Minersville School District v. Gobitis* and are of the opinion that the judgment below should be reversed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, concurring.

* * *

Words uttered under coercion are proof of loyalty to nothing but self-interest. Love of country must spring from willing hearts and free minds, inspired by a fair administration of wise laws enacted by the people's elected representatives within the bounds of express constitutional prohibitions. These laws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men.
Neither our domestic tranquillity in peace nor our martial effort in war depend on compelling little children to participate in a ceremony which ends in nothing for them but a fear of spiritual condemnation. If, as we think, their fears are groundless, time and reason are the proper antidotes for their errors. The ceremonial, when enforced against conscientious objectors, more likely to defeat than to serve its high purpose, is a handy implement for disguised religious persecution. As such, it is inconsistent with our Constitution's plan and purpose.

MR. JUSTICE MURPHY, concurring.

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I am unable to agree that the benefits that may accrue to society from the compulsory flag salute are sufficiently definite and tangible to justify the invasion of freedom and privacy that it entailed or to compensate for a restraint on the freedom of the individual to be vocal or silent according to his conscience or personal inclination. *** Any spark of love for country which may be generated in a child or his associates by forcing him to make what is to him an empty gesture and recite words wrung from him contrary to his religious beliefs is overshadowed by the desirability of preserving freedom of conscience to the full. It is in that freedom and the example of persuasion, not in force and compulsion, that the real unity of America lies.

MR. JUSTICE FRANKFURTER, dissenting.

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should whole-heartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. *** In the light of all the circumstances, including the history of this question in this Court, it would require more daring than I possess to deny that reasonable legislators could have taken the action which is before us for review. Most unwillingly, therefore, I must differ from my brethren with regard to legislation like this. I cannot bring my mind to believe that the “liberty” secured by the Due Process Clause gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen.

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Of course patriotism cannot be enforced by the flag salute. But neither can the liberal spirit be enforced by judicial invalidation of illiberal legislation. Our constant preoccupation with the constitutionality of legislation rather than with its wisdom tends to preoccupation of the American mind with a false value. The tendency of focusing attention on constitutionality is to make constitutionality synonymous with wisdom, to regard a law as all right if it is constitutional. Such an attitude is a great enemy of liberalism. Particularly in legislation affecting freedom of thought and freedom of speech much which should offend a free-spirited society is constitutional. Reliance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions and habits and actions of a community is the ultimate reliance against unabated temptations to fetter the human spirit.

HIRABAYASHI v. UNITED STATES

Supreme Court of the United States, 1943.
[Argued May 10-11, 1943; Decided June 21, 1943]
320 U.S. 81.

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

Appellant, an American citizen of Japanese ancestry, was convicted in the district court of violating the Act of Congress of March 21, 1942, which makes it a misdemeanor knowingly to disregard restrictions made applicable by a military commander to persons in a military area prescribed by him as such, all as authorized by an Executive Order of the President.

The questions for our decision are whether the particular restriction violated, namely that all persons of Japanese ancestry residing in such an area be within their place of residence daily between the hours of 8:00 p.m. and 6:00 a.m., was adopted by the military commander in the exercise of an unconstitutional delegation by Congress of its legislative power, and whether the restriction unconstitutionally discriminated between citizens of Japanese ancestry and those of other ancestries in violation of the Fifth Amendment.

Executive Order No. 9066, promulgated in time of war for the declared purpose of prosecuting the war by protecting national defense resources from sabotage and espionage, and the Act of March 21, 1942, ratifying and confirming the Executive Order, were each an exercise of the power to wage war conferred on the Congress and on the President, as Commander in Chief of the armed forces, by Articles I and II of the
Constitution. We have no occasion to consider whether the President, acting alone, could lawfully have made the curfew order in question, or have authorized others to make it. For the President's action has the support of the Act of Congress, and we are immediately concerned with the question whether it is within the constitutional power of the national government, through the joint action of Congress and the Executive, to impose this restriction as an emergency war measure. The exercise of that power here involves no question of martial law or trial by military tribunal. Appellant has been tried and convicted in the civil courts and has been subjected to penalties prescribed by Congress for the acts committed.

The war power of the national government is “the power to wage war successfully.” See Charles Evans Hughes, War Powers Under the Constitution, 42 A.B.A. Rep. 232, 238 [1917]. It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war. Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it. Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of warmaking, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.

The actions taken must be appraised in the light of the conditions with which the President and Congress were confronted in the early months of 1942, many of which since disclosed, were then peculiarly within the knowledge of the military authorities. ***

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The challenged orders were defense measures for the avowed purpose of safeguarding the military area in question, at a time of threatened air raids and invasion by the Japanese forces, from the danger of sabotage and espionage. As the curfew was made applicable to citizens residing in the area only if they were of Japanese ancestry, our inquiry must be whether in the light of all the facts and circumstances there was any substantial basis for the conclusion, in which Congress and the military commander united, that the curfew as applied was a protective measure necessary to meet the threat of sabotage and espionage which would
substantially affect the war effort and which might reasonably be expected to aid a threatened enemy invasion. The alternative which appellant insists must be accepted is for the military authorities to impose the curfew on all citizens within the military area, or on none. In a case of threatened danger requiring prompt action, it is a choice between inflicting obviously needless hardship on the many, or sitting passive and unresisting in the presence of the threat. We think that constitutional government, in time of war, is not so powerless and does not compel so hard a choice if those charged with the responsibility of our national defense have reasonable ground for believing that the threat is real.

When the orders were promulgated there was a vast concentration, within Military Areas No. 1 and 2, of installations and facilities for the production of military equipment, especially ships and airplanes. Important Army and Navy bases were located in California and Washington. Approximately one-fourth of the total value of the major aircraft contracts then let by Government procurement officers were to be performed in the State of California. California ranked second, and Washington fifth, of all the states of the Union with respect to the value of shipbuilding contracts to be performed.

In the critical days of March, 1942, the danger to our war production by sabotage and espionage in this area seems obvious. The German invasion of the Western European countries had given ample warning to the world of the menace of the “fifth column.” Espionage by persons in sympathy with the Japanese Government had been found to have been particularly effective in the surprise attack on Pearl Harbor. At a time of threatened Japanese attack upon this country, the nature of our inhabitants' attachments to the Japanese enemy was consequently a matter of grave concern. Of the 126,000 persons of Japanese descent in the United States, citizens and non-citizens, approximately 112,000 resided in California, Oregon and Washington at the time of the adoption of the military regulations. Of these approximately two-thirds are citizens because born in the United States. Not only did the great majority of such persons reside within the Pacific Coast states but they were concentrated in or near three of the large cities, Seattle, Portland and Los Angeles, all in Military Area No. 1.

There is support for the view that social, economic and political conditions which have prevailed since the close of the last century, when the Japanese began to come to this country in substantial numbers, have intensified their solidarity and have in large measure prevented their assimilation as an integral part of the white population. In addition, large numbers of children of Japanese parentage are sent to Japanese language schools outside the regular hours of public schools in the locality. Some of these schools are generally believed to be sources of Japanese nationalistic propaganda, cultivating allegiance to Japan. Considerable numbers, estimated to be approximately
10,000, of American-born children of Japanese parentage have been sent to Japan for all or a part of their education.

Congress and the Executive, including the military commander, could have attributed special significance, in its bearing on the loyalties of persons of Japanese descent, to the maintenance by Japan of its system of dual citizenship. Children born in the United States of Japanese alien parents, and especially those children born before December 1, 1924, are under many circumstances deemed, by Japanese law, to be citizens of Japan. No official census of those whom Japan regards as having thus retained Japanese citizenship is available, but there is ground for the belief that the number is large.

The large number of resident alien Japanese, approximately one-third of all Japanese inhabitants of the country, are of mature years and occupy positions of influence in Japanese communities. The association of influential Japanese residents with Japanese Consulates has been deemed a ready means for the dissemination of propaganda and for the maintenance of the influence of the Japanese Government with the Japanese population in this country.

As a result of all these conditions affecting the life of the Japanese, both aliens and citizens, in the Pacific Coast area, there has been relatively little social intercourse between them and the white population. The restrictions, both practical and legal, affecting the privileges and opportunities afforded to persons of Japanese extraction residing in the United States, have been sources of irritation and may well have tended to increase their isolation, and in many instances their attachments to Japan and its institutions.

Viewing these data in all their aspects, Congress and the Executive could reasonably have concluded that these conditions have encouraged the continued attachment of members of this group to Japan and Japanese institutions. * * * Whatever views we may entertain regarding the loyalty to this country of the citizens of Japanese ancestry, we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.

Appellant does not deny that, given the danger, a curfew was an appropriate measure against sabotage. It is an obvious protection against the perpetration of
sabotage most readily committed during the hours of darkness. If it was an appropriate exercise of the war power its validity is not impaired because it has restricted the citizen's liberty. Like every military control of the population of a dangerous zone in war time, it necessarily involves some infringement of individual liberty, just as does the police establishment of fire lines during a fire, or the confinement of people to their houses during an air raid alarm-neither of which could be thought to be an infringement of constitutional right. Like them, the validity of the restraints of the curfew order depends on all the conditions which obtain at the time the curfew is imposed and which support the order imposing it.

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Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. Yick Wo v. Hopkins, 118 U.S. 356 [1886]. We may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas. Because racial discriminations are in most circumstances irrelevant and therefore prohibited, it by no means follows that, in dealing with the perils of war, Congress and the Executive are wholly precluded from taking into account those facts and circumstances which are relevant to measures for our national defense and for the successful prosecution of the war, and which may in fact place citizens of one ancestry in a different category from others. ***

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Our investigation here does not go beyond the inquiry whether, in the light of all the relevant circumstances preceding and attending their promulgation, the challenged orders and statute afforded a reasonable basis for the action taken in imposing the curfew. We cannot close our eyes to the fact, demonstrated by experience, that in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry. Nor can we deny that Congress, and the military authorities acting with its authorization, have constitutional power to appraise the danger in the light of facts of public notoriety. We need not now attempt to define the ultimate boundaries of the war power. We decide only the issue as we have defined it -- we decide only that the curfew order as applied, and at the time it was applied, was within the boundaries of the war power. In this case it is enough that circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational basis for the decision which they made. Whether we would have made it is irrelevant.

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The military commander's appraisal of facts in the light of the authorized
standard, and the inferences which he drew from those facts, involved the exercise of his informed judgment. But as we have seen, those facts, and the inferences which could be rationally drawn from them, support the judgment of the military commander, that the danger of espionage and sabotage to our military resources was imminent, and that the curfew order was an appropriate measure to meet it.

Where, as in the present case, the standard set up for the guidance of the military commander, and the action taken and the reasons for it, are in fact recorded in the military orders, so that Congress, the courts and the public are assured that the orders, in the judgment of the commander, conform to the standards approved by the President and Congress, there is no failure in the performance of the legislative function. The essentials of that function are the determination by Congress of the legislative policy and its approval of a rule of conduct to carry that policy into execution. The very necessities which attend the conduct of military operations in time of war in this instance as in many others preclude Congress from holding committee meetings to determine whether there is danger, before it enacts legislation to combat the danger.

The Constitution as a continuously operating charter of government does not demand the impossible or the impractical. The essentials of the legislative function are preserved when Congress authorizes a statutory command to become operative, upon ascertainment of a basic conclusion of fact by a designated representative of the Government. The present statute, which authorized curfew orders to be made pursuant to Executive Order No. 9066 for the protection of war resources from espionage and sabotage, satisfies those requirements. * * *

* * *

Affirmed.

MR. JUSTICE DOUGLAS concurring.

* * *

It is true that we might now say that there was ample time to handle the problem on the individual rather than the group basis. But military decisions must be made without the benefit of hindsight. The orders must be judged as of the date when the decision to issue them was made. To say that the military in such cases should take the time to weed out the loyal from the others would be to assume that the nation could afford to have them take the time to do it. But as the opinion of the Court makes clear, speed and dispatch may be of the essence. Certainly we cannot say that those charged with the defense of the nation should have procrastinated until investigations and hearings were completed. At that time further delay might indeed have seemed to be wholly incompatible with military responsibilities.
Since we cannot override the military judgment which lay behind these orders, it seems to me necessary to concede that the army had the power to deal temporarily with these people on a group basis. Petitioner therefore was not justified in disobeying the orders.

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MR. JUSTICE MURPHY, concurring.

It is not to be doubted that the action taken by the military commander in pursuance of the authority conferred upon him was taken in complete good faith and in the firm conviction that it was required by considerations of public safety and military security. Neither is it doubted that the Congress and the Executive working together may generally employ such measures as are necessary and appropriate to provide for the common defense and to wage war “with all the force necessary to make it effective.” This includes authority to exercise measures of control over persons and property which would not in all cases be permissible in normal times.

It does not follow, however, that the broad guaranties of the Bill of Rights and other provisions of the Constitution protecting essential liberties are suspended by the mere existence of a state of war. It has been frequently stated and recognized by this Court that the war power, like the other great substantive powers of government, is subject to the limitations of the Constitution. See *Ex parte Milligan*, 4 Wall. 2 [1866] * **. We give great deference to the judgment of the Congress and of the military authorities as to what is necessary in the effective prosecution of the war, but we can never forget that there are constitutional boundaries which it is our duty to uphold. It would not be supposed, for instance, that public elections could be suspended or that the prerogatives of the courts could be set aside, or that persons not charged with offenses against the law of war could be deprived of due process of law and the benefits of trial by jury, in the absence of a valid declaration of martial law.

Distinctions based on color and ancestry are utterly inconsistent with our traditions and ideals. They are at variance with the principles for which we are now waging war. * ** * To say that any group cannot be assimilated is to admit that the great American experiment has failed, that our way of life has failed when confronted with the normal attachment of certain groups to the lands of their forefathers. As a nation we embrace many groups, some of them among the oldest settlements in our midst, which have isolated themselves for religious and cultural reasons.

Today is the first time, so far as I am aware, that we have sustained a substantial restriction of the personal liberty of citizens of the United States based upon the accident of race or ancestry. Under the curfew order here challenged no less
than 70,000 American citizens have been placed under a special ban and deprived of their liberty because of their particular racial inheritance. In this sense it bears a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany and in other parts of Europe. The result is the creation in this country of two classes of citizens for the purposes of a critical and perilous hour-to sanction discrimination between groups of United States citizens on the basis of ancestry. In my opinion this goes to the very brink of constitutional power.

Except under conditions of great emergency a regulation of this kind applicable solely to citizens of a particular racial extraction would not be regarded as in accord with the requirement of due process of law contained in the Fifth Amendment. We have consistently held that attempts to apply regulatory action to particular groups solely on the basis of racial distinction or classification is not in accordance with due process of law as prescribed by the Fifth and Fourteenth Amendments. It is true that the Fifth Amendment, unlike the Fourteenth, contains no guarantee of equal protection of the laws. It is also true that even the guaranty of equal protection of the laws allows a measure of reasonable classification. It by no means follows, however, that there may not be discrimination of such an injurious character in the application of laws as to amount to a denial of due process of law as that term is used in the Fifth Amendment. I think that point is dangerously approached when we have one law for the majority of our citizens and another for those of a particular racial heritage.

In view, however, of the critical military situation which prevailed on the Pacific Coast area in the spring of 1942, and the urgent necessity of taking prompt and effective action to secure defense installations and military operations against the risk of sabotage and espionage, the military authorities should not be required to conform to standards of regulatory action appropriate to normal times. Because of the damage wrought by the Japanese at Pearl Harbor and the availability of new weapons and new techniques with greater capacity for speed and deception in offensive operations, the immediate possibility of an attempt at invasion somewhere along the Pacific Coast had to be reckoned with. However desirable such a procedure might have been, the military authorities could have reasonably concluded at the time that determinations as to the loyalty and dependability of individual members of the large and widely scattered group of persons of Japanese extraction on the West Coast could not be made without delay that might have had tragic consequences. Modern war does not always wait for the observance of procedural requirements that are considered essential and appropriate under normal conditions. Accordingly I think that the military arm, confronted with the peril of imminent enemy attack and acting under the authority conferred by the Congress, made an allowable judgment at the time the curfew restriction was imposed. Whether such a restriction is valid today is another matter.
In voting for affirmance of the judgment I do not wish to be understood as intimating that the military authorities in time of war are subject to no restraints whatsoever, or that they are free to impose any restrictions they may choose on the rights and liberties of individual citizens or groups of citizens in those places which may be designated as "military areas". While this Court sits, it has the inescapable duty of seeing that the mandates of the Constitution are obeyed. That duty exists in time of war as well as in time of peace, and in its performance we must not forget that few indeed have been the invasions upon essential liberties which have not been accompanied by pleas of urgent necessity advanced in good faith by responsible men.

Nor do I mean to intimate that citizens of a particular racial group whose freedom may be curtailed within an area threatened with attack should be generally prevented from leaving the area and going at large in other areas that are not in danger of attack and where special precautions are not needed. Their status as citizens, though subject to requirements of national security and military necessity, should at all times be accorded the fullest consideration and respect. When the danger is past, the restrictions imposed on them should be promptly removed and their freedom of action fully restored.

Mr. Justice RUTLEDGE, concurring. [omitted]

KOREMATSU v. UNITED STATES

Supreme Court of the United States, 1944.
323 U.S. 214.

MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioner, an American citizen of Japanese descent, was convicted in a federal district court for remaining in San Leandro, California, a "Military Area", contrary to Civilian Exclusion Order No. 34 of the Commanding General of the Western Command, U.S. Army, which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area. No question was raised as to petitioner's loyalty to the United States. The Circuit Court of Appeals affirmed, and the importance of the constitutional question involved caused us to grant certiorari.

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes pustify the existence of such
restrictions; racial antagonism never can.

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In the light of the principles we announced in the Hirabayashi case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did. True, exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p.m. to 6 a.m. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either. But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage. The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion. They did so, as pointed out in our Hirabayashi opinion, in accordance with Congressional authority to the military to say who should, and who should not, remain in the threatened areas.

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Here, as in the Hirabayashi case, "* * * we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.”

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We uphold the exclusion order as of the time it was made and when the petitioner violated it. In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

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It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of
the assembly and relocation centers -- and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies -- we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. 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. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot -- by availing ourselves of the calm perspective of hindsight -- now say that at that time these actions were unjustified.

Affirmed.

MR. JUSTICE FRANKFURTER, concurring.

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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.” 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. *** 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”. 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. *** 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. 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.

MR. JUSTICE ROBERTS. [dissenting – omitted]

MR. JUSTICE MURPHY, dissenting.

This exclusion of “all persons of Japanese ancestry, both alien and non-alien,” from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over “the very brink of constitutional power” and falls into the ugly abyss of racism.

In dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration to the judgments of the military authorities who are on the scene and who have full knowledge of the military facts. The scope of their discretion must, as a matter of necessity and common sense, be wide. And their judgments ought not to be overruled lightly by those whose training and duties ill-equip them to deal intelligently with matters so vital to the physical security of the nation.

At the same time, however, it is essential that there be definite limits to military discretion, especially where martial law has not been declared. Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support. Thus, like other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled. * * *

That this forced exclusion was the result in good measure of this erroneous assumption of racial guilt rather than bona fide military necessity is evidenced by the Commanding General’s Final Report on the evacuation from the Pacific Coast area. In it he refers to all individuals of Japanese descent as “subversive,” as belonging to “an enemy race” whose “racial strains are undiluted,” and as constituting “over 112,000 potential enemies * * * at large today” along the Pacific Coast. In support of this blanket condemnation of all persons of Japanese descent, however, no reliable evidence is cited to show that such individuals were generally disloyal, or had generally so conducted themselves in this area as to constitute a special menace to defense installations or war industries, or had otherwise by their behavior furnished reasonable ground for their exclusion as a group.

Justification for the exclusion is sought, instead, mainly upon questionable racial and sociological grounds not ordinarily within the realm of expert military
judgment, supplemented by certain semi-military conclusions drawn from an 
warranted use of circumstantial evidence. Individuals of Japanese ancestry are 
condemned because they are said to be “a large, unassimilated, tightly knit racial 
group, bound to an enemy nation by strong ties of race, culture, custom and religion.”  

The main reasons relied upon by those responsible for the forced evacuation, 
therefore, do not prove a reasonable relation between the group characteristics of 
Japanese Americans and the dangers of invasion, sabotage and espionage. The reasons 
appear, instead, to be largely an accumulation of much of the misinformation, half-
truths and insinuations that for years have been directed against Japanese Americans 
by people with racial and economic prejudices -- the same people who have been among 
the foremost advocates of the evacuation. A military judgment based upon such racial 
and sociological considerations is not entitled to the great weight ordinarily given the 
judgments based upon strictly military considerations. Especially is this so when every 
charge relative to race, religion, culture, geographical location, and legal and economic 
status has been substantially discredited by independent studies made by experts in 
these matters.

No adequate reason is given for the failure to treat these Japanese Americans 
on an individual basis by holding investigations and hearings to separate the loyal 
from the disloyal, as was done in the case of persons of German and Italian ancestry.

Nor is there any denial of the fact that not one person of Japanese ancestry 
was accused or convicted of espionage or sabotage after Pearl Harbor while they were 
still free, a fact which is some evidence of the loyalty of the vast majority of these 
individuals and of the effectiveness of the established methods of combatting these 
evils.

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.

MR. JUSTICE JACKSON, dissenting.
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.

**

A citizen's presence in the locality, however, was made a crime only if his parents were of Japanese birth. Had Korematsu been one of four -- the others being, say, a German alien enemy, an Italian alien enemy, and a citizen of American-born ancestors, convicted of treason but out on parole -- only Korematsu's presence would have violated the order. The difference between their innocence and his 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. ** 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.

**

It would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality. When an area is so beset that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal. The armed services must protect a society, not merely its Constitution. **

But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient. This is what the Court appears to be doing, whether consciously or not. I cannot say, from any evidence before me, that the orders of General DeWitt were not reasonably expedient military precautions, nor could I say that they were. But even if they were permissible military procedures, I deny that it follows that they are constitutional. If, as the Court holds, it does follow, then we may as well say that any military order will be constitutional and have done with it.

**

Much is said of the danger to liberty from the Army program for deporting and
detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. 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. All who observe the work of courts are familiar with what Judge Cardozo described as “the tendency of a principle to expand itself to the limit of its logic.” A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court’s opinion in this case.

** **

I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority. The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy.

Of course the existence of a military power resting on force, so vagrant, so centralized, so necessarily heedless of the individual, is an inherent threat to liberty. But I would not lead people to rely on this Court for a review that seems to me wholly delusive. The military reasonableness of these orders can only be determined by military superiors. If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.

My duties as a justice as I see them do not require me to make a military judgment as to whether General DeWitt’s evacuation and detention program was a reasonable military necessity. I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task. But I do not think they 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.
The coram nobis effort in the wartime internment cases began in 1981, when Peter Irons (this book’s author and also a lawyer) was conducting research for a book on the cases, hoping to explain why the Supreme Court—with so many “liberal” members—made decisions in these cases that scholars have agreed were judicial “disasters,” as Yale law professor Eugene Rostow wrote in 1945. Using the Freedom of Information Act, Irons obtained the Justice Department’s files in the Hirabayashi, Yasui, and Korematsu cases, and he discovered several astounding documents. The “loaded weapons” that Justice Jackson warned about in his Korematsu dissent were really “smoking guns” of legal misconduct.

Two memoranda by Edward Ennis, who headed the Justice Department’s Alien Enemy Control Unit, shot out of these files. He sent the first to Solicitor General Fahy in April 1943, shortly before Fahy’s Supreme Court argument in the Hirabayashi case. Ennis had obtained military intelligence reports to General DeWitt, informing him that no evidence existed to support claims of Japanese American disloyalty. Ennis reminded Fahy of his “duty to advise the Court of the existence” of these crucial reports. Failing to perform this duty “might approximate the suppression of evidence,” he warned. But Fahy ignored the warning and assured the Court that DeWitt had evidence of disloyalty among Japanese Americans before he signed the internment orders in 1942. Chief Justice Stone based his Hirabayashi opinion in large part on Fahy’s assurances, citing “the judgment of the military authorities” that “there were disloyal members” of the Japanese American community who constituted “a menace to the national defense and safety” on the West Coast.

Ennis sent another memorandum to Fahy in September 1944, during his preparation for the Korematsu argument. Suspicious of General DeWitt’s claims to have evidence of “espionage and sabotage” by Japanese Americans, Ennis had found more intelligence reports that refuted the charges DeWitt made in his “Final Report” on the internment program. Excerpts of DeWitt’s report were included in the Korematsu brief that Fahy was about to file with the Court. Ennis urged Fahy to disavow the report’s claims that “overt acts of treason were being committed” by Japanese Americans. “Since this is not so,” Ennis wrote, “it is highly unfair to this racial minority that these lies, put out in an official publication, go uncorrected.” Again, Fahy ignored Ennis and assured the justices that he vouched for “every sentence, every line, and every word” in DeWitt’s report. Again, the Court accepted Fahy’s assurances in upholding Fred Korematsu’s conviction; Justice Hugo Black cited
DeWitt’s report as providing sufficient “evidence of disloyalty” among Japanese Americans to justify their mass evacuation from the West Coast.

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President Gerald R. Ford's Proclamation 4417, Confirming the Termination of the Executive Order Authorizing Japanese-American Internment During World War II

February 19, 1976

By the President of the United States of America, a Proclamation

In this Bicentennial Year, we are commemorating the anniversary dates of many great events in American history. An honest reckoning, however, must include a recognition of our national mistakes as well as our national achievements. Learning from our mistakes is not pleasant, but as a great philosopher once admonished, we must do so if we want to avoid repeating them.

February 19th is the anniversary of a sad day in American history. It was on that date in 1942, in the midst of the response to the hostilities that began on December 7, 1941, that Executive Order 9066 was issued, subsequently enforced by the criminal penalties of a statute enacted March 21, 1942, resulting in the uprooting of loyal Americans. Over one hundred thousand persons of Japanese ancestry were removed from their homes, detained in special camps, and eventually relocated.

The tremendous effort by the War Relocation Authority and concerned Americans for the welfare of these Japanese-Americans may add perspective to that story, but it does not erase the setback to fundamental American principles. Fortunately, the Japanese-American community in Hawaii was spared the indignities suffered by those on our mainland.

We now know what we should have known then--not only was that evacuation wrong, but Japanese-Americans were and are loyal Americans. On the battlefield and at home, Japanese-Americans -- names like Hamada, Mitsumori, Marimoto, Noguchi, Yamasaki, Kido, Munemori and Miyamura -- have been and continue to be written in our history for the sacrifices and the contributions they have made to the well-being and security of this, our common Nation.

The Executive order that was issued on February 19, 1942, was for the sole purpose of prosecuting the war with the Axis Powers, and ceased to be effective with the end of those hostilities. Because there was no formal statement of its termination, however, there is concern among many Japanese-Americans that there may yet be some life in
that obsolete document. I think it appropriate, in this our Bicentennial Year, to remove all doubts on that matter, and to make clear out commitment in the future.

NOW, THEREFORE, I, GERALD R. FORD, President of the United States of America, do hereby proclaim that all authority conferred by Executive Order 9066 terminated upon the issuance of Proclamation 2714, which formally proclaimed the cessation of hostilities of World War II on December 31, 1946. I call upon the American people to affirm with me this American Promise -- that we have learned from the tragedy of that long-ago experience forever to treasure liberty and justice for each individual American, and resolve that this kind of action shall never again be repeated.

IN WITNESS THEREOF, I have hereunto set my hand this nineteenth day of February in the year of our Lord nineteen hundred seventy-six, and of the Independence of the United States of America the two hundredth.

CIVIL LIBERTIES ACT OF 1988 [H.R. 442]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. PURPOSES.

The purposes of this Act are to –

(1) acknowledge the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II;

(2) apologize on behalf of the people of the United States for the evacuation, relocation, and internment of such citizens and permanent resident aliens;

(3) provide for a public education fund to finance efforts to inform the public about the internment of such individuals so as to prevent the recurrence of any similar event;

(4) make restitution to those individuals of Japanese ancestry who were interned;

(5) discourage the occurrence of similar injustices and violations of civil liberties in the future; and

* * *
(7) make more credible and sincere any declaration of concern by the United States over violations of human rights committed by other nations.

SEC. 2. STATEMENT OF THE CONGRESS.

(a) * * * The Congress recognizes that, as described by the Commission on Wartime Relocation and Internment of Civilians, a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II. As the Commission documents, these actions were carried out without adequate security reasons and without any acts of espionage or sabotage documented by the Commission, and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership. The excluded individuals of Japanese ancestry suffered enormous damages, both material and intangible, and there were incalculable losses in education and job training, all of which resulted in significant human suffering for which appropriate compensation has not been made. For these fundamental violations of the basic civil liberties and constitutional rights of these individuals of Japanese ancestry, the Congress apologizes on behalf of the Nation.

* * *

PRESIDENT RONALD REAGAN

REMARKS ON SIGNING THE BILL PROVIDING RESTITUTION FOR WARTIME RELOCATION AND INTERNMENT OF CIVILIANS

(Aug. 10, 1988)

The Members of Congress and distinguished guests, my fellow Americans, we gather here today to right a grave wrong. More than 40 years ago, shortly after the bombing of Pearl Harbor, 120,000 persons of Japanese ancestry living in the United States were forcibly removed from their homes and placed in makeshift internment camps. This action was taken without trial, without jury. It was based solely on race, for these 120,000 were Americans of Japanese descent.

Yes, the Nation was then at war, struggling for its survival, and it's not for us today to pass judgment upon those who may have made mistakes while engaged in that great struggle. Yet we must recognize that the internment of Japanese-Americans was just that: a mistake. For throughout the war, Japanese-Americans in the tens of thousands remained utterly loyal to the United States. Indeed, scores of Japanese-Americans volunteered for our Armed Forces, many stepping forward in the internment camps themselves. The 442d Regimental Combat Team, made up entirely of Japanese-Americans, served with immense distinctions to defend this nation, their nation. Yet back at home, the soldiers' families were being denied the
very freedom for which so many of the soldiers themselves were laying down their lives.

Congressman Norman Mineta, with us today, was 10 years old when his family was interned. In the Congressman's words: "My own family was sent first to Santa Anita Racetrack. We showered in the horse paddocks. Some families lived in converted stables, others in hastily thrown together barracks. We were then moved to Heart Mountain, Wyoming, where our entire family lived in one small room of a rude tar paper barrack." Like so many tens of thousands of others, the members of the Mineta family lived in those conditions not for a matter of weeks or months but for 3 long years.

The legislation that I am about to sign provides for a restitution payment to each of the 60,000 surviving Japanese-Americans of the 120,000 who were relocated or detained. Yet no payment can make up for those lost years. So, what is most important in this bill has less to do with property than with honor. For here we admit a wrong. Here we reaffirm our commitment as a nation to equal justice under the law.

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And now in closing, I wonder whether you'd permit me one personal reminiscence, one prompted by an old newspaper report sent to me by Rose Ochi, a former internee. The clipping comes from the Pacific Citizen and it’s dated December 1945.

"Arriving by plane from Washington," the article begins, "General Joseph W. Stilwell pinned the Distinguished Service Cross on Mary Masuda in a simple ceremony on the porch of her small frame shack near Talbert, Orange County. She was one of the first Americans of Japanese ancestry to return from relocation centers to California's farmlands." "Vinegar Joe" Stillwell was there that day to honor Kazuo Masuda, Mary's brother. You see, while Mary and her parents were in an internment camp, Kazuo served as staff sergeant to the 442d Regimental Combat Team. In one action, Kazuo ordered his men and advanced through heavy fire, hauling a mortar. For 12 hours, he engaged in a singlehanded barrage of Nazi positions. Several weeks later at Cassino, Kazuo staged another lone advance. This time it cost him his life.

The newspaper clipping notes that her two surviving brothers were with Mary and her parents on the little porch that morning. These two brothers, like the heroic Kazuo, had served in the United States Army. After General Stilwell made the award, the motion picture actress Louise Allbritton, a Texas girl, told how a Texas battalion had been saved by the 442d. Other show business personalities paid tribute -- Robert Young, Will Rogers, Jr. And one young actor said: "Blood that has soaked into the sands of a beach is all of one color. America stands unique in the world: the only
country not founded on race but on a way, an ideal. Not in spite of but because of our polyglot background, we have had all the strength in the world. That is the American way." The name of that young actor -- I hope I pronounce this right -- was Ronald Reagan. And, yes, the ideal of liberty and justice for all -- that is still the American way.  

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[Source: Public Papers of the Presidents, 24 Weekly Comp. Pres. Doc. 1034 (Aug. 10, 1988)]

KRAEMER v. SHELLEY

Supreme Court of Missouri, 1947.
198 S.W.2d 679.

DOUGLAS, Judge.

This is a suit to enforce restrictions against the occupancy of property by negroes. From a judgment holding the restrictions invalid, plaintiffs appeal.

In 1911 some of the owners of the property fronting on both sides of Labadie Avenue in the double blocks between Taylor Avenue on the east and Cora Avenue on the west in the city of St. Louis signed the restrictive agreement set out below. Thirty out of a total of thirty-nine owners signed the agreement. Of the nine owners who did not sign, five were negroes. Negroes had occupied one parcel since 1882. The entire district comprised fifty-seven parcels divided into sixty-one lots. The thirty parties who signed the agreement owned forty-seven parcels or forty-eight lots having a total frontage of 1245 feet. * * * The parcel involved in this case, which is covered by the agreement, * * * was purchased from white owners through a real estate firm, placed in the name of a white person who was a straw party, defendant Fitzgerald, and transferred to defendants Shelley and his wife, negroes, who are occupying the premises. Plaintiffs are the owners of a parcel in the district covered by the agreement. They seek an injunction against defendants Shelley's occupancy and ask that title be divested out of them.

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The agreement which was duly recorded in the office of the Recorder of Deeds is as follows: "* * * [E]ach and every one of the undersigned persons hereby contract and agree with the other and for the benefit of all to place, and do place and make upon the Real Estate * * * a restriction, which is to run with the title of said property in favor of each and every one of the undersigned parties, and their assigns and legal representatives and successors as the owners of this property, which shall not be removed except by the consent of all of the property owners by some instrument or
Deed, made and Executed and put of record, the said property is hereby restricted to the use and occupancy for the term of Fifty (50) years from this date, so that it shall be a condition all the time * * * that hereafter no part of said property or any portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race. * * *

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Agreements restricting property from being transferred to or occupied by negroes have been consistently upheld by the courts of this state as one which the parties have the right to make and which is not contrary to public policy. The new provision in the Bill of Rights in the Constitution of 1945 “that all persons are created equal and are entitled to equal rights and opportunity under the law” not only sustains these decisions but even strengthens them. * * *

The restriction does not contravene the guaranties of civil rights of the Constitution of the United States. * * * [N]either the Thirteenth nor Fourteenth Amendments prohibit[s] private individuals from entering into contracts respecting the control and disposition of their own property. * * * Nor can it be claimed that the enforcement of such a restriction by court process amounts to action by the state itself in violation of the Fourteenth Amendment, which relates to a state action exclusively. To sustain such a claim would be to deny the parties to such an agreement one of the fundamental privileges of citizenship, access to the courts. This would violate both the State and Federal Constitutions.

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The chancellor found the negro population in St.Louis has greatly increased in recent years, and now numbers in excess of 100,000; and that some of the sections in which negroes live are overcrowded, which is detrimental to their moral and physical well being.

Such living conditions bring deep concern to everyone, and present a grave and acute problem to the entire community. Their correction should strikingly challenge both governmental and private leadership. It is tragic that such conditions seem to have worsened although much has been written and said on the subject from coast to coast. But their correction is beyond the authority of the courts generally, and in particular in a case involving the determination of contractual rights between parties to a law suit. If their correction is sought in the field of government, the appeal must be addressed to its branches other than the judicial.
The judgment dismissing the petition should be reversed and the cause remanded with directions to the chancellor to enter a decree upholding the restrictions and granting plaintiffs the relief prayed for, and such other relief as the court may deem just and proper. * * *

All concur except GANTT J., not sitting.

"LETTER FROM A BIRMINGHAM JAIL"

MARTIN LUTHER KING, JR. - APRIL 16, 1963

My Dear Fellow Clergymen:

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

Moreover, I am cognizant of the interrelatedness of all communities and states. I cannot sit idly by in Atlanta and not be concerned about what happens in Birmingham. Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly. Never again can we afford to live with the narrow, provincial "outside agitator" idea. Anyone who lives inside the United States can never be considered an outsider anywhere within its bounds.

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

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

Then, last September, came the opportunity to talk with leaders of Birmingham's economic community. In the course of the negotiations, certain promises were made by the merchants—for example, to remove the stores' humiliating racial signs. On the basis of these promises, the Reverend Fred Shuttlesworth and the leaders of the Alabama Christian Movement for Human Rights agreed to a moratorium on all demonstrations. As the weeks and months went by, we realized that we were the victims of a broken promise. A few signs, briefly removed, returned; the others remained. As in so many past experiences, our hopes had been blasted, and the shadow of deep disappointment settled upon us. We had no alternative except to prepare for direct action, whereby we would present our very bodies as a means of laying our case before the conscience of the local and the national community. Mindful of the difficulties involved, we decided to undertake a process of self purification. We began a series of workshops on nonviolence, and we repeatedly asked ourselves: "Are you able to accept blows without retaliating?" "Are you able to endure the ordeal of jail?" We decided to schedule our direct action program for the Easter season, realizing that except for Christmas, this is the main shopping period of the year. Knowing that a strong economic-withdrawal program would be the byproduct of direct action, we felt that this would be the best time to bring pressure to bear on the merchants for the needed change.

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

You may well ask: "Why direct action? Why sit ins, marches and so forth? Isn't negotiation a better path?" You are quite right in calling for negotiation. Indeed, this is the very purpose of direct action. Nonviolent direct action seeks to create such a crisis and foster such a tension that a community which has constantly refused to negotiate is forced to confront the issue. It seeks so to dramatize the issue that it can no longer be ignored. My citing the creation of tension as part of the work of the
nonviolent resister may sound rather shocking. But I must confess that I am not afraid of the word "tension." I have earnestly opposed violent tension, but there is a type of constructive, nonviolent tension which is necessary for growth. Just as Socrates felt that it was necessary to create a tension in the mind so that individuals could rise from the bondage of myths and half truths to the unfettered realm of creative analysis and objective appraisal, so must we see the need for nonviolent gadflies to create the kind of tension in society that will help men rise from the dark depths of prejudice and racism to the majestic heights of understanding and brotherhood. The purpose of our direct action program is to create a situation so crisis packed that it will inevitably open the door to negotiation. I therefore concur with you in your call for negotiation. Too long has our beloved Southland been bogged down in a tragic effort to live in monologue rather than dialogue.

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

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

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

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

Let us consider a more concrete example of just and unjust laws. An unjust law is a code that a numerical or power majority group compels a minority group to obey but does not make binding on itself. This is difference made legal. By the same token, a just law is a code that a majority compels a minority to follow and that it is willing to follow itself. This is sameness made legal. Let me give another explanation. A law is unjust if it is inflicted on a minority that, as a result of being denied the right to vote, had no part in enacting or devising the law. Who can say that the legislature of Alabama which set up that state's segregation laws was democratically elected? Throughout Alabama all sorts of devious methods are used to prevent Negroes from becoming registered voters, and there are some counties in which, even though Negroes constitute a majority of the population, not a single Negro is registered. Can any law enacted under such circumstances be considered democratically structured?

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

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

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

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

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

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

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

You speak of our activity in Birmingham as extreme. At first I was rather disappointed that fellow clergymen would see my nonviolent efforts as those of an extremist. I began thinking about the fact that I stand in the middle of two opposing forces in the Negro community. One is a force of complacency, made up in part of Negroes who, as a result of long years of oppression, are so drained of self respect and a sense of "somebodiness" that they have adjusted to segregation; and in part of a few middle-class Negroes who, because of a degree of academic and economic security and because in some ways they profit by segregation, have become insensitive to the problems of the masses. The other force is one of bitterness and hatred, and it comes perilously close to advocating violence. It is expressed in the various black nationalist groups that are springing up across the nation, the largest and best known being Elijah Muhammad's Muslim movement. Nourished by the Negro's frustration over the continued existence of racial discrimination, this movement is made up of people who have lost faith in America, who have absolutely repudiated Christianity, and who have concluded that the white man is an incorrigible "devil."

I have tried to stand between these two forces, saying that we need emulate neither the "do nothingism" of the complacent nor the hatred and despair of the black nationalist. For there is the more excellent way of love and nonviolent protest. I am grateful to God that, through the influence of the Negro church, the way of nonviolence became an integral part of our struggle. If this philosophy had not emerged, by now many streets of the South would, I am convinced, be flowing with blood. And I am further convinced that if our white brothers dismiss as "rabble rousers" and "outside agitators" those of us who employ nonviolent direct action, and if they refuse to support our nonviolent efforts, millions of Negroes will, out of frustration and despair, seek solace and security in black nationalist ideologies--a development that would inevitably lead to a frightening racial nightmare.
Oppressed people cannot remain oppressed forever. The yearning for freedom eventually manifests itself, and that is what has happened to the American Negro. Something within has reminded him of his birthright of freedom, and something without has reminded him that it can be gained. Consciously or unconsciously, he has been caught up by the Zeitgeist, and with his black brothers of Africa and his brown and yellow brothers of Asia, South America and the Caribbean, the United States Negro is moving with a sense of great urgency toward the promised land of racial justice. If one recognizes this vital urge that has engulfed the Negro community, one should readily understand why public demonstrations are taking place. The Negro has many pent up resentments and latent frustrations, and he must release them. So let him march; let him make prayer pilgrimages to the city hall; let him go on freedom rides -and try to understand why he must do so. If his repressed emotions are not released in nonviolent ways, they will seek expression through violence; this is not a threat but a fact of history. So I have not said to my people: "Get rid of your discontent." Rather, I have tried to say that this normal and healthy discontent can be channeled into the creative outlet of nonviolent direct action. And now this approach is being termed extremist. But though I was initially disappointed at being categorized as an extremist, as I continued to think about the matter I gradually gained a measure of satisfaction from the label. Was not Jesus an extremist for love: "Love your enemies, bless them that curse you, do good to them that hate you, and pray for them which despitefully use you, and persecute you." Was not Amos an extremist for justice: "Let justice roll down like waters and righteousness like an ever flowing stream." Was not Paul an extremist for the Christian gospel: "I bear in my body the marks of the Lord Jesus." Was not Martin Luther an extremist: "Here I stand; I cannot do otherwise, so help me God." And John Bunyan: "I will stay in jail to the end of my days before I make a butchery of my conscience." And Abraham Lincoln: "This nation cannot survive half slave and half free." And Thomas Jefferson: "We hold these truths to be self evident, that all men are created equal . . . ." So the question is not whether we will be extremists, but what kind of extremists we will be. Will we be extremists for hate or for love? Will we be extremists for the preservation of injustice or for the extension of justice? In that dramatic scene on Calvary's hill three men were crucified. We must never forget that all three were crucified for the same crime--the crime of extremism. Two were extremists for immorality, and thus fell below their environment. The other, Jesus Christ, was an extremist for love, truth and goodness, and thereby rose above his environment. Perhaps the South, the nation and the world are in dire need of creative extremists.

I had hoped that the white moderate would see this need. Perhaps I was too optimistic; perhaps I expected too much. I suppose I should have realized that few members of the oppressor race can understand the deep groans and passionate yearnings of the oppressed race, and still fewer have the vision to see that injustice must be rooted out by strong, persistent and determined action. I am thankful, however, that some of our white brothers in the South have grasped the meaning of this social revolution and committed themselves to it. They are still all too few in quantity, but they are big in quality. Some * * * have written about our struggle in eloquent and prophetic terms.
Others have marched with us down nameless streets of the South. They have languished in filthy, roach infested jails, suffering the abuse and brutality of policemen who view them as "dirty nigger-lovers." Unlike so many of their moderate brothers and sisters, they have recognized the urgency of the moment and sensed the need for powerful "action" antidotes to combat the disease of segregation. Let me take note of my other major disappointment. I have been so greatly disappointed with the white church and its leadership. Of course, there are some notable exceptions. I am not unmindful of the fact that each of you has taken some significant stands on this issue. * * *

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

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

In spite of my shattered dreams, I came to Birmingham with the hope that the white religious leadership of this community would see the justice of our cause and, with deep moral concern, would serve as the channel through which our just grievances could reach the power structure. I had hoped that each of you would understand. But again I have been disappointed.

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

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

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

There was a time when the church was very powerful--in the time when the early Christians rejoiced at being deemed worthy to suffer for what they believed. In those days the church was not merely a thermometer that recorded the ideas and principles of popular opinion; it was a thermostat that transformed the mores of society. Whenever the early Christians entered a town, the people in power became disturbed and immediately sought to convict the Christians for being "disturbers of the peace" and "outside agitators." But the Christians pressed on, in the conviction that they were "a colony of heaven," called to obey God rather than man. Small in number, they were big in commitment. They were too God-intoxicated to be "astronomically intimidated." By their effort and example they brought an end to such ancient evils as infanticide and gladiatorial contests. Things are different now. So often the contemporary church is a weak, ineffectual voice with an uncertain sound. So often it is an archdefender of the status quo. Far from being disturbed by the presence of the church, the power structure of the average community is consoled by the church's silent -- and often even vocal -- sanction of things as they are.

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

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

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

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

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

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

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

Yours for the cause of Peace and Brotherhood,

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

But one hundred years later, we must face the tragic fact that the Negro is still not free. One hundred years later, the life of the Negro is still sadly crippled by the manacles of segregation and the chains of discrimination. One hundred years later, the Negro lives on a lonely island of poverty in the midst of a vast ocean of material prosperity. One hundred years later, the Negro is still languishing in the corners of American society and finds himself an exile in his own land. So we have come here today to dramatize an appalling condition.

In a sense we have come to our nation's capital to cash a check. When the architects of our republic wrote the magnificent words of the Constitution and the declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men would be guaranteed the inalienable rights of life, liberty, and the pursuit of happiness.

It is obvious today that America has defaulted on this promissory note insofar as her citizens of color are concerned. Instead of honoring this sacred obligation, America has given the Negro people a bad check which has come back marked "insufficient funds." But we refuse to believe that the bank of justice is bankrupt. We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation. So we have come to cash this check -- a check that will give us upon demand the riches of freedom and the security of justice. We have also come to this hallowed spot to remind America of the fierce urgency of now. This is no time to engage in the luxury of cooling off or to take the tranquilizing drug of gradualism. Now is the time to rise from the dark and desolate valley of segregation to the sunlit path of racial justice. Now is the time to open the doors of opportunity to all of God's children. Now is the time to lift our nation from the quicksands of racial injustice to the solid rock of brotherhood.

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

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

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

And as we walk, we must make the pledge that we shall march ahead. We cannot turn back. There are those who are asking the devotees of civil rights, "When will you be satisfied?" We can never be satisfied as long as our bodies, heavy with the fatigue of travel, cannot gain lodging in the motels of the highways and the hotels of the cities. We cannot be satisfied as long as the Negro's basic mobility is from a smaller ghetto to a larger one. We can never be satisfied as long as a Negro in Mississippi cannot vote and a Negro in New York believes he has nothing for which to vote. No, no, we are not satisfied, and we will not be satisfied until justice rolls down like waters and righteousness like a mighty stream.

I am not unmindful that some of you have come here out of great trials and tribulations. Some of you have come fresh from narrow cells. Some of you have come from areas where your quest for freedom left you battered by the storms of persecution and staggered by the winds of police brutality. You have been the veterans of creative suffering. Continue to work with the faith that unearned suffering is redemptive.

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

I say to you today, my friends, that in spite of the difficulties and frustrations of the moment, I still have a dream. It is a dream deeply rooted in the American dream.

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

I have a dream that one day on the red hills of Georgia the sons of former slaves and the sons of former slaveowners will be able to sit down together at a table of brotherhood.
I have a dream that one day even the state of Mississippi, a desert state, sweltering with the heat of injustice and oppression, will be transformed into an oasis of freedom and justice.

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

I have a dream today.

I have a dream that one day the state of Alabama, whose governor's lips are presently dripping with the words of interposition and nullification, will be transformed into a situation where little black boys and black girls will be able to join hands with little white boys and white girls and walk together as sisters and brothers.

I have a dream today.

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

This is our hope. This is the faith with which I return to the South. With this faith we will be able to hew out of the mountain of despair a stone of hope. With this faith we will be able to transform the jangling discords of our nation into a beautiful symphony of brotherhood. With this faith we will be able to work together, to pray together, to struggle together, to go to jail together, to stand up for freedom together, knowing that we will be free one day.

This will be the day when all of God's children will be able to sing with a new meaning, "My country, 'tis of thee, sweet land of liberty, of thee I sing. Land where my fathers died, land of the pilgrim's pride, from every mountainside, let freedom ring."

And if America is to be a great nation this must become true. So let freedom ring from the prodigious hilltops of New Hampshire. Let freedom ring from the mighty mountains of New York. Let freedom ring from the heightening Alleghenies of Pennsylvania!

Let freedom ring from the snowcapped Rockies of Colorado!

Let freedom ring from the curvaceous peaks of California!

But not only that; let freedom ring from Stone Mountain of Georgia!

Let freedom ring from Lookout Mountain of Tennessee!
Let freedom ring from every hill and every molehill of Mississippi. From every mountainside, let freedom ring.

When we let freedom ring, when we let it ring from every village and every hamlet, from every state and every city, we will be able to speed up that day when all of God's children, black men and white men, Jews and Gentiles, Protestants and Catholics, will be able to join hands and sing in the words of the old Negro spiritual, "Free at last! free at last! Thank God Almighty, we are free at last!"

**HOYT v. FLORIDA**
368 U.S. 57.
Supreme Court of the United States, 1961.

MR. JUSTICE HARLAN delivered the opinion of the Court.

Appellant, a woman, has been convicted in Hillsborough County, Florida, of second degree murder of her husband. On this appeal *** from the Florida Supreme Court's affirmance of the judgment of conviction, we noted probable jurisdiction to consider appellant's claim that her trial before an all-male jury violated rights assured by the Fourteenth Amendment. The claim is that such jury was the product of a state jury statute which works an unconstitutional exclusion of women from jury service.

***

The jury law primarily in question *** requires that grand and petit jurors be taken from "male and female" citizens of the State possessed of certain qualifications, contains the following proviso:

"provided, however, that the name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court her desire to be placed on the jury list."

Showing that since the enactment of the statute only a minimal number of women have so registered, appellant challenges the constitutionality of the statute both on its face and as applied in this case. For reasons now to follow we decide that both contentions must be rejected.

***

At the core of appellant's argument is the claim that the nature of the crime of which she was convicted peculiarly demanded the inclusion of persons of her own sex on the jury. She was charged with killing her husband by assaulting him with a baseball bat. *** As described by the Florida Supreme Court, the affair occurred in the context of a marital upheaval involving, among other things, the suspected infidelity of appellant's husband, and culminating in the husband's final rejection of his wife's efforts at reconciliation. It is claimed, in substance, that women jurors would have been more understanding or compassionate than men in assessing the quality of appellant's act and her defense of "temporary insanity." No claim is made that the jury as constituted was otherwise afflicted by any elements of supposed unfairness.
In neither respect can we conclude that Florida's statute is not “based on some reasonable classification,” and that it is thus infected with unconstitutionality. Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.

We cannot hold this statute as written offensive to the Fourteenth Amendment.

THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, concurring. [omitted]

IN THE SENATE OF THE UNITED STATES
151 Cong Rec S 6373 (June 13, 2005)
Agreed to (by unanimous consent)

Ms. Landrieu (for herself, Mr. Allen, Mr. Levin, Mr. Frist, Mr. Reid, Mr. Allard, Mr. Akaka, Mr. Brownback, Mr. Bayh, Ms. Collins, Mr. Biden, Mr. Ensign, Mrs. Boxer, Mr. Hagel, Mr. Corzine, Mr. Lugar, Mr. Dayton, Mr. McCain, Mr. Dodd, Ms. Snowe, Mr. Durbin, Mr. Specter, Mr. Feingold, Mr. Stevens, Mrs. Feinstein, Mr. Talent, Mr. Harkin, Mr. Jeffords, Mr. Johnson, Mr. Kennedy, Mr. Kohl, Mr. Lautenberg, Mr. Leahy, Mr. Lieberman, Mr. Nelson of Florida, Mr. Pryor, and Mr. Schumer) submitted the following resolution; which was referred to the Committee on the Judiciary

RESOLUTION

Apologizing to the victims of lynching and the descendants of those victims for the failure of the Senate to enact anti-lynching legislation.

Whereas the crime of lynching succeeded slavery as the ultimate expression of racism in the United States following Reconstruction;

Whereas lynching was a widely acknowledged practice in the United States until the middle of the 20th century;
Whereas lynching was a crime that occurred throughout the United States, with documented incidents in all but 4 States;

Whereas at least 4,742 people, predominantly African-Americans, were reported lynched in the United States between 1882 and 1968;

Whereas 99 percent of all perpetrators of lynching escaped from punishment by State or local officials;

Whereas lynching prompted African-Americans to form the National Association for the Advancement of Colored People (NAACP) and prompted members of B'nai B'rith to found the Anti-Defamation League;

Whereas nearly 200 anti-lynching bills were introduced in Congress during the first half of the 20th century;

Whereas, between 1890 and 1952, 7 Presidents petitioned Congress to end lynching;

Whereas, between 1920 and 1940, the House of Representatives passed 3 strong anti-lynching measures;

Whereas protection against lynching was the minimum and most basic of Federal responsibilities, and the Senate considered but failed to enact anti-lynching legislation despite repeated requests by civil rights groups, Presidents, and the House of Representatives to do so;

* * *

Whereas only by coming to terms with history can the United States effectively champion human rights abroad; and

Whereas an apology offered in the spirit of true repentance moves the United States toward reconciliation and may become central to a new understanding, on which improved racial relations can be forged: Now, therefore, be it

Resolved, That the Senate--

(1) apologizes to the victims of lynching for the failure of the Senate to enact anti-lynching legislation;

(2) expresses the deepest sympathies and most solemn regrets of the Senate to the descendants of victims of lynching, the ancestors of whom were deprived of life, human dignity, and the constitutional protections accorded all citizens of the United States; and
(3) remembers the history of lynching, to ensure that these tragedies will be neither forgotten nor repeated.