

Civic Literacy and Citizenship: A Symposium for High School Teachers

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Session 1

American Constitutional Federalism
Dr. Sean Beienburg

American Constitutional Federalism

In the American system of federalism, power is divided between the states and the federal government. Any proposed federal action must be justified by a constitutionally enumerated power—that is, one identified and granted to the federal government -- or derived from some other piece of constitutional text. (Article I, Section 8 of the U.S. Constitution contains most but not all of this list.)

By way of contrast, the U.S. Constitution preserved the presumption of power for state authority. States (and the local governments they create) are thus presumed to have authority to govern on behalf of the public good of the citizens--specifically, the health, welfare, safety, and morals of the people--unless forbidden to act by the federal text or their own state constitution. (In constitutional law, this presumption of state power is often known as the “police power”).

As the excerpts from the Federalist make clear, this logic was already in the original Constitution, which was part of the reason the authors of the Federalist argued a federal Bill of Rights was unnecessary. However, critics insisted on clearer checks on federal power; such as making the logic of enumerated powers even more explicit. That is why the Tenth Amendment, holds that “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

Alexander Hamilton, *Federalist* No. 32

Source: George W. Carey, ed. *The Federalist* (Indianapolis: Liberty Fund, 2001).
https://oll.libertyfund.org/titles/carey-the-federalist-gideon-ed#lf1631_head_055

... as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, EXCLUSIVELY delegated to the United States

James Madison, *Federalist* No. 39

Source: George W. Carey, ed. *The Federalist* (Indianapolis: Liberty Fund, 2001).
https://oll.libertyfund.org/titles/carey-the-federalist-gideon-ed#lf1631_head_062

The difference between a federal and national government, as it relates to the OPERATION OF THE GOVERNMENT, is supposed to consist in this, that in the former the powers operate on the political bodies composing the Confederacy [ed. note: the states]....; in the latter, on the individual citizens composing the nation.... On trying the Constitution by this criterion, it falls under the NATIONAL, not the FEDERAL character; though perhaps not so completely as has been understood. The operation of the government on the people, in their individual capacities, in its ordinary and most essential proceedings, may, on the whole, designate it, in this relation, a NATIONAL government.

But if the government be national with regard to the OPERATION of its powers, it changes its aspect again when we contemplate it in relation to the EXTENT of its powers. The idea of a national government involves in it, not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as

they are objects of lawful government. Among a people consolidated into one nation, this supremacy is completely vested in the national legislature. Among communities united for particular purposes, it is vested partly in the general and partly in the municipal legislatures. In the former case, all local authorities are subordinate to the supreme; and may be controlled, directed, or abolished by it at pleasure. In the latter, the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere. In this relation, then, the proposed government cannot be deemed a NATIONAL one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.

James Madison, *Federalist* No. 45

Source: George W. Carey, ed. *The Federalist* (Indianapolis: Liberty Fund, 2001).
https://oll.libertyfund.org/titles/carey-the-federalist-gideon-ed#lf1631_label_241

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected.

The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State. The operations of the federal government will be most extensive and important in times of war and danger; those of the State governments, in times of peace and security. As the former periods will probably bear a small proportion to the latter, the State governments will here enjoy another advantage over the federal government. The more adequate, indeed, the federal powers may be rendered to the national defense, the less frequent will be those scenes of danger which might favor their ascendancy over the governments of the particular States. If the new Constitution be examined with accuracy and candor, it will be found that the change which it proposes consists much less in the addition of NEW POWERS to the Union, than in the invigoration of its ORIGINAL POWERS.

The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained. The powers relating to war and peace, armies and fleets, treaties and finance, with the other more considerable powers, are all vested in the existing Congress by the articles of Confederation. The proposed change does not enlarge these powers; it only substitutes a more effectual mode of administering them. \

James Madison, *Federalist* No. 51

Source: George W. Carey, ed. *The Federalist* (Indianapolis: Liberty Fund, 2001).
https://oll.libertyfund.org/titles/carey-the-federalist-gideon-ed#lf1631_head_074

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself. Second. It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.

James Madison or Alexander Hamilton, Federalist No. 62

Source: George W. Carey, ed. *The Federalist* (Indianapolis: Liberty Fund, 2001).

https://oll.libertyfund.org/titles/carey-the-federalist-gideon-ed#lf1631_label_264

.....In this spirit it may be remarked, that the equal vote allowed to each State [in the Senate] is at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty. So far the equality ought to be no less acceptable to the large than to the small States; since they are not less solicitous to guard, by every possible expedient, against an improper consolidation of the States into one simple republic.

Alexander Hamilton, Federalist No. 84

Source: Philip B. Kurland and Ralph Lerner, eds., *The Founders' Constitution*, Volume 5 (Chicago: University of Chicago Press, 1987), Bill of Rights, Document 7.

http://press-pubs.uchicago.edu/founders/documents/bill_of_rightss7.html

... It has been several times truly remarked, that bills of rights are in their origin, stipulations between kings and their subjects, abridgments of prerogative in favor of privilege, reservations of rights not surrendered to the prince ... It is evident, therefore, that according to their primitive signification, they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing, and as they retain every thing, they have no need of particular reservations ...

But a minute detail of particular rights is certainly far less applicable to a constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to a constitution which has the regulation of every species of personal and private concerns ...

I go further, and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power. They might urge with a semblance of reason, that the constitution ought not to be charged with the absurdity of providing against the abuse of an authority, which was not given, and that the provision against restraining the liberty of the press afforded a clear

implication, that a power to prescribe proper regulations concerning it, was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights. ...

There remains but one other view of this matter to conclude the point. The truth is, after all the declamation we have heard, that the constitution is itself in every rational sense, and to every useful purpose, A BILL OF RIGHTS ... Is it one object of a bill of rights to declare and specify the political privileges of the citizens in the structure and administration of the government? This is done in the most ample and precise manner in the plan of the convention, comprehending various precautions for the public security, which are not to be found in any of the state constitutions. Is another object of a bill of rights to define certain immunities and modes of proceeding, which are relative to personal and private concerns? This we have seen has also been attended to, in a variety of cases, in the same plan. Adverting therefore to the substantial meaning of a bill of rights, it is absurd to allege that it is not to be found in the work of the convention. It may be said that it does not go far enough, though it will not be easy to make this appear; but it can with no propriety be contended that there is no such thing. It certainly must be immaterial what mode is observed as to the order of declaring the rights of the citizens, if they are to be found in any part of the instrument which establishes the government. And hence it must be apparent that much of what has been said on this subject rests merely on verbal and nominal distinctions, which are entirely foreign from the substance of the thing.

Brutus No. 2

Source: Philip B. Kurland and Ralph Lerner, eds., *The Founders' Constitution*, Volume 1 (Chicago: University of Chicago Press, 1987), Chapter 14, Document 26.

<http://press-pubs.uchicago.edu/founders/documents/v1ch14s26.html>

... Those who have governed, have been found in all ages ever active to enlarge their powers and abridge the public liberty. This has induced the people in all countries, where any sense of freedom remained, to fix barriers against the encroachments of their rulers ...

... It has been said ... that such declaration[s] of rights, however requisite they might be in the constitutions of the states, are not necessary in the general constitution, because, "in the former case, every thing which is not reserved is given, but in the latter the reverse of the proposition prevails, and every thing which is not given is reserved." It requires but little attention to discover, that this mode of reasoning is rather specious than solid. The powers, rights, and authority, granted to the general government by this constitution, are as complete, with respect to every object to which they extend, as that of any state government--It reaches to every thing which concerns human happiness--Life, liberty, and property, are under its controul. There is the same reason, therefore, that the exercise of power, in this case, should be restrained within proper limits, as in that of the state governments.

... it is evident, that the reason here assigned was not the true one, why the framers of this constitution omitted a bill of rights; if it had been, they would not have made certain reservations, while they totally omitted others of more importance. We find they have, in the 9th section of the 1st article, declared, that the writ of habeas corpus shall not be suspended, unless in cases of rebellion--that no bill of attainder, or ex post facto law, shall be passed--that no title of nobility shall be granted by the United States, &c. If every thing which is not given is reserved, what propriety is there in these exceptions? Does this constitution any where grant the power of suspending the habeas corpus, to make ex post facto laws, pass bills of attainder, or grant titles of nobility? It certainly does not in express terms. The only answer that can be given is, that these are implied in the general powers granted. With equal truth it may be said, that all the powers, which the bills of right, guard against the abuse of, are contained or implied in the general ones granted by this constitution.

So far it is from being true, that a bill of rights is less necessary in the general constitution than in those of the states, the contrary is evidently the fact. This system, if it is possible for the people of America to accede to it, will be an original compact; and being the last, will, in the nature of things, vacate every former agreement inconsistent with it. For it being a plan of government received and ratified by the whole people, all other forms, which are in existence at the time of its adoption, must yield to it. This is expressed in positive and unequivocal terms, in the 6th article, "That this constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the *constitution*, or laws of any state, *to the contrary* notwithstanding ...

... the different state constitutions are repealed and entirely done away, so far as they are inconsistent with this, with the laws which shall be made in pursuance thereof, or with treaties made, or which shall be made, under the authority of the United States; of what avail will the constitutions of the respective states be to preserve the rights of its citizens?

James Madison *National Gazette*, February 4, 1792

Source: <https://founders.archives.gov/documents/Madison/01-14-02-0190>

Power being found by universal experience liable to abuses, a distribution of it into separate departments, has become a first principle of free governments.

The political system of the United States claims still higher praise. The power delegated by the people is first divided between the general government and the state governments; each of which is then subdivided into legislative, executive, and judiciary departments. And as in a single government these departments are to be kept separate and safe, by a defensive armour for each; so, it is to be hoped, do the two governments possess each the means of preventing or correcting unconstitutional encroachments of the other....

It must not be denied that the task of forming and maintaining a division of power between different governments....be difficult, however, it must by no means be abandoned. Those who would pronounce it impossible, offer no alternative to their country but schism, or consolidation; both of them bad, but the latter the worst, since it is the high road to monarchy, than which nothing worse, in the eye of republicans, could result from the anarchy implied in the former.

Those who love their country, its repose, and its republicanism, will therefore study to avoid the alternative, by elucidating and guarding the limits which define the two governments; by inculcating moderation in the exercise of the powers of both....

In bestowing the eulogies due to the partitions and internal checks of power, it ought not the less to be remembered, that they are neither the sole nor the chief palladium of constitutional liberty. The people who are the authors of this blessing, must also be its guardians. Their eyes must be ever ready to mark, their voice to pronounce, and their arm to repel or repair aggressions on the authority of their constitutions....

Schechter Poultry Corp v. United States
295 U.S. 495 (1935); May 27, 1935

At the core of President Roosevelt's early New Deal programs was Section 3 of the National Industrial Recovery Act, which authorized the President (through an administrative agency, the National Recovery Administration or NRA) to establish a wide range of regulatory codes for businesses. The Schechter brothers, who operated a small, very local, kosher poultry company, allowed customers to select their chickens. This ran afoul of an NRA policy requiring customers to 'accept the run of any half coop, coop, or coops, as purchased by slaughterhouse operators'—in other words, the customer could not pick the chicken, but had to take the first one possible. The Schechters contended that the NRA policy was an unconstitutional delegation of legislative power to the executive and exceeded the enumerated powers of the federal government.

CHIEF JUSTICE HUGHES delivered the opinion of the Court.

We are told that the provision of the statute authorizing the adoption of codes must be viewed in the light of the grave national crisis with which Congress was confronted. Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power....The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extraconstitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment...

[On] the application of the provisions of the Live Poultry Code to intrastate transactions:

Were these transactions "*in*" interstate commerce? Much is made of the fact that almost all the poultry coming to New York is sent there from other States. But the code provisions, as here applied, do not concern the transportation of the poultry from other States to New York, or the transactions of the commission men or others to whom it is consigned, or the sales made by such consignees to defendants. When defendants had made their purchases, whether at the West Washington Market in New York City or at the railroad terminals serving the City, or elsewhere, the poultry was trucked to their slaughterhouses in Brooklyn for local disposition. The interstate transactions in relation to that poultry then ended...

The undisputed facts thus afford no warrant for the argument that the poultry handled by defendants at their slaughterhouse markets was in a "*current*" or "*flow*" of interstate commerce, and was thus subject to congressional regulation. The mere fact that there may be a constant flow of commodities into a State does not mean that the flow continues after the property has arrived, and has become commingled with the mass of property within the State, and is there held solely for local disposition and use. So far as the poultry here in question is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the State. It was not held, used, or sold by defendants in relation to any further transactions in interstate commerce....

In determining how far the federal government may go in controlling intrastate transactions upon the ground that they "affect" interstate commerce, there is a necessary and well established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle... [W]here the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprise and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the State over its domestic concerns would exist only by sufferance of the federal government....

[T]he distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to the federal power, and, for all practical purposes, we should have a completely centralized government...

It is not the province of the Court to consider the economic advantages or disadvantage of such a centralized system. It is sufficient to say that the Federal Constitution does not provide for it.

JUSTICE CARDOZO wrote a concurring opinion.

...If that conception shall prevail, anything that Congress may do within the limits of the commerce clause for the betterment of business may be done by the President upon the recommendation of a trade association by calling it a code. This is delegation running riot. No such plenitude of power is susceptible of transfer. The statute, however, aims at nothing less, as one can learn both from its terms and from the administrative practice under it.

But there is another objection, far-reaching and incurable, aside from any defect of unlawful delegation. If this code had been adopted by Congress itself, and not by the President, on the advice of an industrial association, it would even then be void unless authority to adopt it is

included in the grant of power "to regulate commerce with foreign nations and among the several states." United States Constitution, Art. I, § 8

I find no authority in that grant for the regulation of wages and hours of labor in the intrastate transactions that make up the defendants' business. As to this feature of the case, little can be added to the opinion of the court. There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours "is an elastic medium which transmits all tremors throughout its territory; the only question is of their size." [Judge Learned Hand in the court below]. The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate and national because of distant repercussions. What is near and what is distant may at times be uncertain. There is no penumbra of uncertainty obscuring judgment here. To find immediacy or directness here is to find it almost everywhere. If centripetal forces are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our federal system.

Wickard v. Filburn
317 U.S. 111 (1942); November 9, 1942

Farmer Roscoe Filburn was fined for growing more wheat than he had been allotted under an Agricultural Adjustment Act production quota. He contended that, because the excess wheat had been used for livestock raised on his farm, he had not engaged in interstate commerce and thus was beyond the reach of federal commerce powers.

JUSTICE JACKSON delivered the opinion of the Court.

It is urged that ...Congress does not possess the power it has in this instance sought to exercise. The question would merit little consideration except for the fact that this Act extends federal regulation to production not intended in any part for commerce, but wholly for consumption on the farm....

In the *Shreveport Rate Cases*, the Court held that railroad rates of an admittedly intrastate character and fixed by authority of the state might, nevertheless, be revised by the Federal Government because of the economic effects which they had upon interstate commerce. The opinion of Mr. Justice Hughes found federal intervention constitutionally authorized because of "matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance."

Whether the subject of the regulation in question was "production," "consumption," or "marketing" is, therefore, not material for purposes of deciding the question of federal power before us. That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it. The same consideration might help in determining whether, in the absence of Congressional action, it would be permissible for the state to exert its power on the subject matter, even though, in so doing, it to some

degree affected interstate commerce. But even if appellee's activity be local, and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

[Jackson then undertakes a lengthy survey of the state of the wheat farming industry, concluding that the] effect of consumption of home-grown wheat on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop...

The maintenance by government regulation of a price for wheat undoubtedly can be accomplished as effectively by sustaining or increasing the demand as by limiting the supply. The effect of the statute before us is to restrict the amount which may be produced for market and the extent, as well, to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.

It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices. One of the primary purposes of the Act in question was to increase the market price of wheat, and, to that end, to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions... [I]f we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. ... This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.

U.S. v. Lopez
514 U.S. 549 (1995) April 26, 1995

Lopez brought a handgun to his high school, violating the Gun-Free School Zones Act of 1990 which prohibited possession of "a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone" or within 1000 feet of one. He contended that the law was a federal criminal law, akin to a state's exercise of the police power, rather than a regulation of interstate commerce and thus exceeded the powers of the federal government.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress "[t]o regulate Commerce . . . among the several States..."

We start with first principles. The Constitution creates a Federal Government of enumerated powers. As James Madison wrote, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite..." (*Federalist* 45)

Gibbons v. Ogden (1824)... acknowledged that limitations on the commerce power are inherent in the very language of the Commerce Clause. "It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary..."

NLRB v Jones & Laughlin Steel (1937), *Darby* (1941), and *Wickard* (1942) ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause. In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that had once been local or at most regional in nature had become national in scope. But the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.

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

...We now turn to consider the power of Congress, in the light of this framework, to enact [the Act]. ..[It] is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can [it] be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce. Thus, if [the act] is to be sustained, it must be as a regulation of an activity that substantially affects interstate commerce.

Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained. Even *Wickard*, which is perhaps the most far-reaching

example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not.... [The Agricultural Adjustment Act] was designed to regulate the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and shortages, and concomitant fluctuation in wheat prices, which had previously obtained....

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

The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic wellbeing. ...

We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce...

Under the theories that the Government presents ... it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate...

These are not precise formulations, and in the nature of things they cannot be. But we think they point the way to a correct decision of this case. The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce...

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

suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.

JUSTICE THOMAS wrote a concurring opinion.

Although I join the majority, I write separately to observe that our case law has drifted far from the original understanding of the Commerce Clause. In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause....

[D]espite being well aware that agriculture, manufacturing, and other matters substantially affected commerce, the founding generation did not cede authority over all these activities to Congress. Hamilton, for instance, acknowledged that the Federal Government could not regulate agriculture and like concerns: "The administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things in short which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction...." (*Federalist* 17)

Where the Constitution was meant to grant federal authority over an activity substantially affecting interstate commerce, the Constitution contains an enumerated power over that particular activity. Indeed, the Framers knew that many of the other enumerated powers in § 8 dealt with matters that substantially affected interstate commerce.

In short, the Founding Fathers were well aware of what the principal dissent calls "'economic . . . realities.' Even though the boundary between commerce and other matters may ignore "economic reality" and thus seem arbitrary or artificial to some, we must nevertheless respect a constitutional line that does not grant Congress power over all that substantially affects interstate commerce.

JUSTICE BREYER wrote a dissenting opinion.

I apply three basic principles of Commerce Clause interpretation. First, the power to "regulate Commerce . . . among the several States," encompasses the power to regulate local activities insofar as they significantly affect interstate commerce. *E.g.* *Gibbons*, *Wickard*....

Second, in determining whether a local activity will likely have a significant effect upon interstate commerce, a court must consider, not the effect of an individual act (a single instance of gun possession), but rather the cumulative effect of all similar instances (*i.e.*, the effect of all guns possessed in or near schools). *See, e.g., Wickard*.

Third, the Constitution requires us to judge the connection between a regulated activity and interstate commerce, not directly, but at one remove. Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce -- both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy... Thus, the specific question before us, as the Court recognizes, is not whether the "regulated activity sufficiently affected interstate commerce," but, rather, whether Congress could have had "*a rational basis*" for so concluding...

[W]e must ask whether Congress could have had a *rational basis* for finding a significant (or substantial) connection between gun-related school violence and interstate commerce. Or, to put the question in the language of the *explicit* finding that Congress made when it amended this law in 1994: could Congress rationally have found that "violent crime in school zones," through its effect on the "quality of education," significantly (or substantially) affects "interstate" or "foreign commerce"?

For one thing, reports, hearings, and other readily available literature make clear that the problem of guns in and around schools is widespread and extremely serious... [T]hey report that this widespread violence in schools throughout the Nation significantly interferes with the quality of education in those schools... Based on reports such as these, Congress obviously could have thought that guns and learning are mutually exclusive. ...And, Congress could therefore have found a substantial educational problem -- teachers unable to teach, students unable to learn -- and concluded that guns near schools contribute substantially to the size and scope of that problem.

Having found that guns in schools significantly undermine the quality of education in our Nation's classrooms, Congress could also have found, given the effect of education upon interstate and foreign commerce, that gun-related violence in and around schools is a commercial, as well as a human, problem. Education, although far more than a matter of economics, has long been inextricably intertwined with the Nation's economy...

The economic links I have just sketched seem fairly obvious. Why then is it not equally obvious, in light of those links, that a widespread, serious, and substantial physical threat to teaching and learning *also* substantially threatens the commerce to which that teaching and learning is inextricably tied?

Session 2

Judicial Review—Origins and Critics
Dr. Sean Beienburg

Judicial Review

Alexander Hamilton, Federalist No. 78

Source: Philip B. Kurland and Ralph Lerner, eds., *The Founders' Constitution*, Volume 4 (Chicago: University of Chicago Press, 1987), Article 3, Section 1, Document 11.
http://press-pubs.uchicago.edu/founders/documents/a3_1s11.html

... The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such for instance as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the right of the courts to pronounce legislative acts void, because contrary to the constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the grounds on which it rests cannot be unacceptable.

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorise, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the constitution. It is not otherwise to be supposed that the constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should

happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought of course to be preferred; or in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental ...

Calder v. Bull
3 U.S. 386 (1798)

In the course of deciding whether Article 1, Section 10's prohibition on ex post facto laws prevented state legislatures from modifying filing deadlines, the Supreme Court discussed both whether it had the authority to overturn legislation and if so, on what grounds.

JUSTICE CHASE issued the following opinion:

...The sole enquiry is, whether this resolution or law of *Connecticut*, having such operation, is an *ex post facto law*, within the prohibition of the *Federal Constitution*?

Whether the Legislature of any of the States can revise and correct by law, a decision of any of its Courts of Justice, although not prohibited by the Constitution of the State, is a question of very great importance, and not necessary now to be determined; *because the resolution or law in question does not go so far*. I cannot subscribe to the *omnipotence* of a *State Legislature*, or that it is *absolute and without controul*; although its authority should not be *expressly* restrained by the *Constitution, or fundamental law*, of the State. The people of the *United States* erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their *persons and property* from violence.....There are acts which the *Federal, or State, Legislature* cannot do, *without exceeding their authority*. There are certain *vital* principles in our *free Republican governments*, which will determine and over-rule an *apparent and flagrant* abuse of *legislative power*; as to authorize *manifest injustice by positive law*; or to take away that security for *personal liberty, or private property*, for the protection whereof the government was established. An act of the Legislature (for I cannot call it a *law*) contrary to the *great first principles* of the *social compact*, cannot be considered a *rightful exercise of legislative authority*...¹

¹ This is an invocation of *Federalist* 44, which, in defending Article I, Sections 9 and 10, held that “Bills of Attainder, ex post facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the

All the restrictions contained in the Constitution of the *United States* on the power of the *State Legislatures*, were provided in favour of the authority of the *Federal Government*...

The Constitution of the *United States*, article 1, section 9, prohibits the Legislature of the *United States* from passing any *ex post facto law*; and, in section 10, lays several restrictions on the authority of the *Legislatures* of the several *states* and, among them, "that no state shall pass an *ex post facto law*."

Without giving an opinion, at this time, whether this Court has jurisdiction to decide that any law made by *Congress*, contrary to the Constitution of the *United States*, is void; I am fully satisfied that this court has no *jurisdiction* to determine that any law of any state *Legislature*, contrary to the Constitution of such *state* is void. Further, if this court had *such* jurisdiction, yet it does not appear to me, that the resolution (or law) in question, is contrary to the charter of *Connecticut*, or its constitution, which is said by counsel to be composed of its charter, acts of assembly, and usages, and customs. I should think, that the courts of *Connecticut* are the proper tribunals to decide, whether laws, contrary to the constitution thereof, are void...

If the term *ex post facto law* is to be *construed* to include and to prohibit the enacting *any law after a fact*, it will greatly restrict the power of the federal and state legislatures; and the consequences of such a *construction* may not be foreseen.

JUSTICE IREDELL issued the following opinion.

If, then, a government, composed of Legislative, Executive and Judicial departments, were established, by a Constitution, which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power could never interpose to pronounce it void. It is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that under such a government, any court of Justice would possess a power to declare it so....

In order, therefore, to guard against so great an evil, it has been the policy of all the *American* states, which have, individually, framed their state constitutions since the revolution, and of the people of the *United States*, when they framed the Federal Constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot

declarations affixed to the state constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters... Very properly have the convention added this constitutional bulwark." [italics added]

pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice.

The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice. There are then but two lights, in which the subject can be viewed: 1st. If the Legislature pursue the authority delegated to them, their acts are valid. 2d. If they transgress the boundaries of that authority, their acts are invalid. In the former case, they exercise the discretion vested in them by the people, to whom alone they are responsible for the faithful discharge of their trust; but in the latter case, they violate a fundamental law, which must be our guide, whenever we are called upon as judges to determine the validity of a legislative act.

Marbury v. Madison
5 U.S. 137 (1803); February 24, 1803

Throughout its first 14 years of operation the Supreme Court asserted its authority to declare legislation unconstitutional but did not actually exercise that power until Marbury v. Madison, which has come to be the classic exposition of and justification for judicial review. The technical arguments that led Marshall to conclude that part of the congressional act was unconstitutional, in exceeding the enumerated powers of Congress, are omitted, as they are less relevant than the Court's description of the purpose of a Constitution and its own role enforcing it.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

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

That the people have an original right to establish for their future government such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

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

The Government of the United States is of the latter description. The powers of the Legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits

do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it, or that the Legislature may alter the Constitution by an ordinary act.

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

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

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

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

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

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

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official character. How immoral to impose it on them if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the Legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States.

Why does a judge swear to discharge his duties agreeably to the Constitution of the United States if that Constitution forms no rule for his government? If such be the real state of things, this is worse than solemn mockery. To prescribe or to take this oath becomes equally a crime. It is also not entirely unworthy of observation that, in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned, and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank. *[This is an allusion to the Supremacy Clause, Article VI.2]*

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

James Madison

During the 1820s Madison was often pestered to release his notes from the Constitutional Convention, which he resisted for the duration of his life (consenting to their posthumous release). Madison justified this refusal by turning to an argument that he had long made (most notably to Congress when discussing the Jay Treaty). For Madison, the definitive and binding meaning of the Constitution should not be discerned from the secret writings of those who drafted the Constitution at the Convention in 1787.

Debate in the House of Representatives, *Annals of Congress* (April 6, 1796)

Source: Philip B. Kurland and Ralph Lerner, eds., *The Founders' Constitution*
http://press-pubs.uchicago.edu/founders/documents/a2_2_2-3s22.html

...whatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as the oracular guide in expounding the Constitution. As the instrument came from them it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions. If we were to look, therefore, for the meaning of the instrument beyond the face of the instrument, we must look for it, not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified [it].

[Letter to John J. Jackson, his brother in law, December 28, 1821]

Source: Founders Online (National Archives)
<https://founders.archives.gov/documents/Madison/04-02-02-0367>

Whatever might have been the opinions entertained in forming the Constitution, it was the duty of all to support it in its true meaning as understood *by the Nation* at the time of its ratification. No one felt this obligation more.... The departures from the true & fair construction of the Instrument have always given me pain; and always experienced my opposition when called for.

The attempts, in the outset of the Govt. to defeat those safe if not necessary, and those politic if not obligatory amendments introduced in conformity to the known desires of the Body of the people, & to the pledges of many, particularly myself, when vindicating and recommending the Constitution, was an occurrence not a little ominous. And it was soon followed by indications of political tenets, and by rules, or rather the abandonment of all rules, of expounding it, which were capable of transforming it into something very different from its legitimate character as the offspring of the national Will. I wish I could say that constructive innovations had altogether ceased.

Whether the Constitution, as it has divided the powers of Govt. between the States in their separate and in their united capacities, tends to an oppressive aggrandizement of the General Govt. or to an anarchical Independence of the State Govts., is a problem

which time alone can absolutely determine. It is much to be wished that the division as it exists, or as it may be made with the regular sanction of the people, may effectually guard against both extremes: For it can not be doubted that an accumulation of all power in the General Govt. would as naturally lead to a dangerous accumulation in the Executive hands, as that the resumption of all power by the several States, would end in the calamities incident to contiguous & rival Sovereigns...

[Letter to Thomas Ritchie], September 15, 1821

Source: Founders Online (National Archives)

<https://founders.archives.gov/documents/Madison/04-02-02-0321>

As a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the Convention can have no authoritative character. However desirable it be that they should be preserved as a gratification to the laudable curiosity felt by every people to trace the origin and progress of their political Institutions, & as a source perhaps of some lights on the Science of Govt. the legitimate meaning of the Instrument must be derived from the text itself; or if a key is to be sought elsewhere, it must be not in the opinions or intentions of the Body which planned & proposed the Constitution, but in the sense attached to it by the people in their respective State Conventions where it rec[eived] all the authority which it possesses.

[Letter to Henry Lee] June 25, 1824

Source: Founders Online (National Archives)

<https://founders.archives.gov/documents/Madison/04-03-02-0333>

...I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be no Security for a consistent and stable, more than for a faithful exercise of its powers. If the meaning of the text be sought in the changeable meaning of the words composing it, it is evident that the shape and attributes of the Government must partake of the changes to which the words and phrases of all living languages are constantly subject.

What a metamorphosis would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense. And that the language of our Constitution is already undergoing interpretations unknown to its founders, will I believe appear to all unbiassed Enquirers into the history of its origin and adoption. Not to look further for an example, take the word "consolidate" in the address of the Convention prefixed to the Constitution. It then and there meant to give strength and solidity to the Union of the States. In its current & controversial application it means a destruction of the States, by transfusing their powers into the government of the Union...

Thomas Jefferson to Spencer Roane, September 6, 1819

Source: Philip B. Kurland and Ralph Lerner, eds., *The Founders' Constitution*, Volume 3 (Chicago: University of Chicago Press, 1987), Article I, Section 8, Clause 18, Document 16

... In denying the right [that the Supreme Court usurps] of exclusively explaining the constitution, I go further than you do, if I understand rightly your quotation from the *Federalist*, of an opinion that “the judiciary is the last resort in relation *to the other departments* of the government, but not in relation to the rights of the parties to the compact under which the judiciary is derived.” If this opinion be sound, then indeed is our constitution a complete *felo de se* [suicide]. For intending to establish three departments, co-ordinate and independent, that they might check and balance one another, it has given, according to this opinion, to one of them alone, the right to prescribe rules for the government of the others, and to that one too, which is unelected by, and independent of the nation. For experience has already shown that the impeachment it has provided is not even a scarecrow; that such opinions as the one you combat, sent cautiously out, as you observe also, by detachment, not belonging to the case often, but sought for out of it, as if to rally the public opinion beforehand to their views, and to indicate the line they are to walk in, have been so quietly passed over as never to have excited animadversion, even in a speech of any one of the body entrusted with impeachment. The constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please. It should be remembered, as an axiom of eternal truth in politics, that whatever power in any government is independent, is absolute also; in theory only, at first, while the spirit of the people is up, but in practice, as fast as that relaxes. Independence can be trusted nowhere but with the people in mass. They are inherently independent of all but moral law. My construction of the constitution is very different from that you quote. It is that each department is truly independent of the others, and has an equal right to decide for itself what is the meaning of the constitution in the cases submitted to its action; and especially, where it is to act ultimately and without appeal. ...

Abraham Lincoln, "Speech at Springfield, Illinois," June 26, 1857

Source: Abraham Lincoln, *Collected Works of Abraham Lincoln*, Volume 2, ed. Roy P. Basler (Ann Arbor: University of Michigan Digital Library Production Services, 2001), 400-401.

<https://quod.lib.umich.edu//lincoln/lincoln2/1:438?rgn=div1;view=fulltext>

... And now as to the Dred Scott decision. That decision declares two propositions---first, that a negro cannot sue in the U.S. Courts; and secondly, that Congress cannot prohibit slavery in the Territories. It was made by a divided court---dividing differently on the different points ...

[Judge Douglas] denounces all who question the correctness of that decision, as offering violent resistance to it. But who resists it? Who has, in spite of the decision, declared Dred Scott free, and resisted the authority of his master over him?

Judicial decisions have two uses---first, to absolutely determine the case decided, and secondly, to indicate to the public how other similar cases will be decided when they arise. For the latter use, they are called "precedents" and "authorities."

We believe, as much as Judge Douglas, (perhaps more) in obedience to, and respect for the judicial department of government. We think its decisions on Constitutional questions, when fully settled, should control, not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution as provided in that instrument itself. More than this would be revolution. But we think the Dred Scott decision is erroneous. We know the court that made it, has often over-ruled its own decisions, and we shall do what we can to have it to over-rule this. We offer no *resistance* to it.

Judicial decisions are of greater or less authority as precedents, according to circumstances. That this should be so, accords both with common sense, and the customary understanding of the legal profession.

If this important decision had been made by the unanimous concurrence of the judges, and without any apparent partisan bias, and in accordance with legal public expectation, and with the steady practice of the departments throughout our history, and had been in no part, based on assumed historical facts which are not really true; or, if wanting in some of these, it had been before the court more than once, and had there been affirmed and re-affirmed through a course of years, it then might be, perhaps would be, factious, nay, even revolutionary, to not acquiesce in it as a precedent.

But when, as it is true we find it wanting in all these claims to the public confidence, it is not resistance, it is not factious, it is not even disrespectful, to treat it as not having yet quite established a settled doctrine for the country ...

Session 3

Abolition and the Constitution
Dr. Peter Myers

The American Union

by William Lloyd Garrison

January 10, 1845



Tyrants of the old world! contemners of the rights of man! disbelievers in human freedom and equality! enemies of mankind! console not yourselves with the delusion, that REPUBLICANISM and the AMERICAN UNION are synonymous terms—or that the downfall of the latter will be the extinction of the former, and, consequently, a proof of the incapacity of the people for self-government, and a confirmation of your own despotic claims! Your thrones must crumble to dust; your sceptre of dominion drop from your powerless hands;

your rod of oppression be broken; yourselves so vilely abased, that there shall be “none so poor to do you reverence.” The will of God, the beneficent Creator of the human family, cannot always be frustrated. It is his will that every form of usurpation, every kind of injustice, every device of tyranny, shall come to nought; that peace, and liberty, and righteousness, shall “reign from sea to sea, and from the rivers to the ends of the earth”; and that, throughout the earth, in the fulness of a sure redemption, there shall be “none to molest or make afraid.” Humanity, covered with gore, cries with a voice that pierces the heavens. “His will be done!” Justice, discrowned by the hand of violence, exclaims in tones of deep solemnity, “HIS WILL BE DONE!” Liberty, burdened with chains, and driven into exile, in thunder-tones responds, “HIS WILL BE DONE!”

Tyrants! know that the rights of man are inherent and unalienable, and therefore, not to be forfeited by the failure of any form of government, however democratic. Let the American Union perish; let these allied States be torn with faction, or drenched in blood; let this republic realize the fate of Rome and Carthage, of Babylon and Tyre; still those rights would remain undiminished in strength, unsullied in purity, unaffected in value, and sacred as their Divine Author. If nations perish, it is not because of their devotion to liberty, but for their disregard of its requirements. Man is superior to all political compacts, all governmental arrangements, all religious institutions. As means to an end, these may sometimes be useful, though never indispensable; but that end must always be the freedom and happiness of man, INDIVIDUAL MAN. It can never be true that the public good requires the violent sacrifice of any, even the humblest citizen; for it is absolutely dependent on his preservation, not destruction. To do evil that good may come, is equally absurd and criminal. The time for the overthrow of any government, the abandonment of any alliance, the subversion of any institution, is, whenever it justifies the immolation of the individual to secure the general welfare; for the welfare of the many cannot be hostile to the safety of the few. In all agreements, in all measures, in all political or religious enterprises, in all attempts to redeem the human race, man, as an individual, is to be held paramount: —

“Him first, him last, him midst, and without end.”

The doctrine, that the end sanctifies the means, is the maxim of profligates and impostors, of usurpers and tyrants. They who, to promote the cause of truth will sanction the utterance of a falsehood are to be put in the category of liars. So, likewise, they who are for trampling on the rights of the minority, in order to benefit the majority, are to be registered as the monsters of their race. Might is never right, excepting when it sees in every human being, “a man and a brother,” and protects him with a divine fidelity. It is the recognition of these truths, the adoption of these principles, which alone can extirpate tyranny from the earth, perpetuate a free government, and cause the dwellers in every clime, “like kindred drops, to mingle into one.”

Tyrants! confident of its overthrow, proclaim not to your vassals that the AMERICAN UNION is an experiment of Freedom, which, if it fail, will forever demonstrate the necessity of

whips for the backs, and chains for the limbs of the people. Know that its subversion is essential to the triumph of justice, the deliverance of the oppressed, the vindication of the BROTHERHOOD OF THE RACE. It was conceived in sin, and brought forth in iniquity; and its career has been marked by unparalleled hypocrisy, by high-handed tyranny, by a bold defiance of the omniscience and omnipotence of God. Freedom indignantly disowns it, and calls for its extinction; for within its borders are three millions of Slaves, whose blood constitutes its cement, whose flesh forms a large and flourishing branch of its commerce, and who are ranked with four-footed beasts and creeping things. To secure the adoption of the Constitution of the United States, it was agreed, first, that the African slave-trade, —till that time, a feeble, isolated colonial traffic, — should for at least twenty years be prosecuted as a national interest under the American flag, and protected by the national arm; —secondly, that a slaveholding oligarchy, created by allowing three-fifths of the slave population to be represented by their taskmasters, should be allowed a permanent seat in Congress;—thirdly, that the slave system should be secured against internal revolt and external invasion, by the united physical force of the country; —fourthly, that not a foot of national territory should be granted, on which the panting fugitive from Slavery might stand, and be safe from his pursuers—thus making every citizen a slave-hunter and slave-catcher. To say that this “covenant with death” shall not be annulled—that this “agreement with hell” shall continue to stand—that this “refuge of lies” shall not be swept away—is to hurl defiance at the eternal throne, and to give the lie to Him who sits thereon. It is an attempt, alike monstrous and impracticable, to blend the light of heaven with the darkness of the bottomless pit, to unite the living with the dead, to associate the Son of God with the prince of evil.

Accursed be the AMERICAN UNION, as a stupendous republican imposture!

Accursed be it, as the most frightful despotism, with regard to three millions of the people, ever exercised over any portion of the human family!

Accursed be it, as the most subtle and atrocious compromise ever made to gratify power and selfishness!

Accursed be it, as a libel on Democracy, and a bold assault on Christianity!

Accursed be it, as stained with human blood, and supported by human sacrifices!

Accursed be it, for the terrible evils it has inflicted on Africa, by burning her villages, ravaging her coast, and kidnapping her children, at an enormous expense of human life, and for a diabolical purpose!

Accursed be it, for all the crimes it has committed at home—for seeking the utter extermination of the red men of its wildernesses—and for enslaving one-sixth part of its

teeming population!

Accursed be it, for its hypocrisy, its falsehood, its impudence, its lust, its cruelty, its oppression!

Accursed be it, as a mighty obstacle in the way of universal freedom and equality!

Accursed be it, from the foundation to the roof, and may there soon not be left one stone upon another, that shall not be thrown down!

Henceforth, the watchword of every uncompromising abolitionist, of every friend of God and liberty, must be, both in a religious and political sense—"NO UNION WITH SLAVEHOLDERS!"

“Secondly : That Congress have no power to interfere in the emancipation of slaves, or in the treatment of them, within any of the States ; it remaining with the several States alone to provide any regulations therein which humanity and true policy may require.

“Thirdly : That Congress have authority to restrain the citizens of the United States from carrying on the African slave trade, for the purpose of supplying foreigners with slaves, and of providing by proper regulations for the humane treatment, during their passage, of slaves imported by the said citizens into the States admitting such importations.

“Fourthly : That Congress have also authority to prohibit foreigners from fitting out vessels in any part of the United States for transporting persons from Africa to any foreign port.”]

Address of the Executive Committee of the American Anti-Slavery Society to the Friends of Freedom and Emancipation in the United States.

AT the tenth anniversary of the American Anti-Slavery Society, held in the city of New York, May 7th, 1844, — after grave deliberation, and a long and earnest discussion, — it was decided, by a vote of nearly three to one of the members present, that fidelity to the cause of human freedom, hatred of oppression, sympathy for those who are held in chains and slavery in this Republic, and allegiance to God, require that the existing national compact should be instantly dissolved ; that secession from the government is a religious and political duty ; that the motto inscribed on the banner of Freedom should be, **NO UNION WITH SLAVEHOLDERS** ; that it is impracticable for tyrants and the enemies of tyranny to coalesce and legislate together for the preservation of human rights, or the promotion of the interests of Liberty ; and that revolutionary ground should be occupied by all those who ab-

hor the thought of doing evil that good may come, and who do not mean to compromise the principles of Justice and Humanity.

A decision involving such momentous consequences, so well calculated to startle the public mind, so hostile to the established order of things, demands of us, as the official representatives of the American Society, a statement of the reasons which led to it. This is due, not only to the Society, but also to the country and the world.

It is declared by the American people to be a self-evident truth, "that all men are created equal ; that they are endowed BY THEIR CREATOR with certain inalienable rights ; that among these are *life*, LIBERTY, and the pursuit of happiness." It is further maintained by them, that "all governments derive their just powers from the consent of the governed ;" that "whenever any form of government becomes destructive of human rights, it is the right of the people to alter or to abolish it, and institute a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness." These doctrines the patriots of 1776 sealed with their blood. They would not brook even the menace of oppression. They held that there should be no delay in resisting, at whatever cost or peril, the first encroachments of power on their liberties. Appealing to the great Ruler of the Universe for the rectitude of their course, they pledged to each other "their lives, their fortunes, and their sacred honor," to conquer or perish in their struggle to be free.

For the example which they set to all people subjected to a despotic sway, and the sacrifices which they made, their descendants cherish their memories with gratitude, reverence their virtues, honor their deeds, and glory in their triumphs.

It is not necessary, therefore, for us to prove that a state of slavery is incompatible with the dictates of reason and humanity ; or that it is lawful to throw off a government which is at war with the sacred rights of mankind.

We regard this as indeed a solemn crisis, which requires of every man sobriety of thought, prophetic forecast, independent judgment, invincible determination, and a sound heart. A revolutionary step is one that should not be taken hastily, nor followed under the influence of impulsive imitation. To know what spirit they are of — whether they have counted the cost of the warfare — what are the principles they advocate — and how they are to achieve their object, is the first duty of revolutionists.

But, while circumspection and prudence are excellent qualities in every great emergency, they become the allies of tyranny whenever they restrain prompt, bold, and decisive action against it.

We charge upon the present national compact, that it was formed at the expense of human liberty, by a profligate surrender of principle, and to this hour is cemented with human blood.

We charge upon the American Constitution, that it contains provisions, and enjoins duties, which make it unlawful for freemen to take the oath of allegiance to it, because they are expressly designed to favor a slaveholding oligarchy, and, consequently, to make one portion of the people a prey to another.

We charge upon the existing national government, that it is an insupportable despotism, wielded by a power which is superior to all legal and constitutional restraints — equally indisposed and unable to protect the lives or liberties of the people — the prop and safeguard of American slavery.

These charges we proceed briefly to establish : —

I. It is admitted by all men of intelligence, — or if it be denied in any quarter, the records of our national history settle the question beyond doubt, — that the American Union was effected by a guilty compromise between the free and slaveholding States ; in other words, by immolating the colored population on the altar of slavery, by depriving the North of equal rights and privileges, and by incorporating the slave system into the government. In the expressive and pertinent

language of Scripture, it was "a covenant with death, and an agreement with hell," — null and void before God from the first hour of its inception — the framers of which were recreant to duty, and the supporters of which are equally guilty.

It was pleaded at the time of its adoption, — it is pleaded now, — that, without such a compromise, there could have been no union; that, without union, the colonies would have become an easy prey to the mother country; and, hence, that it was an act of necessity — deplorable indeed when viewed alone, but absolutely indispensable to the safety of the republic.

To this we reply: The plea is as profligate as the act was tyrannical. It is the jesuitical doctrine, that the end sanctifies the means. It is a confession of sin, but the denial of any guilt in its perpetration. It is at war with the government of God, and subversive of the foundations of morality. It is to make lies our refuge, and under falsehood to hide ourselves, so that we may escape the overflowing scourge. "Therefore, thus saith the Lord God: Judgment will I lay to the line, and righteousness to the plummet; and the hail shall sweep away the refuge of lies, and the waters shall overflow the hiding place." Moreover, "Because ye trust in oppression and perverseness, and stay thereon, therefore this iniquity shall be to you as a breach ready to fall, swelling out in a high wall, whose breaking cometh suddenly at an instant. And he shall break it as the breaking of the potter's vessel that is broken in pieces; he shall not spare."

This plea is sufficiently broad to cover all the oppression and villany that the sun has witnessed in his circuit since God said, "Let there be light." It assumes that to be practicable which is impossible, namely, that there can be freedom with slavery, union with injustice, and safety with bloodguiltiness. A union of virtue with pollution is the triumph of licentiousness. A partnership between right and wrong is wholly wrong. A compromise of the principles of justice is the deification of crime.

Better that the American Union had never been formed than that it should have been obtained at such a frightful cost. If they were guilty who fashioned it, but who could not foresee all its frightful consequences, how much more guilty are they, who, in full view of all that has resulted from it, clamor for its perpetuity! If it was sinful, at the commencement, to adopt it on the ground of escaping a greater evil, is it not equally sinful to swear to support it, for the same reason, or until, in process of time, it be purged from its corruption?

The fact is, the compromise alluded to, instead of effecting a union, rendered it impracticable — unless by the term union we are to understand the absolute reign of the slaveholding power over the whole country, to the prostration of Northern rights. In the just use of words, the American Union is, and always has been, a sham — an imposture. It is an instrument of oppression unsurpassed in the criminal history of the world. How, then, can it be innocently sustained? It is not certain, — it is not even probable, — that if it had not been adopted, the mother country would have reconquered the colonies. The spirit that would have chosen danger in preference to crime, — to perish with justice rather than live with dishonor, — to dare and suffer whatever might betide rather than sacrifice the rights of one human being, — could never have been subjugated by any mortal power. Surely, it is paying a poor tribute to the valor and devotion of our revolutionary fathers in the cause of liberty, to say that, if they had sternly refused to sacrifice their principles, they would have fallen an easy prey to the despotic power of England.

II. The American Constitution is the exponent of the national compact. We affirm that it is an instrument which no man can innocently bind himself to support, because its anti-republican and anti-Christian requirements are explicit and peremptory; at least, so explicit that, in regard to all the clauses pertaining to slavery, they have been uniformly understood and enforced in the same way by all the courts and

by all the people; and so peremptory, that no individual interpretation or authority can set them aside with impunity. It is not a ball of clay, to be moulded into any shape that party contrivance or caprice may choose it to assume. It is not a form of words, to be interpreted in any manner, or to any extent, or for the accomplishment of any purpose, that individuals in office under it may determine. *It means precisely what those who framed and adopted it meant, — NOTHING MORE, NOTHING LESS, as a matter of bargain and compromise.* Even if it can be construed to mean something else, without violence to its language, such construction is not to be tolerated *against the wishes of either party.* No just or honest use of it can be made, in opposition to the plain intentions of its framers, *except to declare the contract at an end, and to refuse to serve under it.*

To the argument, that the words “slaves” and “slavery” are not to be found in the Constitution, and therefore that it was never intended to give any protection or countenance to the slave system, it is sufficient to reply, that though no such words are contained in that instrument, other words were used intelligently and specifically, *TO MEET THE NECESSITIES OF SLAVERY*; and that these were adopted *in good faith, to be observed until a constitutional change could be effected.* On this point, as to the design of certain provisions, no intelligent man can honestly entertain a doubt. If it be objected, that though these provisions were meant to cover slavery, yet, as they can fairly be interpreted to mean something exactly the reverse, it is allowable to give to them such an interpretation, *especially as the cause of freedom will thereby be promoted,* we reply, that this is to advocate fraud and violence towards one of the contracting parties, *whose coöperation was secured only by an express agreement and understanding between them both, in regard to the clauses alluded to*; and that such a construction, if enforced by pains and penalties, would unquestionably lead to a civil war, in which the aggrieved party would justly claim to have been betrayed, and robbed of their constitutional rights.

Again, if it be said, that those clauses, being immoral, are null and void, we reply, it is true they are not to be observed; but it is also true that they are portions of an instrument, the support of which, AS A WHOLE, is required by oath or affirmation; and, therefore, *because they are immoral*, and BECAUSE OF THIS OBLIGATION TO ENFORCE IMMORALITY, no one can innocently swear to support the Constitution.

Again, if it be objected, that the Constitution was formed by the people of the United States, in order to establish justice, to promote the general welfare, and secure the blessings of liberty to themselves and their posterity, and therefore it is to be so construed as to harmonize with these objects, we reply, again, that its language is *not to be interpreted in a sense which neither of the contracting parties understood*, and which would frustrate every design of their alliance — to wit, *union at the expense of the colored population of the country*. Moreover, nothing is more certain than that the preamble alluded to never included, in the minds of those who framed it, *those who were then pining in bondage* — for, in that case, a general emancipation of the slaves would have instantly been proclaimed throughout the United States. The words, “secure the blessings of liberty to ourselves and our posterity,” assuredly meant only the white population. “To promote the general welfare,” referred to their own welfare exclusively. “To establish justice,” was understood to be for their sole benefit as slaveholders, and the guilty abettors of slavery. This is demonstrated by other parts of the same instrument, and by their own practice under it.

We would not detract aught from what is justly their due; but it is as reprehensible to give them credit for *what they did not possess*, as it is to rob them of what is theirs. It is absurd, it is false, it is an insult to the common sense of mankind, to pretend that the Constitution was intended to embrace the entire population of the country under its sheltering wings; or that the parties to it were actuated by a sense of justice and the spirit of impartial liberty; or that it needs no altera-

tion, but only a new interpretation, to make it harmonize with the object aimed at by its adoption. As truly might it be argued, that because it is asserted in the Declaration of Independence that all men are created equal, and endowed with an inalienable right to liberty, therefore none of its signers were slaveholders, and since its adoption, slavery has been banished from the American soil. The truth is, our fathers were intent on securing liberty to *themselves*, without being very scrupulous as to the means they used to accomplish their purpose. They were not actuated by the spirit of universal philanthropy; and though *in words* they recognized occasionally the brotherhood of the human race, *in practice* they continually denied it. They did not blush to enslave a portion of their fellow-men, and to buy and sell them as cattle in the market, while they were fighting against the oppression of the mother country, and boasting of their regard for the rights of man. Why, then, concede to them virtues which they did not possess? *Why cling to the falsehood that they were no respecters of persons in the formation of the government?*

Alas! that they had no more fear of God, no more regard for man, in their hearts! "The iniquity of the house of Israel and Judah [the North and South] is exceeding great, and the land is full of blood, and the city full of perverseness; for they say, the Lord hath forsaken the earth, and the Lord seeth not."

We proceed to a critical examination of the American Constitution, in its relations to slavery.

In Article 1, Section 9, it is declared, "The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress, prior to the year one thousand eight hundred and eight; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person."

In this Section, it will be perceived, the phraseology is so guarded as not to imply, *ex necessitate*, any criminal intent or inhuman arrangement; and yet no one has ever had the

hardihood or folly to deny, that it was clearly understood by the contracting parties to mean that there should be no interference with the African slave trade, on the part of the General Government, until the year 1808. For twenty years after the adoption of the Constitution, the citizens of the United States were to be encouraged and protected in the prosecution of that infernal traffic, in sacking and burning the hamlets of Africa, in slaughtering multitudes of the inoffensive natives on the soil, kidnapping and enslaving a still greater proportion, crowding them to suffocation in the holds of the slave ships, populating the Atlantic with their dead bodies, and subjecting the wretched survivors to all the horrors of unmitigated bondage! This awful covenant was strictly fulfilled; and though, since its termination, Congress has declared the foreign slave traffic to be piracy, yet all Christendom knows that the American flag, instead of being the terror of the African slavers, has given them the most ample protection.

The manner in which the 9th Section was agreed to, by the National Convention that formed the Constitution, is thus frankly avowed by the Hon. LUTHER MARTIN,* who was a prominent member of that body: —

“The Eastern States, notwithstanding their aversion to slavery (!) were very willing to indulge the Southern States at least with a temporary liberty to prosecute the slave trade, provided the Southern States would, in their turn, gratify them by laying no restriction on navigation acts; and after a very little time, the committee, by a great majority, agreed on a report by which the General Government was to be prohibited from preventing the importation of slaves for a limited time; and the restrictive clause relative to navigation acts was to be omitted.”

Behold the iniquity of this agreement! how sordid were the motives which led to it! what a profligate disregard of justice and humanity on the part of those who had solemnly declared the inalienable right of all men to freedom and equality to be a self-evident truth!

It is due to the National Convention to say, that this Section was not adopted “without considerable opposition.” Alluding to it, Mr. MARTIN observes, —

* Speech before the legislature of Maryland, in 1787.

"It was said that we had just assumed a place among independent nations, in consequence of our opposition to the attempts of Great Britain to *enslave us*; that this opposition was grounded upon the preservation of those rights to which God and nature had entitled us, not in *particular*, but in *common with all the rest of mankind*; that we had appealed to the Supreme Being for his assistance, as the God of freedom, who could not but approve our efforts to preserve the rights which he had thus imparted to his creatures; that now, when we scarcely had risen from our knees, from supplicating his aid and protection in forming our government over a free people, a government formed pretendedly on the principles of liberty, and for its preservation,—in that government to have a provision, not only putting it out of its power to restrain and prevent the slave trade, but even encouraging that most infamous traffic, by giving the States power and influence in the Union in proportion as they cruelly and wantonly sport with the rights of their fellow-creatures, ought to be considered as a solemn mockery of, and insult to, that God whose protection we had then implored, and could not fail to hold us up in detestation, and render us contemptible to every true friend of liberty in the world. It was said it ought to be considered that national crimes can only be, and frequently are, punished in this world by *national punishments*, and that the continuance of the slave trade, and thus giving it a national sanction and encouragement, ought to be considered as justly exposing us to the displeasure and vengeance of Him who is equally Lord of all, and who views with equal eye the poor *African slave* and his *American master*! (1)

"It was urged that, by this system, we were giving the General Government full and absolute power to regulate commerce, under which general power it would have a right to restrain, or totally prohibit, the slave trade: it must, therefore, appear to the world absurd and disgraceful to the last degree, that we should except from the exercise of that power the only branch of commerce which is unjustifiable in its nature, and contrary to the rights of mankind. That, on the contrary, we ought rather to prohibit expressly, in our Constitution, the further importation of slaves, and to authorize the General Government, from time to time, to make such regulations as should be thought most advantageous for the gradual abolition of slavery, and the emancipation of the slaves which are already in the States. That slavery is inconsistent with the genius of republicanism, and has a tendency to destroy those principles on which it is supported, as it lessens the sense of the equal rights of mankind, and habituates us to tyranny and oppression. It was further urged that, by this system of government, every State is to be protected, both from foreign invasion and from domestic insurrections; that, from this consideration, it was of the utmost importance it should have a power to restrain the importation of slaves, since in proportion as the number of slaves were increased in any State, in the same proportion the State is weakened and exposed to foreign invasion or domestic insurrection; and by so much less will it be able to protect itself against either, and therefore will, by so much the more, want aid from, and be a burden to, the Union.

"It was further said that, as in this system we were giving the General Government a power, under the idea of national character, or national interest, to regulate even our weights and measures, and had prohibited all possibility of emitting paper money, and passing insolvent laws, &c., it must appear still more extraordinary that we should prohibit the government from interfering with the slave trade, than which nothing could so materially affect both our national honor and interest.

"These reasons influenced me, both on the committee and in convention, most decidedly to oppose and vote against the clause, as it now makes a part of the system."*

Happy had it been for this nation, had these solemn considerations been heeded by the framers of the Constitution! But for the sake of securing some local advantages, they chose to do evil that good might come, and to make the end sanctify the means. They were willing to enslave others, that they might secure their own freedom. They did this

- (1) How terribly and justly has this guilty nation been scourged, since these words were spoken, on account of slavery and the slave trade!

* Secret Proceedings, p. 64.

deed deliberately, with their eyes open, with all the facts and consequences arising therefrom before them, in violation of all their heaven-attested declarations, and in atheistical distrust of the overruling power of God. "The Eastern States were very willing to *indulge* the Southern States" in the unrestricted prosecution of their piratical traffic, provided in return they could be *gratified* by no restriction being laid on navigation acts!! Had there been no other provision of the Constitution justly liable to objection, this one alone rendered the support of that instrument incompatible with the duties which men owe to their Creator, and to each other. It was the poisonous infusion in the cup, which, though constituting but a very slight portion of its contents, perilled the life of every one who partook of it.

If it be asked, to what purpose are these animadversions, since the clause alluded to has long since expired by its own limitation — we answer, that if at any time the foreign slave trade could be *constitutionally* prosecuted, it may yet be renewed, under the Constitution, at the pleasure of Congress, whose prohibitory statute is liable to be reversed at any moment, in the frenzy of Southern opposition to emancipation. It is ignorantly supposed that the bargain was, that the traffic *should cease* in 1808; but the only thing secured by it was, the *right* of Congress (not any obligation) to prohibit it at that period. If, therefore, Congress had not chosen to exercise that right, *the traffic might have been prolonged indefinitely under the Constitution*. The right to destroy any particular branch of commerce, implies the right to reestablish it. True, there is no probability that the African slave trade will ever again be legalized by the national government; but no credit is due the framers of the Constitution on this ground; for, while they threw around it all the sanction and protection of the national character and power for twenty years, *they set no bounds to its continuance by any positive constitutional prohibition*.

Again, the adoption of such a clause, and the faithful exe-

cution of it, prove what was meant by the words of the preamble — “to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity” — namely, that the parties to the Constitution regarded only their own rights and interests, and never intended that its language should be so interpreted as to interfere with slavery, or to make it unlawful for one portion of the people to enslave another, *without an express alteration in that instrument, in the manner therein set forth*. While, therefore, the Constitution remains as it was originally adopted, they who swear to support it are bound to comply with all its provisions, as a matter of allegiance. For it avails nothing to say, that some of those provisions are at war with the law of God and the rights of man, and therefore are not obligatory. Whatever may be their character, they are *constitutionally* obligatory; and whoever feels that he cannot execute them, or swear to execute them, without committing sin, has no other choice left than to withdraw from the government, or to violate his conscience by taking on his lips an impious promise. The object of the Constitution is not to define *what is the law of God*, but **WHAT IS THE WILL OF THE PEOPLE** — which will is not to be frustrated by an ingenious moral interpretation, by those whom they have elected to serve them.

Article 1, Sect. 2, provides — “Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, *three fifths of all other persons*.”

Here, as in the clause we have already examined, veiled beneath a form of words as deceitful as it is unmeaning in a truly democratic government, is a provision for the safety, perpetuity, and augmentation of the slaveholding power — a

provision scarcely less atrocious than that which related to the African slave trade, and almost as afflictive in its operation — a provision still in force, with no possibility of its alteration, so long as a majority of the slave States choose to maintain their slave system — a provision which, at the present time, enables the South to have twenty-five additional representatives in Congress on the score of *property*, while the North is not allowed to have one — a provision which concedes to the oppressed three fifths of the political power which is granted to all others, and then puts this power into the hands of their oppressors, to be wielded by them for the more perfect security of their tyrannous authority, and the complete subjugation of the non-slaveholding States.

Referring to this atrocious bargain, ALEXANDER HAMILTON remarked in the New York Convention —

“The first thing objected to, is that clause which allows a representation for three fifths of the negroes. Much has been said of the impropriety of representing men who have no will of their own. Whether this be *reasoning* or *declamation*, (!) I will not presume to say. It is the *unfortunate* situation of the Southern States to have a great part of their population, as well as *property*, in blacks. The regulation complained of was one result of the *spirit of accommodation* which governed the Convention; and without this *indulgence*, NO UNION COULD POSSIBLY HAVE BEEN FORMED. But, sir, considering some *peculiar advantages* which we derive from them, it is entirely JUST that they should be *gratified*. The Southern States possess certain staples — tobacco, rice, indigo, &c., — which must be *capital* objects in treaties of commerce with foreign nations; and the advantage which they necessarily procure in these treaties will be felt throughout all the States.”

If such was the patriotism, such the love of liberty, such the morality of ALEXANDER HAMILTON, what can be said of the character of those who were far less conspicuous than himself in securing American independence, and in framing the American Constitution?

Listen, now, to the opinions of JOHN QUINCY ADAMS, respecting the constitutional clause now under consideration:—

“‘In outward show, it is a representation of persons in bondage; in fact, it is a representation of their masters, — the oppressor representing the oppressed.’ — ‘Is it in the compass of human imagination to devise a more perfect exemplification of the art of committing the lamb to the tender custody of the wolf?’ — ‘The representative is thus constituted, not the friend, agent and trustee of the person whom he represents, but the most inveterate of his foes.’ — ‘It was one of the curses from that Pandora’s box, adjusted at the time, as usual, by a *compromise*, the whole advantage of which enured to the benefit of the South, and to aggravate the burdens of the North.’ — ‘If there be a parallel to it in human history, it can only be that of the Roman Emperors, who, from the days when Julius Cæsar substituted a military despotism in the place of a republic, among the offices which they always concentrated

upon themselves, was that of tribune of the people. A Roman Emperor tribune of the people, is an exact parallel to that feature in the Constitution of the United States which makes the master the representative of his slave.' — 'The Constitution of the United States expressly prescribes that no title of nobility shall be granted by the United States. The spirit of this interdict is not a rooted antipathy to the grant of mere powerless empty titles, but to titles of nobility; to the institution of privileged orders of men. But what order of men under the most absolute of monarchies, or the most aristocratic of republics, was ever invested with such an odious and unjust privilege as that of the separate and exclusive representation of less than half a million owners of slaves, in the Hall of this House, in the chair of the Senate, and in the Presidential mansion?' — 'This investment of power in the owners of one species of property concentrated in the highest authorities of the nation, and disseminated through thirteen of the twenty-six States of the Union, constitutes a privileged order of men in the community, more adverse to the rights of all, and more pernicious to the interests of the whole, than any order of nobility ever known. To call government thus constituted a Democracy, is to insult the understanding of mankind. To call it an Aristocracy, is to do injustice to that form of government. Aristocracy is the government of the best. Its standard qualification for accession to power is merit, ascertained by popular election, recurring at short intervals of time. If even that government is prone to degenerate into tyranny, what must be the character of that form of polity in which the standard qualification for access to power is wealth in the possession of slaves? It is doubly tainted with the infection of riches and of slavery. *There is no name in the language of national jurisprudence that can define it* — no model in the records of ancient history, or in the political theories of Aristotle, with which it can be likened. It was introduced into the Constitution of the United States by an equivocation — a representation of property under the name of persons. Little did the members of the Convention from the free States imagine or foresee what a sacrifice to Moloch was hidden under the mask of this concession.' — 'The House of Representatives of the United States consists of 223 members — all, by the letter of the Constitution, representatives only of persons, as 135 of them really are; but the other 88, equally representing the persons of their constituents, by whom they are elected, also represent, under the name of other persons, upwards of two and a half millions of slaves, held as the property of less than half a million of the white constituents, and valued at twelve hundred millions of dollars. Each of these 88 members represents in fact the whole of that mass of associated wealth, and the persons and exclusive interests of its owners; all thus knit together, like the members of a moneyed corporation, with a capital not of thirty-five or forty or fifty, but of twelve hundred millions of dollars, exhibiting the most extraordinary exemplification of the anti-republican tendencies of associated wealth that the world ever saw.' — 'Here is one class of men, consisting of not more than one fortieth part of the whole people, not more than one thirtieth part of the free population, exclusively devoted to their personal interests, identified with their own as slaveholders of the same associated wealth, and wielding by their votes, upon every question of government or of public policy, two fifths of the whole power of the House. In the Senate of the Union, the proportion of the slaveholding power is yet greater. By the influence of slavery, in the States where the institution is tolerated, over their elections, no other than a slaveholder can rise to the distinction of obtaining a seat in the Senate; and thus, of the 52 members of the Federal Senate, 26 are owners of slaves, and as effectively representatives of that interest as the 88 members elected by them to the House.' — 'By this process it is that all political power in the States is absorbed and engrossed by the owners of slaves, and the overruling policy of the States is shaped to strengthen and consolidate their domination. The legislative, executive, and judicial authorities are all in their hands — the preservation, propagation, and perpetuation of the black code of slavery — every law of the legislature becomes a link in the chain of the slave; every executive act a rivet to his hapless fate; every judicial decision a perversion of the human intellect to the justification of wrong.' — 'Its reciprocal operation upon the government of the nation is, to establish an artificial majority in the slave representation over that of the free people, in the American Congress, and thereby to make the PRESERVATION, PROPAGATION, AND PERPETUATION OF SLAVERY THE VITAL AND ANIMATING SPIRIT OF THE NATIONAL GOVERNMENT.' — 'The result is seen in the fact that, at this day, the President of the United States, the President of the Senate, the Speaker of the House of Representatives, and five out of nine of the Judges of the Supreme Judicial Court of the United States, are not only citizens of slaveholding States, but individual slaveholders themselves. So are, and constantly have been, with scarcely an exception, all the members of both Houses of Congress from the slaveholding States; and so are, in immensely disproportionate numbers, the commanding officers of the army and navy; the officers of the customs; the registers and receivers of the land offices; and

the postmasters throughout the slaveholding States. — The Biennial Register indicates the birthplace of all the officers employed in the government of the Union. If it were required to designate the owners of this species of property among them, it would be little more than a catalogue of slaveholders.’ ”

It is confessed by Mr. ADAMS, alluding to the National Convention that framed the Constitution, that “the delegation from the free States, in their extreme anxiety to conciliate the ascendancy of the Southern slaveholder, did listen to *a compromise between right and wrong — between freedom and slavery*; of the ultimate fruits of which they had no conception, but which already even now is urging the Union to its inevitable ruin and dissolution, by a civil, servile, foreign and Indian war, all combined in one; a war, the essential issue of which will be between freedom and slavery, and in which the unhallowed standard of slavery will be the desecrated banner of the North American Union — that banner, first unfurled to the breeze, inscribed with the self-evident truths of the Declaration of Independence.”

Hence, to swear to support the Constitution of the United States, *as it is*, is to make “a compromise between right and wrong,” and to wage war against human liberty. It is to recognize and honor as republican legislators *incorrigible men-stealers*, MERCILESS TYRANTS, BLOODTHIRSTY ASSASSINS, who legislate with deadly weapons about their persons, such as pistols, daggers, and bowie-knives, with which they threaten to murder any Northern senator or representative who shall dare to stain their *honor*, or interfere with their *rights*! They constitute a banditti more fierce and cruel than any whose atrocities are recorded on the pages of history or romance. To mix with them on terms of social or religious fellowship, is to indicate a low state of virtue; but to think of administering a free government by their coöperation is nothing short of insanity.

Article 4, Section 2, declares, “No person held to service or labor in one State, *under the laws thereof*, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be de-

livered up on claim of the party to whom such service or labor may be due."

Here is a third clause, which, like the other two, makes no mention of slavery or slaves in express terms; and yet, like them, was intelligently framed and mutually understood by the parties to the ratification, and intended both to protect the slave system and to restore runaway slaves. It alone makes slavery a national institution, a national crime, and all the people who are not enslaved the body-guard over those whose liberties have been cloven down. This agreement, too, has been fulfilled to the letter by the North.

Under the Mosaic dispensation it was imperatively commanded, "Thou shalt not deliver unto his master the servant which is escaped from his master unto thee: he shall dwell with thee, even among you, in that place which he shall choose in one of thy gates, where it liketh him best: thou shalt not oppress him." The warning which the prophet Isaiah gave to oppressing Moab was of a similar kind: "Take counsel, execute judgment; make thy shadow as the night in the midst of the noonday; hide the outcasts; bewray not him that wandereth. Let mine outcasts dwell with thee, Moab; be thou a covert to them from the face of the spoiler." The prophet Obadiah brings the following charge against treacherous Edom, which is precisely applicable to this guilty nation:—"For thy violence against thy brother Jacob, shame shall come over thee, and thou shalt be cut off forever. In the day that thou stoodest on the other side, in the day that the strangers carried away captive his forces, and foreigners entered into his gates, and cast lots upon Jerusalem, *even thou wast as one of them*. But thou shouldst not have looked on the day of thy brother in the day that he became a stranger; neither shouldst thou have rejoiced over the children of Judah in the day of their destruction; neither shouldst thou have spoken proudly in the day of distress; neither shouldst thou have *stood in the cross-way, to cut off those of his that did escape*; neither shouldst thou have *delivered up those of his that did remain* in the day of distress."

How exactly descriptive of this boasted republic is the impeachment of Edom by the same prophet! "The pride of thine heart hath deceived thee, thou whose habitation is high; that saith in thy heart, Who shall bring me down to the ground? Though thou exalt thyself as the eagle, and though thou set thy nest among the stars, thence will I bring thee down, saith the Lord." The emblem of American pride and power is the *eagle*, and on her banner she has mingled *stars* with its *stripes*. Her vanity, her treachery, her oppression, her self-exaltation, and her defiance of the Almighty, far surpass the madness and wickedness of Edom. What shall be her punishment? Truly, it may be affirmed of the American people, (who live not under the Levitical but Christian code, and whose guilt, therefore, is the more awful, and their condemnation the greater,) in the language of another prophet, "They all lie in wait for blood; they hunt every man his brother with a net. That they may do evil with both hands earnestly, the prince asketh, and the judge asketh for a reward; and the great man, he uttereth his mischievous desire: *so they wrap it up.*" Likewise of the colored inhabitants of this land it may be said, "This is a people robbed and spoiled; they are all of them snared in holes, and they are hid in prison-houses; they are for a prey, and none delivereth; for a spoil, and none saith, Restore."

By this stipulation, the Northern States are made the hunting ground of slave-catchers, who may pursue their victims with bloodhounds, and capture them with impunity wherever they can lay their robber hands upon them. At least twenty-five thousand runaway slaves are now in Canada, exiled from their native land, because they could not find throughout its vast extent a single rood on which they could dwell in safety, *in consequence of this provision of the Constitution!* How is it possible, then, for the advocates of liberty to support a government which gives over to destruction one sixth part of the whole population?

It is denied by some at the present day, that the clause

which has been cited was intended to apply to runaway slaves. This indicates either ignorance, or folly, or something worse. JAMES MADISON, as one of the framers of the Constitution, is of some authority on this point. Alluding to that instrument, in the Virginia convention, he said, —

“Another clause *secures us that property which we now possess*. At present, if any slave elopes to any of those States where slaves are free, *he becomes emancipated by their laws*; for the laws of the States are *uncharitable* (!) to one another in this respect; but in this Constitution, ‘No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.’ THIS CLAUSE WAS EXPRESSLY INSERTED TO ENABLE OWNERS OF SLAVES TO RECLAIM THEM. *This is a better security than any that now exists*. No power is given to the General Government to interpose with respect to the property in slaves now held by the States.”

In the same convention, alluding to the same clause, Gov. RANDOLPH said, —

“Every one knows that slaves are held to service or labor. And, when authority is given to owners of slaves to *vindicate their property*, can it be supposed they can be deprived of it? If a citizen of this State, in consequence of this clause, can take his runaway slave in Maryland, can it be seriously thought that, after taking him and bringing him home, he could be made free?”

It is objected that slaves are held as property, and therefore, as the clause refers to persons, it cannot mean slaves. But this is criticism against fact. Slaves are recognized not merely as property, but also as persons — as having a mixed character — as combining the human with the brutal. This is paradoxical, we admit; but slavery is a paradox — the American Constitution is a paradox — the American Union is a paradox — the American government is a paradox; and if any one of these is to be repudiated on that ground, they all are. That it is the duty of the friends of freedom to deny the binding authority of them all, and to secede from them all, we distinctly affirm. After the independence of this country had been achieved, the voice of God exhorted the people, saying, “Execute true judgment, and show mercy and compassion, every man to his brother: and oppress not the widow, nor the fatherless, the stranger, nor the poor; and let none of you imagine evil against his brother in your heart. But they refused to hearken, and pulled away the shoulder, and stopped their ears that they should not hear; yea, they made their

hearts as an adamant stone." "Shall I not visit for these things? saith the Lord. Shall not my soul be avenged on such a nation as this?"

Whatever doubt may have rested on any honest mind, respecting the meaning of the clause in relation to persons held to service or labor, must have been removed by the unanimous decision of the Supreme Court of the United States, in the case of *Prigg vs. The State of Pennsylvania*. By that decision, any Southern slave-catcher is empowered to seize and convey to the South, without hinderance or molestation on the part of the State, and without any legal process duly obtained and served, any person or persons, irrespective of caste or complexion, whom he may choose to claim as runaway slaves; and if, when thus surprised and attached, or on their arrival South, they cannot prove by legal witnesses that they are freemen, their doom is sealed! Hence the free colored population of the North are specially liable to become the victims of this terrible power, and all the other inhabitants are at the mercy of prowling kidnappers, because there are multitudes of white as well as black slaves on Southern plantations, and slavery is no longer fastidious with regard to the color of its prey.

As soon as that appalling decision of the Supreme Court was enunciated, in the name of the Constitution, the people of the North should have risen *en masse*, if for no other cause, and declared the Union at an end; and they would have done so if they had not lost their manhood, and their reverence for justice and liberty.

In the fourth section of Article IV., the United States guarantee to protect every State in the Union "against *domestic violence*." By the eighth section of Article I., Congress is empowered "to provide for calling forth the militia to execute the laws of the Union, *suppress insurrections*, and repel invasions." These provisions, however strictly they may apply to cases of disturbance among the white population, were adopted with special reference to the slave population, for the pur-

pose of keeping them in their chains by the combined military force of the country ; and were these repealed, and the South left to manage her slaves as best she could, a servile insurrection would ere long be the consequence, as general as it would unquestionably be successful. Says Mr. MADISON, respecting these clauses, —

“ On application of the legislature or executive, as the case may be, the militia of the other States are to be called to suppress domestic insurrections. Does this bar the States from calling forth their own militia? No; but it gives them a *supplementary* security to suppress insurrections and domestic violence.”

In answer to PATRICK HENRY’S objection, as urged against the Constitution in the Virginia Convention, that there was no power left to the *States* to quell an insurrection of slaves, as it was wholly vested in Congress, GEORGE NICHOLAS asked, —

“ Have they it now? If they have, does the Constitution take it away? If it does, it must be in one of the three clauses which have been mentioned by the worthy member. The first clause gives the General Government power to call them out when necessary. Does this take it away from the States? No; but it gives an *additional security*; for, besides the power in the State Governments to use their own militia, it will be *the duty of the General Government* to aid them WITH THE STRENGTH OF THE UNION, when called for.”

This solemn guarantee of security to the slave system caps the climax of national barbarity, and stains with human blood the garments of all the people. In consequence of it, that system has multiplied its victims from seven hundred thousand to nearly three millions; a vast amount of territory has been purchased, in order to give it extension and perpetuity; several new slave States have been admitted into the Union; the slave trade has been made one of the great branches of American commerce; the slave population, though overworked, starved, lacerated, branded, maimed, and subjected to every form of deprivation and every species of torture, have been overawed and crushed, or, whenever they have attempted to gain their liberty by revolt, they have been shot down and quelled by the strong arm of the National Government — as, for example, in the case of NAT TURNER’S insurrection in Virginia, when the naval and military forces of the government were called into active service. Cuban

bloodhounds have been purchased with the money of the people, and imported and used to hunt slave fugitives among the everglades of Florida. A merciless warfare has been waged for the extermination or expulsion of the Florida Indians, because they gave succor to these poor hunted fugitives — a warfare which has cost the nation several thousand lives and forty millions of dollars. But the catalogue of enormities is too long to be recapitulated in the present address.

We have thus demonstrated that the compact between the North and the South embraces every variety of wrong and outrage, is at war with God and man, cannot be innocently supported, and deserves to be immediately annulled. In behalf of the society which we represent, we call upon all our fellow-citizens, who believe it is right to obey God rather than man, to declare themselves peaceful revolutionists, and to unite with us under the stainless banner of Liberty, having for its motto, "EQUAL RIGHTS FOR ALL — NO UNION WITH SLAVEHOLDERS!"

It is pleaded that the Constitution provides for its own amendment, and we ought to use the elective franchise to effect this object. True, there is such a proviso; but, until the amendment be made, that instrument is binding as it stands. Is it not to violate every moral instinct, and to sacrifice principle to expediency, to argue that we may swear to steal, oppress, and murder by wholesale, because it may be necessary to do so only for the time being, and because there is some remote probability that the instrument which requires that we should be robbers, oppressors, and murderers, may at some future day be amended in these particulars? Let us not palter with our consciences in this manner; let us not deny that the compact was conceived in sin, and brought forth in iniquity; let us not be so dishonest, even to promote a good object, as to interpret the Constitution in a manner utterly at variance with the intentions and arrangements of the contracting parties; but, confessing the guilt of the nation, acknowledging the dreadful specifications in the bond, washing our hands in the waters of repentance from all further

participation in this criminal alliance, and resolving that we will sustain none other than a free and righteous government, let us glory in the name of revolutionists, unfurl the banner of disunion, and consecrate our talents and means to the overthrow of all that is tyrannical in the land, — to the establishment of all that is free, just, true, and holy, — to the triumph of universal love and peace.

If, in utter disregard of the historical facts which have been cited, it is still asserted that the Constitution needs no amendment to make it a free instrument, adapted to all the exigencies of a free people, and was never intended to give any strength or countenance to the slave system, the indignant spirit of insulted Liberty replies, "What though the assertion be true? Of what avail is a mere piece of parchment? In itself, though it be written all over with words of truth and freedom, — though its provisions be as impartial and just as words can express or the imagination paint, — though it be as pure as the gospel, and breathe only the spirit of heaven, — it is powerless; it has no executive vitality; it is a lifeless corpse, even though beautiful in death. I am famishing for lack of bread — how is my appetite relieved by holding up to my gaze a painted loaf? I am manacled, wounded, bleeding, dying — what consolation is it to know, that they who are seeking to destroy my life profess in words to be my friends?" If the liberties of the people have been betrayed, — if judgment is turned away backward, and justice standeth afar off, and truth has fallen in the streets, and equity cannot enter, — if the princes of the land are roaring lions, the judges evening wolves, the people light and treacherous persons, the priests covered with pollution, — if we are living under a frightful despotism, which scoffs at all constitutional restraints, and wields the resources of the nation to promote its own bloody purposes, — tell us not that the forms of freedom are still left to us! "Would such tameness and submission have freighted the Mayflower for Plymouth Rock? Would it have resisted the Stamp Act, the Tea Tax, or any of those entering wedges of tyranny with which the British govern-

ment sought to rive the liberties of America? The wheel of the Revolution would have rusted on its axle, if a spirit so weak had been the only power to give it motion." Did our fathers say, when their rights and liberties were infringed, "*Why, what is done cannot be undone.* That is the first thought"? No, it was the last thing they thought of; or, rather, it never entered their minds at all. They sprang to the conclusion at once, "*What is done SHALL be undone.* That is our FIRST and ONLY thought."

"Is water running in our veins? Do we remember still
Old Plymouth Rock, and Lexington, and famous Bunker Hill?
The debt we owe our fathers' graves? and to the yet unborn,
Whose heritage ourselves must make a thing of pride or scorn?"

Gray Plymouth Rock hath yet a tongue, and Concord is not dumb;
And voices from our fathers' graves and from the future come:
They call on us to stand our ground—they charge us still to be
Not only free from chains ourselves, but foremost to make free!"

It is of little consequence who is on the throne, if there be behind it a power mightier than the throne. It matters not what is the theory of the government, if the practice of the government be unjust and tyrannical. We rise in rebellion against a despotism incomparably more dreadful than that which induced the colonists to take up arms against the mother country; not on account of a threepenny tax on tea, but because fetters of living iron are fastened on the limbs of millions of our countrymen, and our most sacred rights are trampled in the dust. As citizens of the State, we appeal to the State in vain for protection and redress. As citizens of the United States, we are treated as outlaws in one half of the country, and the National Government consents to our destruction. We are denied the right of locomotion, freedom of speech, the right of petition, the liberty of the press, the right peaceably to assemble together to protest against oppression and plead for liberty—at least in thirteen States of the Union. If we venture, as avowed and unflinching abolitionists, to travel south of Mason and Dixon's line, we do so at the peril of our lives. If we would escape torture and death, on visiting any of the slave States, we must stifle our conscientious convictions, bear no testimony against cruelty

and tyranny, suppress the struggling emotions of humanity, divest ourselves of all letters and papers of an anti-slavery character, and do homage to the slaveholding power, or run the risk of a cruel martyrdom. These are appalling and undeniable facts.

Three millions of the American people are crushed under the American Union ! They are held as slaves, trafficked as merchandise, registered as goods and chattels ! The government gives them no protection ; the government is their enemy ; the government keeps them in chains ! Where they lie bleeding, we are prostrate by their side ; in their sorrows and sufferings we participate ; their stripes are inflicted on our bodies ; their shackles are fastened on our limbs ; their cause is ours ! The Union, which grinds them to the dust, rests upon us, and with them we will struggle to overthrow it ! The Constitution, which subjects them to hopeless bondage, is one that we cannot swear to support ! Our motto is, "NO UNION WITH SLAVEHOLDERS," either religious or political. They are the fiercest enemies of mankind, and the bitterest foes of God ! We separate from them, not in anger, not in malice, not for a selfish purpose, not to do them an injury, not to cease warning, exhorting, reproving them for their crimes, not to leave the perishing bondman to his fate — O, no ! But to clear our skirts of innocent blood ; to give the oppressor no countenance ; to signify our abhorrence of injustice and cruelty ; to testify against an ungodly compact ; to cease striking hands with thieves and consenting with adulterers ; to make no compromise with tyranny ; to walk worthily of our high profession ; to increase our moral power over the nation ; to obey God, and vindicate the gospel of his Son ; to hasten the downfall of slavery in America and throughout the world.

We are not acting under a blind impulse. We have carefully counted the cost of this warfare, and are prepared to meet its consequences. It will subject us to reproach, persecution, infamy ; it will prove a fiery ordeal to all who shall pass through it ; it may cost us our lives. We shall be ridiculed as fools, scorned as visionaries, branded as disorganizers,

reviled as madmen, threatened and perhaps punished as traitors. But we shall bide our time. Whether safety or peril, whether victory or defeat, whether life or death be ours, believing that our feet are planted on an eternal foundation, that our position is sublime and glorious, that our faith in God is rational and steadfast, that we have exceeding great and precious promises on which to rely, THAT WE ARE IN THE RIGHT, we shall not falter nor be dismayed, "though the earth be removed, and though the mountains be carried into the midst of the sea." Freemen! are you ready for the conflict? Come what may, will you sever the chain that binds you to a slaveholding government, and declare your independence? Up, then, with the banner of revolution! Not to shed blood; not to injure the person or estate of any oppressor; not by force and arms to resist any law; not to countenance a servile insurrection; not to wield any carnal weapons. No; ours must be a bloodless strife, excepting *our* blood be shed; for we aim, as did Christ our leader, not to destroy men's lives, but to save them; to overcome evil with good; to conquer through suffering for righteousness' sake; to set the captive free by the potency of truth!

Secede, then, from the government. Submit to its exactions, but pay it no allegiance, and give it no voluntary aid. Fill no offices under it. Send no senators or representatives to the National or State legislature; for what you cannot conscientiously perform yourself, you cannot ask another to perform as your agent. Circulate a declaration of **DISUNION FROM SLAVEHOLDERS**, throughout the country. Hold mass meetings — assemble in conventions — nail your banners to the mast!

Do you ask what can be done, if you abandon the ballot box? What did the crucified Nazarene do without the elective franchise? What did the apostles do? What did the glorious army of martyrs and confessors do? What did Luther and his intrepid associates do? What can women and children do? What has Father Mathew done for teetotal-

ism? What has Daniel O'Connell done for Irish repeal? "Stand, having your loins girt about with truth, and having on the breastplate of righteousness," and arrayed in the whole armor of God!

The form of government that shall succeed the present government of the United States, let time determine. It would be a waste of time to argue that question, until the people are regenerated and turned from their iniquity. Ours is no anarchical movement, but one of order and obedience. In ceasing from oppression, we establish liberty. What is now fragmentary shall in due time be crystallized, and shine like a gem set in the heavens, for a light to all coming ages.

Finally — we believe that the effect of this movement will be, — First, to create discussion and agitation throughout the North; and these will lead to a general perception of its grandeur and importance.

Secondly, to convulse the slumbering South like an earthquake, and convince her that her only alternative is, to abolish slavery, or be abandoned by that power on which she now relies for safety.

Thirdly, to attack the slave power in its most vulnerable point, and to carry the battle to the gate.

Fourthly, to exalt the moral sense, increase the moral power, and invigorate the moral constitution of all who heartily espouse it.

We reverently believe that, in withdrawing from the American Union, we have the God of justice with us. We know that we have our enslaved countrymen with us. We are confident that all free hearts will be with us. We are certain that tyrants and their abettors will be against us.

In behalf of the Executive Committee of the American Anti-Slavery Society.

WM. LLOYD GARRISON, *President.*

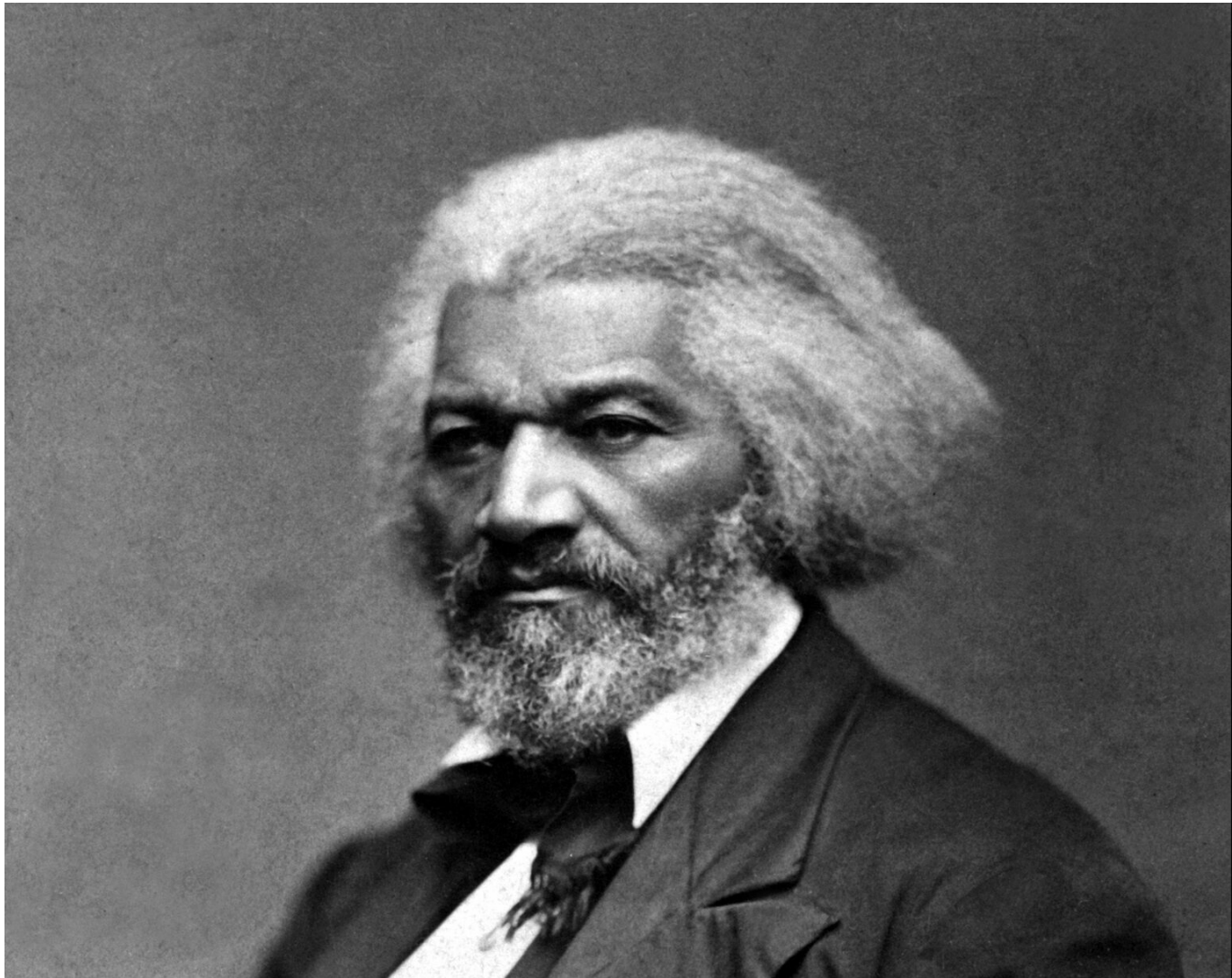
WENDELL PHILLIPS,
MARIA WESTON CHAPMAN, } *Secretaries.*

Boston, May 20, 1844.

Speech on the Dred Scott Decision

by Frederick Douglass

May, 1857



Mr. Chairman, Friends, and Fellow Citizens:

While four millions of our fellow countrymen are in chains — while men, women, and children are bought and sold on the auction-block with horses, sheep, and swine — while the remorseless slave-whip draws the warm blood of our common humanity — it is meet that we assemble as we have done to-day, and lift up our hearts and voices in earnest denunciation of the vile and shocking abomination. It is not for us to be governed by our hopes or our fears in this great work; yet it is natural on occasions like this, to survey the position of the great struggle which is going on between slavery and freedom, and to dwell upon such signs of encouragement as may have been lately developed, and the state of feeling these signs or events have occasioned in us and among the people generally. It is a fitting time to take an observation to ascertain where we are, and what our prospects are.

To many, the prospects of the struggle against slavery seem far from cheering. Eminent men, North and South, in Church and State, tell us that the omens are all against us. Emancipation, they tell us, is a wild, delusive idea; the price of human flesh was never higher than now; slavery was never more closely entwined about the hearts and affections of the southern people than now; that whatever of conscientious scruple, religious conviction, or public policy, which opposed the system of slavery forty or fifty years ago, has subsided; and that slavery never reposed upon a firmer basis than now. Completing this picture of the happy and prosperous condition of this system of wickedness, they tell us that this state of things is to be set to our account. Abolition agitation has done it all. How deep is the misfortune of my poor, bleeding people, if this be so! How lost their condition, if even the efforts of their friends but sink them deeper in ruin!

Without assenting to this strong representation of the increasing strength and stability of slavery, without denouncing what of untruth pervades it, I own myself not insensible to the many difficulties and discouragements, that beset us on every hand. They fling their broad and gloomy shadows across the pathway of every thoughtful colored man in this country. For one, I see them clearly, and feel them sadly. With an earnest, aching heart, I have long looked for the realization of the hope of my people. Standing, as it were, barefoot, and treading upon the sharp and flinty rocks of the present, and looking out upon the boundless sea of the future, I have sought, in my humble way, to penetrate the intervening mists and clouds, and, perchance, to descry, in the dim and shadowy distance, the white flag of freedom, the precise speck of time at which the cruel bondage of my people should end, and the long entombed millions rise from the foul grave of slavery and death. But of that time I can know nothing, and you can know nothing. All is uncertain at that point. One thing, however, is certain; slaveholders are in earnest, and mean to cling to their slaves as long as they can, and to the bitter end. They show no sign of a wish to quit their iron grasp upon the sable throats of their victims. Their motto is, “a firmer hold and a tighter grip” for every new effort that is made to break their cruel power. The case is one of life or death with them, and they will give up only when they must do that or do worse.

In one view the slaveholders have a decided advantage over all opposition. It is well to notice this advantage — the advantage of complete organization. They are organized; and

yet were not at the pains of creating their organizations. The State governments, where the system of slavery exists, are complete slavery organizations. The church organizations in those States are equally at the service of slavery; while the Federal Government, with its army and navy, from the chief magistracy in Washington, to the Supreme Court, and thence to the chief marshalship at New York, is pledged to support, defend, and propagate the crying curse of human bondage. The pen, the purse, and the sword, are united against the simple truth, preached by humble men in obscure places.

This is one view. It is, thank God, only one view; there is another, and a brighter view. David, you know, looked small and insignificant when going to meet Goliath, but looked larger when he had slain his foe. The Malakoff was, to the eye of the world, impregnable, till the hour it fell before the shot and shell of the allied army. Thus hath it ever been. Oppression, organized as ours is, will appear invincible up to the very hour of its fall. Sir, let us look at the other side, and see if there are not some things to cheer our heart and nerve us up anew in the good work of emancipation.

Take this fact — for it is a fact — the anti-slavery movement has, from first to last, suffered no abatement. It has gone forth in all directions, and is now felt in the remotest extremities of the Republic. It started small, and was without capital either in men or money. The odds were all against it. It literally had nothing to lose, and everything to gain. There was ignorance to be enlightened, error to be combatted, conscience to be awakened, prejudice to be overcome, apathy to be aroused, the right of speech to be secured, mob violence to be subdued, and a deep, radical change to be inwrought in the mind and heart of the whole nation. This great work, under God, has gone on, and gone on gloriously. Amid all changes, fluctuations, assaults, and adverses of every kind, it has remained firm in its purpose, steady in its aim, onward and upward, defying all opposition, and never losing a single battle. Our strength is in the growth of anti-slavery conviction, and this has never halted.

There is a significant vitality about this abolition movement. It has taken a deeper, broader, and more lasting hold upon the national heart than ordinary reform movements. Other subjects of much interest come and go, expand and contract, blaze and vanish, but the huge question of American Slavery, comprehending, as it does, not merely the weal or the woe of four millions, and their countless posterity, but the weal or the woe of this entire nation, must increase in magnitude and in majesty with every hour of its history. From a cloud not bigger than a man's hand, it has overspread the heavens. It has risen from a grain not bigger than a mustard seed. Yet see the fowls of the air, how they crowd its branches.

Politicians who cursed it, now defend it; ministers, once dumb, now speak in its praise; and presses, which once flamed with hot denunciations against it, now surround the sacred cause as by a wall of living fire. Politicians go with it as a pillar of cloud by day, and the press as a pillar of fire by night. With these ancient tokens of success, I, for one, will not despair of our cause.

Those who have undertaken to suppress and crush out this agitation for Liberty and humanity, have been most woefully disappointed. Many who have engaged to put it down, have found themselves put down. The agitation has pursued them in all their meanderings, broken in upon their seclusion, and, at the very moment of fancied security, it has settled down upon them like a mantle of unquenchable fire. Clay, Calhoun, and Webster each tried his hand at suppressing the agitation; and they went to their graves disappointed and defeated.

Loud and exultingly have we been told that the slavery question is settled, and settled forever. You remember it was settled thirty-seven years ago, when Missouri was admitted into the Union with a slaveholding constitution, and slavery prohibited in all territory north of thirty-six degrees of north latitude. Just fifteen years afterwards, it was settled again by voting down the right of petition, and gagging down free discussion in Congress. Ten years after this it was settled again by the annexation of Texas, and with it the war with Mexico. In 1850 it was again settled. This was called a final settlement. By it slavery was virtually declared to be the equal of Liberty, and should come into the Union on the same terms. By it the right and the power to hunt down men, women, and children, in every part of this country, was conceded to our southern brethren, in order to keep them in the Union. Four years after this settlement, the whole question was once more settled, and settled by a settlement which unsettled all the former settlements.

The fact is, the more the question has been settled, the more it has needed settling. The space between the different settlements has been strikingly on the decrease. The first stood longer than any of its successors. There is a lesson in these decreasing spaces. The first stood fifteen years — the second, ten years — the third, five years — the fourth stood four years — and the fifth has stood the brief space of two years. This last settlement must be called the Taney settlement. We are now told, in tones of lofty exultation, that the day is lost — all lost — and that we might as well give up the struggle. The highest authority has spoken. The voice of the Supreme Court has gone out over the troubled waves of the National Conscience, saying peace, be still.

This infamous decision of the Slaveholding wing of the Supreme Court maintains that slaves are within the contemplation of the Constitution of the United States, property; that slaves are property in the same sense that horses, sheep, and swine are property; that the old doctrine that slavery is a creature of local law is false; that the right of the slaveholder to his slave does not depend upon the local law, but is secured wherever the Constitution of the United States extends; that Congress has no right to prohibit slavery anywhere; that slavery may go in safety anywhere under the star-spangled banner; that colored persons of African descent have no rights that white men are bound to respect; that colored men of African descent are not and cannot be citizens of the United States.

You will readily ask me how I am affected by this devilish decision — this judicial incarnation of wolfishness? My answer is, and no thanks to the slaveholding wing of the Supreme Court,

my hopes were never brighter than now. I have no fear that the National Conscience will be put to sleep by such an open, glaring, and scandalous tissue of lies as that decision is, and has been, over and over, shown to be. The Supreme Court of the United States is not the only power in this world. It is very great, but the Supreme Court of the Almighty is greater. Judge Taney can do many things, but he cannot perform impossibilities. He cannot bale out the ocean, annihilate the firm old earth, or pluck the silvery star of liberty from our Northern sky. He may decide, and decide again; but he cannot reverse the decision of the Most High. He cannot change the essential nature of things — making evil good, and good evil. Happily for the whole human family, their rights have been defined, declared, and decided in a court higher than the Supreme Court.

“There is a law,” says Brougham, “above all the enactments of human codes, and by that law, unchangeable and eternal, man cannot hold property in man.”

Your fathers have said that man’s right to liberty is self-evident. There is no need of argument to make it clear. The voices of nature, of conscience, of reason, and of revelation, proclaim it as the right of all rights, the foundation of all trust, and of all responsibility. Man was born with it. It was his before he comprehended it. The *deed* conveying it to him is written in the center of his soul, and is recorded in Heaven. The sun in the sky is not more palpable to the sight than man’s right to liberty is to the moral vision. To decide against this right in the person of Dred Scott, or the humblest and most whip-scarred bondman in the land, is to decide against God. It is an open rebellion against God’s government. It is an attempt to undo what God has done, to blot out the broad distinction instituted by the *Allwise* between men and things, and to change the image and superscription of the everliving God into a speechless piece of merchandise.

Such a decision cannot stand. God will be true though every man be a liar. We can appeal from this hell black judgment of the Supreme Court, to the court of common sense and common humanity. We can appeal from man to God. If there is no justice on earth, there is yet justice in heaven. You may close your Supreme Court against the black man’s cry for justice, but you cannot, thank God, close against him the ear of a sympathising world, nor shut up the Court of Heaven. All that is merciful and just, on earth and in Heaven, will execrate and despise this edict of Taney.

If it were at all likely that the people of these free States would tamely submit to this demoniacal judgment, I might feel gloomy and sad over it, and possibly it might be necessary for my people to look for a home in some other country. But as the case stands, we have nothing to fear.

In one point of view, we, the abolitionists and colored people, should meet this decision, unlooked for and monstrous as it appears, in a cheerful spirit. This very attempt to blot out forever the hopes of an enslaved people may be one necessary link in the chain of events preparatory to the downfall and complete overthrow of the whole slave system.

The whole history of the anti-slavery movement is studded with proof that all measures devised and executed with a view to ally and diminish the anti-slavery agitation, have only served to increase, intensify, and embolden that agitation.

This wisdom of the crafty has been confounded, and the counsels of the ungodly brought to nought. It was so with the Fugitive Slave Bill. It was so with the Kansas-Nebraska Bill; and it will be so with this last and most shocking of all pro-slavery devices, this Taney decision.

When great transactions are involved, where the fate of millions is concerned, where a long enslaved and suffering people are to be delivered, I am superstitious enough to believe that the finger of the Almighty may be seen bringing good out of evil, and making the wrath of man redound to his honor, hastening the triumph of righteousness.

The American people have been called upon, in a most striking manner, to abolish and put away forever the system of slavery. The subject has been pressed upon their attention in all earnestness and sincerity. The cries of the slave have gone forth to the world, and up to the throne of God. This decision, in my view, is a means of keeping the nation awake on the subject. It is another proof that God does not mean that we shall go to sleep, and forget that we are a slaveholding nation.

Step by step we have seen the slave power advancing; poisoning, corrupting, and perverting the institutions of the country; growing more and more haughty, imperious, and exacting. The white man's liberty has been marked out for the same grave with the black man's.

The ballot box is desecrated, God's law set at nought, armed legislators stalk the halls of Congress, freedom of speech is beaten down in the Senate. The rivers and highways are infested by border ruffians, and white men are made to feel the iron heel of slavery. This ought to arouse us to kill off the hateful thing. They are solemn warnings to which the white people, as well as the black people, should take heed.

If these shall fail, judgment, more fierce or terrible, may come. The lightning, whirlwind, and earthquake may come. Jefferson said that he trembled for his country when he reflected that God is just, and his justice cannot sleep forever. The time may come when even the crushed worm may turn under the tyrant's feet. Goaded by cruelty, stung by a burning sense of wrong, in an awful moment of depression and desperation, the bondman and bondwoman at the south may rush to one wild and deadly struggle for freedom. Already slaveholders go to bed with Bowie knives, and apprehend death at their dinners. Those who enslave, rob, and torment their cooks, may well expect to find death in their dinner-pots.

The world is full of violence and fraud, and it would be strange if the slave, the constant victim of both fraud and violence, should escape the contagion. He, too, may learn to fight the devil with fire, and for one, I am in no frame of mind to pray that this may be long

deferred.

Two remarkable occurrences have followed the presidential election; one was the unaccountable sickness traced to the National Hotel at Washington, and the other was the discovery of a plan among the slaves, in different localities, to slay their oppressors. Twenty or thirty of the suspected were put to death. Some were shot, some hanged, some burned, and some died under the lash. One brave man owned himself well acquainted with the conspiracy, but said he would rather die than disclose the facts. He received seven hundred and fifty lashes, and his noble spirit went away to the God who gave it. The name of this hero has been by the meanness of tyrants suppressed. Such a man redeems his race. He is worthy to be mentioned with the Hoffers and Tells, the noblest heroes of history. These insurrectionary movements have been put down, but they may break out at any time, under the guidance of higher intelligence, and with a more invincible spirit.

The fire thus kindled, may be revived again;

The flames are extinguished, but the embers remain;

One terrible blast may produce an ignition,

Which shall wrap the whole South in wild conflagration.

The pathway of tyrants lies over volcanoes

The very air they breathe is heavy with sorrows;

Agonizing heart-throbs convulse them while sleeping,

And the wind whispers Death as over them sweeping.

By all the laws of nature, civilization, and of progress, slavery is a doomed system. Not all the skill of politicians, North and South, not all the sophistries of Judges, not all the fulminations of a corrupt press, not all the hypocritical prayers, or the hypocritical refusals to pray of a hollow-hearted priesthood, not all the devices of sin and Satan, can save the vile thing from extermination.

Already a gleam of hope breaks upon us from the southwest. One Southern city has grieved

and astonished the whole South by a preference for freedom. The wedge has entered. Dred Scott, of Missouri, goes into slavery, but St. Louis declares for freedom. The judgment of Taney is not the judgment of St. Louis.

It may be said that this demonstration in St. Louis is not to be taken as an evidence of sympathy with the slave; that it is purely a white man's victory. I admit it. Yet I am glad that white men, bad as they generally are, should gain a victory over slavery. I am willing to accept a judgment against slavery, whether supported by white or black reasons—though I would much rather have it supported by both. He that is not against us, is on our part.

Come what will, I hold it to be morally certain that, sooner or later, by fair means or foul means, in quiet or in tumult, in peace or in blood, in judgment or in mercy, slavery is doomed to cease out of this otherwise goodly land, and liberty is destined to become the settled law of this Republic.

I base my sense of the certain overthrow of slavery, in part, upon the nature of the American Government, the Constitution, the tendencies of the age, and the character of the American people; and this, notwithstanding the important decision of Judge Taney. I know of no soil better adapted to the growth of reform than American soil. I know of no country where the conditions for affecting great changes in the settled order of things, for the development of right ideas of liberty and humanity, are more favorable than here in these United States.

The very groundwork of this government is a good repository of Christian civilization. The Constitution, as well as the Declaration of Independence, and the sentiments of the founders of the Republic, give us a platform broad enough, and strong enough, to support the most comprehensive plans for the freedom and elevation of all the people of this country, without regard to color, class, or clime.

There is nothing in the present aspect of the anti-slavery question which should drive us into the extravagance and nonsense of advocating a dissolution of the American Union as a means of overthrowing slavery, or freeing the North from the malign influence of slavery upon the morals of the Northern people. While the press is at liberty, and speech is free, and the ballot-box is open to the people of the sixteen free States; while the slaveholders are but four hundred thousand in number, and we are fourteen millions; while the mental and moral power of the nation is with us; while we are really the strong and they are the weak, it would look worse than cowardly to retreat from the Union.

If the people of the North have not the power to cope with these four hundred thousand slaveholders inside the Union, I see not how they could get out of the Union. The strength necessary to move the Union must ever be less than is required to break it up. If we have got to conquer the slave power to get out of the Union, I for one would much rather conquer, and stay in the Union. The latter, it strikes me, is the far more rational mode of

action.

I make these remarks in no servile spirit, nor in any superstitious reverence for a mere human arrangement. If I felt the Union to be a curse, I should not be far behind the very chiefest of the disunion Abolitionists in denouncing it. But the evil to be met and abolished is not in the Union. The power arrayed against us is not a parchment.

It is not in changing the dead form of the Union, that slavery is to be abolished in this country. We have to do not with the dead, but the living; not with the past, but the living present.

Those who seek slavery in the Union, and who are everlastingly dealing blows upon the Union, in the belief that they are killing slavery, are most woefully mistaken. They are fighting a dead form instead of a living and powerful reality. It is clearly not because of the peculiar character of our Constitution that we have slavery, but the wicked pride, love of power, and selfish perverseness of the American people.

Slavery lives in this country not because of any paper Constitution, but in the moral blindness of the American people, who persuade themselves that they are safe, though the rights of others may be struck down.

Besides, I think it would be difficult to hit upon any plan less likely to abolish slavery than the dissolution of the Union. The most devoted advocates of slavery, those who make the interests of slavery their constant study, seek a dissolution of the Union as their final plan for preserving slavery from Abolition, and their ground is well taken. Slavery lives and flourishes best in the absence of civilization; a dissolution of the Union would shut up the system in its own congenial barbarism.

The dissolution of the Union would not give the North one single additional advantage over slavery to the people of the North, but would manifestly take from them many which they now certainly possess.

Within the Union we have a firm basis of anti-slavery operation. National welfare, national prosperity, national reputation and honor, and national scrutiny; common rights, common duties, and common country, are so many bridges over which we can march to the destruction of slavery. To fling away these advantages because James Buchanan is President, or Judge Taney gives a lying decision in favor of slavery, does not enter into my notion of common sense.

Mr. Garrison and his friends have been telling us that, while in the Union, we are responsible for slavery; and in so telling us, he and they have told us the truth. But in telling us that we shall cease to be responsible for slavery by dissolving the Union, he and they

have not told us the truth.

There now, clearly, is no freedom from responsibility for slavery, but in the Abolition of slavery. We have gone too far in this business now to sum up our whole duty in the cant phrase of “no Union with slaveholders.” To desert the family hearth may place the recreant husband out of the sight of his hungry children, but it cannot free him from responsibility. Though he should roll the waters of three oceans between him and them, he could not roll from his soul the burden of his responsibility to them; and, as with the private family, so in this instance with the national family. To leave the slave in his chains, in the hands of cruel masters who are too strong for him, is not to free ourselves from responsibility. Again: If I were on board of a pirate ship, with a company of men and women whose lives and liberties I had put in jeopardy, I would not clear my soul of their blood by jumping in the long boat, and singing out no union with pirates. My business would be to remain on board, and while I never would perform a single act of piracy again, I should exhaust every means given me by my position, to save the lives and liberties of those against whom I had committed piracy. In like manner, I hold it is our duty to remain inside this Union, and use all the power to restore to enslaved millions their precious and God-given rights. The more we have done by our voice and our votes, in times past, to rivet their galling fetters, the more clearly and solemnly comes the sense of duty to remain, to undo what we have done. Where, I ask, could the slave look for release from slavery if the Union were dissolved? I have an abiding conviction founded upon long and careful study of the certain effects of slavery upon the moral sense of slaveholding communities, that if the slaves are ever delivered from bondage, the power will emanate from the free States.

All hope that the slaveholders will be self-moved to this great act of justice, is groundless and delusive. Now, as of old, the Redeemer must come from above, not from beneath. To dissolve the Union would be to withdraw the emancipating power from the field.

But I am told this is the argument of expediency. I admit it, and am prepared to show that what is expedient in this instance is right.

“Do justice, though the heavens fall.” Yes, that is a good motto, but I deny that it would be doing justice to the slave to dissolve the Union and leave the slave in his chains to get out by the clemency of his master, or the strength of his arms. Justice to the slave is to break his chains, and going out of the union is to leave him in his chains, and without any probable chance of getting out of them.

But I come now to the great question as to the constitutionality of slavery. The recent slaveholding decision, as well as the teachings of anti-slavery men, make this a fit time to discuss the constitutional pretensions of slavery.

The people of the North are a law abiding people. They love order and respect the means to that end. This sentiment has sometimes led them to the folly and wickedness of trampling

upon the very life of law, to uphold its dead form. This was so in the execution of that thrice accursed Fugitive Slave Bill. Burns and Simms were sent back to the hell of slavery after they had looked upon Bunker Hill, and heard liberty thunder in Faneuil Hall. The people permitted this outrage in obedience to the popular sentiment of reverence for law. While men thus respect law, it becomes a serious matter so to interpret the law as to make it operate against liberty. I have a quarrel with those who fling the Supreme Law of this land between the slave and freedom. It is a serious matter to fling the weight of the Constitution against the cause of human liberty, and those who do it, take upon them a heavy responsibility. Nothing but absolute necessity, shall, or ought to drive me to such a concession to slavery.

When I admit that slavery is constitutional, I must see slavery recognized in the Constitution. I must see that it is there plainly stated that one man of a certain description has a right of property in the body and soul of another man of a certain description. There must be no room for a doubt. In a matter so important as the loss of liberty, everything must be proved beyond all reasonable doubt.

The well known rules of legal interpretation bear me out in this stubborn refusal to see slavery where slavery is not, and only to see slavery where it is.

The Supreme Court has, in its day, done something better than make slaveholding decisions. It has laid down rules of interpretation which are in harmony with the true idea and object of law and liberty.

It has told us that the intention of legal instruments must prevail; and that this must be collected from its words. It has told us that language must be construed strictly in favor of liberty and justice.

It has told us where rights are infringed, where fundamental principles are overthrown, where the general system of the law is departed from, the Legislative intention must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect such objects.

These rules are as old as law. They rise out of the very elements of law. It is to protect human rights, and promote human welfare. Law is in its nature opposed to wrong, and must everywhere be presumed to be in favor of the right. The pound of flesh, but not one drop of blood, is a sound rule of legal interpretation. Besides there is another rule of law as well of common sense, which requires us to look to the ends for which a law is made, and to construe its details in harmony with the ends sought.

Now let us approach the Constitution from the standpoint thus indicated, and instead of finding in it a warrant for the stupendous system of robbery, comprehended in the term

slavery, we shall find it strongly against that system.

“We, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America.”

Such are the objects announced by the instrument itself, and they are in harmony with the Declaration of Independence, and the principles of human well-being. Six objects are here declared, “Union,” “defence,” “welfare,” “tranquility,” and “justice,” and “liberty.”

Neither in the preamble nor in the body of the Constitution is there a single mention of the term *slave* or *slave holder*, *slave master* or *slave state*, neither is there any reference to the color, or the physical peculiarities of any part of the people of the United States. Neither is there anything in the Constitution standing alone, which would imply the existence of slavery in this country.

“We, the people” — not we, the white people — not we, the citizens, or the legal voters — not we, the privileged class, and excluding all other classes but we, the people; not we, the horses and cattle, but we the people — the men and women, the human inhabitants of the United States, do ordain and establish this Constitution, &c.

I ask, then, any man to read the Constitution, and tell me where, if he can, in what particular that instrument affords the slightest sanction of slavery? Where will he find a guarantee for slavery? Will he find it in the declaration that no person shall be deprived of life, liberty, or property, without due process of law? Will he find it in the declaration that the Constitution was established to secure the blessing of liberty? Will he find it in the right of the people to be secure in their persons and papers, and houses, and effects? Will he find it in the clause prohibiting the enactment by any State of a bill of attainder?

These all strike at the root of slavery, and any one of them, but faithfully carried out, would put an end to slavery in every State in the American Union.

Take, for example, the prohibition of a bill of attainder. That is a law entailing on the child the misfortunes of the parent. This principle would destroy slavery in every State of the Union.

The law of slavery is a law of attainder. The child is property because its parent was property, and suffers as a slave because its parent suffered as a slave. Thus the very essence of the whole slave code is in open violation of a fundamental provision of the Constitution, and is in open and flagrant violation of all the objects set forth in the Constitution.

While this and much more can be said, and has been said, and much better said, by Lysander Spooner, William Goodell, Beriah Green, and Gerrit Smith, in favor of the entire unconstitutionality of slavery, what have we on the other side? How is the constitutionality of slavery made out, or attempted to be made out? First, by discrediting and casting away as worthless the most beneficent rules of legal interpretation; by disregarding the plain and common sense reading of the instrument itself; by showing that the Constitution does not mean what it says, and says what it does not mean, by assuming that the written Constitution is to be interpreted in the light of a secret and unwritten understanding of its framers, which understanding is declared to be in favor of slavery. It is in this mean, contemptible, underhand method that the Constitution is pressed into the service of slavery.

They do not point us to the Constitution itself, for the reason that there is nothing sufficiently explicit for their purpose; but they delight in supposed intentions—intentions nowhere expressed in the Constitution, and everywhere contradicted in the Constitution.

Judge Taney lays down this system of interpreting in this wise:

“The general words above quoted would seem to embrace the whole human family, and, if they were used in a similar instrument at this day, would be so understood. But it is too clear for dispute that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they appealed, they would have deserved and received universal rebuke and reprobation.”

“It is difficult, at this day, to realize the state of public opinion respecting that unfortunate class with the civilized and enlightened portion of the world at the time of the Declaration of Independence and the adoption of the Constitution; but history shows they had, for more than a century, been regarded as beings of an inferior order, and unfit associates for the white race, either socially or politically, and had no rights which white men are bound to respect; and the black man might be reduced to slavery, bought and sold, and treated as an ordinary article of merchandise. This opinion, at that time, was fixed and universal with the civilized portion of the white race. It was regarded as an axiom of morals, which no one thought of disputing, and everyone habitually acted upon it, without doubting, for a moment, the correctness of the opinion. And in no nation was this opinion more fixed, and generally acted upon, than in England; the subjects of which government not only seized them on the coast of Africa, but took them, as ordinary merchandise, to where they could make a profit on them. The opinion, thus entertained, was universally maintained on the colonies this side of the Atlantic; accordingly, Negroes of the African race were regarded by them as property, and held and bought and sold as such in every one of the thirteen colonies, which united in the Declaration of Independence, and afterwards formed the

Constitution.”

The argument here is, that the Constitution comes down to us from a slaveholding period and a slaveholding people; and that, therefore, we are bound to suppose that the Constitution recognizes colored persons of African descent, the victims of slavery at that time, as debarred forever from all participation in the benefit of the Constitution and the Declaration of Independence, although the plain reading of both includes them in their beneficent range.

As a man, an American, a citizen, a colored man of both Anglo-Saxon and African descent, I denounce this representation as a most scandalous and devilish perversion of the Constitution, and a brazen misstatement of the facts of history.

But I will not content myself with mere denunciation; I invite attention to the facts.

It is a fact, a great historic fact, that at the time of the adoption of the Constitution, the leading religious denominations in this land were anti-slavery, and were laboring for the emancipation of the colored people of African descent.

The church of a country is often a better index of the state of opinion and feeling than is even the government itself. The Methodists, Baptists, Presbyterians, and the denomination of Friends, were actively opposing slavery, denouncing the system of bondage, with language as burning and sweeping as we employ at this day.

Take the Methodists. In 1780, that denomination said: “The Conference acknowledges that slavery is contrary to the laws of God, man, and nature, and hurtful to society—contrary to the dictates of conscience and true religion, and doing to others that we would not do unto us.” In 1784, the same church declared, “that those who buy, sell, or give slaves away, except for the purpose to free them, shall be expelled immediately.” In 1785, it spoke even more stringently on the subject. It then said: “We hold in the deepest abhorrence the practice of slavery, and shall not cease to seek its destruction by all wise and proper means.” So much for the position of the Methodist Church in the early history of the Republic, in those days of darkness to which Judge Taney refers.

Let us now see how slavery was regarded by the Presbyterian Church at that early date.

In 1794, the General Assembly of that body pronounced the following judgment in respect to slavery, slaveholders, and slaveholding. “1st Timothy, 1st chapter, 10th verse: ‘The law was made for man stealers.’ ‘This crime among the Jews exposed the perpetrators of it to capital punishment.’ Exodus, xxi, 15. — And the apostle here classes them with sinners of the first rank. The word he uses in its original import, comprehends all who are concerned in bringing any of the human race into slavery, or in retaining them in it. Stealers of men are

all those who bring off slaves or freemen, and keep, sell, or buy them. ‘To steal a freeman’ says Grotius, ‘is the highest kind of theft.’ In other instances, we only steal human property, but when we steal or retain men in slavery, we seize those who, in common with ourselves, are constituted, by the original grant, lords of the earth.”

I might quote, at length, from the sayings of the Baptist Church and the sayings of eminent divines at this early period, showing that Judge Taney has grossly falsified history, but will not detain you with these quotations.

The testimony of the church, and the testimony of the founders of this Republic, from the declaration downward, prove Judge Taney false; as false to history as he is to law.

Washington and Jefferson, and Adams, and Jay, and Franklin, and Rush, and Hamilton, and a host of others, held no such degrading views on the subject of slavery as are imputed by Judge Taney to the Fathers of the Republic. All, at that time, looked for the gradual but certain abolition of slavery, and shaped the constitution with a view to this grand result.

George Washington can never be claimed as a fanatic, or as the representative of fanatics. The slaveholders impudently use his name for the base purpose of giving respectability to slavery. Yet, in a letter to Robert Morris, Washington uses this language – language which, at this day, would make him a terror of the slaveholders, and the natural representative of the Republican party.

“There is not a man living, who wishes more sincerely than I do, to see some plan adopted for the abolition of slavery; but there is only one proper and effectual mode by which it can be accomplished, and that is by Legislative authority; and this, as far as my suffrage will go, shall not be wanting.”

Washington only spoke the sentiment of his times. There were, at that time, Abolition societies in the slave States – Abolition societies in Virginia, in North Carolina, in Maryland, in Pennsylvania, and in Georgia – all slaveholding States. Slavery was so weak, and liberty so strong, that free speech could attack the monster to its teeth. Men were not mobbed and driven out of the presence of slavery, merely because they condemned the slave system. The system was then on its knees imploring to be spared, until it could get itself decently out of the world. In the light of these facts, the Constitution was framed, and framed in conformity to it.

It may, however, be asked, if the Constitution were so framed that the rights of all the people were naturally protected by it, how happens it that a large part of the people have been held in slavery ever since its adoption? Have the people mistaken the requirements of their own Constitution?

The answer is ready. The Constitution is one thing, its administration is another, and, in this instance, a very different and opposite thing. I am here to vindicate the law, not the administration of the law. It is the written Constitution, not the unwritten Constitution, that is now before us. If, in the whole range of the Constitution, you can find no warrant for slavery, then we may properly claim it for liberty.

Good and wholesome laws are often found dead on the statute book. We may condemn the practice under them and against them, but never the law itself. To condemn the good law with the wicked practice, is to weaken, not to strengthen our testimony.

It is no evidence that the Bible is a bad book, because those who profess to believe the Bible are bad. The slaveholders of the South, and many of their wicked allies at the North, claim the Bible for slavery; shall we, therefore, fling the Bible away as a pro-slavery book? It would be as reasonable to do so as it would be to fling away the Constitution. We are not the only people who have illustrated the truth, that a people may have excellent law, and detestable practices. Our Savior denounces the Jews, because they made void the law by their traditions. We have been guilty of the same sin.

The American people have made void our Constitution by just such traditions as Judge Taney and Mr. Garrison have been giving to the world of late, as the true light in which to view the Constitution of the United States. I shall follow neither. It is not what Moses allowed for the hardness of heart, but what God requires, ought to be the rule.

It may be said that it is quite true that the Constitution was designed to secure the blessings of liberty and justice to the people who made it, and to the posterity of the people who made it, but was never designed to do any such thing for the colored people of African descent.

This is Judge Taney's argument, and it is Mr. Garrison's argument, but it is not the argument of the Constitution. The Constitution imposes no such mean and satanic limitations upon its own beneficent operation. And, if the Constitution makes none, I beg to know what right has anybody, outside of the Constitution, for the special accommodation of slaveholding villainy, to impose such a construction upon the Constitution?

The Constitution knows all the human inhabitants of this country as "the people." It makes, as I have said before, no discrimination in favor of, or against, any class of the people, but is fitted to protect and preserve the rights of all, without reference to color, size, or any physical peculiarities. Besides, it has been shown by William Goodell and others, that in eleven out of the old thirteen States, colored men were legal voters at the time of the adoption of the Constitution.

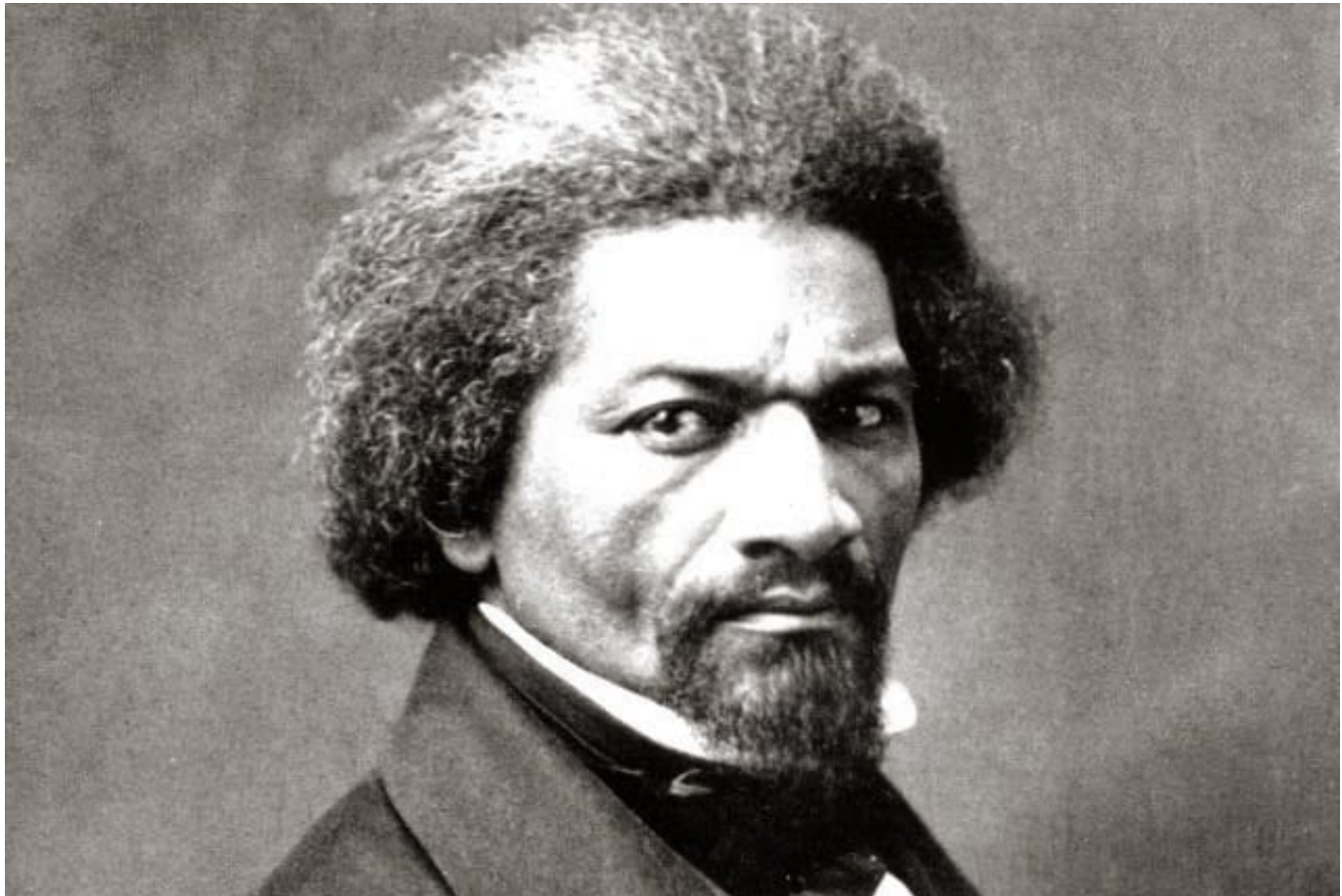
In conclusion, let me say, all I ask of the American people is, that they live up to the

Constitution, adopt its principles, imbibe its spirit, and enforce its provisions. When this is done, the wounds of my bleeding people will be healed, the chain will no longer rust on their ankles, their backs will no longer be torn by the bloody lash, and liberty, the glorious birthright of our common humanity, will become the inheritance of all the inhabitants of this highly favored country.

The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?

by Frederick Douglass

March 26, 1860



...I proceed to the discussion. And first a word about the question. Much will be gained at the outset if we fully and clearly understand the real question under discussion. Indeed, nothing is or can be understood. This are often confounded and treated as the same, for no better reason than that they resemble each other, even while they are in their nature and character totally distinct and even directly opposed to each other. This jumbling up things is a sort of dust-throwing which is often indulged in by small men who argue for victory rather than for truth. Thus, for instance, the American Government and the American Constitution are spoken of in a manner which would naturally lead the hearer to believe that one is identical with the other; when the truth is, they are distinct in character as is a ship and a compass. The one may point right and the other steer wrong. A chart is one thing, the course of the vessel is another. The Constitution may be right, the Government is wrong. If the Government has been governed by mean, sordid, and wicked passions, it does not follow that the Constitution is mean, sordid, and wicked. What, then, is the question? I will state it. But first let me state what is not the question. It is not whether slavery existed in the United States at the time of the adoption of the Constitution; it is not whether slaveholders took part in the framing of the Constitution; it is not whether those slaveholders, in their hearts, intended to secure certain advantages in that instrument for slavery; it is not whether the American Government has been wielded during seventy-two years in favour of the propagation and permanence of slavery; it is not whether a pro-slavery interpretation has been put upon the Constitution by the American Courts — all these points may be true or they may be false, they may be accepted or they may be rejected, without in any wise affecting the real question in debate. The real and exact question between myself and the class of persons represented by the speech at the City Hall may be fairly stated thus: — 1st, Does the United States Constitution guarantee to any class or description of people in that country the right to enslave, or hold as property, any other class or description of people in that country? 2nd, Is the dissolution of the union between the slave and free States required by fidelity to the slaves, or by the just demands of conscience? Or, in other words, is the refusal to exercise the elective franchise, and to hold office in America, the surest, wisest, and best way to abolish slavery in America?

To these questions the Garrisonians say Yes. They hold the Constitution to be a slaveholding instrument, and will not cast a vote or hold office, and denounce all who vote or hold office, no matter how faithfully such persons labour to promote the abolition of slavery. I, on the other hand, deny that the Constitution guarantees the right to hold property in man, and believe that the way to abolish slavery in America is to vote such men into power as well use their powers for the abolition of slavery. This is the issue plainly stated, and you shall judge between us. Before we examine into the disposition, tendency, and character of the Constitution, I think we had better ascertain what the Constitution itself is. Before looking for what it means, let us see what it is. Here, too, there is much dust to be cleared away. What, then, is the Constitution? I will tell you. It is not even like the British Constitution, which is made up of enactments of Parliament, decisions of Courts, and the established

usages of the Government. The American Constitution is a written instrument full and complete in itself. No Court in America, no Congress, no President, can add a single word thereto, or take a single word therefrom. It is a great national enactment done by the people, and can only be altered, amended, or added to by the people. I am careful to make this statement here; in America it would not be necessary. It would not be necessary here if my assailant had shown the same desire to be set before you the simple truth, which he manifested to make out a good case for himself and friends. Again, it should be borne in mind that the mere text, and only the text, and not any commentaries or creeds written by those who wished to give the text a meaning apart from its plain reading, was adopted as the Constitution of the United States. It should also be borne in mind that the intentions of those who framed the Constitution, be they good or bad, for slavery or against slavery, are so respected so far, and so far only, as we find those intentions plainly stated in the Constitution. It would be the wildest of absurdities, and lead to endless confusion and mischiefs, if, instead of looking to the written paper itself, for its meaning, it were attempted to make us search it out, in the secret motives, and dishonest intentions, of some of the men who took part in writing it. It was what they said that was adopted by the people, not what they were ashamed or afraid to say, and really omitted to say. Bear in mind, also, and the fact is an important one, that the framers of the Constitution sat with doors closed, and that this was done purposely, that nothing but the result of their labours should be seen, and that that result should be judged of by the people free from any of the bias shown in the debates. It should also be borne in mind, and the fact is still more important, that the debates in the convention that framed the Constitution, and by means of which a pro-slavery interpretation is now attempted to be forced upon that instrument, were not published till more than a quarter of a century after the presentation and the adoption of the Constitution.

These debates were purposely kept out of view, in order that the people should adopt, not the secret motives or unexpressed intentions of any body, but the simple text of the paper itself. Those debates form no part of the original agreement. I repeat, the paper itself, and only the paper itself, with its own plainly written purposes, is the Constitution. It must stand or fall, flourish or fade, on its own individual and self-declared character and objects. Again, where would be the advantage of a written Constitution, if, instead of seeking its meaning in its words, we had to seek them in the secret intentions of individuals who may have had something to do with writing the paper? What will the people of America a hundred years hence care about the intentions of the scribes who wrote the Constitution? These men are already gone from us, and in the course of nature were expected to go from us. They were for a generation, but the Constitution is for ages. Whatever we may owe to them, we certainly owe it to ourselves, and to mankind, and to God, to maintain the truth of our own language, and to allow no villainy, not even the villainy of holding men as slaves – which Wesley says is the sum of all villainies – to shelter itself under a fair-seeming and virtuous language. We owe it to ourselves to compel the devil to wear his own garments, and to make wicked laws speak out their wicked intentions. Common sense, and common justice, and sound rules of interpretation all drive us to the words of the law for the meaning of the

law. The practice of the Government is dwelt upon with much fervour and eloquence as conclusive as to the slaveholding character of the Constitution. This is really the strong point and the only strong point, made in the speech in the City Hall. But good as this argument is, it is not conclusive. A wise man has said that few people have been found better than their laws, but many have been found worse. To this last rule America is no exception. Her laws are one thing, her practice is another thing. We read that the Jews made void the law by their tradition, that Moses permitted men to put away their wives because of the hardness of their hearts, but that this was not so at the beginning. While good laws will always be found where good practice prevails, the reverse does not always hold true. Far from it. The very opposite is often the case. What then? Shall we condemn the righteous law because wicked men twist it to the support of wickedness? Is that the way to deal with good and evil? Shall we blot out all distinction between them, and hand over to slavery all that slavery may claim on the score of long practice? Such is the course commended to us in the City Hall speech. After all, the fact that men go out of the Constitution to prove it pro-slavery, whether that going out is to the practice of the Government, or to the secret intentions of the writers of the paper, the fact that they do go out is very significant. It is a powerful argument on my side. It is an admission that the thing for which they are looking is not to be found where only it ought to be found, and that is in the Constitution itself. If it is not there, it is nothing to the purpose, be it wheresoever else it may be. But I shall have no more to say on this point hereafter.

The very eloquent lecturer at the City Hall doubtless felt some embarrassment from the fact that he had literally to *give* the Constitution a pro-slavery interpretation; because upon its face it of itself conveys no such meaning, but a very opposite meaning. He thus sums up what he calls the slaveholding provisions of the Constitution. I quote his own words: — “Article 1, section 9, provides for the continuance of the African slave trade for the 20 years, after the adoption of the Constitution. Art. 4, section 9, provides for the recovery from the other States of fugitive slaves. Art. 1, section 2, gives the slave States a representation of the three-fifths of all the slave population; and Art. 1, section 8, requires the President to use the military, naval, ordnance, and militia resources of the entire country for the suppression of slave insurrection, in the same manner as he would employ them to repel invasion.” Now any man reading this statement, or hearing it made with such a show of exactness, would unquestionably suppose that he speaker or writer had given the plain written text of the Constitution itself. I can hardly believe that he intended to make any such impression. It would be a scandalous imputation to say he did. Any yet what are we to make of it? How can we regard it? How can he be screened from the charge of having perpetrated a deliberate and point-blank misrepresentation? That individual has seen fit to place himself before the public as my opponent, and yet I would gladly find some excuse for him. I do not wish to think as badly of him as this trick of his would naturally lead me to think. Why did he not read the Constitution? Why did he read that which was not the Constitution? He pretended to be giving chapter and verse, section and clause, paragraph and provision. The words of the Constitution were before him. Why then did he not give you the plain words of the Constitution? Oh, sir, I fear that the gentleman knows too well why he

did not. It so happens that no such words as “African slave trade,” no such words as “slave insurrections,” are anywhere used in that instrument. These are the words of that orator, and not the words of the Constitution of the United States. Now you shall see a slight difference between my manner of treating this subject and what which my opponent has seen fit, for reasons satisfactory to himself, to pursue. What he withheld, that I will spread before you: what he suppressed, I will bring to light: and what he passed over in silence, I will proclaim: that you may have the whole case before you, and not be left to depend upon either his, or upon my inferences or testimony. Here then are several provisions of the Constitution to which reference has been made. I read them word for word just as they stand in the paper, called the United States Constitution, Art. I, sec. 2. “Representatives and direct taxes shall be apportioned among the several States which may be included in this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term years, and excluding Indians not taxed, three-fifths of all other persons; Art. I, sec. 9. The migration or importation of such persons as any of the States now existing shall think fit to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding tend dollars for each person; Art. 4, sec. 2. No person held to service or labour in one State, under the laws thereof, escaping into another shall, in consequence of any law or regulation therein, be discharged from service or labour; but shall be delivered up on claim of the party to whom such service or labour may be due; Art. I, sec. 8. To provide for calling for the militia to execute the laws of the Union, suppress insurrections, and repel invasions.” Here then, are those provisions of the Constitution, which the most extravagant defenders of slavery can claim to guarantee a right of property in man. These are the provisions which have been pressed into the service of the human fleshmongers of America. Let us look at them just as they stand, one by one. Let us grant, for the sake of the argument, that the first of these provisions, referring to the basis of representation and taxation, does refer to slaves. We are not compelled to make that admission, for it might fairly apply to aliens — persons living in the country, but not naturalized. But giving the provisions the very worse construction, what does it amount to? I answer — It is a downright disability laid upon the slaveholding States; one which deprives those States of two-fifths of their natural basis of representation. A black man in a free State is worth just two-fifths more than a black man in a slave State, as a basis of political power under the Constitution. Therefore, instead of encouraging slavery, the Constitution encourages freedom by giving an increase of “two-fifths” of political power to free over slave States. So much for the three-fifths clause; taking it at is worst, it still leans to freedom, not slavery; for, be it remembered that the Constitution nowhere forbids a coloured man to vote. I come to the next, that which it is said guaranteed the continuance of the African slave trade for twenty years. I will also take that for just what my opponent alleges it to have been, although the Constitution does not warrant any such conclusion. But, to be liberal, let us suppose it did, and what follows? Why, this — that this part of the Constitution, so far as the slave trade is concerned, became a dead letter more than 50 years ago, and now binds no man’s conscience for the continuance of any slave trade whatsoever. Mr. Thompson is just 52 years too late in

dissolving the Union on account of this clause. He might as well dissolve the British Government, because Queen Elizabeth granted to Sir John Hawkins to import Africans into the West Indies 300 years ago! But there is still more to be said about this abolition of the slave trade. Men, at that time, both in England and in America, looked upon the slave trade as the life of slavery. The abolition of the slave trade was supposed to be the certain death of slavery. Cut off the stream, and the pond will dry up, was the common notion at the time.

Wilberforce and Clarkson, clear-sighted as they were, took this view; and the American statesmen, in providing for the abolition of the slave trade, thought they were providing for the abolition of the slavery. This view is quite consistent with the history of the times. All regarded slavery as an expiring and doomed system, destined to speedily disappear from the country. But, again, it should be remembered that this very provision, if made to refer to the African slave trade at all, makes the Constitution anti-slavery rather than for slavery; for it says to the slave States, the price you will have to pay for coming into the American Union is, that the slave trade, which you would carry on indefinitely out of the Union, shall be put an end to in twenty years if you come into the Union. Secondly, if it does apply, it expired by its own limitation more than fifty years ago. Thirdly, it is anti-slavery, because it looked to the abolition of slavery rather than to its perpetuity. Fourthly, it showed that the intentions of the framers of the Constitution were good, not bad. I think this is quite enough for this point. I go to the “slave insurrection” clause, though, in truth, there is no such clause. The one which is called so has nothing whatever to do with slaves or slaveholders any more than your laws for suppression of popular outbreaks has to do with making slaves of you and your children. It is only a law for suppression of riots or insurrections. But I will be generous here, as well as elsewhere, and grant that it applies to slave insurrections. Let us suppose that an anti-slavery man is President of the United States (and the day that shall see this the case is not distant) and this very power of suppressing slave insurrections would put an end to slavery. The right to put down an insurrection carries with it the right to determine the means by which it shall be put down. If it should turn out that slavery is a source of insurrection, that there is no security from insurrection while slavery lasts, why, the Constitution would be best obeyed by putting an end to slavery, and an anti-slavery Congress would do the very same thing. Thus, you see, the so-called slave-holding provisions of the American Constitution, which a little while ago looked so formidable, are, after all, no defence or guarantee for slavery whatever. But there is one other provision. This is called the “Fugitive Slave Provision.” It is called so by those who wish to make it subserve the interest of slavery in America, and the same by those who wish to uphold the views of a party in this country. It is put thus in the speech at the City Hall: — “Let us go back to 1787, and enter Liberty Hall, Philadelphia, where sat in convention the illustrious men who framed the Constitution — with George Washington in the chair. On the 27th of September, Mr. Butler and Mr. Pinckney, two delegates from the State of South Carolina, moved that the Constitution should require that fugitive slaves and servants should be delivered up like criminals, and after a discussion on the subject, the clause, as it stands in the Constitution, was adopted. After this, in the conventions held in the several States to ratify the Constitution, the same meaning was attached to the words. For example, Mr. Madison

(afterwards President), when recommending the Constitution to his constituents, told them that the clause would secure them their property in slaves.” I must ask you to look well to this statement. Upon its face, it would seem a full and fair statement of the history of the transaction it professes to describe and yet I declare unto you, knowing as I do the facts in the case, my utter amazement at the downright untruth conveyed under the fair seeming words now quoted. The man who could make such a statement may have all the craftiness of a lawyer, but who can accord to him the candour of an honest debater? What could more completely destroy all confidence in his statements? Mark you, the orator had not allowed his audience to hear read the provision of the Constitution to which he referred. He merely characterized it as one to “deliver up fugitive slaves and servants like criminals,” and tells you that this was done “after discussion.” But he took good care not to tell you what was the nature of that discussion. He have would have spoiled the whole effect of his statement had he told you the whole truth. Now, what are the facts connected with this provision of the Constitution? You shall have them. It seems to take two men to tell the truth. It is quite true that Mr. Butler and Mr. Pinckney introduced a provision expressly with a view to the recapture of fugitive slaves: it is quite true also that there was some discussion on the subject – and just here the truth shall come out. These illustrious kidnappers were told promptly in that discussion that no such idea as property in man should be admitted into the Constitution. The speaker in question might have told you, and he would have told you but the simple truth, if he had told you that he proposition of Mr. Butler and Mr. Pinckney – which he leads you to infer was adopted by the convention that from the Constitution – was, in fact, promptly and indignantly rejected by that convention. He might have told you, had it suited his purpose to do so, that the words employed in the first draft of the fugitive slave clause were such as applied to the condition of slaves, and expressly declared that persons held to “servitude” should be given up; but that the word “servitude” was struck from the provision, for the very reason that it applied to slaves. He might have told you that the same Mr. Madison declared that the word was struck out because the convention would not consent that the idea of property in men should be admitted into the Constitution. The fact that Mr. Madison can be cited on both sides of this question is another evidence of the folly and absurdity of making the secret intentions of the framers the criterion by which the Constitution is to be construed. But it may be asked – if this clause does not apply to slaves, to whom does it apply?

I answer, that when adopted, it applies to a very large class of persons – namely, redemptioners – persons who had come to America from Holland, from Ireland, and other quarters of the globe – like the Coolies to the West Indies – and had, for a consideration duly paid, become bound to “serve and labour” for the parties to whom their service and labour was due. It applies to indentured apprentices and others who have become bound for a consideration, under contract duly made, to serve and labour, to such persons this provision applies, and only to such persons. The plain reading of this provision shows that it applies, and that it can only properly and legally apply, to persons “bound to service.” Its object plainly is, to secure the fulfillment of contracts for “service and labour.” It applies to indentured apprentices, and any other persons from whom service and labour may be due.

The legal condition of the slave puts him beyond the operation of this provision. He is not described in it. He is a simple article of property. He does not owe and cannot owe service. He cannot even make a contract. It is impossible for him to do so. He can no more make such a contract than a horse or an ox can make one. This provision, then, only respects persons who owe service, and they only can owe service who can receive an equivalent and make a bargain. The slave cannot do that, and is therefore exempted from the operation of this fugitive provision. In all matters where laws are taught to be made the means of oppression, cruelty, and wickedness, I am for strict construction. I will concede nothing. It must be shown that it is so nominated in the bond. The pound of flesh, but not one drop of blood. The very nature of law is opposed to all such wickedness, and makes it difficult to accomplish such objects under the forms of law. Law is not merely an arbitrary enactment with regard to justice, reason, or humanity. Blackstone defines it to be a rule prescribed by the supreme power of the State commanding what is right and forbidding what is wrong. The speaker at the City Hall laid down some rules of legal interpretation. These rules send us to the history of the law for its meaning. I have no objection to such a course in ordinary cases of doubt. But where human liberty and justice are at stake, the case falls under an entirely different class of rules. There must be something more than history – something more than tradition. The Supreme Court of the United States lays down this rule, and it meets the case exactly – “Where rights are infringed – where the fundamental principles of the law are overthrown – where the general system of the law is departed from, the legislative intention must be expressed with irresistible clearness.” The same court says that the language of the law must be construed strictly in favour of justice and liberty. Again, there is another rule of law. It is – Where a law is susceptible of two meanings, the one making it accomplish an innocent purpose, and the other making it accomplish a wicked purpose, we must in all cases adopt that which makes it accomplish an innocent purpose. Again, the details of a law are to be interpreted in the light of the declared objects sought by the law. I set these rules down against those employed at the City Hall. To me they seem just and rational. I only ask you to look at the American Constitution in the light of them, and you will see with me that no man is guaranteed a right of property in man, under the provisions of that instrument. If there are two ideas more distinct in their character and essence than another, those ideas are “persons” and “property,” “men” and “things.” Now, when it is proposed to transform persons into “property” and men into beasts of burden, I demand that the law that completes such a purpose shall be expressed with irresistible clearness. The thing must not be left to inference, but must be done in plain English. I know how this view of the subject is treated by the class represented at the City Hall. They are in the habit of treating the Negro as an exception to general rules. When their own liberty is in question they will avail themselves of all rules of law which protect and defend their freedom; but when the black man’s rights are in question they concede everything, admit everything for slavery, and put liberty to the proof. They reserve the common law usage, and presume the Negro a slave unless he can prove himself free. I, on the other hand, presume him free unless he is proved to be otherwise. Let us look at the objects for which the Constitution was framed and adopted, and see if slavery is one of them. Here are its own objects as set forth by itself: – “We, the people of these United

States, in order to form a more perfect union, establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution of the United States of America.” The objects here set forth are six in number: union, defence, welfare, tranquility, justice, and liberty. These are all good objects, and slavery, so far from being among them, is a foe of them all. But it has been said that Negroes are not included within the benefits sought under this declaration. This is said by the slaveholders in America — it is said by the City Hall orator — but it is not said by the Constitution itself. Its language is “we the people;” not we the white people, not even we the citizens, not we the privileged class, not we the high, not we the low, but we the people; not we the horses, sheep, and swine, and wheel-barrows, but we the people, we the human inhabitants; and, if Negroes are people, they are included in the benefits for which the Constitution of America was ordained and established. But how dare any man who pretends to be a friend to the Negro thus gratuitously concede away what the Negro has a right to claim under the Constitution? Why should such friends invent new arguments to increase the hopelessness of his bondage? This, I undertake to say, as the conclusion of the whole matter, that the constitutionality of slavery can be made out only by disregarding the plain and common-sense reading of the Constitution itself; by discrediting and casting away as worthless the most beneficent rules of legal interpretation; by ruling the Negro outside of these beneficent rules; by claiming that the Constitution does not mean what it says, and that it says what it does not mean; by disregarding the written Constitution, and interpreting it in the light of a secret understanding. It is in this mean, contemptible, and underhand method that the American Constitution is pressed into the service of slavery. They go everywhere else for proof that the Constitution declares that no person shall be deprived of life, liberty, or property without due process of law; it secures to every man the right of trial by jury, the privilege of the writ of habeas corpus — the great writ that put an end to slavery and slave-hunting in England — and it secures to every State a republican form of government. Anyone of these provisions in the hands of abolition statesmen, and backed up by a right moral sentiment, would put an end to slavery in America. The Constitution forbids the passing of a bill of attainder: that is, a law entailing upon the child the disabilities and hardships imposed upon the parent. Every slave law in America might be repealed on this very ground. The slave is made a slave because his mother is a slave. But to all this it is said that the practice of the American people is against my view. I admit it. They have given the Constitution a slaveholding interpretation. I admit it. They have committed innumerable wrongs against the Negro in the name of the Constitution. Yes, I admit it all; and I go with him who goes farthest in denouncing these wrongs. But it does not follow that the Constitution is in favour of these wrongs because the slaveholders have given it that interpretation. To be consistent in his logic, the City Hall speaker must follow the example of some of his brothers in America — he must not only fling away the Constitution, but the Bible. The Bible must follow the Constitution, for that, too, has been interpreted for slavery by American divines. Nay, more, he must not stop with the Constitution of America, but make war with the British Constitution, for, if I mistake not, the gentleman is opposed to the union of Church and State. In America he called himself a Republican. Yet he does not go

for breaking down the British Constitution, although you have a Queen on the throne, and bishops in the House of Lords.

My argument against the dissolution of the American Union is this: It would place the slave system more exclusively under the control of the slaveholding States, and withdraw it from the power in the Northern States which is opposed to slavery. Slavery is essentially barbarous in its character. It, above all things else, dreads the presence of an advanced civilisation. It flourishes best where it meets no reproving frowns, and hears no condemning voices. While in the Union it will meet with both. Its hope of life, in the last resort, is to get out of the Union. I am, therefore, for drawing the bond of the Union more completely under the power of the Free States. What they most dread, that I most desire. I have much confidence in the instincts of the slaveholders. They see that the Constitution will afford slavery no protection when it shall cease to be administered by slaveholders. They see, moreover, that if there is once a will in the people of America to abolish slavery, this is no word, no syllable in the Constitution to forbid that result. They see that the Constitution has not saved slavery in Rhode Island, in Connecticut, in New York, or Pennsylvania; that the Free States have only added three to their original number. There were twelve Slave States at the beginning of the Government: there are fifteen now. The dissolution of the Union would not give the North a single advantage over slavery, but would take from it many. Within the Union we have a firm basis of opposition to slavery. It is opposed to all the great objects of the Constitution. The dissolution of the Union is not only an unwise but a cowardly measure — 15 millions running away from three hundred and fifty thousand slaveholders. Mr. Garrison and his friends tell us that while in the Union we are responsible for slavery. He and they sing out “No Union with slaveholders,” and refuse to vote. I admit our responsibility for slavery while in the Union but I deny that going out of the Union would free us from that responsibility. There now clearly is no freedom from responsibility for slavery to any American citizen short to the abolition of slavery. The American people have gone quite too far in this slaveholding business now to sum up their whole business of slavery by singing out the cant phrase, “No union with slaveholders.” To desert the family hearth may place the recreant husband out of the presence of his starving children, but this does not free him from responsibility. If a man were on board of a pirate ship, and in company with others had robbed and plundered, his whole duty would not be preformed simply by taking the longboat and singing out, “No union with pirates.” His duty would be to restore the stolen property. The American people in the Northern States have helped to enslave the black people. Their duty will not have been done till they give them back their plundered rights. Reference was made at the City Hall to my having once held other opinions, and very different opinions to those I have now expressed. An old speech of mine delivered fourteen years ago was read to show — I know not what. Perhaps it was to show that I am not infallible. If so, I have to say in defence, that I never pretended to be. Although I cannot accuse myself of being remarkably unstable, I do not pretend that I have never altered my opinion both in respect to men and things. Indeed, I have been very much modified both in feeling and opinion within the last fourteen years. When I escaped from slavery, and was introduced to the Garrisonians, I adopted very many of their opinions, and

defended them just as long as I deemed them true. I was young, had read but little, and naturally took some things on trust. Subsequent experience and reading have led me to examine for myself. This had brought me to other conclusions. When I was a child, I thought and spoke as a child. But the question is not as to what were my opinions fourteen years ago, but what they are now. If I am right now, it really does not matter what I was fourteen years ago. My position now is one of reform, not of revolution. I would act for the abolition of slavery through the Government – not over its ruins. If slaveholders have ruled the American Government for the last fifty years, let the anti-slavery men rule the nation for the next fifty years. If the South has made the Constitution bend to the purposes of slavery, let the North now make that instrument bend to the cause of freedom and justice. If 350,000 slaveholders have, by devoting their energies to that single end, been able to make slavery the vital and animating spirit of the American Confederacy for the last 72 years, now let the freemen of the North, who have the power in their own hands, and who can make the American Government just what they think fit, resolve to blot out for ever the foul and haggard crime, which is the blight and mildew, the curse and the disgrace of the whole United States.

Session 4

The Evolution of the First Amendment: What Happened and Why It Matters
Dr. Tim Shiell

Civic Literacy and Citizenship
A Symposium for High School Teachers
Sponsored by UW-Madison Center for the Study of Liberal Democracy and Jack Miller Center

THE EVOLUTION OF THE FIRST AMENDMENT: WHAT HAPPENED AND WHY IT MATTERS
Dr. Tim Shiell, Director, Center for the Study of Institutions and Innovation
UW-Stout

The First Amendment is an essential component of civic literacy and citizenship, so essential it is often referred to as our “first freedom.” The more one understands the rationales for and limitations on freedom of religion; freedom of speech, press, and assembly; and the right to petition government the more informed and effective a citizen one can be. This is especially true because the meaning and importance of the First Amendment to the U.S. Constitution has radically changed from the nation’s founding era to 21st century, and most First Amendment doctrines have technical definitions misunderstood by the average citizen. Yet the changes are often controversial and have far-reaching impacts on individuals and society as a whole. The objectives of the session are to provide food for thought and potential classroom applications.

For the workshop, please read (Included):

<https://www.nytimes.com/2019/02/12/opinion/college-board-sat-ap.html> This is a short op-ed piece discussing the increased role of constitutional knowledge in the SAT exam.

<https://www.usatoday.com/story/news/politics/2018/04/06/what-first-amendment-protects-and-what-doesnt/469920002/> and <https://www.cnn.com/2017/04/27/politics/first-amendment-explainer-trnd/index.html> These are short op-ed pieces discussing some basic First Amendment applications.

Geoffrey R. Stone, “Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century,” 36 Pepp. L. Rev. 2 (2009). You can download it at: <http://digitalcommons.pepperdine.edu/plr/vol36/iss2/2> This is an accessible review of major free speech developments during the 1900s by one of the foremost constitutional scholars.

Some non-required further resources you may find useful (Not Included):

<https://www.freedomforuminstitute.org/wp-content/uploads/2016/10/FirstFreedoms.pdf> This is a collection of 23 “seminar” plans for selected cases involving each of the five First Amendment rights.

<https://www.freespeechweek.org/celebration-ideas/freedom-of-speech-lesson-plans/> This provides links to lesson plans from more than a dozen reputable sources.

<https://www.congress.gov/content/conan/pdf/GPO-CONAN-REV-2016-10-2.pdf> This is a government publication addressing dozens of specific First Amendment topics.

<https://www.thefire.org/free-speech-history-podcast/> The Foundation for Individual Rights in Education (FIRE) is the leading defender of First Amendment rights in higher education. Amongst their many free resources available to the public are a series of podcasts on the history of free speech.

Some Wisconsin FA decisions of Interest:

- *State ex rel Weiss v. District Board 76* Wis. 177 (1890) (public school Bible reading)
- *Milwaukee Social Democratic Pub. Co. v. Burleson*, 255 U.S. 407 (1921) and *Berger v. United States*, 255 U.S. 22 (1921) (freedom of the press and national security)
- *Milwaukee County v. Carter*, 258 Wis. 139 (1950) (freedom of religious speech)
- *State v. Givens*, 28 Wis. 2d 109 (1965) (protest as disorderly conduct)
- *Kois v. Wisconsin*, 408 U.S. 229 (1972) (obscenity)
- *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (free exercise of religion)
- *United States of America v. Progressive, Inc., Erwin Knoll, Samuel Day, Jr., and Howard Morland*, 467 F. Supp. 990 (1979) (freedom of the press and national security)
- *UWM Post v. Board of Regents of the University of Wisconsin*, 774 F. Supp. 1163 (E.D. Wis. 1991) (hate speech)
- *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (hate crime vs. hate speech)
- *Koser v. County of Price*, 834 F. Supp. 305 (W.D. Wis. 1993) (flag desecration and incitement)
- *King v. Village of Waunakee*, 185 Wis. 2d 25 (1994) (establishment clause—nativity scenes)
- *State v. Janssen*, 219 Wis. 2d 362 (1998) (flag desecration)
- *Jackson v. Benson*, 218 Wis. 2d 835 (1998) (establishment clause--school vouchers)
- *Deida v. City of Milwaukee*, 176 F. Supp. 2d 859 (E.D. Wis. 2001) (leaflets)
- *Doe v. Elmbrook School District*, 687 F.3d 840 (7th Cir. 2012) (en banc) (establishment clause—graduation ceremony)
- *State ex. rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85 (a.k.a. John Doe 2) (free speech—campaign finance restrictions)

The Two Codes Your Kids Need to Know

The College Board came up with a surprising conclusion about keys to success for college and life.



By Thomas L. Friedman

Opinion Columnist

Feb. 12, 2019

A few years ago, the leaders of the College Board, the folks who administer the SAT college entrance exam, asked themselves a radical question: Of all the skills and knowledge that we test young people for that we know are correlated with success in college and in life, which is the most important? Their answer: the ability to master “two codes” — *computer science and the U.S. Constitution*.

Since then they’ve been adapting the SATs and the College Board’s Advanced Placement program to inspire and measure knowledge of both. Since the two people who led this move — David Coleman, president of the College Board, and Stefanie Sanford, its chief of global policy — happen to be people I’ve long enjoyed batting around ideas with, and since I thought a lot of students, parents and employers would be interested in their answer, I asked them to *please show their work*: “Why these two codes?”

Their short answer was that if you want to be an empowered citizen in our democracy — able to not only navigate society and its institutions but also to improve and shape them, and not just be shaped by them — you need to know how the code of the U.S. Constitution works. And if you want to be an empowered and

adaptive worker or artist or writer or scientist or teacher — and be able to shape the world around you, and not just be shaped by it — you need to know how computers work and how to shape them.

With computing, the internet, big data and artificial intelligence now the essential building blocks of almost every industry, any young person who can master the principles and basic coding techniques that drive computers and other devices “will be more prepared for nearly every job,” Coleman and Sanford said in a joint statement explaining their initiative. “At the same time, the Constitution forms the foundational code that gives shape to America and defines our essential liberties — it is the indispensable guide to our lives as productive citizens.”

So rather than have SAT exams and Advanced Placement courses based on things that you cram for and forget, they are shifting them, where they can, to promote the “two codes.”

In 2016, the College Board completely revamped its approach to A.P. computer science courses and exams. In the original Computer Science course, which focused heavily on programming in Java, nearly 80 percent of students were men. And a large majority were white and Asian, said Coleman. What that said to women and underrepresented minorities was, “How would you like to learn the advanced grammar of a language that you aren’t interested in?”

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Turned out that was not very welcoming. So, explained Coleman, they decided to “change the invitation” to their new Computer Science Principles course by starting with the question: What is it that you’d like to do in the world? Music? Art? Science? Business? Great! Then come build an app in the furtherance of that interest and learn the principles of computer science, not just coding, Coleman said. “Learn to be a shaper of your environment, not just a victim of it.”

The new course debuted in 2016. Enrollment was the largest for a new course in the history of Advanced Placement, with just over 44,000 students nationwide.

Two years later The Christian Science Monitor reported, “More high school students than ever are taking the College Board’s Advanced Placement (A.P.) computer science exams, and those taking them are increasingly female and people of color.”

Indeed, the story added, “the College Board reports that from 2017 to 2018 female, African-American and Hispanic students were among the fastest growing demographics of A.P. computer science test-takers, with increases in exam participation of 39 percent, 44 percent and 41 percent, respectively. ... For context, in 2007, fewer than 3,000 high school girls took the A.P. Computer Science A exam; in 2018, more than 15,000 completed it.”

The A.P. U.S. Government and Politics course also was reworked. At a time when we have a president who doesn’t act as if he’s read the Constitution — and we have a growing perception and reality that college campuses are no longer venues for the free exchange of ideas and real debate of consequential issues — Coleman and Sanford concluded that it was essential that every student entering college actually have command of the First Amendment, *which enshrines five freedoms, not just freedom of speech.*

Every student needs to understand that, as Coleman put it, “our country was argued into existence — and that is the first thing that binds us — but also has some of the tensions that divide us. So we thought, ‘What can we do to help replace the jeering with productive conversation?’”

It had to start in high school, said Sanford, who is leading the “two codes” initiative. “Think of how much more ready you are to participate in college and society with an understanding of the five freedoms that the First Amendment protects — of speech, assembly, petition, press and religion. The First Amendment lays the foundation for

a mature community of conversation and ideas — built on the right and even obligation to speak up and, when needed, to protest, but not to interrupt and prevent others from speaking.”

This becomes particularly important, she noted, “when technology and democracy are thought of as in conflict, but are actually both essential” and need to work in tandem.

One must observe only how Facebook was abused in the 2016 election to see that two of the greatest strengths of America — innovation and free speech — have been weaponized. If they are not harmonized, well, *Houston, we have a problem.*

So the new A.P. government course is built on an in-depth look at 15 Supreme Court cases as well as nine foundational documents that every young American should know. It shows how the words of the Constitution give rise to the structures of our government.

Besides revamping the government course and the exam on that subject, Coleman and Sanford in 2014 made a staple of the regular SAT a long reading comprehension passage from one of the founding documents, such as the Constitution, or another important piece of democracy, like a great presidential speech. That said to students and teachers something the SAT had never dared say before: Some content is disproportionately more powerful and important, and if you prepare for it you will be rewarded on the SAT.

Sanford grew up in Texas and was deeply affected as a kid watching video of the African-American congresswoman Barbara Jordan arguing the case against Richard Nixon in Watergate. What she remembered most, said Sanford, was how Jordan’s power “emanated from her command of the Constitution.”

“Understanding how government works is the essence of power. To be a strong citizen, you need to know how the structures of our government work and how to operate within them.”

Kids are getting it: An A.P. U.S. Government and Politics class at Hightstown High School in New Jersey was credited in a Senate committee report with contributing content to a bill, the Civil Rights Cold Case Records Collection Act, which was signed into law last month.

Sanford cites it as a great example of her mantra: “‘Knowledge, skills and agency’ — kids learn things, learn how to do things and then discover that they can use all that to make a difference in the world.”

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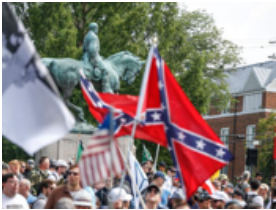
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Thomas L. Friedman is the foreign affairs Op-Ed columnist. He joined the paper in 1981, and has won three Pulitzer Prizes. He is the author of seven books, including “From Beirut to Jerusalem,” which won the National Book Award. [@tomfriedman](#) • [Facebook](#)

A version of this article appears in print on Feb. 12, 2019, on Page A23 of the New York edition with the headline: The 2 Codes Your Kids Need to Know

What the First Amendment protects — and what it doesn't

Richard Wolf, USA TODAY Published 2:11 p.m. ET April 6, 2018 | Updated 9:25 a.m. ET April 9, 2018



(Photo: Mykal McEldowney, Mykal McEldowney/IndyStar)

The First Amendment is a mere 45 words. But it's still giving lawmakers and judges fits 227 years after its adoption.

The government can't establish religion, but federal, state and municipal officials can open meetings with a prayer ([/story/news/nation/2014/05/05/supreme-court-government-prayer-new-york/4481969/](https://story/news/nation/2014/05/05/supreme-court-government-prayer-new-york/4481969/)).

The government can't block religious exercise, but it's trying to ban travelers from majority-Muslim countries ([/story/news/politics/2018/01/19/supreme-court-issue-final-verdict-trump-travel-ban/1038126001/](https://story/news/politics/2018/01/19/supreme-court-issue-final-verdict-trump-travel-ban/1038126001/)) in the name of national security.

It can't restrict free speech — not even hate speech or flag-burning or protests of military funerals. But don't try shouting "Fire!" in a theater or threatening folks on Facebook ([/story/news/nation/2015/06/01/supreme-court-facebook-threat/23901307/](https://story/news/nation/2015/06/01/supreme-court-facebook-threat/23901307/)).

It can't muzzle the media, unless it concerns outright lies made with malicious intent.

And peaceful protests are protected, but that doesn't mean the Secret Service can't push you around a little in order to protect the president ([/story/news/politics/2014/05/27/supreme-court-bush-protest-speech/9172707/](https://story/news/politics/2014/05/27/supreme-court-bush-protest-speech/9172707/)).

Sound confusing? Here's your guide to the First Amendment, circa 2018:

The First Amendment

noun

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

032818-first amendment_online_Online (Photo: USA TODAY)

Public protests

If [white nationalists and neo-Nazis](https://www.washingtonpost.com/news/politics/wp/2017/08/16/cross-burning-funeral-protests-hate-speech-enjoys-broad-protection/573232001/) (/story/news/politics/2017/08/16/cross-burning-funeral-protests-hate-speech-enjoys-broad-protection/573232001/) can march through the college town of Charlottesville, Va., and win backing from the American Civil Liberties Union, the rights of demonstrators are in safe hands.

What remains in doubt: whether such protests can be accompanied by displays of weapons, even in states that permit firearms to be carried in public. That raises the potential for violence, which public officials have the authority to prevent.

In a series of cases dating back to the 1960s, the Supreme Court has struck down restrictions on so-called "hate speech" unless it specifically incites violence or is intended to do so.

The First Amendment, the justices have said, protected neo-Nazis seeking to march through heavily Jewish Skokie, Ill., in 1977. It protected a U.S. flag burner from Texas in 1989, three cross burners from Virginia in 2003 and homophobic funeral protesters in 2011.

Even symbols of intimidation, such as torches carried by some marchers in Charlottesville, are protected unless they have specific targets. Justice Clarence Thomas dissented in the cross-burning case, reasoning that "those who hate cannot terrorize and intimidate," but he was on the losing end of an 8-1 vote.

Public speakers

If right-wing demonstrators are protected by the First Amendment, so too are right-wing speakers. The Supreme Court made that clear in 1969 when it protected a Ku Klux Klan member decrying Jews and blacks in Ohio because he did not pose an imminent threat.

[Richard Spencer](https://www.washingtonpost.com/news/politics/wp/2018/03/12/alt-right-leader-richard-spencer-says-his-rallies-arent-fun-anymore/416579002/) (/story/news/2018/03/12/alt-right-leader-richard-spencer-says-his-rallies-arent-fun-anymore/416579002/), a white nationalist who has traveled the country on a controversial "alt-right" speaking tour, is but the most recent example. He's been allowed to speak, along with counter-demonstrators aligned with a left-wing coalition known as Antifa.

Spencer is better off giving sparsely attended speeches and facing opponents in Florida, Michigan and Virginia than he would be overseas. He's been banned from visiting large portions of Europe and Great Britain by government officials who said his speeches foster hatred. Under the First Amendment, those bans would not stand.

"The American free speech tradition holds unequivocally that hate speech is protected, unless it is intended to and likely to incite imminent violence," says Jeffrey Rosen, president of the National Constitution Center in Philadelphia.

Censorship

Speech isn't restricted to the spoken or written word. The First Amendment also protects movies and TV, art and music, yard signs and video games, clothing and accessories.

The Supreme Court has ruled in favor of video games depicting the slaughter of animals. It has upheld derogatory trademarks, such as those promoting [The Slants](/story/news/politics/2017/06/19/supreme-court-upholds-offensive-trademarks-form-free-speech/100618478/) (</story/news/politics/2017/06/19/supreme-court-upholds-offensive-trademarks-form-free-speech/100618478/>), an Asian-American rock band. When a Pennsylvania school district tried to stop students from wearing breast cancer awareness bracelets reading "I (Heart) Boobies," the court refused even to hear the case.

But as usual, there are exceptions. When the speaker is the government, the court has allowed for censorship — such as when Texas refused to permit specialty license plates displaying the [Confederate flag](/story/news/nation/2015/06/18/supreme-court-license-plates/27605915/) (</story/news/nation/2015/06/18/supreme-court-license-plates/27605915/>). The justices reasoned that the government, not the motorist, was doing the talking.

Compelled speech

The First Amendment gives you the right to speak out — as well as the right "to refrain from speaking at all," Chief Justice Warren Burger wrote in 1977. That signaled a win for a New Hampshire couple who covered up part of their home state's motto, "Live Free or Die," on license plates.

The doctrine is up for grabs in three major Supreme Court cases this term. It appears likely the justices will rule that an Illinois state employee cannot be compelled to [contribute to his local union](/story/news/politics/2018/02/26/public-employee-union-fees-raise-ire-supreme-court-but-key-justices-remain-silent-direction/373048002/) (</story/news/politics/2018/02/26/public-employee-union-fees-raise-ire-supreme-court-but-key-justices-remain-silent-direction/373048002/>). They also seem inclined to say that California cannot force [anti-abortion pregnancy centers](/story/news/politics/2018/03/20/supreme-court-skeptical-california-law-requiring-information-abortion/441640002/) (</story/news/politics/2018/03/20/supreme-court-skeptical-california-law-requiring-information-abortion/441640002/>) to inform clients where they can get an abortion.

The third case is a closer call: Must a [deeply religious Colorado baker](/story/news/politics/2017/12/05/speech-religion-lgbt-rights-collide-supreme-court/921458001/) (</story/news/politics/2017/12/05/speech-religion-lgbt-rights-collide-supreme-court/921458001/>) use his creative skills to bake a cake for a same-sex couple's wedding? Here the court seems split.

"The case isn't about same-sex marriage, ultimately. It isn't about religion, ultimately," says Jeremy Tedesco, a lawyer with Alliance Defending Freedom, which represents Jack Phillips. "It's about this broader right to free speech, the right to be free of compelled speech."

Social media

Facebook, Twitter and other social media sites can police their own websites to control what's posted. But under the First Amendment, the government has no such right.

Thus did the Supreme Court rule that a North Carolina law criminalizing social media use by [sex offenders](/story/news/politics/2017/06/19/supreme-court-says-sex-offenders-can-access-social-media/103006410/) (</story/news/politics/2017/06/19/supreme-court-says-sex-offenders-can-access-social-media/103006410/>) violated the First Amendment.

The justices also gave a temporary reprieve to an angry, self-styled rapper who rattled his wife, co-workers and others on Facebook. Phrases such as "Hell hath no fury like a crazy man in a kindergarten class" are criminal only if intended as a threat, they ruled, and sent the case back to a lower court, which ruled against him on that basis.

Campaign spending

If you want to put free speech rights to work in politics, you're in luck. The Supreme Court equates campaign spending with speech.

Say you're a wealthy individual, or you run a corporation that wants to spend unlimited amounts in this year's elections. As long as you do not coordinate your spending with a candidate or political committee, you're home free.

And while there are anti-corruption limits on how much you can donate directly to a candidate, committee or political party, the court recently [ditched restrictions](/story/news/politics/2014/04/02/supreme-court-campaign-finance-mccutcheon-fec/7228237/) (</story/news/politics/2014/04/02/supreme-court-campaign-finance-mccutcheon-fec/7228237/>) on the total amount you can apportion among those recipients. That means you can give to as many campaigns as you like.

Religious exercise

Your First Amendment right to exercise your religion depends on what other rights it bumps up against. That's why it's a frequent conundrum in court.

When the arts and crafts chain [Hobby Lobby \(/story/news/politics/2014/06/30/supreme-court-hobby-lobby-religion-contraception-obama/11473189/\)](/story/news/politics/2014/06/30/supreme-court-hobby-lobby-religion-contraception-obama/11473189/) wanted out from Obamacare's requirement that employers offer free coverage of contraceptives, the Supreme Court ruled narrowly in its favor. The corporation's First Amendment right "protects the religious liberty of the humans who own and control" it, Justice Samuel Alito said.

And when a [Lutheran church in Missouri \(/story/news/politics/2017/06/26/supreme-court-declares-churches-eligible-public-funds/102438402/\)](/story/news/politics/2017/06/26/supreme-court-declares-churches-eligible-public-funds/102438402/) was denied state funds to resurface its playground, the high court said the separation of church and state does not apply to purely secular activities such as swings and slides.

But religious claims are not a slam dunk, as Phillips, the Colorado baker, may discover. At least four justices — possibly five — are likely to say his speech and religious beliefs must take a back seat to public accommodations laws requiring that merchants serve all customers.

Religious establishment

This is another area where more than two centuries haven't reduced passions on both sides, often leaving courts divided.

Public schools cannot lead children in prayer, a prohibition that has been extended in recent years to [graduations and football games \(/story/news/nation/2014/06/16/supreme-court-school-church-graduation/10571949/\)](/story/news/nation/2014/06/16/supreme-court-school-church-graduation/10571949/). But Congress, state legislatures and local governments can open their sessions with a prayer, provided the audience is not coerced to participate.

The line between what's OK and what's not is even thinner than that. On the same day in 2005, the Supreme Court ruled against displaying the Ten Commandments inside a county courthouse but said it could be memorialized outdoors on statehouse grounds.

Press freedom

[President Trump took aim at the press \(/story/news/politics/2017/03/30/donald-trump-new-york-times-libel-laws/99820218/\)](/story/news/politics/2017/03/30/donald-trump-new-york-times-libel-laws/99820218/) soon after coming into office. "Our current libel laws are a sham and a disgrace and do not represent American values or American fairness," he said.

Since the 1960s, the Supreme Court has made clear that the First Amendment protects statements made about public officials unless they are false and intended to defame. Only "reckless disregard for the truth" is unprotected.

Furthermore, the media can publish information from classified documents even if the government says it would threaten national security, a conclusion reached in the Pentagon Papers case featured in the recent film, [The Post \(/story/life/movies/2017/12/06/review-steven-spielbergs-post-dazzles-terrific-cast-journalistic-bent/924812001/\)](/story/life/movies/2017/12/06/review-steven-spielbergs-post-dazzles-terrific-cast-journalistic-bent/924812001/).

This explainer is part of the Trusting News project. Learn more about it [here \(/story/opinion/2018/01/12/we-want-earn-your-trust/1013643001/\)](/story/opinion/2018/01/12/we-want-earn-your-trust/1013643001/).

For more information on the First Amendment, check out the [National Constitution Center \(https://constitutioncenter.org/interactive-constitution/amendments/amendment-i\)](https://constitutioncenter.org/interactive-constitution/amendments/amendment-i), the [Newseum Institute \(http://www.newseuminstitute.org/first-amendment-center/\)](http://www.newseuminstitute.org/first-amendment-center/) and the [Legal Information Institute \(https://www.law.cornell.edu/constitution/first_amendment\)](https://www.law.cornell.edu/constitution/first_amendment).

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The First Amendment doesn't guarantee you the rights you think it does

By [AJ Willingham](#), CNN

Design: India Hayes, CNN

Updated 7:36 PM ET, Thu September 6, 2018

“ Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances

That's it. That's the entirety of our Constitution's First Amendment, the central tenet of our American way of life that gets dragged out every time someone's banned from Twitter.

There's a lot going on in those few sentences, and it's important to know when and how it applies to common situations -- and, equally as important, when it doesn't.

Let's look at some common First Amendment arguments; illuminated and debunked by a constitutional expert.

This is not a First Amendment issue though plenty of people think it is.

This scenario illustrates one of the biggest misconceptions people have about the First Amendment. Bottom line: It protects you from the government punishing or censoring or oppressing your speech. It doesn't apply to private organizations. "So if, say, Twitter decides to ban you, you'd be a bit out of luck," Nott says. "You can't make a First Amendment claim in court."

However, while it's not unconstitutional, if private platforms outright ban certain types of protected speech, it sets an uncomfortable precedent for the values of free speech.

If you work for a private company, it's probably not a First Amendment issue.

"It's the company's right to discipline their employees' speech," Nott says.

But just because a private employer has the right to fire someone for something they say doesn't give them legal *carte blanche*. Depending on what the fired employee said, the employer could be in violation of [the Civil Rights Act](#), or possibly in violation of contract law

If you're a government employee, it's complicated.

Institutions like police departments, public schools and local government branches can't restrict employee's free speech rights, but they do need to assure that such speech doesn't keep the employee from doing their job. It's definitely a balancing act, and the rise of social media has made it harder for such institutions to regulate their employee's speech in a constitutional manner.

REAL LIFE EXAMPLE

Google reportedly fired a male engineer who, in a memo, argued women are not biologically fit for tech roles. It's not a First Amendment issue because the government is not involved.

However, Nott says she's heard of cases where police officers sued after being fired for saying or writing racist remarks, and courts have ruled in favor of the department. In that case, she says, "They decided that for police officers, in their community, being a known racist impacts their ability to do their job."

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the officer. in 2016, the Supreme Court ruled in favor of a police officer who sued his department [when he was demoted after he was spotted in public](#) holding a yard sign for a mayoral candidate.

If it's a private institution, it's probably not a First Amendment issue.

If it's a public institution, the lines can get blurry.

"If you invite someone to speak on your campus and are a public university, you have to respect their First Amendment rights," Nott says. That doesn't mean you can't put regulations on a speech, like dictating the time, place, venue and suggestions for subject matter. It just means you can't do so in a way that discriminates against a certain point of view.

If students protesting play a hand in moving or canceling a speaker, that presents a different free speech challenge.

"If a speaker were to take legal action for being blocked from speaking, they can't do it against the students. You can't take constitutional action against a group of private citizens," she adds.

Such a complaint would have to go against the school, for allowing the constitutional breach to happen.

REAL LIFE EXAMPLE

Two conservative organizations filed a federal lawsuit after a speaking event at UC Berkely featuring Ann Coulter was rescheduled following violent protests and threats. The groups argued the change of venue and time was "repressive" and marginalized conservative views. The school says they acted out of concern for safety.

The question of intent is central to arguments like these. "If they moved her because her life is under threat, that seems pretty viewpoint neutral," Nott says. "But if a school moves a speaker just to shove them to the side then that is unconstitutional."

Definitely a First Amendment issue.

But, like pretty much everything in law, there are exceptions and nuances.

"It's definitely unconstitutional, unless you are trying to incite people to violence with your speech," Nott says. Even then, it needs to be a true threat -- one that has immediacy and some sort of actual intent.

REAL LIFE EXAMPLE

During the Vietnam War, a man was giving a speech and said, if he got drafted, his first bullet would be for then-President Lyndon B. Johnson. Courts ruled that it wasn't a true threat.

"They looked at the context, and it was hyperbole," Nott says. "The audience took it as a joke, they laughed, and it was clearly a joke. If he was going to meet with LBJ the next day, or had said it in a serious way to a serious audience, that would be a different set of circumstances."

It's a private company, so it's not a First Amendment issue.

There's that refrain again: Private companies, like social media sites, can do whatever they want.

But regulating conversations and posts online is a delicate balance for social media giants like Facebook.

While such sites retain the right to remove content they don't like, they are also protected by the [Communications Decency Act, Section 230](#).

"That says, if you are an internet company and you have some way for people to post or leave comments, you are not liable for what they do," Nott says. This covers things like obscenity, violence and threats.

The problem is, this protection often butts up against the enforcement of basic community standards.

"Facebook is under enormous pressure to take down, not just violent and illegal content, but fake news," Nott says. "And the more it starts to play editor for its own site, the more likely it is to lose that Section 230 protection."

WHAT SPEECH ISN'T COVERED UNDER THE FIRST AMENDMENT?

- Obscenity (the definition relies on context, but regular old porn is not considered obscene)
- Fighting words
- Defamation
- Child pornography
- Perjury
- Blackmail
- Incitement to imminent lawless action
- True threats
- Solicitations to commit crimes
- Plagiarism of copyrighted material

This is a First Amendment issue, at the very least in spirit.

"Symbolic speech is protected by the constitution," Nott says. "In essence, you have the right to not speak. You have the right to silence."

In theory, a private employer could require you to stand for the anthem or say the Pledge of Allegiance, but such a requirement may run afoul of the Civil Rights Act. Even in schools, where there have been some cases of students being singled out for sitting or kneeling for the anthem, it would be hard to provide justification for punishment.

"This is an act of political speech, the most protected type of speech," Nott says. "It's completely not disruptive because it's silent." Plus, it is buttressed by court cases that have decided there is no requirement to salute the flag.

Source: [The Newseum Institute](#)

A First Amendment issue -- usually.

You are fully within your rights to record the police doing their job in public. And if you get arrested while doing so, your constitutional rights are being violated.

This is, unless you were doing something unlawful at the time of your arrest.

In a heated situation with police, that can also become a gray area. Physical assault or threats could obviously get you arrested, but what about if you were just yelling at the police while recording, say, to get them to stop an act or to pay attention?

"That's tough," Nott says. "If you were disturbing the peace, you can get arrested for that, or for other things. But the bottom line is it's not a crime to record police activities in a public space."

If it's a student publication, it's a First Amendment issue.

Nott points to a landmark Supreme Court cases from 1969 that has acted as a standard for cases involving free speech at public universities and colleges. That's *Tinker v. Des Moines Independent Community School District*, which you can read more about below.

Another case, *Bazaar v. Fortune* from 1973, helps tailor these guidelines to the student press by stating that schools cannot act as "private publishers" just because they fund a student publication or program. In other words, they can't punish the publication -- whether it be through student firings, budget cuts or withdrawals or a ban -- just for printing or broadcasting something they don't like.

Now, a gentle reminder that this is just for PUBLIC schools. All together now: Private institutions can (usually) do what they want!

REAL LIFE EXAMPLE

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)

In December of 1965, three students were suspended for wearing black armbands to school to protest the Vietnam War. The school argued the display was a distraction and possibly a danger to students, and the case went all the way up the judicial chain. The Supreme Court didn't bite.

"While schools have a responsibility to keep their students safe, [the Supreme Court] decided that the armbands didn't invade the rights of others," Nott says. "And ultimately, the school asking students to remove the bands infringed upon *their* rights."

This case is used as a gold standard for free speech in schools.

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Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century

Geoffrey R. Stone*

- I. UNDERSTANDING THE TEXT
- II. REJECTING ABSOLUTISM, AD HOC BALANCING, AND A UNITARY STANDARD
- III. LEARNING THE LESSONS OF EXPERIENCE
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At the turn of the twentieth century, we knew almost nothing about the First Amendment. Although there had been important disputes about free speech over the Sedition Act of 1798, the suppression of abolitionist literature in the early nineteenth century and during the Civil War, and although both state and federal courts had occasionally wrestled during the nineteenth century with such diverse free speech issues as obscenity and lotteries, for the most part, there was no settled understanding about the meaning of the First Amendment.¹

* Edward H. Levi Distinguished Service Professor, The University of Chicago Law School.

1. See GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME 15–78* (W.W. Norton 2004) (discussing the Sedition Act of 1798); see also MICHAEL KENT CURTIS, *FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 105–116* (Duke University Press 2000) (regarding abolitionist literature); DAVID RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS, 1870–1920* (Cambridge University Press 1997) (addressing free speech between 1870 and 1920).

At the dawn of the twenty-first century, however, we have an astonishingly rich, multi-faceted, and often maddeningly complex free speech jurisprudence. In this Essay, I will try to identify the ten judgments that the Supreme Court made during the course of the twentieth century that most fundamentally shaped the overall framework of contemporary First Amendment doctrine.

I. UNDERSTANDING THE TEXT

The first fundamental judgment we made in the twentieth century is that the First Amendment does not mean what it says. “Congress,” it says, “shall make no law . . . abridging the freedom of speech, or of the press.”² Most obviously, we decided that “Congress” does not mean Congress. Rather, it means the “national government,” including the executive and judicial branches, despite the express and rather puzzling limitation of the text. Moreover, after the enactment of the Fourteenth Amendment and the advent of the incorporation doctrine, we decided that “Congress” effectively means the “government,” which includes not only the national government, but all state and local governments, as well.³

We also decided that the First Amendment does not mean what it *appears* to mean. The text says that the government may not abridge the freedom of speech.⁴ At first blush, this appears to suggest that the government may not restrict an individual’s freedom to say what he wants, where he wants, how he wants, and when he wants. But Justice Oliver Wendell Holmes decisively put this apparent meaning to rest in *Schenck v. United States*⁵ with his famous example of a false cry of fire in a crowded theatre.⁶ From that moment on, we have acknowledged that although the government may not “abridge” the freedom of speech, we must define what we mean by the “freedom of speech” that the government may not abridge. That freedom, in other words, is not self-defining and, indeed, nothing in the text of the First Amendment helps us to decide what it means.⁷

2. U.S. CONST. amend I, § 2.

3. See, e.g., *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (applying the First Amendment to the states).

4. U.S. CONST. amend I.

5. *Schenck v. United States*, 249 U.S. 47 (1919).

6. *Id.* at 52.

7. A related conclusion was the judgment that the First Amendment is not limited to the Blackstone conception of prohibiting only previous restraints. See *Schenck*, 249 U.S. at 51–52.

II. REJECTING ABSOLUTISM, AD HOC BALANCING, AND A UNITARY STANDARD

The second fundamental judgment we made in the twentieth century was to reject three strongly-advocated approaches to interpreting the First Amendment. The first of these approaches, championed by Justice Hugo Black, insisted that the First Amendment is an absolute—that is, “no law” means “no law.”⁸ To make this approach credible in the light of Justice Holmes’s false cry of fire, its advocates had to define rather narrowly “the freedom of speech” that could *never* be abridged. Otherwise, absolute protection would require all sorts of implausible outcomes. Ultimately, we rejected this approach because the broad range of issues posed by the First Amendment proved too varied and too complex to be governed sensibly by a simple absolute protection versus no protection dichotomy.⁹

We also rejected ad hoc balancing as a general approach to First Amendment interpretation.¹⁰ Under this approach, the Court’s task would be to weigh the benefits of restricting speech against the benefits of protecting speech in each case in order to decide whether the challenged restriction is reasonable.¹¹ In theory, this approach seems sensible, but in practice it proved unworkable. It turns out to be incredibly difficult to identify and assess all of the many factors that should go into this judgment on a case-by-case basis. As a result, its application would produce a highly uncertain, unpredictable, and fact-dependent set of outcomes that would

8. See Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874, 879 (1960) (arguing that “[t]he phrase ‘Congress shall make no law’ is composed of plain words, easily understood” and that the language is “absolute”); see generally *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 61 (1961) (Black, J., dissenting); HUGO BLACK, A CONSTITUTIONAL FAITH 43–63 (Alfred A. Knopf 1968); Hugo Black & Edmond Cahn, *Justice Black and First Amendment “Absolutes”: A Public Interview*, 37 N.Y.U. L. REV. 549 (1969); Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

9. For examples of cases that strained Justice Black’s “absolutist” approach, see *Cohen v. California*, 403 U.S. 15, 27 (1971) (Black, J., dissenting) (disagreeing with the holding that the state cannot constitutionally prohibit the use of the word “fuck” in public); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 516 (1969) (Black, J., dissenting) (disagreeing with the holding that students have a right to free speech); and *Adderley v. Florida*, 385 U.S. 39, 41 (1966) (Black, J., opinion) (rejecting the First Amendment right to speak on public property).

10. On ad hoc balancing, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 93–97 (Yale University Press 1962); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 583–84 (1st ed. 1978); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); Laurent B. Franz, *Is the First Amendment Law? A Reply to Professor Mendelson*, 51 CAL. L. REV. 729 (1963); Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821, 825–26 (1962).

11. See Frantz, *supra* note 10, at 729.

leave speakers, police officers, prosecutors, jurors, and judges in a state of constant uncertainty. Thus, although this approach arguably sought to ask the right question, it attempted to do so in a manner that proved fatally unpredictable.

The third approach we rejected in the twentieth century was the notion that a single standard of review should govern all First Amendment cases. Whether that standard is set at a high level of justification, such as clear and present danger, strict scrutiny, necessary to promote a compelling government interest, or at a low level of justification, such as reasonableness or rational basis review, it became readily apparent that a “one-size fits all” standard would not do the trick. Applied in a consistent manner, any single standard would inevitably dictate implausible results, sometimes insufficiently protective of free speech, sometimes insufficiently respectful of competing government interests.¹² The only single approach that could sensibly apply in all cases was ad hoc balancing, but for the reasons already noted, that test was too vague. So, in short, we concluded that there is no unified field theory of the First Amendment—no single test that can apply to all cases.¹³

Now, when I say that these standards would dictate results that would be unacceptably over or under protective of free speech, what I am obviously assuming is that there is some set of results that most reasonable people—including the Supreme Court Justices—would properly regard as clearly “right” or clearly “wrong.” And that, of course, assumes that we have some intuitive sense of what the First Amendment sensibly means. What I am suggesting, in other words, is that we built First Amendment doctrine backwards—not from theory to doctrine to results, but from intuited results to doctrine, with only passing attention to theory. This is an important point, for it suggests that First Amendment doctrine as we know it today is largely the product of practical experience rather than philosophical reasoning.

III. LEARNING THE LESSONS OF EXPERIENCE

This, then, brings me to my third twentieth century judgment. While we were in the process of rejecting these three proposed approaches to First Amendment interpretation, we learned several practical lessons about the

12. See *TRIBE*, *supra* note 10, at 583–84.

13. On definitional balancing and the recognition that a series of separate and distinct rules were necessary for different First Amendment issues, see William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CAL. L. REV. 107, 148–49 (1982). See generally *TRIBE*, *supra* note 10, at 583–84; John Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935 (1968); Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915 (1978).

workings of what Professor Thomas Emerson once called “the system of free expression”—lessons that played a critical role in shaping contemporary First Amendment jurisprudence.¹⁴ Three such lessons, or effects, are especially worthy of note.

First, we learned about the so-called “chilling effect.”¹⁵ That is, we learned that people are easily deterred from exercising their freedom of speech.¹⁶ This is so because the individual speaker usually gains very little personally from signing a petition, marching in a demonstration, handing out leaflets, or posting on a blog. Put simply, except in the most unusual circumstances, whether any particular individual speaks or not is unlikely to have any appreciable impact on the world. Thus, if the individual knows that he might go to jail for speaking out, he will often forego his right to speak. This makes perfect sense for each individual. But if many individuals make this same decision, then in the words of Professor Alexander Meiklejohn, the net effect will often be to mutilate “the thinking process of the community.”¹⁷ Recognition of this “chilling effect,” and of the consequent power of government to use intimidation to silence its critics and to dominate and manipulate public debate, was a critical insight in shaping twentieth century free speech doctrine.¹⁸

Second, we learned in the twentieth century about what we might call the “pretext effect.”¹⁹ That is, we learned that government officials will often defend their restrictions of speech on grounds quite different from their real motivations for the suppression, which will often be to silence their critics and to suppress ideas they do not like.²⁰ The pretext effect is not unique to the realm of free speech, but it is especially potent in this context, because public officials will often be sorely tempted to silence dissent in order to insulate themselves from criticism and preserve their own authority.

14. See generally THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970).

15. See *id.* at 158.

16. See *id.*

17. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 24–27 (1948).

18. On “chilling effect,” see *Bartnicki v. Vopper*, 532 U.S. 514, 514 (2001) (Rehnquist, C.J., dissenting); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 306–07 (1965); *N.Y. Times v. Sullivan*, 376 U.S. 254, 300 (1964); see also Paul A. Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 539 (1950).

19. On the pretext effect and improper motivation, see Elena Kagan, *Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996).

20. See *id.*

Of course, the very idea of the pretext effect turns on what we mean by legitimate and illegitimate reasons for restricting speech. One thing we decided in the twentieth century is that the First Amendment forbids government officials from suppressing particular ideas because they do not want citizens to accept those ideas in the political process. This principle, which was first clearly stated by the Supreme Court in 1919 in Justice Holmes's dissenting opinion in *Abrams v. United States*,²¹ is central to contemporary First Amendment doctrine and rests at the very core of the pretext effect's strong suspicion of any government regulation of speech that is consistent with such an impermissible motive.²²

Third, we learned about what we might call the "crisis" effect.²³ That is, we learned that in times of crisis, real or imagined, citizens and government officials tend to panic, to grow desperately intolerant, and to rush headlong to suppress speech they can demonize as dangerous, subversive, disloyal, or unpatriotic.²⁴ Painful experience with this "crisis effect," especially during World War I and the Cold War, led us to embrace what Professor Vincent Blasi has aptly termed a "pathological perspective" in crafting First Amendment doctrine.²⁵ That is, we structure First Amendment doctrine to anticipate and to guard against the worst of times.²⁶

IV. THE CONTENT-BASED/CONTENT-NEUTRAL DISTINCTION

This, then, brings me to my fourth observation about what we learned in the twentieth century. Having rejected absolutism, ad hoc balancing, and the quest for a unitary standard of review,²⁷ we divided First Amendment issues into a series of distinct problems, in the hope of addressing each of them separately with a specific standard that would be relatively predictable and easy to administer, would approximate the results of ad hoc balancing, and would guard against the chilling, pretext, and crisis effects.

The critical step in this development was the Court's recognition of the content-based/content-neutral distinction. Until roughly 1970, the Court did not clearly see that laws regulating the content of expression posed a different First Amendment issue than laws regulating expression without regard to content. The Court first articulated this concept in an otherwise

21. *Abrams v. United States*, 250 U.S. 616 (1919).

22. See Kagan, *supra* note 19, at 414.

23. On the crisis effect and the pathological perspective, see STONE, *supra* note 1, at 542–50. See generally Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

24. See Blasi, *supra* note 23, at 450–51.

25. See *id.*

26. *Id.*

27. See *supra* Parts I–III.

uneventful 1970 decision, *Schacht v. United States*.²⁸ In *Schacht*, the Court held unconstitutional a law prohibiting soldiers from wearing their uniforms in theatrical productions if those productions held the military in contempt.²⁹

Although conceding that the government could constitutionally prohibit soldiers from wearing their uniforms in all theatrical productions—a regulation that would be content-neutral—the Court nonetheless held it unconstitutional for the government to prohibit soldiers from wearing their uniforms only in productions that mocked the military.³⁰ In effect, the Court held that a content-neutral law that banned more speech was less problematic under the First Amendment than a content-based law that banned less speech. As the Court put the point, the government cannot constitutionally punish soldiers for wearing their uniforms to protest “the role of . . . our country in Vietnam” while at the same time allowing them to wear their uniforms to “praise the war in Vietnam.” Such a distinction, the Court declared, “cannot survive in a country which has the First Amendment.”³¹

Now, this might seem obvious to us today, but it was not at all obvious at the time. It was, indeed, a pivotal insight, and the Court followed it up two years later in *Police Department of Chicago v. Mosley*,³² in which the Court invalidated a Chicago ordinance prohibiting peaceful picketers, except peaceful labor picketers, from picketing near a school while the school was in session.³³ The Court assumed that a content-neutral ban on all picketing in such circumstances would be constitutional, but as in *Schacht* it invalidated the seemingly less speech-restrictive content-based ban, explaining that because “[t]here is an ‘equality of status in the field of ideas,’” the “government must afford all points of view an equal opportunity to be heard.”³⁴ The Chicago ordinance, the Court declared, “‘slip[s] from . . . neutrality . . . into a concern about content.’ This is never permitted.”³⁵ The Court added that, at the very least, such content-based regulations “must be carefully scrutinized.”³⁶

28. *Schacht v. United States*, 398 U.S. 58, 65 (1970).

29. *Id.* at 63.

30. *Id.*

31. *Id.* at 58.

32. *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92 (1972).

33. *Id.* at 102.

34. *Id.* at 96 (citing ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 27 (1948)).

35. *Id.* at 99 (internal citation omitted).

36. *Id.*

With *Schacht* and *Mosley*, we entered a new era in First Amendment jurisprudence. Ever since those decisions, the first question we must ask about any First Amendment case is whether the challenged regulation is content-based or content-neutral, for the answer to that question dictates the terms of the constitutional inquiry. Some scholars, such as Professors Martin Redish and Barry McDonald, have criticized this distinction as simplistic, wooden, and unduly rigid.³⁷ Other commentators, including myself, have defended it as a sensible organizing principle that enables us to sort First Amendment problems in a way that responds to a host of concerns, including the chilling, pretext and crisis effects.³⁸

In brief, the rationale for analyzing content-based restrictions differently from content-neutral restrictions, and for being particularly suspicious of them, is that content-based restrictions are more likely to skew public debate for or against particular ideas and are more likely to be tainted by a constitutionally impermissible motivation. The Court's recognition of this distinction was the fourth critical step in the evolution of twentieth century free speech jurisprudence.

V. A STRONG PRESUMPTION AGAINST CONTENT-BASED RESTRICTIONS

The fifth important twentieth century development relates to the content-based side of this distinction. Recognizing that content-based and content-neutral regulations pose different First Amendment problems does not tell us how to evaluate the constitutionality of specific laws that fall on one side of the line or the other.

In *Mosley*, Justice Thurgood Marshall, who authored the Court's opinion, offered several strong statements about the constitutionality of content-based restrictions, noting, for example, that content regulation "is never permitted," regulations of speech "may not be based on content," and content-based restrictions must be "carefully scrutinized."³⁹ In declaring

37. See Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347 (2006); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981); see also Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297 (1997); Wilson R. Huhn, *Assessing the Constitutionality of Laws that are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801 (2004).

38. See Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987) [hereinafter Stone, *Content-Neutral*]; Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983) [hereinafter Stone, *Content Regulation*]; Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978); see also John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Kagan, *supra* note 19, at 446-63; Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203 (1982).

39. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 99 (1972).

content-based restrictions at least presumptively unconstitutional, *Schacht* and *Mosley* gave structure to an insight that had stumbled around in First Amendment discourse from its earliest days. Beginning with the writings of Professor Zechariah Chafee⁴⁰ and the early dissenting and concurring opinions of Justices Holmes and Brandeis in cases like *Abrams v. United States*⁴¹ and *Whitney v. California*,⁴² and running through the later dissenting opinions of Justices Black and Douglas in cases like *Dennis v. United States*,⁴³ a minority view forcefully argued that at least some types of content-based restrictions should be declared unconstitutional unless the government could prove that the speech created a clear and present danger of grave harm.

But it was not until *Brandenburg v. Ohio*⁴⁴ in 1969 and the *Pentagon Papers* decision⁴⁵ in 1971 that the Supreme Court clearly embraced this view. *Schacht* and *Mosley*, which were decided within a year of those decisions, were tied directly to this pivotal shift in First Amendment doctrine.

It is noteworthy that, in declaring content-based restrictions presumptively unconstitutional, *Schacht* and *Mosley* also drew on the Court's Equal Protection Clause jurisprudence, which at the time was more well-developed than its First Amendment jurisprudence.⁴⁶ The Court invoked the Equal Protection Clause because *Schacht* and *Mosley* were different kinds of First Amendment cases than the Court was used to. In the typical First Amendment case, the government prohibits certain speech, such as criticism of the war or the violent overthrow of government, and the defendant argues that the law violates his right to free speech.

Schacht and *Mosley*, however, were, at bottom, equality cases. In each case, the Court conceded that a content-neutral law—prohibiting all soldiers from wearing their uniforms in theatrical productions or prohibiting all protestors from picketing near schools—would be constitutional.⁴⁷ The

40. See ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* (Harvard University Press 1967) (1941).

41. *Abrams v. United States*, 250 U.S. 616, 624 (1919).

42. *Whitney v. California*, 274 U.S. 357 (1927).

43. *Dennis v. United States*, 341 U.S. 494 (1951).

44. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

45. *N.Y. Times Co. v. United States* (*Pentagon Papers*), 403 U.S. 713 (1971).

46. See Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975); Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 274–80 (1974) [hereinafter Stone, *Fora Americana*]; Geoffrey R. Stone, *Kenneth Karst's Equality as a Central Principle in the First Amendment*, 75 U. CHI. L. REV. 37 (2008).

47. See *supra* notes 28–32 and accompanying text.

defendants' constitutional claim therefore, was not that they had a First Amendment right to wear a uniform in theatrical productions or to picket near schools, but rather that they had a right to be treated equally with other speakers the government allowed to wear a uniform or picket near schools.⁴⁸ In effect, then, the constitutional violation in these cases was one of under inclusion. That is, the government violated the First Amendment not because it limited Schacht's and Mosley's right to speak, but because it discriminated against them based on the content of their message.

This is significant because it was the inequality issue that enabled the Court to draw the critical insight about content-based restrictions, which in turn shaped its approach to such restrictions more generally. Building upon its Equal Protection Clause jurisprudence, the Court invoked the language of "strict scrutiny," which, as Professor Gerald Gunther was soon to point out, was "'strict' in theory, and fatal in fact."⁴⁹ Indeed, it was for that reason that Justice Marshall could easily conflate the language of "strict scrutiny" with "impermissible," for in practical effect, those two phrases had come to mean essentially the same thing by the early 1970s.⁵⁰ Put differently, the Court seemed to be saying in *Mosley* that content-based regulation in the First Amendment context was analogous to discrimination against African-Americans in the Equal Protection context.

Except in the most extraordinary of circumstances, such laws are, in *Mosley's* words, "impermissible." As Professor Kenneth Karst noted at the time, the Court in these cases recognized equality as a "[c]entral [p]rinciple in the First Amendment," for the first time.⁵¹ In important respects, this doctrinal development stabilized a central part of First Amendment doctrine. With two significant exceptions, which I will address shortly—low value speech and what I will loosely call "special circumstances"—the Court has adhered to this doctrine, with the result that it has not upheld a single content-based restriction of speech, not involving one of these two exceptions, in half a century.

The key point I want to make about this development is that it was the combination of Justices Holmes and Brandeis's early clear and present danger arguments with the strict scrutiny element of the Court's Equal Protection jurisprudence that finally enabled the Court to deal effectively with the chilling, pretext and crisis effects. By recognizing that these dangers are most likely to arise when the government targets speech of a specific content, and by making it almost impossible for the government to

48. *Id.*

49. Gerald Gunter, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

50. *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 99 (1972).

51. Karst, *supra* note 46, at 20.

justify such laws, the Court went a long way toward solving those critical First Amendment problems.

VI. LOW VALUE SPEECH

This brings me to the sixth important twentieth century development—the concept of low value speech. One obvious problem with a doctrine that presumptively holds all content-based restrictions unconstitutional is that there may be some types of content that do not merit such protection. Some speech might not sufficiently further the values and purposes of the First Amendment to warrant such extraordinary immunity from regulation. In part, this was what Justice Holmes was getting at with his false cry of fire.⁵²

The Court first formally recognized this concept in its 1942 decision in *Chaplinsky v. New Hampshire*,⁵³ which declared that “[t]here are certain well-defined and narrowly limited classes of speech” that “are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”⁵⁴ Over the years, the Court has characterized several categories of speech as “low value,” including express incitement of unlawful conduct, threats, fighting words, false statements of fact, obscenity, and commercial advertising.⁵⁵ Following *Chaplinsky*, the Court has held that because these categories of expression do not further core First Amendment values, they can be restricted without meeting the usual standards of First Amendment review.⁵⁶

Whether this doctrine is justified has been a matter of some controversy, both as to its existence and as to the specific categories of speech that have—and have not—been deemed of “low” value. Professor Cass Sunstein has suggested that the Court considers four factors in determining whether speech qualifies as “low value,” specifically whether: (1) the speech is “far afield from the central concerns of the first amendment” (which he defines as “effective popular control of public affairs”); (2) there are important

52. See *supra* text accompanying note 6.

53. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

54. *Id.* at 571–72.

55. See *Virginia v. Black*, 538 U.S. 343 (2003) (threats); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (commercial advertising); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (false statements of fact); *Watts v. United States*, 394 U.S. 705 (1969) (threats); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Chaplinsky*, 315 U.S. at 571–72 (fighting words); *Gitlow v. New York*, 268 U.S. 652 (1925) (express incitement).

56. See *supra* note 55.

“noncognitive aspects” of the speech; (3) “the speaker is seeking to communicate a message”; and (4) the speech is in an area in which the “government is unlikely to be acting for constitutionally impermissible reasons.”⁵⁷ I have offered a slightly different four-factor explanation, noting that (1) low value speech does not “primarily advance political discourse,” (2) is not defined in terms of “disfavored ideas or political viewpoints,” (3) usually has “a strong noncognitive” aspect, and (4) has “long been regulated without undue harm to the overall system of free expression.”⁵⁸

Although the precise rationale of these categories remains controversial, and although some scholars, such as Professor Thomas Emerson, have attacked the very existence of the doctrine on the ground that it injects the Court “into value judgments . . . foreclosed to it by the basic theory of the First Amendment,”⁵⁹ my own view is that the low value doctrine is a sensible and pragmatic compromise that serves a salutary function by operating as a useful safety valve, enabling the Court to deal reasonably with somewhat harmful, but relatively insignificant, speech—without requiring the Court to dilute the protection it properly accords speech at the very heart of the guarantee.

Moreover, two significant developments in the Court’s application of the low value doctrine have cabined its impact. First, as noted in my fourth factor, the Court has been quite reluctant to recognize new “low value” categories that have not been well established over time. Although this can be criticized as unduly rigid, it constrains what might otherwise be the temptation to manipulate the low value doctrine in ways that would more seriously implicate Emerson’s concerns. That is, confining the concept of “low value” speech to those categories that have been recognized as “low value” time out of mind lessens the risk that judges will conflate politically unpopular ideas with constitutionally low value speech.⁶⁰ (The debate over this question, by the way, has been especially acute in recent decades over the issues of violent expression, hate speech, pornography, and non-newsworthy invasions of privacy.)

The second constructive limitation on the scope of the low value doctrine concerns the degree of protection accorded such speech. Originally, the Court treated “low value” speech as completely unprotected by the First Amendment. Restrictions of such speech therefore received essentially no First Amendment scrutiny.⁶¹ Since *New York Times v.*

57. Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 603–04 (1986).

58. Geoffrey R. Stone, *Sex, Violence, and the First Amendment*, 74 U. CHI. L. REV. 1857, 1863–64 (2007).

59. EMERSON, *supra* note 14, at 326.

60. See *supra* note 55.

61. See Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1

*Sullivan*⁶² in 1964, however, the Court has increasingly abandoned the idea that regulations of low value speech are immune from First Amendment review. Beginning with *Sullivan*, the Court has recognized that restrictions of even low value speech can pose significant dangers to free expression.

In some instances, illustrated by the false statements of fact at issue in *Sullivan*,⁶³ low value speech may itself have no First Amendment value, but regulations of such speech may have spillover or chilling effects on speech with important First Amendment value. The threat of liability for false statements of fact, for example, may chill speakers from making even true statements. As the Court recognized in *Sullivan*, regulations of low value speech must take such effects into account in order to pass constitutional muster.⁶⁴ In other instances, even low value speech may have some First Amendment value. This is illustrated by the Court's 1974 decision in *Virginia Pharmacy*,⁶⁵ which held that although commercial advertising may be of only low First Amendment value, it nonetheless serves a useful informational purpose and must therefore be accorded significant if not full First Amendment protection.

Using these two considerations, the Court over the past half-century has engaged in what Professor Melville Nimmer has usefully described as a process of categorical balancing with respect to these low value categories, attempting to fine-tune the degree of constitutional protection accorded each category based upon its relative First Amendment value and the risk of chilling valuable expression.⁶⁶

VII. CONTENT-BASED RESTRICTIONS IN SPECIAL CIRCUMSTANCES

The seventh important twentieth century development also involves content-based regulation, but relates to what I earlier described as the "special circumstances" exception to the strong constitutional presumption against content-based regulation. The key problem here is that, even apart from low value speech, an almost absolute presumption against content regulation often turns out to be too speech-protective. There are some circumstances, in other words, in which such a presumption would demand

(1960).

62. *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

63. *See id.* at 256–59.

64. *Id.* at 278.

65. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

66. Nimmer, *supra* note 13, at 942–43.

too great a sacrifice of competing government interests without sufficiently serving important First Amendment values.

Alas, there is a long list of such “special circumstances,” ranging from regulations of speech by government employees, to regulations of speech on public property, to regulations of speech by students, soldiers, and prisoners, to regulations of the government’s own speech, to regulations that compel individuals to disclose information to the government.⁶⁷ In theory, of course, it would be possible to apply the strict presumption against content-based regulation in all of these situations, but this would sometimes produce unwise and even foolish results. Consider a high school mathematics teacher who asserts a First Amendment right to preach Marxist doctrine instead of the Pythagorean Theorem in her mathematics classroom. Or an IRS employee who claims a First Amendment right to post confidential tax returns on the Internet. Or a taxpayer who claims that the government cannot constitutionally create a library or museum dedicated only to science or American history. Or a witness who claims that a congressional committee cannot constitutionally investigate alleged corruption in Iraq without also investigating the use of steroids by athletes.

All of these examples regulate speech on the basis of content, none involves low value speech, and none poses the sort of clear and imminent danger of grave harm that might otherwise be sufficient to justify a content-based restriction of speech. Must we, then, hold all of these regulations unconstitutional? Examples like these caused the Court to rethink the scope of the strong presumption against content-based restrictions. More specifically, they prompted the Court to rethink two facets of that doctrine.

First, they caused the Court to recognize that not all content-based restrictions are equally threatening to core First Amendment values. On closer inspection, the Court came to realize that regulations of viewpoint are much more dangerous to fundamental First Amendment values than other regulations of content, such as regulations of the subject matter of expression, the use of profanity, or the use of certain images. Indeed, for many of the same reasons that content-based restrictions were seen as different from and more threatening than content-neutral restrictions, so too were viewpoint-based restrictions seen as different from and more threatening than other forms of content-based restrictions. That is, they are more likely to distort public debate in a politically-biased manner, and they are more likely to be motivated by hostility to particular points of view. To

67. See, e.g., *Rust v. Sullivan*, 500 U.S. 173 (1991) (government speech); *Perry Educators’ Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983) (public property); *Jones v. N.C. Prisoners’ Union*, 433 U.S. 119 (1977) (prisoners); *Parker v. Levy*, 417 U.S. 733 (1974) (soldiers); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969) (students); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) (public employees); *Gibson v. Fla. Legis. Investigating Comm.*, 372 U.S. 539 (1963) (compelled disclosure).

return to the Equal Protection analogy on which the content-based/content-neutral distinction was initially founded, one might say that it is really viewpoint-based restrictions that are analogous to laws that discriminate against African-Americans, whereas other types of content-based restrictions more sensibly warrant something akin to an intermediate level of concern.⁶⁸

Although this insight has real force, and although viewpoint-based restrictions are indeed the most problematic form of content-based regulation, the question remains, how much should we make of this insight? One possibility would be to revisit the understanding that flowed from *Schacht* and *Mosley*—that content regulation is presumptively unconstitutional—and to limit that presumption only to viewpoint-based restrictions.⁶⁹ That might seem sensible in theory, but as the Court quickly came to recognize the line between viewpoint and other forms of content regulation is often distressingly elusive. In cases like *R.A.V.*,⁷⁰ *Rosenberger*,⁷¹ and *Lamb's Chapel*,⁷² for example, the Court discovered that in many instances this distinction is far from clear. Does a university policy refusing to subsidize student religious publications regulate content or viewpoint? Does a law prohibiting fighting words only if they are based on race regulate content or viewpoint? Does a law prohibiting sexually explicit images on the Internet regulate content or viewpoint? There is no simple answer to these questions.

Thus, to attach great significance to the line between content and viewpoint could generate precisely the sort of uncertainty, ambiguity, and confusion that the strict presumption against content regulation was designed to prevent. But to ignore the distinction and to treat all viewpoint and content restrictions alike would require either a dilution of the strict presumption against viewpoint-based restrictions or a large sacrifice of competing and legitimate government interests, as illustrated by the mathematics teacher, public library and congressional witness hypotheticals.

To resolve this dilemma, the Court has essentially split the difference in a rather creative way. In dealing with regulations of speech in general

68. For illustrative decisions recognizing this distinction, see *Morse v. Frederick*, 127 S. Ct. 2618 (2007); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1985); *Perry Educators' Ass'n*, 460 U.S. 37; *Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853 (1982); and *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

69. See *supra* note 28–32 and accompanying text.

70. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

71. *Rosenberger*, 515 U.S. 819.

72. *Lamb's Chapel v. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

public discourse, the Court has adhered to the strong presumption against all content regulation. But in dealing with what I have termed “special circumstances,” the Court has recognized a distinction between viewpoint and content.⁷³ Thus, a public library can constitutionally choose to collect books only about American history, but cannot constitutionally choose to exclude books because they criticize the Vietnam War. A government grants program can constitutionally fund research only about the environment, but cannot constitutionally refuse to fund research because it substantiates global warming. And a public university can constitutionally allow students to post notices on a university bulletin board only if they relate to the curriculum, but cannot constitutionally exclude notices because they criticize the university administration.

Now, I do not want to suggest that this area of First Amendment law is in any way simple, straightforward, or transparent. To the contrary, it is filled with deep ambiguities and complexities. The general proposition, though, is clear. It is that in these special circumstances, when the government is not regulating general public discourse, it can constitutionally regulate content as long as it does so reasonably and in a viewpoint-neutral manner.

For the record, let me identify several facets of continuing complexity in the scope and application of this doctrine. First, as I have already noted, the line between content and viewpoint is often unclear. Although most cases are easy to classify, the marginal cases are genuinely hard.⁷⁴ Second, the boundaries of what I have called “special circumstances” are far from clear, the doctrine is in a state of flux, and some of the subcategories that make up the core of the doctrine, such as the distinction between nonpublic forums and limited public forums, are also unclear. Third, and not surprisingly, what constitutes “reasonable” regulation is often a source of confusion. *Morse v. Frederick*, for example, the recent “Bong Hits for Jesus” decision, illustrates the difficulty of defining “reasonable.”⁷⁵ Fourth, although the prohibition of viewpoint discrimination remains extremely strong even in the context of these “special circumstances,” it is not absolute. Most notably, as the Court held in *Rust v. Sullivan*,⁷⁶ when the government itself speaks, it can constitutionally insist that its agents convey a point of view the government is legally entitled to communicate. So, for example, if the government wants to discourage abortion or encourage energy conservation,

73. See, e.g., *Morse*, 127 S. Ct. 2618; *Nat’l Endowment for the Arts*, 524 U.S. 569; *Bethel Sch. Dist. No. 403*, 478 U.S. 675; *Perry Educators’ Ass’n*, 460 U.S. 37; *Greer v. Spock*, 424 U.S. 828 (1976); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

74. The issue of religious expression has been especially difficult in this regard. See *Rosenberger*, 515 U.S. 819; *Lamb’s Chapel*, 508 U.S. 384.

75. *Morse*, 127 S. Ct. 2618.

76. *Rust v. Sullivan*, 500 U.S. 173, 192–200 (1991).

it can constitutionally retain private individuals and agencies to communicate this message on its behalf.

Even acknowledging these myriad and often vexing complexities, the Court's doctrine in this respect is generally sound. The world is a complicated place, and the realist must recognize that constitutional doctrine can never achieve both perfect results and perfect clarity. The challenge is to reach the right result when the right result is most important, while at the same time having reasonably clear and predictable rules that otherwise reach the "right" result most of the time.

In the realm of content-based regulation, the Court has achieved these conflicting goals reasonably well. In the situation that matters most—the freedom of individuals to express their ideas, beliefs, and convictions in public debate without fear of government censorship—existing doctrine has come a long way toward making that aspiration a reality. At the same time, the Court has not pushed the principle of free speech so far that it has either alienated the American people from their own Constitution by demanding absurd results or paralyzed the government's capacity to fulfill its most basic responsibilities. This is no small achievement.

VIII. CONTENT-NEUTRAL RESTRICTIONS

The eighth major development of twentieth century free speech jurisprudence concerns the other side of the content-based/content-neutral divide. Why do we care about laws that do not regulate the content of speech? Consider three laws. The first prohibits anyone to criticize an ongoing war. The second prohibits anyone to criticize the war within 150 feet of a military recruiting center. The third prohibits any billboard in a residential area.

The first law is a classic viewpoint-based restriction that forbids anyone to advocate a specific point of view. Such a law profoundly distorts public debate and was very likely enacted at least in part because of the constitutionally impermissible desire to silence dissent and to manipulate political discourse, although the government would no doubt defend it on other grounds. Such a law directly implicates the most fundamental reasons for protecting free speech and under any credible theory of the First Amendment must be at least presumptively unconstitutional.⁷⁷

77. See generally *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 275–76 (1964) (discussing the invalidity of the Alien and Sedition Acts of 1798).

The second law is what we might call a “modest” viewpoint-based restriction. One might sensibly argue that, as compared with the first law, the second is much less troubling. It leaves open broad opportunities for speakers to convey an anti-war message and is therefore much less likely seriously to distort public debate. Nonetheless, the Court clearly decided in the twentieth century to treat this viewpoint-based law like the first one.⁷⁸ That is, the Court is unwilling to engage in fine-tuned inquiries into the extent to which particular viewpoint-based laws actually distort public discourse. In part this is because it is very difficult to assess the actual distorting effects of particular viewpoint-based restrictions, especially when there may be many of them, and in part it is because even modest viewpoint-based laws pose a high risk of constitutionally impermissible motivation. Thus, although one could imagine a regime in which the Court would attempt to assess the distorting effect and the risk of impermissible motivation of every viewpoint-based restriction on a case-by-case basis, the Court has wisely opted for a clear, straightforward standard that is difficult to evade and renders all such laws presumptively invalid.⁷⁹

The third law, prohibiting all billboards in residential areas, does not regulate the content of speech at all. One might therefore argue that it has nothing to do with the First Amendment. One might insist, in other words, that the First Amendment is about censorship and that censorship is about regulating content. Although this is a theoretically plausible approach, the Court has rightly rejected it.⁸⁰ But that poses further puzzles, for if content-neutral laws can violate the First Amendment, we need to know how and why they threaten First Amendment values.

To begin, it is important to note that content-neutral laws come in many shapes and sizes. They include, for example, laws prohibiting anyone to publish a newspaper, to hand out leaflets in a public park, to scatter leaflets from a helicopter, to spend money to elect political candidates, to discriminate on the basis of sexual orientation, to appear naked in public, or to knowingly destroy a driver’s license.⁸¹ Some of these laws have a severe impact on the opportunities for free expression, whereas others have only a trivial impact. Clearly, a content-neutral law that severely impacts the

78. See, e.g., *Rosenberger*, 515 U.S. 819; *Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853 (1982); *Schacht v. United States*, 398 U.S. 58 (1970).

79. See *Stone*, *Content Regulation*, *supra* note 38.

80. See, e.g., *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 520–21 (1981) (holding that a billboard ordinance was invalid under the First and Fourteenth Amendment because it “reache[d] too far into the realm of protected speech” and stating “[t]here can be no question that a prohibition on the reaction of billboards infringes freedom of speech”).

81. See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *Arcara v. Cloud Books*, 478 U.S. 697 (1986); *Wayte v. United States*, 470 U.S. 598 (1985); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *United States v. O’Brien*, 391 U.S. 367 (1968).

opportunities for free expression should be more likely to be unconstitutional than a content-neutral law that has only a minor impact, and not surprisingly that turns out to be a central concern in assessing the constitutionality of such laws. A robust system of free expression assumes that individuals have ample opportunities to express their views, and content-neutral laws that significantly limit those opportunities should be more closely scrutinized for that reason.

But there are also other reasons why we might be concerned with content-neutral laws, for not only do they limit the opportunities for free speech, but they sometimes do so in a way that has content-differential effects. For example, a law restricting leafleting in public parks will have more of an effect on some types of speakers and on some types of messages than on others. Even though such laws may be content-neutral on their face, they may distort public discourse in a non-neutral manner. Indeed, in some instances the government may enact a content-neutral law in order to achieve a content-differential effect. Consider, for example, laws that have recently been enacted to limit protests near funerals. Although these laws are usually neutral on their face, they were clearly driven in large part by a desire to suppress a particular group of speakers who have engaged in highly offensive protests at the funerals of soldiers.

So, there are several reasons why even content-neutral laws may trouble us. In dealing with such laws, the Court has generally adopted a form of ad hoc balancing, in which it considers many possible factors, including: (1) the restrictive impact of the law; (2) the ability of speakers to shift to other means of expression; (3) the substantiality of the state's interest; (4) the ability of the state to achieve its interest in a less speech-restrictive manner; (5) whether the speech involves the use of private property; (6) whether the speech involves the use of government property; (7) whether the means of expression has traditionally been allowed; (8) whether the regulation has a disparate impact on certain points of view; (9) whether there is a serious risk of impermissible motivation; and (10) whether the law is a direct or incidental restriction of speech.⁸² The eighth major development, then, is that content-neutral restrictions of speech are presumptively analyzed with a form of ad hoc balancing.

A good example of ad hoc balancing in this context is *Buckley v. Valeo*,⁸³ in which the Court employed such balancing in the realm of campaign finance regulation to uphold contribution limits as relatively

82. See *infra* notes 83–85 and accompanying text.

83. *Buckley v. Valeo*, 424 U.S. 1, 23–29 (1976).

modest content-neutral restrictions of free expression but to invalidate expenditure limitations as much more restrictive limitations of free speech. Additional examples would include *City of Ladue v. Gilleo*,⁸⁴ which invalidated an ordinance prohibiting homeowners from displaying political signs on their property in order to minimize “visual clutter,” and *Martin v. City of Struthers*,⁸⁵ which invalidated a law prohibiting individuals to “ring the door bell” of any homeowner for the purpose of distributing handbills. In both decisions, the Court indicated that some measure of regulation would be permissible (for example, limiting the size of the signs or the hours of the handbill distribution), but that a flat ban on these activities violated the First Amendment.⁸⁶

Now, if the Court were really to take all the factors I listed above into account in every case involving a content-neutral restriction, the law in this area would be a complete muddle. That is the nature of ad hoc balancing. To avoid this state of affairs, the Court, as in the content-based context, has therefore attempted to carve out a few specific and recurring categories of content-neutral problems for which it has articulated more clearly-defined rules of decision. I will offer two significant examples.⁸⁷

IX. PUBLIC FORUM DOCTRINE

The first of these examples, which represents the ninth major development in twentieth century free speech doctrine, involves the public forum problem. The central question here is whether an individual has a First Amendment right to speak on government property over the objections of the government. To begin with, suppose Mary, who lives on the forty-fourth floor of an apartment building, puts a sign on Joe’s front lawn, saying “Mary Supports Obama,” claiming that her speech is protected by the First Amendment. Joe objects to this invasion of his property. Joe will prevail, for two reasons: First, Joe’s private property rights trump Mary’s desire to commandeer his property; and second, Joe is not the government, so there is no relevant state action to bring Mary’s First Amendment rights into play.

Now suppose Mary wants to put her sign not on Joe’s front lawn, but on the lawn in front of city hall. The government, like Joe, objects. Here, of course, there is state action, so the First Amendment comes into play. Moreover, Mary maintains that the First Amendment should be understood

84. *City of Ladue v. Gilleo*, 512 U.S. 43 (1994).

85. *Martin v. City of Struthers*, 319 U.S. 141 (1943).

86. See *Gilleo*, 512 U.S. at 58–59; *Martin*, 319 U.S. at 145–49.

87. Despite the effort to carve out some clear rules, there remains a large residual area in the realm of content-neutral regulations in which the Court employs ad hoc balancing. See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514 (2001); *Gilleo*, 512 U.S. 43; *Buckley*, 424 U.S. 1; *NAACP v. Button*, 371 U.S. 415 (1963); *Talley v. California*, 362 U.S. 60 (1960); *Martin*, 319 U.S. 141.

as guaranteeing her a reasonable opportunity for effective free expression, and putting her sign on the lawn in front of city hall seems reasonable to her. The government responds that it, no less than a private owner of property, has the authority to control the use of its property, and that as long as it acts in a content-neutral manner, and does not discriminate among would-be speakers, it should be free to prohibit Mary's sign.

When this issue first arose in the nineteenth century, Justice Oliver Wendell Holmes, then a justice on the Supreme Judicial Court of Massachusetts, took the view that the government has the same authority as a private individual to exclude those who want to use its property for speech purposes.⁸⁸ The Supreme Court, however, has embraced a more nuanced approach. In dealing with this question, the Court has divided public property into essentially two categories. As the Court noted in its 1939 decision in *Hague v. Committee for Industrial Organization*,⁸⁹ some public property, most notably parks, streets, and sidewalks, have been dedicated "time out of mind" for the purposes of "assembly, communicating thoughts between citizens, and discussing public questions."⁹⁰ The Court reasoned that, wherever the title to such property might rest, the traditional dedication of such property to speech purposes created what Professor Harry Kalven termed a sort of "First-Amendment easement."⁹¹ Following this line of reasoning, the Court over time developed the principle that in such traditional "public forums" the government may reasonably regulate expressive activities "in the interest of all," but may not "in the guise of regulation" restrict those activities unreasonably.⁹²

Under this approach, the Court has generally protected the right of individuals to demonstrate, leaflet, parade, speak, and congregate for expressive purposes in public parks, streets, and sidewalks, subject to reasonable regulation.⁹³ Thus, a content-neutral prohibition of leafleting on the lawn in front of city hall would be unconstitutional, but a content-neutral

88. See *Commonwealth v. Davis*, 39 N.E. 113 (1895), *aff'd sub nom. Davis v. Massachusetts*, 167 U.S. 43 (1897).

89. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939).

90. *Id.* at 515.

91. See Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1 (1965).

92. *Hague*, 307 U.S. at 516.

93. See *id.*; see also *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 315 (1968) (citing opinions holding that "streets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely").

law restricting the use of loudspeakers in a public park near a hospital would be upheld as reasonable. For the most part, this approach has worked reasonably well for these traditional public forums, though serious questions have recently arisen about the way in which public authorities have sometimes limited public demonstrations to so-called “Free Speech Zones.”⁹⁴

But even if this approach generally works well for traditional public forums—that is, streets, parks, and sidewalks—it still leaves untouched the vast majority of public property. What about a speaker’s desire to hand out leaflets in a welfare office, to post signs on the outside of a public building or on the inside of a public bus, to use the government’s loudspeakers or printing presses, or to enter a prison, public school, military base, or public hospital to speak with inmates, teachers, soldiers, patients, and staff?

The justices have put forth three different approaches on this question. One approach, suggested by Justice Black in *Adderley v. Florida* in 1966, insisted that the government, “no less than a private owner of property,” has the authority to limit the use of its property to the purposes to which it has been dedicated.⁹⁵ In other words, as long as the government acts neutrally, it has absolute authority to exclude expression from non-public forum public property.

The second approach, advanced most forcefully by Justices William Brennan and Thurgood Marshall in the *Grayned* case in 1972, insisted that the “crucial question” in every case should be “whether the manner of expression is basically incompatible with the normal activity of a particular

94. For illustrative decisions, see *Hill v. Colorado*, 530 U.S. 703 (2000) (affirming the constitutionality of a narrowly tailored and content-neutral statute prohibiting the attempting to pass handbills to a person within 100 feet of the entrances to a health care facility without their consent); *Schenck v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357 (1997) (finding “fixed buffer zone” limitations prohibiting demonstrations within fifteen feet of entrances and driveways to be constitutional but holding that “floating buffer zones” within fifteen feet of persons to be unconstitutional); *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753 (1994) (upholding noise restrictions and buffer zone around entrances and driveway to health clinic but finding the rest of the injunction unconstitutional because it was too broad); *Frisby v. Schultz*, 487 U.S. 474 (1988) (finding an anti-picketing ordinance narrowly tailored to protect the unwilling listener in the privacy of their house to be constitutional); *United States v. Grace*, 461 U.S. 171 (1983) (holding that a statute banning the display of a flag, banner, or device on public sidewalks in front of the Supreme Court, a public forum, unconstitutional because it failed to sufficiently serve the public interest); *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (upholding an anti-noise ordinance near a school because it held maintaining an undisrupted school session to be a sufficient and compelling interest but an anti-picketing ordinance near the school was unconstitutional because it failed to cause the same disruption); *Schneider v. New Jersey*, 308 U.S. 147 (1939) (finding the purpose of a city ordinance—keep the streets clean—insufficient to prohibit the distribution of handbills). On free speech zones, see Nick Suplina, Note, *Crowd Control: The Troubling Mix of First Amendment Law, Political Demonstrations, and Terrorism*, 73 GEO. WASH. L. REV. 395 (2005); Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581 (2006).

95. *Adderley v. Florida*, 385 U.S. 39, 47 (1966).

place at a particular time.”⁹⁶ In effect, this approach invites a form of open-ended balancing to determine whether the challenged content-neutral restriction is constitutional.⁹⁷

The third approach, which has carried the day, holds that the government can constitutionally prohibit expressive activity in non-public forum public property as long as the restriction is content-neutral and reasonable.⁹⁸ Although “reasonable” might be understood to imply balancing, the Court has consistently applied this standard in such a way that “reasonable” means “not irrational,” and the Court has never invalidated any content-neutral restriction under this standard.⁹⁹

The result, then, is that there is effectively no First Amendment right to use non-public forum public property for speech purposes as long as the government acts in a content-neutral manner. Whether this is good or bad is a matter of some debate.¹⁰⁰ The argument against this position, reflected in the Brennan–Marshall approach, is that the First Amendment should be construed to require the government to bend over backwards to accommodate free speech, and that giving the administrators of government property broad discretion to exclude expressive activity will inevitably result in a weak and ineffective marketplace of ideas.¹⁰¹ The prevailing approach maintains that we already have a robust marketplace of ideas, that individuals do not need to use non-public forum public property to communicate their views effectively, and that a more open-ended approach would swamp the courts with an endless array of petty constitutional disputes about where and when individuals can commandeer public property over the objections of government administrators.¹⁰² For what it is worth,

96. *Grayned v. Rockford*, 408 U.S. 104, 116 (1972).

97. See *Stone, Fora Americana*, *supra* note 46, at 251–52.

98. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

99. See, e.g., *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (public utility poles); *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (state fair); *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114 (1981) (letter boxes); *Greer v. Spock*, 424 U.S. 828 (1976) (military base); but see *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) (invalidating ban on distribution of literature in airport terminals because an airport terminal is a “public forum”).

100. Matthew D. McGill, *Unleashing the Limited Public Forum: A Modest Revision to a Dysfunctional Doctrine*, 52 STAN. L. REV. 929 (2000) (arguing that the limited public forum must have a vibrant concept for the continued health of the First Amendment); Allen Lichtenstein & Gary Peck, *Sidewalk Democracy: Free Speech, Public Space and the Constitution*, 8 NEVADA LAWYER 18 (2000) (arguing that restrictions aimed to stifle expression are legally indefensible).

101. See *Stone, Fora Americana*, *supra* note 46.

102. See Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1199–1200 (1996) (discussing incidental restrictions).

my own view is that the Brennan–Marshall position has the better argument, although their view has not prevailed.

It may be useful at this point to offer a simple illustration of the intersection of content-neutral balancing with the Court’s approach to content-regulation. Consider, for example, laws designed to improve the marketplace of ideas. Here are three decisions that seem inconsistent but are readily explained by the interaction of these doctrines. In *Miami Herald Publishing Co. v. Tornillo*,¹⁰³ the Court considered a state law requiring newspapers to give political candidates an opportunity to reply to attacks. In *Red Lion Broadcasting Co. v. FCC*,¹⁰⁴ the Court considered the Fairness Doctrine, which among other things, required broadcasters to give political candidates who had been attacked on-air an opportunity to respond. And in *PruneYard Shopping Center v. Robins*,¹⁰⁵ the Court considered a state law requiring privately-owned shopping centers to allow individuals to distribute leaflets on the grounds of their shopping malls. In each instance, the newspaper,¹⁰⁶ broadcaster¹⁰⁷ and shopping center owner¹⁰⁸ maintained that the law violated the First Amendment by compelling it to associate with speech with which it disagreed.

In *PruneYard*, the Court upheld the shopping center regulation because it was content-neutral and reasonable.¹⁰⁹ In *Tornillo*, the Court invalidated the right-of-reply statute because it was a content-based regulation not involving any “special circumstances.”¹¹⁰ Unlike the law in *PruneYard*, which was content-neutral, the law in *Tornillo* was content-based because it kicked-in only in response to the newspaper’s own speech. In *Red Lion*, the Court upheld the fairness doctrine because it was a reasonable, viewpoint-neutral regulation of content on non-public forum public property—that is, the airwaves.¹¹¹ *Tornillo* was different from *Red Lion* because it regulated expression by a private speaker on private property, whereas *Red Lion* regulated expression by a private speaker on publicly-owned property. It is analogous to the distinction between *City of Ladue v. Gilleo*,¹¹² which invalidated a prohibition of political signs on private property, and *Members*

103. *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974).

104. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

105. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

106. *Tornillo*, 418 U.S. 241.

107. *Red Lion*, 395 U.S. 367.

108. *PruneYard*, 447 U.S. 74.

109. *Id.*

110. *Tornillo*, 418 U.S. at 258.

111. *Red Lion*, 395 U.S. 367.

112. *City of Ladue v. Gilleo*, 512 U.S. 43 (1994).

of the *City Council of Los Angeles v. Taxpayers for Vincent*,¹¹³ which upheld a prohibition of political signs on publicly-owned public utility poles.

X. INCIDENTAL IMPACT

This brings me to my tenth and final observation about what we learned in the twentieth century. This observation also concerns a judgment about a sub-problem in the realm of content-neutral restrictions. Here, we are concerned with laws that have an incidental rather than a direct effect on free expression. Illustrations of direct regulation of speech are laws restricting the location of billboards, limiting campaign contributions and expenditures, prohibiting speeches on military bases, and forbidding posting signs on public utility poles.¹¹⁴ Such laws directly and specifically regulate speech.

Illustrations of laws having only an incidental effect on speech are laws prohibiting open fires in public places, as applied to an individual who burns a flag in public;¹¹⁵ forbidding urinating in public, as applied to an individual who urinates on a military recruiting center to convey his opposition to the war; requiring witnesses to testify before grand juries, as applied to a reporter who wants to shield her confidential sources;¹¹⁶ and demanding that we pay taxes, as applied to a citizen who claims that the payment of taxes limits his ability to support his favored political candidates.

As we have seen, content-neutral laws that directly regulate expression are generally subjected to a form of ad hoc balancing. Laws that have only an incidental effect on free speech, however, are treated as presumptively constitutional.¹¹⁷ The Court first established this principle in *United States v. O'Brien* in 1968, in which the Court upheld a conviction for knowingly destroying a draft card, even though the defendant clearly committed the crime in order to express his opposition to the Vietnam War.¹¹⁸ Although

113. *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

114. See, e.g., *People for the Ethical Treatment of Animals, Inc. v. Gittens*, 414 F.3d 23 (D.C. Cir. 2005) (governmental contributions); *Giebel v. Sylvester*, 244 F.3d 1182 (9th Cir. 2001) (bulletin boards at state university available for use by the public); *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000) (bulletin boards in public high school); *Schwanner v. Dep't of Army*, 370 F. Supp. 2d 408 (E.D. Va. 2004), *aff'd*, 119 Fed. App'x 565 (4th Cir. 2005) (military bases); *Cimarron Alliance Found. v. City of Oklahoma City*, 290 F. Supp. 2d 1252 (W.D. Okla. 2002) (public utility poles).

115. *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989); see also Kagan, *supra* note 19, at 501 (discussing incidental restrictions).

116. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

117. *United States v. O'Brien*, 391 U.S. 367, 381–82 (1968).

118. *Id.* at 385–86.

the Court implied that a form of balancing was appropriate in such cases, as in the non-public forum cases the Court in fact gave great deference to the government.¹¹⁹

The logic of this position is that, as compared with laws that directly regulate speech, laws that have only an incidental effect on speech are both less likely to be tainted by impermissible motivations and less likely to have a significant limiting or distorting effect on free expression. Moreover, because every law can conceivably have an incidental effect on someone's speech, a doctrine that required courts to evaluate every such claim would open the door to endless litigation and encourage all sorts of fraudulent claims. For example, if Tom is stopped for speeding, he could claim that he was speeding to protest the speed limit laws.¹²⁰

This doctrine has a broad impact, especially on claims of the press to special First Amendment protection. For example, reporters might argue that in order to gather newsworthy information they should be exempt from laws of otherwise general application that prohibit wiretapping, burglary, trespass, and bribery. Invoking the incidental effects doctrine, the Court, in cases like *Branzburg v. Hayes*,¹²¹ has generally rejected such claims.

In at least a few instances, however, the Court has held incidental effects unconstitutional as applied when the incidental effect of the law was seen by the Court as particularly severe. *NAACP v. Alabama*,¹²² *Brown v. Socialist Workers '74 Campaign Committee*,¹²³ and *Boy Scouts of America v. Dale*¹²⁴ illustrate such decisions. In general, however, the Court has erected a strong presumption that laws having a mere incidental effect on speech are not unconstitutional.

XI. CONCLUSION

With these ten judgments, the Supreme Court has shaped most of our contemporary First Amendment jurisprudence. Given that these principles were adopted by many different justices, with widely varying perspectives,

119. *Id.* at 381–82.

120. On incidental restrictions, see generally Dorf, *supra* note 102; Jeb Jubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 769 (2001); Kagan, *supra* note 19, at 494–508; Stone, *Content-Neutral*, *supra* note 38, at 114.

121. *Branzburg*, 408 U.S. 665 (holding the public interest in ensuring law enforcement sufficient to override a reporter's privilege statute).

122. *NAACP v. Alabama*, 357 U.S. 449 (1958) (holding that an order requiring an association to produce a list of its members violated the members' right to freely associate with others).

123. *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982) (holding disclosure requirements for party that had historically been object of harassment unconstitutional to both campaign contributors and recipients of the party).

124. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (holding preservation of a group's mission and official position to be sufficient for freedom of association purposes).

over many decades, it is not surprising that there are inconsistencies, ambiguities, conundrums, and perplexities in the doctrine. On the other hand, by the end of the twentieth century the Court, in my view, had for the most part built a sensible and reasonably effective set of principles for sorting First Amendment issues and for reaching reasonably sound and predictable outcomes.

Although I have my differences with some of these doctrines, on the whole I applaud the Court for exercising common sense, staying focused on the most fundamental values of the First Amendment, learning from its own mistakes and experience, seeking to articulate a set of relatively simple rules—even if they are sometimes both over and under protective of speech—and refusing to let the perfect be the enemy of the good. And now, with that, we can turn to the twenty-first century.

Session 5

Thy Liberty in Law: Civic Virtue and Why it Matters for Teacher
Dr. Robert Burton

Readings on Civic Virtue

Prepared by Dr. Robert John Burton

Civic Literacy and Citizenship: A Symposium for High School Teachers

Center for the Study of Liberal Democracy

University of Wisconsin – Madison

virtue (n.)

c. 1200, *vertu*, "moral life and conduct; a particular moral excellence," from Anglo-French and Old French *vertu* "force, strength, vigor; moral strength; qualities, abilities" (10c. in Old French), from Latin *virtutem* (nominative *virtus*) "moral strength, high character, goodness; manliness; valor, bravery, courage (in war); excellence, worth," from *vir* "man" (from PIE root **wi-ro-* "man").

Online Etymological Dictionary: https://www.etymonline.com/word/virtue#etymonline_v_7822

PHYLLIS WHEATLEY, from "To the Rev. Dr. Thomas Amory"

TO cultivate in ev'ry noble mind
 Habitual grace, and sentiments refin'd,
 Thus while you strive to mend the human heart,
 Thus while the heav'nly precepts you impart,
 O may each bosom catch the sacred fire,
 And youthful minds to Virtue's throne aspire!
 When God's eternal ways you set in sight,
 And Virtue shines in all her native light,
 In vain would Vice her works in night conceal,
 For Wisdom's eye pervades the sable veil.

ARISTOTLE, *POLITICS*, Book III, Part 4

Source: <http://classics.mit.edu/Aristotle/politics.3.three.html>

There is a point nearly allied to the preceding: Whether the virtue of a good man and a good citizen is the same or not. But, before entering on this discussion, we must certainly first obtain some general notion of the virtue of the citizen. Like the sailor, the citizen is a member of a community. Now, sailors have different functions, for one of them is a rower, another a pilot, and a third a look-out man, a fourth is described by some similar term; and while the precise definition of each individual's virtue applies exclusively to him, there is, at the same time, a common definition applicable to them all. For they have all of them a common object, which is safety in navigation. Similarly, one citizen differs from another, but the salvation of the community is the common business of them all. This community is the constitution; the virtue of the citizen must therefore be relative to the constitution of which he is a member. If, then, there are many forms of government, it is evident that there is not one single virtue of the good citizen which is perfect virtue. But we say that the good man is he who has one single virtue which is perfect virtue. Hence it is evident that the good citizen need not of necessity possess the virtue which makes a good man.

The same question may also be approached by another road, from a consideration of the best constitution. If the state cannot be entirely composed of good men, and yet each citizen is expected to do his own business well, and must therefore have virtue, still inasmuch as all the citizens cannot be alike, the virtue of the citizen and of the good man cannot coincide. All must have the virtue of the good citizen- thus, and thus only, can the state be perfect; but they will not have the virtue of a good man, unless we assume that in the good state all the citizens must be good.

Again, the state, as composed of unlikes, may be compared to the living being: as the first elements into which a living being is resolved are soul and body, as soul is made up of rational principle and appetite, the family of husband and wife, property of master and slave, so of all these, as well as other dissimilar elements, the state is composed; and, therefore, the virtue of all the citizens cannot possibly be the same, any more than the excellence of the leader of a chorus is the same as that of the performer who stands by his side. I have said enough to show why the two kinds of virtue cannot be absolutely and always the same.

But will there then be no case in which the virtue of the good citizen and the virtue of the good man coincide? To this we answer that the good ruler is a good and wise man, and that he who would be a statesman must be a wise man. And some persons say that even the education of the ruler should be of a special kind; for are not the children of kings instructed in riding and military exercises? As Euripides says:

"No subtle arts for me, but what the state requires. "

As though there were a special education needed by a ruler. If then the virtue of a good ruler is the same as that of a good man, and we assume further that the subject is a citizen as well as the ruler, the virtue of the good citizen and the virtue of the good man cannot be absolutely the same, although in some cases they may; for the virtue of a ruler differs from that of a citizen. It was the sense of this difference which made Jason say that 'he felt hungry when he was not a tyrant,' meaning that he could not endure to live in a private station. But, on the other hand, it may be argued that men are praised for knowing both how to rule and how to obey, and he is said to be a citizen of approved virtue who is able to do both. Now if we suppose the virtue of a good man to be that which rules, and the virtue of the citizen to include ruling and obeying, it cannot be said that they are equally worthy of praise. Since, then, it is sometimes thought that the ruler and the ruled must learn different things and not the same, but that the citizen must know and share in them both, the inference is obvious. There is, indeed, the rule of a master, which is concerned with menial offices- the master need not know how to perform these, but may employ others in the execution of them: the other would be degrading; and by the other I mean the power actually to do menial duties, which vary much in character and are executed by various classes of slaves, such, for example, as handicraftsmen, who, as their name signifies, live by the labor of their hands: under these the mechanic is included. Hence in ancient times, and among some nations, the working classes had no share in the government- a privilege which they only acquired under the extreme democracy. Certainly the good man and the statesman and the good citizen ought not to learn the crafts of inferiors except for their own occasional use; if they habitually practice them, there will cease to be a distinction between master and slave.

This is not the rule of which we are speaking; but there is a rule of another kind, which is exercised over freemen and equals by birth -a constitutional rule, which the ruler must learn by obeying, as he would learn the duties of a general of cavalry by being under the orders of a general of cavalry, or the duties of a general of infantry by being under the orders of a general of infantry, and by having had the command of a regiment and of a company. It has been well said that 'he who has never learned to obey cannot be a good commander.' The two are not the same, but the good citizen ought to be capable of both; he should know how to govern like a freeman, and how to obey like a freeman- these are the virtues of a citizen. And, although the temperance and justice of a ruler are distinct from those of a subject, the virtue of a good man will include both; for the virtue of the good man who is free and also a subject, e.g., his justice, will not be one but will comprise distinct kinds, the one qualifying him to rule, the other to obey, and differing as the temperance and courage of men and women differ. For a man would be thought a coward if he had no more courage than a courageous woman, and a woman would be thought loquacious if she imposed no more restraint on her conversation than the good man; and indeed their part in the management of the household is different, for the duty of the one is to acquire, and of the other to preserve. Practical wisdom only is characteristic of the ruler:

it would seem that all other virtues must equally belong to ruler and subject. The virtue of the subject is certainly not wisdom, but only true opinion; he may be compared to the maker of the flute, while his master is like the flute-player or user of the flute.

From these considerations may be gathered the answer to the question, whether the virtue of the good man is the same as that of the good citizen, or different, and how far the same, and how far different.

EDMUND BURKE: LETTER TO CHARLES-JEAN-FRANÇOIS DEPONT

November 1789

Edmund Burke's letter to Charles-Jean-François Depont (1767–1796) is his first extensive analysis of the French Revolution. Written just four months after the fall of the Bastille, when many Englishmen were uncertain in their opinions of the events in France, the letter is striking for the certainty of its judgments. Burke did not send this letter immediately, for he believed it might endanger Depont, but the young Frenchman continued to urge Burke to send his views of the Revolution (Corr. Copeland 6:59–61). Burke probably sent the letter below in early 1790. Burke's more important, much longer Reflections on the Revolution in France also takes the form of a letter to Depont. In its language and in its themes of constitutional government, prudence, and abstract versus "practical" liberty, the letter below is in some respects an early draft of the Reflections.

The date of this letter is supplied by Alfred Cobban and Robert A. Smith, editors of volume six of the Copeland edition of the Correspondence.

Letter to Charles-Jean-François Depont

November 1789

Dear Sir,

We are extremely happy in your giving us leave to promise ourselves a renewal of the pleasure we formerly had in your company at Becons and in London. It was too lively to be speedily forgotten on our part; and we are highly flattered to find that you keep so exactly in your memory all the particulars of the few attentions which you were so good to accept from us during your stay in England. We indulge ourselves in the hope that you will be able to execute what you intend in our favour; and that we shall be more fortunate in the coming spring, than we were in the last.

You have reason to imagine that I have not been as early as I ought, in acquainting you with my thankful acceptance of the correspondence you have been pleased to offer. Do not think me insensible to the honour you have done me. I confess I did hesitate for a time, on a doubt, whether it would be prudent to yield to my earnest desire of such a correspondence.

Your frank and ingenuous manner of writing would be ill answered by a cold, dry, and guarded reserve on my part. It would, indeed, be adverse to my habits and my nature, to make use of that sort of caution in my intercourse with any friend. Besides, as you are pleased to think that your splendid flame of liberty was first lighted up at my faint and glimmering taper, I thought you had a right to call upon me for my undisguised sentiments on whatever related to that subject. [...]

You may easily believe, that I have had my eyes turned, with great curiosity, to the astonishing scene now displayed in France. It has certainly given rise in my mind to many reflections, and to some emotions. These are natural and unavoidable; but it would ill become me to be too ready in forming a positive opinion upon matters transacted in a country, with the correct political map of which I must be very imperfectly acquainted. Things, indeed, have already happened so much beyond the scope of all speculation, that persons of infinitely more sagacity than I am, ought to be ashamed of any thing like confidence in their reasoning upon the operation of any principle, or the effect of any measure. It would become me, least of all, to be so confident, who ought, at my time of life, to have well learned the important lesson of self-distrust, a lesson of no small value in company with the best information, but which alone can make any sort of amends for our not having learned other lessons so well as it was our business to learn them. I beg you, once for all, to apply this corrective of the diffidence I have, on my own judgment, to whatever I may happen to say with more positiveness than suits my knowledge and situation. If I should seem any where to express myself in the language of disapprobation, be so good as to consider it as no more than the expression of doubt.

You hope, sir, that I think the French deserving of liberty. I certainly do. I certainly think that all men who desire it, deserve it. It is not the reward of our merit, or the acquisition of our industry. It is our inheritance. It is the birthright of our species. We cannot forfeit our right to it, but by what forfeits our title to the privileges of our kind. I mean the abuse, or oblivion, of our rational faculties, and a ferocious indocility which makes us prompt to wrong and violence, destroys our social nature, and transforms us into something little better than the description of wild beasts. To men so degraded, a state of strong constraint is a sort of necessary substitute for freedom; since, bad as it is, it may deliver them in some measure from the worst of all slavery—that is, the despotism of their own blind and brutal passions.

You have kindly said, that you began to love freedom from your intercourse with me. Permit me then to continue our conversation, and to tell you what the freedom is that I love, and that to which I think all men entitled. This is the more necessary, because, of all the loose terms in the world, liberty is the most indefinite. It is not solitary, unconnected, individual, selfish liberty, as

if every man was to regulate the whole of his conduct by his own will. The liberty I mean is *social* freedom. It is that state of things in which liberty is secured by the equality of restraint. A constitution of things in which the liberty of no one man, and no body of men, and no number of men, can find means to trespass on the liberty of any person, or any description of persons, in the society. This kind of liberty is, indeed, but another name for justice; ascertained by wise laws, and secured by well-constructed institutions. I am sure that liberty, so incorporated, and in a manner identified with justice, must be infinitely dear to every one who is capable of conceiving what it is. But whenever a separation is made between liberty and justice, neither is, in my opinion, safe. I do not believe that men ever did submit, certain I am that they never ought to have submitted, to the arbitrary pleasure of one man; but, under circumstances in which the arbitrary pleasure of many persons in the community pressed with an intolerable hardship upon the just and equal rights of their fellows, such a choice might be made, as among evils. The moment *will* is set above reason and justice, in any community, a great question may arise in sober minds, in what part or portion of the community that dangerous dominion of *will* may be the least mischievously placed.

If I think all men who cultivate justice, entitled to liberty, and, when joined in states, entitled to a constitution framed to perpetuate and secure it, you may be assured, sir, that I think your countrymen eminently worthy of a blessing which is peculiarly adapted to noble, generous, and humane natures. Such I found the French, when, more than fifteen years ago, I had the happiness, though but for too short a time, of visiting your country; and I trust their character is not altered since that period.

I have nothing to check my wishes towards the establishment of a solid and rational scheme of liberty in France. On the subject of the relative power of nations, I may have my prejudices; but I envy internal freedom, security, and good order, to none. When, therefore, I shall learn that, in France, the citizen, by whatever description he is qualified, is in a perfect state of legal security, with regard to his life, to his property, to the uncontrolled disposal of his person, to the free use of his industry and his faculties: When I hear that he is protected in the beneficial enjoyment of the estates to which, by the course of settled law, he was born, or is provided with a fair compensation for them; that he is maintained in the full fruition of the advantages belonging to the state and condition of life in which he had lawfully engaged himself, or is supplied with a substantial, equitable, equivalent: When I am assured that a simple citizen may decently express his sentiments upon public affairs, without hazard to his life or safety, even though against a predominant and fashionable opinion: When I know all this of France, I shall be as well pleased as every one must be, who has not forgot the general communion of mankind, nor lost his natural sympathy, in local and accidental connexions.

[...]

One form of government may be better than another, and this difference may be worth a struggle. I think so. I do not mean to treat any of those forms which are often the contrivances of deep human wisdom (not the rights of men, as some people, in my opinion, not very wisely, talk of them) with slight or disrespect; nor do I mean to level them.

A positively vicious and abusive government ought to be changed—and, if necessary, by violence—if it cannot be (as sometimes it is the case) reformed. But when the question is concerning the more or the less *perfection* in the organization of a government, the allowance to *means* is not of so much latitude. There is, by the essential fundamental constitution of things, a radical infirmity in all human contrivances; and the weakness is often so attached to the very perfection of our political mechanism, that some defect in it—something that stops short of its principle, something that controls, that mitigates, that moderates it—becomes a necessary corrective to the evils that the theoretic perfection would produce. I am pretty sure it often is so; and this truth may be exemplified abundantly.

It is true that every defect is not of course such a corrective as I state; but supposing it is not, an imperfect good is still a good. The defect may be tolerable, and may be removed at some future time. In that case, prudence (in all things a virtue, in politics, the first of virtues) will lead us rather to acquiesce in some qualified plan, that does not come up to the full perfection of the abstract idea, than to push for the more perfect, which cannot be attained without tearing to pieces the whole contexture of the commonwealth, and creating a heart-ache in a thousand worthy bosoms. In that case, combining the means and end, the less perfect is the more desirable. The *means* to any end being first in order, are *immediate* in their good or their evil; they are always, in a manner, *certainities*. The *end* is doubly problematical; first, whether it is to be attained; then, whether, supposing it attained, we obtain the true object we sought for.

But allow it in any degree probable, that theoretic and practical perfection may differ, that an object pure and absolute may not be so good as one lowered, mixed, and qualified; then, what we abate in our demand, in favour of moderation and justice, and tenderness to individuals, would be neither more nor less than a real improvement which a wise legislator would make, if he had no collateral motive whatsoever, and only looked, in the formation of his scheme, to its own independent ends and purposes. Would it then be right to make way, through temerity and crime, to a form of things which, when obtained, evident reason, perhaps imperious necessity, would compel us to alter, with the disgrace of inconsistency in our conduct, and of want of foresight in our designs?

Believe me, sir, in all changes in the state, moderation is a virtue, not only amiable but powerful. It is a disposing, arranging, conciliating, cementing virtue. In the formation of new constitutions, it is in its province. Great powers reside in those who can make great changes. Their own moderation is their only check; and if this virtue is not paramount in their minds, their acts will taste more of their power than of their wisdom, or their benevolence. Whatever they do will be in

extremes; it will be crude, harsh, precipitate. It will be submitted to with grudging and reluctance. Revenge will be smothered and hoarded, and the duration of schemes marked in that temper, will be as precarious as their establishment was odious. This virtue of moderation (which times and situations will clearly distinguish from the counterfeits of pusillanimity and indecision) is the virtue only of superior minds. It requires a deep courage, and full of reflection, to be temperate when the voice of multitudes (the specious mimic of fame and reputation) passes judgment against you. The impetuous desire of an unthinking public will endure no course, but what conducts to splendid and perilous extremes. Then, to dare to be fearful, when all about you are full of presumption and confidence, and when those who are bold at the hazard of others would punish your caution and disaffection, is to show a mind prepared for its trial; it discovers, in the midst of general levity, a self-possessing and collected character, which, sooner or later, bids fair to attract every thing to it, as to a centre. If, however, the tempest should prove to be so very violent, that it would make public prudence itself unseasonable, and, therefore, little less than madness for the individual and the public too; perhaps a young man could not do better than to retreat for a while into study, to leave the field to those whose duty or inclination, or the necessities of their condition, have put them in possession of it, and wait for the settlement of such a commonwealth as an honest man may act in with satisfaction and credit. This he can never do when those who counsel the public, or the prince, are under terror, let the authority under which they are made to speak other than the dictates of their conscience, be never so imposing in its name and attributes.

This moderation is no enemy to zeal and enthusiasm. There is room enough for them; for the restraint is no more than the restraint of principle, and the restraint of reason.

I have been led further than I intended; but every day's account shows more and more, in my opinion, the ill-consequence of keeping good principles, and good general views, within no bounds. Pardon the liberty I have taken; though it seems somewhat singular that I, whose opinions have so little weight in my own country, where I have some share in a public trust, should write as if it were possible they should affect one man with regard to affairs in which I have no concern. But, for the present, my time is my own, and to tire your patience is the only injury I can do you.

I am, &c.

Edm. Burke

EDMUND BURKE: Excerpt from "A Letter to a Member of the National Assembly" (1791)

[https://www.gutenberg.org/files/15700/15700-h/15700-h.htm#MEMBER OF THE NATIONAL ASSEMBLY](https://www.gutenberg.org/files/15700/15700-h/15700-h.htm#MEMBER_OF_THE_NATIONAL_ASSEMBLY)

Why speculate on the measure and standard of liberty? I doubt much, very much indeed, whether France is at all ripe for liberty on any standard. Men are qualified for civil liberty in exact proportion to their disposition to put moral chains upon their own appetites,—in proportion as their love to justice is above their rapacity,—in proportion as their soundness and sobriety of understanding is above their vanity and presumption,—in proportion as they are more disposed to listen to the counsels of the wise and good, in preference to the flattery of knaves. Society cannot exist, unless a controlling power upon will and appetite be placed somewhere; and the less of it there is within, the more there must be without. It is ordained in the eternal constitution of things, that men of intemperate minds cannot be free. Their passions forge their fetters.

ABIGAIL ADAMS, Letter to John Quincy Adams

19 January 1780

My dear Son

I hope you have had no occasion either from Enemies or the Dangers of the Sea to repent your second voyage to France. If I had thought your reluctance arose from proper deliberation, or that you was capable of judging what was most for your own benefit, I should not have urged you to have accompanied your Father and Brother when you appeared so averse to the voyage.

You however readily submitted to my advice, and I hope will never have occasion yourself, nor give me reason to Lament it. Your knowledge of the Language must give you greater advantages now, than you could possibly have reaped whilst Ignorant of it, and as you increase in years you will find your understanding opening and daily improving.

Some Author that I have met with compares a judicious traveller, to a river that increases its stream the farther it flows from its source, or to certain springs which running through rich veins of minerals improve their qualities as they pass along. It will be expected of you my son that as you are favoured with superiour advantages under the instructive Eye of a tender parent, that your improvements should bear some proportion to your advantages. Nothing is wanting with you, but attention, diligence and steady application, Nature has not been deficient.

These are times in which a Genius would wish to live. It is not in the still calm of life, or the repose of a pacific station, that great characters are formed. Would Cicero have shone so distinguished an orator, if he had not been roused, kindled and enflamed by the Tyranny of Catiline, Milo, Verres and Mark Anthony. The Habits of a vigorous mind are formed in contending with difficulties. All History will convince you of this, and that wisdom and penetration are the fruits of experience, not the Lessons of retirement and leisure.

Great necessities call out great virtues. When a mind is raised, and animated by scenes that engage the Heart, then those qualities which would otherways lay dormant, wake into Life, and form the Character of the Hero and the Statesman.

War, Tyranny and Desolation are the Scourges of the Almighty, and ought no doubt to be deprecated. Yet it is your Lot my Son to be an Eye witness of these Calimities in your own Native land, and at the same time to owe your existance among a people who have made a glorious defence of their invaded Liberties, and who, aided by a generous and powerfull Ally, with the blessing of heaven will transmit this inheritance to ages yet unborn.

Nor ought it to be one of the least of your excitements towards exerting every power and faculty of your mind, that you have a parent who has taken so large and active a share in this contest, and discharged the trust reposed in him with so much satisfaction as to be honoured with the important Embassy, which at present calls him abroad.

I cannot fulfill the whole of my duty towards you, if I close this Letter, without reminding you of a failing which calls for a strict attention and watchfull care to correct. You must do it for yourself. You must curb that impetuosity of temper, for which I have frequently chid you, but which properly directed may be productive of great good. I know you capable of these exertions, with pleasure I observed my advice was not lost upon you. If you indulge yourself in the practise of any foible or vice in youth, it will gain strength with your years and become your conquerer.

The strict and invariable regard you have ever paid to truth, gives me pleasing hopes that you will not swerve from her dictates, but add justice, fortitude, and every Manly Virtue which can adorn a good citizen, do Honour to your Country, and render your parents supremely happy, particularly your ever affectionate Mother,

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JAMES MADISON, Virginia Ratifying Convention

20 June 1788 *Papers 11:163*

I have observed, that gentlemen suppose, that the general legislature will do every mischief they possibly can, and that they will omit to do every thing good which they are authorised to do. If this were a reasonable supposition, their objections would be good. I consider it reasonable to conclude, that they will as readily do their duty, as deviate from it: Nor do I go on the grounds mentioned by gentlemen on the other side--that we are to place unlimited confidence in them, and expect nothing but the most exalted integrity and sublime virtue. But I go on this great republican principle, that the people will have virtue and intelligence to select men of virtue and wisdom. Is there no virtue among us? If there be not, we are in a wretched [Volume 1, Page 410] situation. No theoretical checks--no form of government can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people, is

a chimerical idea. If there be sufficient virtue and intelligence in the community, it will be exercised in the selection of these men. So that we do not depend on their virtue, or put confidence in our rulers, but in the people who are to choose them.

The Founders' Constitution

Volume 1, Chapter 13, Document 36

<http://press-pubs.uchicago.edu/founders/documents/v1ch13s36.html>

The University of Chicago Press

The Papers of James Madison. Edited by William T. Hutchinson et al. Chicago and London: University of Chicago Press, 1962--77 (vols. 1--10); Charlottesville: University Press of Virginia, 1977--(vols. 11--).

JAMES MADISON, Federalist #10

Source: https://oll.libertyfund.org/title/jay-the-federalist-gideon-ed#lf1631_label_191

The same Subject continued

Among the numerous advantages promised by a well constructed union, none deserves to be more accurately developed, than its tendency to break and control the violence of faction. The friend of popular governments, never finds himself so much alarmed for their character and fate, as when he contemplates their propensity to this dangerous vice. He will not fail, therefore, to set a due value on any plan which, without violating the principles to which he is attached, provides a proper cure for it. The instability, injustice, and confusion, introduced into the public councils, have, in truth, been the mortal diseases under which popular governments have every where perished; as they continue to be the favourite and fruitful topics from which the adversaries to liberty derive their most specious declamations. The valuable improvements made by the American constitutions on the popular models, both ancient and modern, cannot certainly be too much admired; but it would be an unwarrantable partiality, to contend that they have as effectually obviated the danger on this side, as was wished and expected. Complaints are every where heard from our most considerate and virtuous citizens, equally the friends of public and private faith, and of public and personal liberty, that our governments are too unstable; that the public good is disregarded in the conflicts of rival parties; and that measures are too often decided, not according to the rules of justice, and the rights of the minor party, but by the superior force of an interested and overbearing majority. However anxiously we may wish that these complaints had no foundation, the evidence of known facts will not permit us to deny that they are in some degree true. It will be found, indeed, on a candid review of our situation, that some of the distresses under which we labour, have been erroneously charged on the operation of our governments; but it will be found, at the same time, that other causes will not alone account

for many of our heaviest misfortunes; and, particularly, for that prevailing and increasing distrust of public engagements, and alarm for private rights, which are echoed from one end of the continent to the other. These must be chiefly, if not wholly, effects of the unsteadiness and injustice, with which a factious spirit has tainted our public administrations.

By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

There are two methods of curing the mischiefs of faction: The one, by removing its causes; the other, by controlling its effects.

There are again two methods of removing the causes of faction: The one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.

It could never be more truly said, than of the first remedy, that it is worse than the disease. Liberty is to faction, what air is to fire, an aliment, without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

The second expedient is as impracticable, as the first would be unwise. As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves. The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties, is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.

The latent causes of faction are thus sown in the nature of man; and we see them every where brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders, ambitiously contending for pre-eminence and power; or to persons of other descriptions, whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other, than to co-operate for their common good. So strong is this propensity of mankind, to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and

fanciful distinctions have been sufficient to kindle their unfriendly passions, and excite their most violent conflicts. But the most common and durable source of factions, has been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a monied interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests, forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of government.

No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay, with greater reason, a body of men are unfit to be both judges and parties, at the same time; yet, what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? and what are the different classes of legislators, but advocates and parties to the causes which they determine? Is a law proposed concerning private debts? It is a question to which the creditors are parties on one side, and the debtors on the other. Justice ought to hold the balance between them. Yet the parties are, and must be, themselves the judges; and the most numerous party, or, in other words, the most powerful faction, must be expected to prevail. Shall domestic manufactures be encouraged, and in what degree, by restrictions on foreign manufactures? are questions which would be differently decided by the landed and the manufacturing classes; and probably by neither with a sole regard to justice and the public good. The apportionment of taxes, on the various descriptions of property, is an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act in which greater opportunity and temptation are given to a predominant party, to trample on the rules of justice. Every shilling with which they over-burden the inferior number, is a shilling saved to their own pockets.

It is in vain to say, that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm: nor, in many cases, can such an adjustment be made at all, without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another, or the good of the whole.

The inference to which we are brought, is, that the *causes* of faction cannot be removed; and that relief is only to be sought in the means of controlling its *effects*.

If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views, by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the constitution. When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest, both the public good and the

rights of other citizens. To secure the public good, and private rights, against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed. Let me add, that it is the great desideratum, by which alone this form of government can be rescued from the opprobrium under which it has so long laboured, and be recommended to the esteem and adoption of mankind.

By what means is this object attainable? Evidently by one of two only. Either the existence of the same passion or interest in a majority, at the same time, must be prevented; or the majority, having such co-existent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression. If the impulse and the opportunity be suffered to coincide, we well know, that neither moral nor religious motives can be relied on as an adequate control. They are not found to be such on the injustice and violence of individuals, and lose their efficacy in proportion to the number combined together; that is, in proportion as their efficacy becomes needful.

From this view of the subject, it may be concluded, that a pure democracy, by which I mean, a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert, results from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party, or an obnoxious individual. Hence it is, that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have, in general, been as short in their lives, as they have been violent in their deaths. Theoretic politicians, who have patronised this species of government, have erroneously supposed, that, by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.

A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking. Let us examine the points in which it varies from pure democracy, and we shall comprehend both the nature of the cure and the efficacy which it must derive from the union.

JOHN WINTHROP, “Little Speech on Liberty” (edited)

(Massachusetts Bay, 1645; spelling modernized)

Source: <http://plaza.ufl.edu/edale/Little%20Speech%20on%20Liberty.htm>

[...]

The great questions that have troubled the country are about the authority of the magistrates and the liberty of the people... I entreat you to consider that, when you choose magistrates, you take them from among yourselves, men subject to like passions as you are. Therefore, when you see infirmities in us, you should reflect upon your own, and that would make you bear the more with us, and not be severe censurers of the failings of your magistrates, when you have continual experience of the like infirmities in yourselves and others... But if he fail in faithfulness, which by his oath he is bound unto, that he must answer for. If it fall out that the case be clear to common apprehension, and the rule clear also, if he transgress here, the error is not in the skill, but in the evil of the will: it must be required of him. But if the case be doubtful, or the rule doubtful, to men of such understanding and parts as your magistrates are, if your magistrates should err here, yourselves must bear it.

For the other point concerning liberty, I observe a great mistake in the country about that. There is a twofold liberty, natural (I mean as our nature is now corrupt) and civil or federal. The first is common to man with beasts and other creatures. By this, man as he stands in relation to man simply, hath liberty to do what he lists: it is a liberty to evil as well as to good. This liberty is incompatible and inconsistent with authority, and cannot endure the least restraint of the most just authority. The exercise and maintaining of this liberty makes men grow more evil, and in time to be worse than brute beasts: *omnes sumus licentia deteriores*. This is that great enemy of truth and peace, that wild beast, which all the ordinances of God are bent against, to restrain and subdue it. The other kind of liberty I call civil or federal; it may also be termed moral, in reference to the covenant between God and man, in the moral law, and the politic covenants and constitutions, amongst men themselves. This liberty is the proper end and object of authority, and cannot subsist without it; and it is a liberty to that only which is good, just, and honest. This liberty you are to stand for, with the hazard (not only of your goods, but) of your lives, if need be. Whatsoever crosses this is not authority, but a distemper thereof.

This liberty is maintained and exercised in a way of subjection to authority... [Yet i]f you stand for your natural corrupt liberties, and will do what is good in your own eyes, you will not endure the least weight of authority, but will murmur, and oppose, and be always striving to shake off that yoke; but if you will be satisfied to enjoy such civil and lawful liberties, such as Christ allows you, then will you quietly and cheerfully submit unto that authority which is set over you, in all the administrations of it, for your good. Wherein, if we fail at any time, we hope we shall

be willing (by God's assistance) to hearken to good advice from any of you, or in any other way of God; so shall your liberties be preserved, in upholding the honor and power of authority amongst you.

[...]