The Price of Rights

The Courts, Government Largesse, and Fundamental Liberties

DANIEL C. KRAMER

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CHAPTER 1

The American Welfare State

A Threat to Civil Liberties?

Financial Aid to College Students, the Draft, and Self-Incrimination

Assume that you are a twenty-year-old male student, a citizen of the United States, and enrolled in an American college or university. Tuition is constantly increasing and your parents' salaries have not risen significantly in recent years, so you need some type of financial aid from the U. S. government in order to continue your studies—either a loan, a Pell Grant, or work study assistance. Assume further that if you do not get help of this sort, you will have to drop out of college. Also assume that it is very important for you to continue as a student. A company for which you want to work has told you that you must get your Bachelor's degree before it will consider your job application; or perhaps you want that B.A. in order to go to law school or medical school; or perhaps you even find your studies exciting. Thus, you really long for those federal dollars. Moreover, you know that your parents' financial ability to contribute to your tuition and expenses is limited enough to make you eligible for Washington's higher education aid programs, and that your grade point average over the two and a half semesters you have been at dear old Siwash University is a respectable B plus.

So you knock confidently on the door of Siwash's financial aid adviser. You have met her at various college parties and know that she is a pleasant person, interested in the welfare of the students. She bids you enter, flashes you a warm smile, and asks you what your problem is. You tell her and she goes to her computer to double check that you in fact have a B

plus average. Having verified this, she hands you the federal student financial aid form known as FAFSA and tells you to complete it in your dorm room and mail it to the government the next day. She adds that approval of your application will come reasonably quickly and that you will soon have the cash you need to stay at Siwash.

As you are going out the door, she calls to you, "By the way, I assume you have registered for the draft." You look at her incredulously and say "draft, what draft? My political science professor told me they ended the draft in the mid-1970s after the Vietnam War. I never registered for the draft. I didn't know we had to." She replies, rather sadly, that your professor, your parents, your high school guidance counselors or your friends should have told you that since 1980 you have to register with the Selective Service System within 30 days of your eighteenth birthday. Moreover, willful failure to do so is a crime. Furthermore, such a failure makes you ineligible for any federal program providing aid for college students. If you want to check this out, she says, just take a hike over to the library and ask the reference person where to find the collection of the laws of the federal government called the United States Code. Turn to Volume 50, Appendix Sec. 462(f)(2), and you will discover that your failure to sign up with the Selective Service System does disqualify you for any sort of federal scholarship or loan. When you ask her why Washington has instituted this registration requirement, she quotes from a Selective Service brochure stating solemnly, "Registration is the process by which the U.S. Government collects names and addresses of men age 18 through 25 to use in case a national emergency requires rapid expansion of the Armed Forces." In other words, she continues, Uncle Sam wants to know where to find you in case he decides he needs you to defend these shores.

Her words stun you, not only because your failure to sign up with Selective Service means that you will not be getting the government aid you absolutely need to continue your studies, but also because it makes you a law violator. You are a law-abiding citizen, and, moreover, you have no wish to spend even a day cooped up in a forbidding federal prison where your colleagues will be bank robbers and drug kingpins. You then remember from your political science class that the United States has a Constitution with a Bill of Rights and that the First Amendment in that Bill of Rights guarantees you, among other things, the free exercise of religion. So you tell her that on religious grounds you are opposed to war in any way, shape or form, and that forcing you to register with Selective Service, either directly through sending you to prison if you don't, or indirectly through rejecting your financial aid application if you haven't, violates your constitutional rights. She responds correctly that the government is not forcing you to go fight, because you can register as a conscientious objector and be

allowed to work in, say, a hospital or nursing home rather than be required to shoot a gun.

Hearing this, you tell her "OK, where's my draft board? I'll run down immediately and sign up." She answers, "My, my, you are behind the times, aren't you. There are no local draft boards now. Merely scurry on over to your post office, pick up a Selective Service registration form, complete it, stamp it, and mail it to the address printed on the cover. But you have an alternative that is even simpler. On the financial aid application you already have, you will notice there is a line (line 28 on the 2002–03 FAFSA) in essence asking the Selective Service System to register you with it. Just check the box on that line reading 'yes,' fill in the other material on the application; mail it off; and, lo and behold, you will get not only an acknowledgment from the federal government that you are registered with Selective Service but also the federal financial aid you hope for."

So you take the FAFSA to your room, put on a relaxing CD, turn on the lamp, and complete the form, including penciling in the "yes" box on line 28 registering you with the Selective Service System. You put it into your briefcase intending to mail it after you have finished your early morning political science class. However, the professor is lecturing about the privilege against self-incrimination. He says that this is located in the Fifth Amendment to the Constitution and means that the government cannot force you to make statements that will help it prove you are guilty of a crime. A light suddenly flashes in your head and you tell yourself that it therefore cannot make you register with Selective Service by threatening you with a denial of federal higher education aid if you do not. You reason that the financial assistance application you have marked up reveals to the government not only the fact of your non-registration but also your date of birth. Therefore (as you are now twenty years old), it will disclose to Washington that you are late signing up for the draft and so have committed a federal crime.

After the professor closes his books, you cross the campus to the financial aid office and tell the adviser that you want a new form; that you are not going to check the "yes" box on line 28 that will register you with Selective Service; and that you can do this without becoming ineligible for federal financial aid because compelling you to check it as a condition of getting such aid violates your privilege against self-incrimination. She regretfully informs you that others thought of that point many years ago, but that in 1984 the U. S. Supreme Court in *Selective Service System* v. *Minnesota Public Interest Research Group*[1] rejected it. Among the reasons given in Chief Justice Warren Burger's majority opinion were that the government is not *forcing* you to reveal to it your "criminal" lateness, as you are not under any legal obligation to ask for financial aid in the first place.

The Chief Justice did not wrestle with the problem posed by the fact that for economic reasons you have to seek some sort of subsidy; however, despite that omission the decision is nonetheless good law in the sense that it binds all the nation's courts and federal executive agencies until the relevant statute is changed or until the Court overrules this case. Justice Thurgood Marshall wrote a lengthy dissent in which Justice William J. Brennan concurred, but, as your political science professor has told you, a dissent is not good law until adopted by a majority of the Court, which has not been the lot of this particular dissent.

Because as a practical matter you are dependent on getting the federal monies, you realize that you have to check that FAFSA "yes" box signing you up with Selective Service. Accordingly, you go to the nearest mailbox and drop into it that FAFSA form you completed last night with that box ticked. You cross your fingers as you do so, hoping (with considerable justification) that the U. S. Department of Justice will decide not to prosecute you because your breach of the Selective Service registration requirement was not willful but, rather, completely unintentional.

The American Welfare State: No Figment of the Imagination

After you mailed in the FAFSA form and did receive a substantial federal grant (and were not arrested for draft evasion), you began thinking about the broader implications of the episode of which you were the protagonist. Looking at the matter realistically, the federal government used its power to hand out largesse as a lever to get you to waive your constitutional privilege against self-incrimination. In a nutshell, it told you that if you wanted the government boon that you needed, you had to take a step (register with the Selective Service System) even though in performing that step you would furnish that very government with information (the tardiness of your registration) it could use to convict you of a crime. You wonder if you are the only person in American history who had to surrender a constitutional right in order to get help from the polity.

You ponder the matter for a while and then conclude that your situation must be almost unique, as the United States, unlike Western European nations, is not a welfare state. You remember, for example, that most industrialized countries have put into place programs in which everyone gets decent health care regardless of her/his ability to pay a doctor's fee or hospital bill. You know that the United States lacks a system of this sort and that a plan proposed by former President Bill Clinton to create one got nowhere in the early 1990s. You also know that the United States is a country where, after 3,000 people were killed by fundamentalist terrorists in an attack on the World Trade Center in New York and the Pentagon in

suburban Washington on September 11, 2001, a proposal to extend unemployment and health insurance benefits to the airline workers laid off as a result of this tragedy was derided by House of Representatives Majority Leader Dick Armey as "not I think one that is commensurate with the American spirit"[2]; where in 1980 a president was elected on a promise to move decisively to control the runaway growth of federal spending; and where there is a movement to have a monument to that president (Ronald Reagan) erected in each one of the nation's 3,000-plus counties. It is a nation where an economist and his wife contend that most of America's present social "welfare programs should never have been enacted. If they had not been, many of the people now dependent on them would have become self-reliant individuals instead of wards of the state. In the short run that might have appeared cruel for some, leaving them no option to low-paying, unattractive work. But in the long run it would have been far more humane."[3] It is also a land where that gentleman is revered as one of its great scholars and his works have become best-sellers.

However, your conclusion that the United States is not a welfare state would be wrong. Looking first at the broader picture and concentrating on the national government, we find that it spent about $1.1 billion for the entire fifty years from 1789, the year our present legislative, executive, and judicial systems came into being, through 1849. (Actually, the years referred to in these paragraphs are "fiscal years," for the federal government at present the twelve-month period between October 1 and September 30. The fiscal year is named after the calendar year in which it ends. For example, fiscal year 2003 ended on September 30, 2003. However, for purposes of style, this book will simply refer to the year, for example, 2003, and omit the adjective "fiscal," which technically should come before it.) For the half-century between 1850 and 1900, the sum was $15.5 billion. In 1929, the year the stock market crashed and the Great Depression came to plague the country from sea to shining sea, its outlays were $3.1 billion. In 1940, just before the United States entered World War II, its budget leaped to $9.5 billion, largely due to the public works and public assistance programs put in place by President Franklin Roosevelt's New Deal to end starvation and lessen unemployment. The war pushed the annual sum of federal outlays to $92 billion by 1945. As President Lyndon Johnson was putting his Great Society domestic reform program into place in 1965, the figure reached $118 billion. When Republican Richard Nixon had to resign in 1974 because of the Watergate cover-up scandal after five-plus years in office, it had swollen to $265 billion.

In 1981, Ronald Reagan's first year as President, it totaled $678 billion. When his successor George Bush took office in 1989, it had grown to $1.143 trillion despite the ex-actor's budget-cutting instincts. By the turn

of the new century (i.e., by 2000), the figure was $1.788 trillion, and in 2003, under President George W. Bush, it was about $2.12 trillion.

It cannot be said that this fantastic increase in federal spending since 1930 or so is mainly due to inflation. The government's outlays from 1940 on have been translated by the U. S. Office of Management and Budget (OMB) into constant fiscal year 1996 dollars. Adjusted this way, expenditures in 1949 were $292 billion; in 1965, $575 billion; in 1974, $810 billion; in 1981, $1.137 trillion; in 1989, $1.4 trillion; in 2000, $1.66 trillion; and in 2003, $1.854 trillion.[4] In other words, even after inflation has been taken into account, federal spending grew six times (i.e., from almost $300 billion to over $1.8 trillion) between 1949 and 2003.

Moreover, the bulk of the surge in federal spending, at least since 1965, has not been due to a growth in expenditures for the military, despite defense buildups during the Vietnam War of the 1960s and early 1970s, the Reagan presidency of the 1980s, and the Bush II presidency of the early 2000s. In 2003 the federal government spent about $500 billion for national defense and foreign policy; a large amount, of course, but only 24 percent of the total federal budget. If we turn to some of Washington's domestic programs, we can see some huge ones. The largest federal health effort is Medicare, a program subsidizing the health expenses of retired people plus those of some disabled individuals. Medicare cost the national government $226 billion in 2002, and in 2001 covered 39 million people.[5] In addition, that government in 2000 spent $118 billion and the states and cities $90 billion on Medicaid, which accords low-income Americans free or inexpensive medical care.[6] The largest federal program of all, Social Security, which provides monthly benefits to retired and disabled workers and the survivors of deceased workers, cost a whopping $475 billion in 2003. About 45 million people received Social Security checks in 2000.[7]

Continuing with federal domestic programs, farmers get about $18 billion in federal subsidies annually. Though state and local governments are primarily responsible for providing Americans with primary, secondary, and public higher education, Washington disbursed close to $100 billion in 2001 on educational programs such as guaranteed loans to college students, aid to school districts with many poor children, and pre-school education for students from low-income families.[8] Poor individuals and families are eligible for food stamps, which reduce the amount they have to pay at the grocery store. By late 2001, with the nation in the midst of a recession, over 18 million individuals were aided by this plan.[9] Needy blind, aged, and disabled men and women obtained almost $31 billion in Supplemental Security Income (SSI) in 2000 though the economy was buoyant that year. Poor families with dependent children received about $16 billion

then from Washington under the Temporary Aid to Needy Families (TANF) law, to which the states added a lesser amount. (TANF used to be called Aid to Families with Dependent Children [AFDC], and is the welfare program that is most despised by the average American.) And in 2001 19 million families were accorded an Earned Income Tax Credit at a cost to the U. S. Treasury of about $30 billion.[10] (If the credit is under what one owes in taxes, the latter sum will be reduced by the former. If it is greater than one's tax bill, a check for the difference will be mailed to the family.)

State and local spending in 2002, minus the amount of this expenditure that came from the national government, amounted to about $1.4 trillion. A high percentage of these outlays were on health, transportation, education, and welfare. Conservatively speaking, the federal government spent another $1.2 trillion during that year for these purposes plus agriculture. Thus we can say with safety that somewhere between $2 trillion and $2.5 trillion was disbursed by American governments at all levels during 2002 on social welfare. Two trillion dollars is 18 percent of the country's Gross Domestic Product of about $11 trillion. Who says the United States is not a welfare state?

Of course, to finance all these activities, governments have to tax. In doing so, they grant certain deductions (for example, gifts to charities) and credits (for example, taxes paid to foreign governments). A deduction allows you to reduce your tax bill by a certain percentage of the amount in question; a credit lessens your tax bill by the entire amount. In addition, tax legislation often exempts certain groups, such as colleges and churches, from any liability to pay.

In putting so many programs into effect, American governments have become large-scale owners of real estate. Public schools and colleges are the most obvious examples of property to which political units have title; but they also have fee simple interests in airports, city halls, hospitals, parks, and playing fields. Many of these buildings and grounds are only in use from 8:00 A.M. to 5:00 P.M.; and so groups of people, especially non-profit or community organizations, are or would like to be given permission to use them for evening or weekend plays, meetings, concerts, or athletic events.

Governments in the United States are also active regulators of businesses and individuals. (The regulation dealt with in this book involves laws and administrative rules and judgments informing someone or some group what he/she or it must, may, or may not do with his/her/its property or in his/her work life.) Government has, of course, engaged in regulatory activity since the rise of the organized state. In ancient Sumer there were inspectors of boats, cattle, and fisheries.[11] State and local governments in the United States license professionals and tradespeople, such as physi-

cians, lawyers, electricians, nurses, psychologists, and plumbers. State Public Utility Commissions influence the price the consumer must pay for electricity and natural gas. Cities, towns, villages, and counties, via the mechanism of zoning laws, determine what can be built on what types of property. For example, factories normally cannot be erected in residential neighborhoods.

The first major piece of federal regulation was the creation in 1887 of the (now abolished) Interstate Commerce Commission, which controlled the rates set by interstate railroads. Since then dozens of federal regulatory agencies have appeared on the scene. To name three, the Environmental Protection Agency determines how much, if any, of various pollutants can be dumped into the water or spewed into the air by sources such as factories, power plants, and automobiles; the Federal Aviation Administration licenses airplane pilots; and the Federal Communications Commission determines who may use the airwaves.

Thus, governments in the United States have become very active regulating property and vocations; owning realty; spending a lot of money providing for the health, safety, welfare, and convenience of those over whom they have jurisdiction; and taxing to fund these activities while simultaneously inserting tax breaks into the relevant finance measures. In a real sense, American governments taken individually or together have become a welfare-regulatory-tax-break-giving-property-owning state. (This phrase usually will be simplified to read *welfare state.*) So we can say a priori that the dilemma faced by the protagonist of the first few pages of this book is not unprecedented. Just about everyone living somewhere in the United States expects some sort of government benefit, whether it be in the form of federal financial aid to further one's college education, social security for one's old age, subsidies for growing cotton, a tax deduction for the expenses incurred in running one's business, a dispensation to use a public school auditorium for the annual play presented by the neighborhood theater group, or a license to practice dentistry. Thus, the scope for the American political system to condition its assistance on the surrender of one or more of the hopeful recipients' fundamental rights, or even to totally exclude from this assistance groups unpopular at the moment, is enormous.

The Welfare State as a Potential Threat to Fundamental Freedoms

To expand on the point made in the previous sentence, imagine an artist eagerly desiring a government grant or a business person dreading a decision by a regulatory agency that she/he cannot take a step she/he wants to carry out in order to make the firm more profitable. Picture, too, a

government led by people who detest a given political or theological position or a particular type of creative activity. Would it not be tempting for the legislators to say to the artist hankering for the assistance, "We'll give it to you, but if you want it you will have to avoid criticizing religion in the works you produce using public money?" And would it not cross the minds of the chiefs of the regulatory body to declare, "we'll license you to do this or that; but first you have to agree to swear that you are loyal to the government of the United States?" Moreover, would not a public school district in a county most of whose inhabitants are religious fundamentalists be strongly inclined to deny an organization of atheists the use of a junior high school classroom for an evening meeting?

To repeat, the wide-ranging welfare-regulatory-property owning-tax-break-according activities of the American political system taken as a whole give it immense potential to constrict fundamental freedoms by informing the hopeful beneficiaries of these activities, and just about everyone in the country falls into this category, that they will have to waive certain fundamental rights if they want one or another of these boons. The state even has the power to inform expectant awardees that if in the past they have made use of a given right in a way it dislikes or belong to a certain racial or ethnic group, they will not be able to get the assistance at all. Some might argue that these particular types of threats to liberty are in reality, as opposed to theory, largely albeit perhaps not totally absent from the United States. To a considerable extent, it remains a free country despite the expansion of the functions of its numerous governments. Hundreds of religious sects worship openly. Individuals and groups do frequently criticize its elected officials, somtimes in bitter and colorful language. Even the most cynical observer would say that the United States has a tradition of free elections, although money too frequently counts in these contests and voter turnout is much too low. America *is* a genuine democracy, in the sense that its leaders are chosen by majority vote, ethnic and racial minorities are shielded from official discrimination, and individuals accused of crime usually receive a fair trial.

However, the record also shows that American governments have *on more than a handful of occasions* used their spending, regulatory or other economic prerogatives to restrict basic liberties or to cripple unpopular groups. Perhaps the most vivid examples arose from the American government's struggle against domestic communism during the 1940s and 1950s; some of these examples are found in the next chapter. This part of this chapter will furnish the reader with additional real-life examples. In the first place, in rural southern counties during the 1940s and 1950s it was much harder for blacks than whites to get public assistance under the program that

was then called Aid to Families With Dependent Children and which is now denominated Temporary Aid to Needy Families.[12] That is, a black living in these areas might well be deemed ineligible whereas a white, living under the same social and economic circumstances, would be added to the rolls. Almost certainly, one reason for discriminating in this way was to push blacks to the North once the South did not need them any more because cotton picking became mechanized rather than done by hand as in the old days. These counties used their power to grant boons to severely limit the right of blacks to live where they chose.

Also, witness some antics of Huey Long, who became Governor of Louisiana in 1928. To be fair, he did have a genuine concern for the welfare of the poorest people of the state: he got through the Legislature measures providing free textbooks to public and parochial schools and had bond issues passed to finance the construction of much needed highways and bridges.[13] This program compelled him to raise severance taxes on natural resources such as gas and oil. These hikes antagonized some members of the state's wealthier element as well as some large corporations that were doing business within its borders, especially when he proposed a tax on the refining of oil.[14]

However, side by side with the Long who wanted to help the poor, black as well as white, there was the Long with a dictatorial streak. During a bitter and ultimately successful campaign in 1930 for U. S. Senator, an uncle of his mistress Alice Grosjean, irked by his loss of a state job, gave Huey's rival information about corruption in the state's government. This material was handed to the challenger just a few days before the Democratic primary—in those days the crucial election in Louisiana. Long first had state employees kidnap the trouble-making gentleman and hold him over the weekend preceding the primary in a parish (county) on the coast. On the Sunday evening before the election, after two days of virtual imprisonment, the "captive" went on the radio to support Huey. He was then given another state position![15] In a real sense, Long told his beloved's uncle that if he wanted to work for Louisiana again, he had to surrender his First Amendment right to oppose Long. (Political patronage still exists in the U. S. but as a mechanism for party-building rather than for supressing dissent).

It should not surprise anyone to discover that a politician capable of abducting his political enemies would be eager to take revenge on newspapers that disliked him, and the state's larger ones almost unanimously did so and were not reluctant to make acerbic references to him and his projects. For example, a cartoon in the *New Orleans Times Picayune* depicted Long's programs as a bunch of pigs eating dollar bills at a trough with Huey above them screaming "More Taxes, Soak Everything."[16] Thus, in 1934,

he got a law through the Legislature hitting Louisiana newspapers, with a circulation of more than 20,000, with a 2% tax on advertising revenues. Just about all the papers covered by this act detested him. (Long, though a U.S. Senator at the time of the enactment of this levy, had continued to be the real ruler of the state.) Luckily the U. S. Supreme Court in 1936 in *Grosjean* v. *American Press Co.*[17] invalidated this tax, which ill-treated those who had spoken out against Longism and in essence exempted those who had not.

Because governments in the United States have at times in the past used their welfare, regulatory, tax-break-granting, and property-ownership prerogatives to restrict fundamental liberties or weaken the position of minority groups, and since the American welfare state retains the ability to employ these prerogatives to limit civil rights and liberties on a widespread basis in the future, we must conclude that it *is* a genuine threat to the continued vitality of our important freedoms. (A friend of mine is afraid to criticize the New York City Sanitation Department in the local newspaper because he worries that it will then fine his business for violating the sanitation code.) Interestingly, it is a work written by an individual on the left side of the political spectrum that makes this point most convincingly through its massing of relevant detail and its clear presentation of that data. That work is the seminal article "The New Property,"[18] authored by law professor Charles Reich. Reich first catalogs the ways in which American governments provide valuable benefits to individuals and institutions. Among the boons listed are social security; government employment; occupational licenses; franchises; contracts; subsidies for agriculture, housing, education, and scientific research; and the use of public resources such as government-owned land and the airwaves.[19] Government largesse is commonplace, he rightly insists, but the problem is that "The recipient of largess [an acceptable alternative spelling of this word], whether an organization or an individual, feels the government's power."[20] He continues by noting that the Bill of Rights is the "chief legal bulwark" of the individual against "oppressive government power...But government largess may impair the individual's enjoyment of these rights."[21] He is happy that the growth of the welfare state has made "much private wealth subject to 'the public interest,'" but is not pleased by the fact that the individual has become more "dependent" and that civil liberties have been diluted "in the public interest state."[22]

Judicial Reaction to the Use of Welfare Legislation to Limit Fundamental Rights: Two Nineteenth-Century Cases and Their Critics

This volume will *not* take a position on whether the welfare state should or should not be extended. Nonetheless, because there is little doubt that it poses a genuine risk to civil liberties, it is important to know to what extent

the *American judiciary,* which is supposed to play a major role in protecting fundamental rights, has defended these against the encroachments, intentional or unintentional, already generated by its spread. Thus, this book will concentrate on the extent to which the country's *courts* have gone along with these encroachments and the extent to which they have frustrated them by declaring them unconstitutional or by using other techniques of the judicial trade. As Chief Judge Patricia Wald of the U. S. Court of Appeals for the District of Columbia Circuit put the matter over a decade ago, "In fact, as government expands its role in the lives of citizens—supplying food, jobs, travel, communication, information, housing, student loans—it can no longer plausibly be contended that their loss is simply the loss of a 'windfall.' *Questions concerning the dispersal of government largesse that were once at the periphery of constitutional adjudication today lie at its core* [emphasis added]."[23] Not only Reich but also Robert M. O'Neil did an outstanding job of chronicling judicial reactions to the use of government boons to restrict fundamental freedoms. O'Neil's *The Price of Dependency: Civil Liberties in the Welfare State* [24] is a classic. However, that work was published in 1970 and Reich's in 1964, and they need updating because much water has fallen over the dam since then.

The ghost of one of the country's greatest jurists, Oliver Wendell Holmes, hovers over this issue of the constitutionality of employing the polity's tax-break-according, regulatory, property-ownership, and subvention-granting capacities in ways that limit fundamental rights. Holmes is probably known to most of the readers of this book as one of the staunchest defenders of the First Amendment in American history. This judgment is accurate, and his views on the constraints on governmental power to limit speech are frequently cited by those opposed to a governmental regulatory, tax, or spending measure that is challenged as restricting a First Amendment right. It was Holmes who in *Schenck v. United States* (1919)[25] developed the famous clear and present danger test, which declares that under the First Amendment speech and press can be restricted only when they create a "clear and present danger that they will bring about the substantive evils that [a legislature] has a right to prevent."[26] (Despite these noble words, Holmes's opinion in that case for a unanimous Supreme Court affirmed the conviction of some individuals who had circulated a document criticizing the military draft law enacted in World War I.) He dissented in *Abrams v. United States* (1919),[27] where the Court upheld the jailing of other radicals who had distributed leaflets calling for an end to American military intervention against the communist regime that had recently seized power in Russia. Reiterating and refining the clear and present danger test, he claimed, in resounding words that still thrill the hearts of students and professors of Constitutional Law:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe in the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment...While that experiment is part of our system I think that we should be extremely vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[28]

However, there are two opinions penned by this same jurist when he sat as a judge of the Supreme Judicial Court of Massachusetts that are often cited in decisions sustaining the use of government's aid-granting, tax-break-according, property-ownership, and regulatory capacities, as opposed to its making certain words criminal as in *Schenck* and *Abrams,* to limit speech or other crucial liberties. The first of this duo is *McAuliffe v. Mayor of City of New Bedford* (1892).[29] This decision upheld the City of New Bedford's firing of a policeman who, in violation of a city regulation, had solicited political contributions and joined a political committee. In response to the officer's complaint that the discharge for his political activities (not described in any detail in the opinion) violated his constitutional rights, Holmes retorted in words repeated many times over subsequent decades that "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract."[30]

Three years later in *Commonwealth v. Davis* (1895),[31] Judge Holmes allowed a preacher to be convicted for speaking in Boston Common, one of America's most famous urban parks. Davis had violated a Boston ordinance providing that no person shall in any public ground make a public address without a permit from the mayor. Holmes defended his upholding of the conviction by asserting that "the legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the less[er] step of limiting the public use to certain purposes."[32] In everyday terminology, Holmes is contending that because the legislature can completely close a park to the public, it can set any condition it wants on the use of that park, including demanding that people who want to orate there get a permit before expounding their views.

McAuliffe and *Davis* embody two related theories, both of which are very valuable to those defending the constitutionality of a government

subsidy, tax break or regulatory measure qualified in a way that constricts free speech or other important rights. The first is that there is a clear distinction between a right and a privilege. There is, for example, no constitutional *right* to government assistance of any sort (including subventions, licenses, tax breaks and permission to use government property); obtaining it thus is a *privilege*. Ergo the polity can condition the largesse as it wishes, including requiring the recipient to renounce one or more of her/his fundamental freedoms. This idea is articulated by O'Neil,[33] who goes on to reject it. However, it is basically the position of the already cited 1984 student financial aid/Selective Service registration/Fifth Amendment case of *Selective Service System v. Minnesota Public Interest Research Group,* where the Supreme Court in essence said that federal financial aid to college students is a privilege that may be conditioned on their furnishing the government with information that could incriminate some of them.

The second thesis built into *McAuliffe* and *Davis* is the idea that the greater includes the lesser. The logic here is that since the government has the *greater* power to completely deny a benefit (e.g., the use of a park to which it holds title) to all, it follows that it has the *lesser* power to disallow the boon to some even after it accords it generally. Professor Seth Kreimer outlines this concept in his landmark article "Allocational Sanctions: The Problem of Negative Rights in a Positive State."[34] He contends, however, that it is seriously flawed.

As we shall see, American courts at least as often as not veer from the theses of *McAuliffe* and *Davis* that government boons such as subsidies, licenses, tax breaks, and so forth are privileges, not rights, and that the power to deny these altogether thus implies the power to accord them on whatever conditions the state sees fit, including qualifications that narrow basic liberties. As Justice Brennan declared in *Goldberg v. Kelly* (1970),[35] holding that the Due Process Clause of the Fourteenth Amendment requires an administrative hearing to be held before welfare benefits may be terminated, the New York City official appealing the case "does not contend that procedural due process is not applicable to the termination of welfare benefits...Their termination involves state action that adjudicates important rights. *The constitutional challenge cannot be answered by an argument that public assistance benefits are a 'privilege' and not a 'right'* [emphasis added]."[36] And as conservative Justice George Sutherland said in *Frost v. Railroad Commission of State of California* (1926),[37] "If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

Moreover, many law review articles and legal scholars have criticized *McAuliffe v. City of New Bedford* and *Commonwealth* v. *Davis*. For example, Professor William Van Alstyne contends[38] that the government cannot significantly limit important freedoms such as speech directly. Thus it cannot do so indirectly by demanding, for example, that the recipient of government largesse say something or keep silent before he/she is accorded the benefit.[39] Furthermore, Van Alstyne continues,[40] in its day the *McAuliffe/Davis* doctrine allowing conditions in governmental benefits to trump the Bill of Rights had little impact on fundamental liberties, for when these cases were decided government employed few people and sponsored few social welfare programs. Now that the welfare/regulatory state has made its appearance, automatically upholding rights-limiting qualifications in governmental grants or regulatory measures will have significant and negative repercussions on the quantity of liberties Americans enjoy. Also, according governmental favors conditionally may raise equal protection of law problems even if First Amendment and other Bill of Rights issues are left out of the equation. If, for example, Social Security payments were to be granted to all retired persons who had paid into the system except current members of the American Communist Party, members of that group could claim with some justification that they had been denied the equal protection of the laws that the federal government must respect because of the Due Process Clause of the Fifth Amendment.[41] In any event, the First Amendment prevents the government from enacting any law *abridging* freedom of speech, press, and so forth; and a measure conditioning a benefit on an individual's waiver of his/her speech rights is just as much an abridgment as a law sending one to jail if she/he utters a particular idea or joins a particular group.[42]

Rights-Limiting Conditions and Rights-Limiting Classifications Attached to Governmental Largesse: Problems of Definition and Analysis

What most scholars who are worried about the ability of the welfare state to limit fundamental freedoms have concerned themselves with are conditions upon governmental largesse. *Conditions* are provisions in a law granting a governmental favor declaring that no one can obtain the boon *unless* he or she agrees to renounce the exercise of one or more of his/her basic rights. In other words, these authors, including Van Alstyne, declare that it is meaningful to accept the doctrine of *unconstitutional conditions,* i.e., the idea that some, albeit not all, conditions on largesse that restrict important rights are unconstitutional. Professor Kathleen Sullivan wrote an important article using the phrase "unconstitutional conditions" as its full

title.[43] Holmes himself said in a little-noticed passage in *McAuliffe* that "the city may impose any *reasonable* [emphasis added] condition upon holding offices within its control."[44] The implication is, of course, that he would have been willing to declare some such qualifications unreasonable and thus null and void.

A quick but important word about the terminology that will be used in this book to refer to conditions is now in order. Because no one who accepts the theory of unconstitutional conditions as defined above says that *all* qualifications affixed to awards of government largesse and restricting important rights are unconstitutional, the author of this volume feels that it would be better to denominate qualifications of this sort as *rights-limiting* as opposed to *unconstitutional* conditions. Ergo, the adjective "rights-limiting" rather than "unconstitutional" will be used in these pages to refer to both the doctrine noted in the prior paragraph as well as to specific conditions in largesse measures that in one way or another constrain the exercise of fundamental liberties.

What few of the writers who have talked about unconstitutional (i.e., what we are calling rights-limiting) conditions have specifically called their readers' attention to is that some provisions in government largesse measures that constrict fundamental freedoms do not take the form of conditions. A condition is future oriented: it declares that only if you do (or only if you refrain from doing) such and such will you get the boon you seek. Moreover, because they are future oriented they always involve some arm-twisting of the individual by the state, which can range from mild inducement to heavy pressure. However, in some cases, reservations in governmental largesse acts limit crucial liberties by, for example, denying the desired assistance to individuals or groups that have in the past exercised one or more of these rights irrespective of how they behave in the future. Professor Lynn Baker is one scholar who has made this important distinction. As she notes, there is a difference between (1) conditions that "present…the otherwise eligible individual with a seeming choice of actions…a situation in which the benefit provides the individual an incentive to act…in a certain way, frequently...to waive a constitutional right"; and (2) a condition which "does not present the individual with a choice of actions; there is in fact nothing the individual can now do...to comply with the attached condition and receive the benefit."[45] It is Baker's item number one that these pages will refer to as rights-limiting *conditions*: her item number two they will denominate rights-limiting *classifications*. (They will not be termed *unconstitutional* classifications because some are *not* unconstitutional.)

Actually, there are two types of rights-limiting classification. The one covered by Baker exists when one is denied governmental aid because

he/she has exercised a fundamental right in the past or because he/she belongs to a given race or ethnic group. Here, as she notes, there is no step he/she can take to get the assistance. Take the old segregationist laws depriving blacks of the right to get an inexpensive education at the best southern public universities. Or take a hypothetical law declaring that no one who has ever been a member of the racist group known as the Klu Klux Klan may receive a Fulbright Fellowship from the U. S. government to do research in a foreign land. Under the terms of the statute, there is nothing an applicant who has been a Klan adherent can do to wash his/her hands of the Klan stain and thus get the Fulbright. The law thus creates a rights-limiting classification. However, the limit would be a rights-limiting condition if the measure were phrased to read simply that *current* members of the Klan may not receive Fulbrights. In that event, a Klan adherent who wanted this type of award could become eligible for it (assuming he/she had an appropriate track record of research in the field he/she wanted to study) just by junking his/her white hood and robe.

There is a second type of rights-limiting classification that can appear in some governmental largesse bills which is not noted even by Baker. This is where government (without looking to past actions or ethnicity) refuses to offer aid to an individual or group exercising or desiring to exercise a fundamental right and does not promise to offer public aid if the right is not exercised, although it assists similar groups or people in similar circumstances or subsidizes actions or activities similar to those the rejected group or individuals would like to carry out. (If there were such a promise, a rights-limiting condition rather than a rights-limiting classification would be present.) An example of this second type of rights-limiting classification would be where a public school allowed the teachers' union currently supported by a majority of the staff, but not other unions, to use school mailboxes to distribute literature asking more instructors to become members. By drawing this line, the school would be limiting the First Amendment rights of speech, press, and association of the other unions and not promising the other unions any benefit after the limitation upon them has been put into effect. It is important to note that a rights-limiting classification of this second type exists only when government rewards actions similar to the exercise of the unsubsidized right; or assists groups or individuals similar to the ones wishing to, or actually exercising, the right but left begging by the state. For example, if government were to make cash awards to scientists but not to artists, it would not be effecting a rights-limiting classification because art and science are activities of different types, although both are important to society and protected by the First Amendment. We would have in that case merely a "failure to fund" the arts. (In fact, the United States gov-

ernment does subsidize both art and science.) But if it should fund sociologists but not political scientists, it would be implementing a rights-limiting, albeit probably constitutional, classification because political science research is an activity protected by the First Amendment and political scientists as well as social scientists study the workings of the social order. (This classification could convince a few political scientists to transfer to sociology!)

Some additional points about rights-limiting classifications and conditions attached to government largesse should now be made. First, this book will cover judicial reactions to both. Second, some rights-limiting classifications as well as rights-limiting conditions may have effects in the future. Note the "disloyal" political scientists mentioned above. And, to continue with the example of the Fulbright applicant who in the past had been a Klan member, when word gets around that he/she has been denied the award because of his/her affiliation with that group, others who are toying with the idea of linking up with it may be deterred from doing so for fear of losing some sort of government boon later on in life. Third, the idea that some rights-limiting conditions and classifications may be unconstitutional, as opposed to individual conditions or classifications themselves, will sometimes for the sake of brevity be referred to as the *doctrine of rights-limiting conditions* rather than as the doctrine of *rights-limiting conditions/classifications.* Fourth, though we shall ignore the huge topic of perils to liberty proceeding from criminal law (e.g., a law making it illegal to advocate the violent overthrow of the state), some of the rights-limiting conditions/ classifications we consider will be backed up by a criminal component. Take a statute allowing one to receive Medicaid benefits only if he/she swears that he/she is not a member of a terrorist organization. In case one falsely takes an oath to the effect that she/he is not an adherent of such a group and the lie is discovered, she/he may go to prison for the crime of perjury. Or take a person who is denied a license to be a physician because he/she refuses to take such an oath. If he/she hangs out a shingle and begins treating the halt, lame, and blind anyway, he/she may be prosecuted for practicing medicine without a license.

Fifth, in its final chapter, this book sets forth various general criteria that the courts should use in determining whether a rights-limiting condition or classification is legitimate or invalid. However, in limning the cases that appear in the following chapters, arguments for and against the decision frequently will be provided: this task will often be accomplished by the very act of summarizing both the majority opinion and the dissent. Once in a while the author will indicate at the end of the summary whether he believes a given result was the proper one. Obviously, he will analyze some cases in

more depth than others. Sometimes after the presentation of a holding he will ask the reader to consider certain questions it raises.

To review the core ideas of the previous pages, the doctrine of rights-limiting conditions and classifications holds that the polity cannot always qualify the grant of one of its benefits upon the recipient's surrender of a fundamental right; deny the benefit because he/she has made use of such a right in the past or because he/she belongs to a particular racial or ethnic group; or refuse to subsidize the exercise of a fundamental right when it is assisting similar activities or individuals similarly situated. Sometimes rights-limiting conditions and classifications attached to government benefits are legitimate: what the rights-limiting conditions and classifications thesis declares is that they are not *invariably* valid. The rest of this book will describe the attitude of the American judiciary to such conditions and classifications.

Types of Rights-Limiting Classifications and Conditions That Will Be Skipped

For reasons of space, we shall ignore several topics that could logically be treated here. We shall not pay any further attention to allegedly unconstitutional conditions or classifications attached to government employment other than from time to time mentioning the *McAuliffe* case because it has had such a profound effect on the way courts treat qualifications appended to governmental boons. (The growth of American governments has made them major employers: 14.5 million people were working for state and local governments alone in 1998.[46]) The problem of conditions limiting speech and other rights of civil servants has been handled well in several works, e.g., Alan Barth's *The Loyalty of Free Men*.[47] Except for waivers of the no-search-without-warrant safeguard that will be scrutinized in the right-to-privacy chapter, we shall pass over the *Selective Service System v. Minnesota Public Interest Research Group* problem of conditions imposed on the grant of public benefits that demand that the beneficiary promise to surrender an important *procedural* right, such as the right to have a hearing before welfare benefits are cut off or the privilege against self-incrimination. Nor shall we have the opportunity to consider the use of classifications or conditions to limit economic rights, even though the doctrine of unconstitutional conditions actually was first developed to protect business.[48] (However, we have already quoted from Justice Sutherland's language in *Frost v. Railroad Commission,* where it was declared unconstitutional for the California Railroad Commission to tell a citrus fruit hauler that it had to become a common carrier subject to considerable regulation if it wanted to continue to use the state's highways. Other cases

where the unconstitutional conditions doctrine was used in property rights disputes are gathered in Robert Hale's celebrated article "Unconstitutional Conditions and Constitutional Rights."[49])

We shall eschew non-free-speech federalism cases such as *South Dakota v. Dole* (1987),[50] where the Supreme Court upheld a federal grant to the states that required them, as a condition of receiving highway aid, to ban the sale of alcoholic beverages to persons under twenty-one years of age. Likewise we shall not study further the use of rights-limiting classifications designed to persecute minority racial and ethnic groups. Luckily, this is not a serious problem today. (However, because of the murderous attacks of September 11, 2001, it is not totally inconceivable that the federal government will start denying financial assistance to, for example, schools run by Muslim or Arab-American groups on the theory that they promote terrorism. Even now, undocumented aliens from Arab and South Asian lands are the ones most likely to be seized and deported, and it was mainly students from Arab and other Muslim countries who until recently had to register with immigration authorities.)

Topics Covered in Subsequent Chapters

The rights-limiting conditions and classifications in government spending and other aid measures the judicial reaction to which this book will consider are, first of all, those that restrict potential beneficiaries' First Amendment freedoms of speech, press, and petitioning the government for a redress of grievances. Conditions and classifications of this sort present the greatest threat to the continued existence of democracy in America. Thus in Chapter 2 we shall see how American courts reacted to conditions and classifications inserted into government spending, regulatory, permission-to-use-public-property, and tax-break measures to wage a war on radicals. Chapters 3, 4, and 7 deal with additional conflicts between the welfare-regulatory state and freedom of speech and press. The second type of conditions and classifications in government largesse measures to be considered is that narrowing the right to privacy. Chapter 5 is devoted to this topic. Not only is privacy necessary to a decent life, but one aspect thereof, the right of a woman to have an abortion, is one of the most politically charged and philosophically complex issues facing us during the first decade of the twenty-first century. Finally, Chapter 6 analyzes conditions and classifications in actions of the welfare state that limit another First Amendment liberty, that of the free exercise of religion.

CHAPTER 2

The Withholding of Government Benefits as a Weapon Against Radicalism

Communism in America: The Early Days

The younger readers of this book will probably be unable to comprehend the fear and loathing aroused by the word *communism* in most Americans during the greatest part of the twentieth century. November 1917 (by the Western calendar), in the midst of World War I in which the United Kingdom, France, Canada, Italy, and the United States were fighting Germany, Turkey, and Austria-Hungary to a bloody standstill, saw the Communist (Bolshevik) Party in Russia ousting the democratic government of Alexander Kerensky. By early 1918 it had put in place a dictatorship and taken its country out of the war, which in turn enabled Germany to send hundreds of thousands of additional troops to the West to confront the Americans, Canadians, British, and French. Under party leader Vladimir Ilyich Lenin the Soviet state seized control of most large enterprises in the country, and as early as 1919, the party had formed an organization known as the "Comintern" or "Third International" to spread communist propaganda over the world and to foment revolution in other lands. Shortly after the war ended in November of 1918 with the victory of the Allied powers, a communist revolution in defeated Germany was crushed and a communist regime actually seized power for a short time in newly independent Hungary.

As one author put it well, "Most Americans have never liked communism. Indeed, most have despised it...Communist ideology was incompatible with the values held by most Americans...most support private property, take immense pride in their individualism, and glory in political democracy."[1] However, America did and does have a Socialist Party. Led by Eugene

Debs, it pulled close to 900,000 votes in the 1912 presidential election and "By the outbreak of the war in 1914 it had thirty members in the legislatures of twelve states and more than 1000 members in various municipal offices."[2] Most socialists in France and Germany supported their countries' entry into World War I; but the majority of American Socialists, including Debs and Milwaukee socialist leader Victor Berger, opposed U. S. participation both before and after the nation belatedly became a belligerent. As such, the party became a victim of the panic that swept the country even before November 1917, hysteria whose initial object had been Americans of German ancestry. This hysteria reached such proportions that Nebraska banned the teaching of German in the public schools (a ban later invalidated by the United States Supreme Court in *Meyer v. Nebraska (1923)*[3]); and small shopkeepers whose German names appeared on their storefronts saw their windows smashed. "In their patriotic fervor many Americans refused to eat sauerkraut...The...[federal government] had to announce with a straight face that sauerkraut was said to be of Dutch, not German, origin."[4] When this paranoia was unleashed against the political left, Socialists who distributed anti-war leaflets were sent to jail, and their convictions were, as Chapter 1 indicated, upheld in cases such as *Schenck v. United States* (1919).[5]

Many American Socialist Party leaders rejected the communist cry for violent revolution, and criticized the imprisonment by the Russian communists of those who disagreed with them. As a consequence, those of its members more sympathetic to the Russian Revolution left the Socialist Party in 1919 and formed several groups, which in 1921 merged to become the American Communist Party.[6] Nonetheless, despite the refusal of most prominent socialists to accept the communist message, many Americans were unable to distinguish between the two and anti-radical panic victimizing both socialists and communists continued to rule the roost into the 1920s. This fear and trembling was aggravated by a general strike in Seattle in 1919 and the mailing of bombs to various prominent Americans including Justice Holmes and John D. Rockefeller. (Unlike the anthrax letters following the World Trade Center bombing of September 11, 2001, most of these bombs were intercepted. However, one was delivered to the home of a former senator—his maid and wife were injured when they opened the packet that contained it.) The alarm gripping the nation culminated in raids rounding up more than 4,000 radicals conducted by President Woodrow Wilson's attorney general, A. Mitchell Palmer, on January 2, 1920. Many of the detainees were kept in heatless and airless rooms, and, like the 1,200 Middle-Eastern men corralled by President George W. Bush's attorney general, John Ashcroft, after September 11, 2001, were held virtually

incommunicado.[7] This and previous raids resulted in the deportation of hundreds of aliens and the trial of some American citizens for violation of state laws prohibiting the advocacy of violent overthrow of the government or of terrorism.

Cutting Off Government Benefits to Radicals: The Early Cases

Cases such as *Schenck* are only indirectly relevant with respect to the subject matter of this book because they deal with instances where people were *sent to jail or fined* for what they said as opposed to *being deprived of this or that governmental benefit* for such a reason. However, before we treat the major case that arose in the aftermath of World War I in which the loss of a government benefit was challenged, we must mention an American post-Civil War holding that casts a shadow over any attempt to deny individuals a government favor because of their views on political or religious matters and involving harm to a man who was about as far from a radical as it is possible to get. This is *Cummings v. Missouri* (1867).[8] Here, Missouri insisted that anyone who wished to be a public official, manager of a corporation, teacher, professor, minister of religion, or lawyer in the state had to take an oath that, among other things, he had never, by act or word, manifested his sympathy with the Confederate cause; had never indicated his "disaffection to the government of the United States in its contest with the Rebellion"; and had never left the state to avoid the draft. Reverend Cummings, a Roman Catholic priest, was fined $500 because he preached without taking the oath. Basically, we have here an example of a licensing statute that denied individuals the right to practice certain professions (law, public office, corporate management, the ministry) unless they could show that they had never exercised their right to advocate a certain political position that was anathema to those in control of the national and Missouri governments at the end of the Civil War. (By the way, the oath here imposed what Chapter 1 termed a rights-limiting classification of the first type rather than a rights-limiting condition; under its terms, there was no way that one who had earlier expressed his/her support of the Confederacy could practice various professions, unless he/she were willing to lie about his/her political positions.)

The Supreme Court, in an opinion by Justice Stephen J. Field, overturned this oath as an unconstitutional bill of attainder; i.e., a legislative punishment without a judicial trial. The U. S. Constitution in Article I Section 9 prohibits the federal government from passing such a bill and Article I Section 10 imposes an identical prohibition on the states. Field thought it was clear that the oath imposed penalties and thus constituted punishment.

> There can be no connection between the fact that Mr. Cummings entered or left the state of Missouri to avoid enrolment or draft in the military service of the United States and his fitness to teach the doctrines or administer the sacraments of his church; nor can a fact of this kind or the expression of words of sympathy, with some of the persons drawn into the Rebellion constitute any evidence of the unfitness of the attorney...to practice his profession, or of the professor to teach the ordinary branches of education, or of the want of business knowledge or business capacity in the manager of a corporation.[9]

On the surface, *Cummings* seems to be a godsend to the individual who is denied a license, subsidy, tax credit, etc., because of his or her religious or political views. When such a refusal takes place, the hurt party often can contend that she/he is being subjected to a legislative rather than a judicial punishment (and thus a bill of attainder, always unconstitutional) because, among other things, his/her views have "no connection" (to use Justice Field's language) with his/her "fitness" to advance the goals of the particular program from which he/she is being excluded. If a senior citizen is, for example, denied Medicare because he/she refuses to swear that he/she is not a "terrorist sympathizer," he/she could contend with reason that the denial is a punishment because, among other things, it has nothing to do with the goal of this act, which is to relieve people who have contributed to the program during their working years of anxiety about medical bills after retirement.

One who is an attorney for such a person should always put forth a contention of this kind. However, that lawyer should not harbor great hopes that it would succeed, because *Cummings* has not proven a fruitful case. During the same year as the *Cummings* decision, the Supreme Court in *Ex Parte Garland* (1867)[10] did invalidate a law of Congress requiring that all attorneys practicing in federal courts take an oath similar to that at issue in *Cummings*. Justice Field penned this opinion too. The lawyer had to swear, for example, that he had not borne arms against the United States and had not given aid or encouragement to persons taking arms against it. Because, among other things, all the acts that the deponent was to swear not to have done were in the past, the Justice felt that the oath was a penalty and thus a bill of attainder. In *United States v. Lovett* (1946),[11] the Supreme Court overturned, as a bill of attainder, a Congressional appropriations measure that denied three named individuals working for the federal government their salaries on the grounds that they had engaged in "subversive activity." But the author of this book discovered no instance other than this one where the bill of attainder argument was used in recent years by that tribunal to invalidate a refusal or cut-off of government benefits for political reasons. (One reason why this is so in the case of state legislation is, of course, the Fourteenth Amendment, whose Due Process Clause makes the First

Amendment and other important sections of the U. S. Constitution's Bill of Rights binding on the states and their political subdivisions. The Fourteenth Amendment was not ratified until 1868, and it was not until well into the twentieth century that it was construed as compelling the states to respect the federal Bill of Rights. Thus the argument that the Missouri oath violated the freedom of speech and religion guarantees of the U.S. Constitution's First Amendment was not available to Reverend Cummings and Justice Field.) *United States v. Brown* (1965)[12] did find a bill of attainder in a law making it illegal for a member of the Communist Party to be a labor union official, but this case involved criminal legislation rather than a denial of a governmental boon. And *Selective Service System v. Minnesota Public Interest Research Group* (1984),[13] the financial aid and draft registration Fifth Amendment case that introduced Chapter 1, rejected a contention that the requirement that college students had to register for the draft to get federal financial aid was a bill of attainder punishing those who had opted not to sign on by denying them such assistance.

That major post-World War I decision involving cancellation of a governmental benefit to radicals was *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson* (1921).[14] The Milwaukee Social Democratic Publishing Company published a newspaper called the *Milwaukee Leader,* which was edited by Victor Berger and contained anti-war articles calling World War I (in which the United States was then engaged) a conflict for the benefit of the capitalists, referring to the United States as a plutocratic republic, and blasting the draft law as unconstitutional and oppressive. All these comments were allegedly in violation of a 1917 law known as the Espionage Act; so Postmaster General Albert S. Burleson revoked the paper's second-class mailing privileges. Second-class mailing privileges are a form of government subsidy. As Justice John H. Clarke pointed out in his opinion sustaining the revocation as constitutional and justified by the relevant statutes, the second-class rate is an extremely low one, which costs the government a lot more than it yields.[15] Still speaking the language of wartime patriotism, though the guns had been silent for over two years, Justice Clarke declared that "Freedom of the press may protect criticism and agitation for modification or repeal of laws, but it does not extend to protection of him who counsels and encourages the violation of the law as it exists. The Constitution was adopted to preserve our government, not to serve as a protecting screen for those who while claiming its privileges seek to destroy it."[16] The Court referred several times to a second-class mailing permit as a "privilege."[17] Though it did not expressly use the logic that "because it is a privilege, it can be withdrawn or limited for any reason" in the manner of Justice Holmes in *McAuliffe v. Mayor of City of New Bedford*

(1892)[18] and *Commonwealth v. Davis* (1895),[19] holdings mentioned in the last chapter, one can assume that a syllogism like this was in the back of the justices' minds.

Holmes himself (with Justice Louis Brandeis) dissented in *Milwaukee Social Democratic Pub. Co.* Their main contention was that Mr. Burleson lacked statutory authority to cancel the *Leader*'s second-class mailing privilege. However, it was obvious that they also felt that this rescission transgressed the First Amendment. In this case Holmes comes close to embracing what this book terms the rights-limiting conditions doctrine that he had repudiated in *McAuliffe* and *Davis.* He asserts that[20] "The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues." (*Leader* editor Berger was twice elected to Congress and twice excluded from sitting there because of his anti-war position. Ironically, he was one of the socialist leaders most opposed to communism.[21])

Communism in America: Its "Glory" Days

The Great Depression created opportunities for the American Communist Party (CPUSA). With unemployment approaching 25% at the height of this economic disaster, many were receptive to messages denouncing the capitalist system as a failure. In addition, the rise of Nazism in Germany and the Soviet Union's call in 1935 for a Popular Front against Hitlerism of communists, socialists, and liberals, accompanied by its damping down of its demands for communist revolution, made the party more attractive. Communists, quite a few of whom were willing to work to put their ideals into practice, helped organize some American trade unions affiliated with the Congress of Industrial Organizations and had the courage to ask for justice for American blacks, a dangerous step to take in the then-segregated American South. Some leading intellectuals, such as playwright Clifford Odets, even joined the party for a while, and some employees of the federal government were secretly communists.[22] After the Hitler-Stalin Pact in 1939 and subsequent CPUSA opposition to American rearmament to prepare the country for a likely war against the Nazi dictator, it lost a good deal of its membership. Of course, after Hitler attacked Russia in June of 1941 it became stridently pro-war and regained a good deal of its popularity. However, even at its membership peaks, in 1939 and 1946 (right after the end of World War II), no more than 70,000 people formally adhered to it.[23] At one time or another up until 1952, perhaps slightly over 700,000 Americans had joined the party at one time or another, but most remained faithful to it for only two or three years.[24]

Side by side with the legal CPUSA, the Soviets had formed an underground organization.[25] This group had some successes. In early 1945,

even before the war had ended, Top Secret classified documents were stolen from the offices of the Office of Strategic Services (the predecessor of today's Central Intelligence Agency) and given to a journal called *Amerasia,* some of whose editors had communist leanings.[26] Information turned over to Moscow by spies such as Klaus Fuchs, Harry Gold, and Julius and Ethel Rosenberg helped the Soviet Union build an atomic bomb. The Soviet blockade of ground transportation into the sector of Berlin controlled by the United States, France, and Great Britain in 1948, and the final takeover of the Chinese mainland by communists at the end of 1949, also helped fuel the American public's terror of communism during this early Cold War period. In the words of one writer, the decade beginning in 1946 "was marked by suspicion, uncertainty, secrecy, fear and hysteria on the part of a large segment of the American people. As a result of these disabling emotions...civil liberties faced threats...probably as serious as at any time in our history."[27] And one of the tools used to combat real and suspected domestic communists during this period and even later was to deny them certain governmental benefits. (Other avenues taken included sending CPUSA leaders to jail under the Smith Act for advocating violent overthrow of the United States government. The first set of these convictions, that of the party's top leadership, was approved by the Supreme Court in *Dennis v. United States* (1951).[28])

The American Judiciary Wrestles Post-World War II with Cutting Government Benefits to Radicals

Let us now look at some of the decisions of the U. S. Supreme Court and other courts about the constitutionality of refusing licenses or other sorts of governmental favors to people because they were actual or supposed communists or because they refused on principle to declare that they were not. In the earliest days of the Cold War, the San Diego, California, Civil Liberties Committee, affiliated with the American Civil Liberties Union (ACLU), asked to use a public junior high school auditorium in that city for a series of meetings on the "Bill of Rights in Postwar America." Under the state's education code, school districts were obligated to provide the free use of school auditoriums for functions such as this. The only catch was that the district was not to permit any "subversive" organization to utilize its property. A subversive organization was defined as one whose members advocated the violent overthrow of the government of the United States or of the state of California.

The ACLU is certainly not a subversive organization, but it is dedicated to, among other things, the preservation of the rights of speech, press, association, and religion guaranteed by the First Amendment. Accordingly,

the leaders of its San Diego branch refused to sign a loyalty oath; i.e., an affidavit declaring that they did not advocate violent overthrow. Consequently, the San Diego School District denied the group the use of the school. Its leaders thereupon sued the district, alleging that this rejection violated their rights of speech and peaceable assembly guaranteed them by both the United States and California state constitutions. In *Danskin v. San Diego Unified School District* (1946)[29] the Supreme Court of California, a bit later to become the nation's most respected state high court, held for the ACLU chapter. Justice Roger Traynor's majority opinion declared that speech could be suppressed only when, to use the theory of Justices Holmes and Brandeis, it created a clear and present danger of "substantive" evils (in Brandeis's concurring opinion in *Whitney v. California* (1927),[30] cited with approval by Justice Traynor, metamorphosed into "serious" evils). Once this theory of the meaning of the First Amendment was adopted, declaring the denial of the auditorium null and void was as easy as rolling off a log. "There is no sign that any danger would arise from the proposed meetings in the present case. The 'Bill of Rights in Postwar America' is not only a legitimate subject of discussion, but one of great public interest. The proposed speakers include men [sic] well qualified to discuss the subject and there is no likelihood that any substantive evil would arise out of their discussion."[31] Justice Traynor could not avoid the conclusion that the real motive for the imposition of the loyalty oath was not a desire to preserve law and order, but a wish to censor individuals whose convictions state lawmakers disliked. He did admit that holding free meetings in a school was a "privilege" that the state could deny completely. However, articulating the doctrine of rights-limiting conditions and classifications, he declared that it cannot "make the privilege of holding them dependent on conditions that would deprive any members of the public of their constitutional rights."[32]

The dissent did not believe that the clear and present danger test had much relevance to the situation here, which did not involve a criminal prosecution, and was dubious that the U.S. Supreme Court would now use it under any circumstances. It analogized the advocacy of violent overthrow to calling for lynching or the assassination of the president of the United States or other crimes of violence against individuals,[33] and declared that no one could validly object to denying people the use of school premises for purposes such as these. Nonetheless, in an almost identical case fifteen years later, *American Civil Liberties Union v. Board of Education* (1961),[34] the California Supreme Court, with Justice Traynor joining but not writing the majority opinion, strongly reaffirmed *Danskin*. Here the Los Angeles Board of Education was held to have infringed the First Amendment rights of freedom of assembly and speech of the ACLU by denying it per-

mission to use a junior high school auditorium for a series of meetings on "The Bill of Rights in 1960." In contemplating *Danskin* and its successor, the reader may want to ask him/herself whether the results would have been the same had the group seeking to use the school assembly halls been the CPUSA itself rather than the eminently respectable ACLU and one of its branches. One feels, but cannot prove, that the answer is "yes."

Four years after *Danskin,* with the Cold War going full steam, the U.S. Supreme Court handed down *American Communications Association v. Douds* (1950).[35] This concerned the constitutionality of Section 9h of the Labor Management Relations Act of 1947 (popularly known as the Taft-Hartley Act). That clause denied the assistance of the National Labor Relations Board (NLRB) to labor unions whose officers refused to swear (a) that they were not members of the Communist Party and (b) that they did not believe in the forcible overthrow of the United States government. In practice, no union-organizing enterprises in the private sector can function without the help of the board, whose aid must thus be deemed an important governmental boon, one analogous to the according of a license.

American Communications Association is one of those cases where it is almost as hard to figure out what the Court actually held, as to read the several opinions. Three justices, Tom Clark, William O. Douglas, and Sherman Minton, did not participate in the decision. The six justices who did take part were Chief Justice Fred Vinson and associate justices Hugo Black, Robert Jackson, Felix Frankfurter, Stanley Reed, and Harold Burton. The validity of the "membership" part of the oath was upheld 5–1, with only Black dissenting. It is the lineup of the justices on the "belief" section that is confusing. In fact, only the chief justice plus Reed and Burton were willing to find this constitutional. Black, of course, was not willing to legitimate it. Neither were Frankfurter or Jackson, but each had a different reason for his unwillingness. Because the court below had upheld this section, the 3–3 split on the Supreme Court meant simply that the decision of the lower court favorable to the government on this matter remained in effect but that it was neither approved nor disapproved by the high court. In other words, *American Communications Association* provided a holding (and thus a precedent) on the membership aspect of the oath, but no holding (and thus no precedent) on its belief segment.

The chief justice's opinion (again, a holding on the membership but not on the belief issue), found the clear and present danger test inapplicable here. The statute was geared to protect the public against a certain type of conduct, i.e., political strikes, and it only indirectly and partially abridged speech. (A political strike is one designed not to improve pay and working conditions, but to oppose some policy of the government that those in

charge of the union dislike or to express their general distaste for the extant political order.) The chief justice, therefore, employed a *balancing* test, weighing the harm to interstate commerce and the public from political strikes against the extent to which the law constricted speech. He found the latter minimal, noting that, "The statute does not prevent or punish by criminal sanctions the making of a speech, the affiliation with any organization, or the holding of any belief."[36] Nor does it cut off the dissemination of any views. On the other hand, Congress is not unreasonable in believing that it can prevent serious harm. Justice Jackson noted in his concurring (on the membership aspect) opinion that

> where communists have labor control, the strike can be and sometimes is perverted to a party weapon. In 1940 and 1941, undisclosed Communists used their labor offices to sabotage this Nation's effort to rebuild its own defenses. Disguised as leaders of free American labor, they were in truth secret partisans of Stalin, who, in partnership with Hitler, was overrunning Europe, sending honest labor leaders to concentration camps, and reducing labor to slavery in every land either of them was able to occupy.[37]

The chief justice's opinion in *American Communications Association,* even though not a holding on one major point it considered, is nonetheless a good illustration of one possible judicial approach to attempts of government to cut off benefits to individuals because it dislikes their political or religious affiliations or positions. In limiting the clear and present danger test to situations where an individual is actually being prosecuted for carrying a card in this or that group; in contending that in other circumstances the injury to First Amendment freedoms must be balanced against the harm to the community prevented by the law or regulation; and in its willingness when balancing to defer considerably to the legislative judgment that a rights-limiting measure is aimed at a serious evil, it tilts the scales in favor of governmental steps that deny individuals assistance for reasons that are claimed to violate the First Amendment. (Granted, this approach will not get anyone imprisoned or executed. Also, those refused government aid because of its adoption can still spread their views. For example, the ACLU in the California cases analyzed above could probably have rented a private meeting hall for its discussions of the Bill of Rights.)

Considering its potential significance, *American Communications Association v. Douds* did not get much attention from the law reviews, and the comments that were made about it were perfunctory. *Barsky v. Board of Regents of University of State of New York* (1954)[38] was similar in philosophy and received even less scrutiny from legal experts. Edward K. Barsky was a doctor licensed to practice in New York State. In fact, he had been a practicing doctor and surgeon since graduation from Columbia University's medical college in 1919 and was on the staff of one of New York City's most

prestigious hospitals. However, in politics he was left-wing and had gone to Spain during the Spanish Civil War to help the wounded on the Loyalist side who were fighting the Hitler-backed and ultimately successful rebels of General Francisco Franco. He became chairman of an organization known as the Joint Anti-Fascist Refugee Committee, founded to help Spanish refugees fleeing the Franco regime. The U. S. House of Representatives Un-American Activities Committee (HUAC), which had made it its business to investigate the extent of communist infiltration in the United States, and which frequently was charged with publicly accusing individuals of communist sympathies who lacked any such attitudes, felt rightly or wrongly that the Joint Anti-Fascist Refugee Committee was a communist front. Thus it ordered Dr. Barsky to produce its books, records, and papers. Acting on the advice of his lawyer, he refused to hand over the subpoenaed records and was sent to jail under a federal law making such refusals illegal. After he left prison, the Board of Regents of the University of the State of New York suspended for six months his license to practice medicine on the ground that he had been convicted of a crime: a section of the New York State Education Law allowed this step. New York courts affirmed this suspension; but the persistent doctor appealed to the U. S. Supreme Court.

That tribunal in an opinion by Justice Burton upheld the suspension. The underlying freedom of speech and press issues were almost completely ignored in the opinion and, apparently, in Dr. Barsky's own brief. His major contention was that the board's decision was arbitrary because the offense for which he was convicted did not involve "moral turpitude" and was not a violation of the law of the state. Given these arguments, the majority's upholding the suspension makes considerable sense. A crime is a crime no matter where it is committed, and the New York law permitting the suspension did not limit itself to actions made illegal by the statutes of that state. Furthermore, though Dr. Barsky did not refuse to turn over the records in order to enrich himself, and though his denial was based on the advice of his counsel, he obviously knew or should have known that his defiance of HUAC was a literal breach of federal law. Thus any claim that he had inadvertently disobeyed the statute could not be taken seriously.

What the majority glosses over, emphasizing in the manner of Justice Holmes in *McAuliffe* that the practice of medicine is a "privilege"[39] granted by the state which it has a great deal of power to limit as it sees fit, is that when push comes to shove, Barsky is being deprived of his license because he was a member of an organization suspected of being controlled by the Communist Party. Thus, looked at realistically, his freedom of association was limited by his suspension. Maybe, given the circumstances, the limitation was not substantial enough to warrant a conclusion that it was

an unconstitutional abridgement of this important right, but Justice Burton should have devoted some space to this issue. Justice Frankfurter's and Justice Douglas's dissents (the latter joined by Justice Black) did feel that the suspension may have been (Frankfurter) or was (Douglas) motivated by the fact that Dr. Barsky "had certain unpopular ideas and belonged to and was an officer of the Joint Anti-Fascist Refugee Committee, which was included in the Attorney General's [list of subversive organizations]."[40] Douglas quotes Holmes's *McAuliffe* epigram only to call it a "distortion" of the Bill of Rights. He also emphasizes that Dr. Barsky's views have no relevance to his ability to practice medicine. As he colorfully puts it,[41] "So far as I know, nothing in a man's political beliefs disables him from setting broken bones or removing ruptured appendixes, safely and efficiently." Arguably, however, Douglas does not give sufficient weight to the fact that this fine physician, who by the way was never accused of being a member of the Communist Party, figuratively thumbed his nose at an organ of his national legislature.

The American Judiciary in Wrestling Post-World War II with Cutting Government Benefits to Radicals Discovers the Doctrine of Rights-Limiting Conditions: *Speiser v. Randall*

One who read *Barsky* would probably have been reluctant to predict that just four years later the Supreme Court would issue a decision in favor of some individuals who were being denied a benefit because they refused to swear that they were not subversives. Yet this is just what happened in *Speiser v. Randall* (1958),[42] which has become what lawyers term a "leading case," one almost always cited by individuals who claim they have been or are being denied a government boon because of their religion or political views. Here the state of California granted a property tax exemption to veterans of World War II. (Remember, a tax exemption or credit is one form of government benefit, and in fact can be a very generous one if the credit or potential tax is big enough.) The plaintiffs here were honorably discharged veterans of that conflict who duly requested this exemption. However, because of state law the application form included an oath that the ex-soldier did not advocate the violent overthrow of the U. S. or California governments. The two veterans here, one living in Contra Costa County and the other in San Francisco, refused to sign this affidavit; were denied the tax break; and lost their case in the Supreme Court of California, the same tribunal that a few years before had declared in the *Danskin* case that an organization could not be refused the use of school facilities for a meeting merely because those sponsoring the event spurned making a pledge similar to that required of the veterans. One wonders how much hope the veterans had here of winning their case in the U. S. Supreme Court,

which had recently approved the temporary suspension of Dr. Barsky's license. Perhaps to their surprise that Court, in an opinion by Justice William Brennan, held in their favor, though the decision on the face of it was not as broad a victory for free speech as some had hoped. Brennan did admit that their having been denied the tax exemption was a limitation on speech. More importantly for our purposes, he did recognize that some conditions and classifications that limited speech could be unconstitutional; i.e., that the rights-limiting conditions/classifications doctrine is a valid one. "[The state is] plainly mistaken in [its] argument that, because a tax exemption is a 'privilege' or 'bounty,' its denial may not infringe speech. This contention did not prevail before the California courts, which recognized that conditions imposed upon the granting of privileges or gratuities must be 'reasonable.'"[43]

However, Brennan assumed for the sake of argument that the turndown would have been constitutionally proper had the veterans been advocating overthrow in such a way that they could properly have been imprisoned for their oratory or op-eds. But, he continued, where the state tries to restrain speech, it must ensure that those it seeks to penalize are provided with the fairest of procedures. The arrangements here do not meet this standard, in his view. Under the relevant California legislation, the ex-soldiers have the burden of proving that they do not advocate violent overthrow. In some way, they have to convince the tax assessor that they are loyal citizens. Though it is standard operating procedure in civil tax cases for the taxpayer to have to show that he/she is entitled to the deduction he/she claims (for example, a college professor requesting a deduction for the expenses involved in maintaining an office at home must demonstrate to the Internal Revenue Service that he/she actually works at home and that he/she has no adequate office at the college for writing and preparing for class), this should not be the case when the tax laws are used to penalize speech. The Court thought it was inevitable that because veterans in the plaintiffs' positions wanted the tax break and knew how difficult it would be to prove to local officials that they were good Americans (what evidence would they have to adduce to demonstrate this?), they would refrain from uttering anything politically controversial even though they had a First Amendment right to take part in disputes on political, social, and economic issues. It was this deterrent effect of the law that made it unconstitutional.

Justices Douglas and Black concurring averred that the California law in question violated the U. S. Constitution not just because of the burden of proof problem, but because it suppressed unpopular ideas. Justice Clark's dissent accepted the philosophy of *McAuliffe* and *Commonwealth v. Davis.* Government largesse such as a tax exemption is a "gratuity" from the sov-

ereign that "'once granted may be withdrawn.' The power of the sovereign to attach conditions to its bounty is firmly established."[44]

Despite the narrowness of the *Speiser* majority opinion, there is a real difference between it on the one hand and *American Communications Association* and *Barsky* on the other. The latter are more concerned with the need of the community for protection: in *American Communications Association* the necessity to safeguard it from political strikes, in *Barsky* the desire to ensure that the physicians who serve it are respecters of the law and loyal Americans. *Speiser,* per contra, is most worried about the need for people to feel free to speak what is on their minds without losing sleep over whether government will deny them a benefit for unsheathing their pens or opening their mouths. Why, then, the shift from *American Communications Association* and *Barsky* to *Speiser?* There are two reasons for the shift that most Supreme Court scholars would accept: changes in court personnel and changes in domestic and world conditions.[45] *American Communications Association* was decided in 1950 and *Speiser* in 1958. Chief Justice Vinson, the author of the part-majority, part-plurality opinion in the former, was no longer on the Court, having been succeeded by the more liberal Earl Warren (who, however, was with the majority in *Barsky* but did not participate in *Speiser*). Justice Minton, who was with Vinson in *American Communications Association,* had been replaced by Justice Brennan, also more liberal. Justice Douglas, who "sat out" that case, was ready and willing in *Speiser* to invalidate the oath required of the veterans. So the composition of the tribunal that handed down *Speiser* was somewhat more tilted toward First Amendment freedoms than the one that produced *American Communications Association,* though Justice Clark, who like Justice Douglas was on the sidelines in the latter, was a participant in *Speiser* and, as we saw, dissented. Somewhat surprisingly, Justice Burton, with Justice Vinson all the way in *American Communications Association* and himself the author of *Barsky,* concurred in the *Speiser* result, though not in Brennan's reasoning (which goes to show that the vote of a Supreme Court justice can never be taken for granted).

As for the situation outside the Court building, the Cold War still was going on in 1958, the date of *Speiser.* However, Western Europe clearly was no longer threatened by communist revolution. The leaders of the Soviet Union in 1958 were a lot less nasty and threatening than Joseph Stalin, the autocrat in 1950. The Chinese communists began feuding with their Russian counterparts in 1957. The American Communist Party had lost most of its membership and was down to a mere 3,000 in 1958.[46] All this meant that communism seemed to be less of a threat to the nation when *Speiser* was handed down than it had appeared several years earlier.

One additional point should be made about what was happening in the

country in 1958, at the time of *Speiser*. That case was but one in a series of decisions that had angered various elements of Congress and the American public. *Brown v. Board of Education* (1954),[47] declaring legally required school segregation unconstitutional, had infuriated the South and its legislators. This group was joined by northern and western conservatives in their dislike of cases such as *Yates v. United States* (1957),[48] which greatly weakened the Smith Act making it illegal to advocate the violent overthrow of the government; *Watkins v. United States* (1957)[49] and *Sweezy v. New Hampshire* (1957),[50] making it more difficult for Congress and state legislatures, respectively, to investigate communist activities; *Schware v. Board of Examiners* (1957),[51] saying in a licensing case that a state could not refuse a lawyer admission to the bar simply because he had once been a member of the Communist party; and *Konigsberg v. State Bar of California* (1957)[52] —Konigsberg *I*—where the Court reversed California's refusal to admit to the bar an applicant on the ground that he lacked good moral character simply because he had refused to say whether he was or had ever been a member of the Communist Party. In fact, he had shown that he was of good moral character and that he opposed violent overthrow of the U.S. government. All these decisions led to threats by Congress to "curb and discipline the Court."[53] These threats, in turn, "apparently caused something of a tactical retreat by the Court."[54]

The Supreme Court Backs Off from Invalidating Denials of Government Benefits to Radicals

One of the maneuvers in the "tactical retreat" noted above was *Konigsberg v. State Bar of California* (1961),[55] henceforth denominated *Konigsberg II*. In *Konigsberg I* the Court had refused to decide whether California could deny Mr. Konigsberg admission to the practice of law not on lack of moral character grounds, but simply because he had refused to tell the California Committee of Bar Examiners whether he was now or ever had been a member of the CPUSA. So after *Konigsberg I* the Bar Examiners Committee expressly refused to admit him because he continued to remain silent on this matter, which silence it said prevented it from fully investigating his qualifications. *Konigsberg II* upheld the constitutionality of the refusal to license him as an attorney for this particular reason; Justice John M. Harlan writing the 5–4 majority opinion. The opinion is a legalistic one with the author largely avoiding emotionalism except in saying that it makes a great deal of sense for a state to inquire whether "applicants for membership in a profession in whose hands so largely lies the safekeeping of this country's legal and political institutions" advocate forcible overthrow of that country's government.[56] He adopts the *American Communications Association* theory that when it comes to regulatory laws "not intended to

control the content of speech" but "incidentally limiting its unfettered exercise,"[57] a balancing of the interests involved is what is to be undertaken. The balancing in this case, in Harlan's eyes, permitted legitimizing the Bar Examiners Committee's insistence that Mr. Konigsberg reveal whether he had ever joined the CPUSA. We want lawyers who are genuinely devoted to the law and orderly change; the effect on free association imposed by this oath is "minimal."[58] Justice Black in dissent angrily pointed out that the applicant had shown clearly that he rejected the idea of violent overthrow and thought that *Speiser* governed here because, in his opinion, the state placed on Konigsberg the burden of proving that he did not clamor for armed revolution. On the other hand, Harlan thought it was far from clear that the state had placed Konigsberg under this burden. He also asserted that *Speiser* should be limited to situations, unlike this one, where government intended to "penalize political beliefs."[59]

Whether one agrees or disagrees with the result in the case, this comment about the Bar Examiners Committee's lack of intent to penalize political beliefs is a bit naive. It is hard to see what rationale it had in mind in rejecting Konigsberg other than punishing him for possible past membership in the CPUSA, given that he had sworn up and down that he did not favor violent rebellion and that he had a fine war record and glowing testimonials from friends asserting to his good character. But the need of the Court to retreat from bitter attacks may have caused Harlan to fudge the facts a bit.

Flemming v. Nestor (1960)[60] is the only U. S. Supreme Court decision that deals with the refusal to accord a government grant of money to supposed subversives; it reached so unjust a result that it is doubtful that it has much vitality now despite the conservatism of the present Court. Mr. Ephram Nestor came to the United States in 1913 and lived here for forty-three years. However, he never became a citizen and was deported to his native Bulgaria in 1956 because he had been a CPUSA member between 1933 and 1939. There was, incidentally, no law in effect during these years making it a crime to be a party member. For twenty years he worked in a job covered by Social Security and he, together with his employer, made regular payments to the program. He became eligible for old age benefits in 1955, the year before he was tossed out of the country. Shortly after he arrived in Bulgaria, the U.S. government rubbed salt into his wounds by terminating his benefits under a 1954 law requiring that these benefits be cut off to anyone deported because of membership in the CPUSA.

Justice Harlan wrote the 5–4 opinion, the dissenters being the same quartet that was to find itself on the losing side in *Konigsberg II*. He first denied that the contributory nature of the Social Security program gave those who made monthly payments under it a property right to this pen-

sion. The cut-off to people living overseas was not irrational, as they would not be able to lift the American economy through spending money here. (Of course all social security recipients who moved abroad and thus spent no money in the United States, except the handful of those in Nestor's position, continued to get their pensions from the government!) Another argument made by Mr. Nestor's lawyers was that the denial of benefits to him was a legislative punishment, i.e., a bill of attainder and thus unconstitutional under Article I, Section 9. The attorneys cited, of course, *Cummings v. Missouri,* analyzed earlier in this chapter. Harlan simply commented that the judges who decided *Cummings* were well aware of the punitive spirit that took hold of Unionists right after the Civil War. Surely a person as intelligent he was aware of the punitive spirit that a large majority of Congress and the American people manifested toward communists in 1954, the date of the enactment of the cut-off legislation! As to the argument that the benefit stoppage for past membership in the party, when that activity was perfectly legal, was an ex post facto law, i.e., one retroactively making criminal an action that was legal when it was done, Harlan emphasized that the sanction here was the "mere denial of a noncontractual government benefit...certainly nothing approaching...imprisonment."[61] (Article I Section 9 of the Constitution prevents the federal government from enacting ex post facto laws, and Article I Section 10 imposes the same prohibition on the states. *Cummings* and *Ex Parte Garland* held that the oaths dealt with in those cases were invalid as ex post facto measures as well as bills of attainder.) But suppose, and this is not clear from the facts, that his social security was Nestor's only source of income during his retirement years. If this was the case, he was being condemned to starvation in then communist-controlled Bulgaria, arguably a fate almost as bad as being incarcerated in an American jail.

Justice Black's dissent declared that Nestor's loss of his social security deprived him of property without just compensation in violation of the Fifth Amendment, and was a bill of attainder, as well. Justice Brennan's dissent, joined by Justice Douglas and Chief Justice Warren, asserted that the cut-off was ex post facto legislation. One has the feeling, reading the majority opinion, that Justice Harlan, an outstanding jurist, was also unhappy with the legislation he was upholding. For example, he refused to say that the benefit cut-off to people in Nestor's position was rational, but simply that it was not irrational, that it could not "be condemned as so lacking in rational justification as to offend due process."[62] The decision's legitimation of the halting of Nestor's social security benefits can better be explained as being part of the Court's defensive reaction against Congressional criticism than as any sort of definitive explication of how far the Constitution protects the fundamental rights of those who anticipate payments from a

government program. Amazingly, neither the majority nor the dissent in *Nestor* considered the obvious and serious First Amendment issues it posed.

The Lower Courts and the Denial of Government Benefits to Radicals

Very, very few cases originate in the U. S. Supreme Court; under Article III of the Constitution, that tribunal's "original jurisdiction" is very limited. Moreover, state and local governments have social programs of their own. Furthermore, as is well known, the Supreme Court does not have to resolve on the merits all the cases it receives on appeal. In fact, in recent years it has been deciding in this way only about 80 per year of the 8,000 or so requests for review normally submitted to it during a twelve-month period. Thus, it is not surprising that the final judicial determination in many disputes involving refusal of government benefits is made by the federal district courts, federal courts of appeal, or state courts. The *Danskin v. San Diego Unified School District* and *American Civil Liberties Union v. Board of Education* cases are examples of denial of governmental favors cases that never were considered by the U. S. Supreme Court on the merits.

Reed v. Gardner (1966)[63] is another, and one of real importance. This is because it dealt with awards under the Medicare program. This, as noted in Chapter 1, is the plan that subsidizes the medical expenses of retired individuals covered by social security as well as those of some others. In 1966 Medicare had only been in existence a year, and it is doubtful that anyone could foresee just how expensive it would become and how many people it would cover. Though the Congress that enacted this major piece of social welfare legislation in 1965 was heavily Democratic and more committed to improving the conditions of the poor and elderly than to taking potshots against radicals, it inserted there a provision denying the statute's benefits to members of the communist and communist-front organizations that were required to register with the government under the Internal Security (McCarran) Act of 1950. The plaintiff in this case was one Ms. Alda T. Reed, who was over sixty-five years of age, had been contributing to the social security system for the required number of quarters, and thus was, on the face of it, eligible for Medicare, for which she applied early in 1966. On the application form she was asked to state whether she was a member of any of these organizations or had been so during the previous twelve months. She did not answer this question or sign a disclaimer to the effect that she had never been affiliated with any of these groups. No evidence was introduced that she was a member of the CPUSA or one of its front organizations. She then sued on behalf of herself and all others similarly situated, to have the ban on Medicare benefits for CPUSA and CPUSA-front members declared unconstitutional.

In certain senses, the facts of this case are strange. In the first place, the Social Security Administration, which was charged with implementing the law, said that she did not have to answer the question. But the district court's three-judge opinion thought that the statute in fact required her to, and that other applicants might well be told that they were obliged to take this step if they wanted their Medicare assistance. Moreover, a week before the case was heard, the government approved her Medicare application. Normally, this step would have led the court to dismiss her suit on the grounds that because the clause to which she objected no longer worked her woe, she lacked "standing" to sue to attack it. The judges, however, felt that she had been hurt because it had taken the government six months to approve her application while the average claimant had his/hers resolved in thirty days. The district court decision declaring the questions about membership invalid contained more quotations from U. S. Supreme Court decisions than analysis of its own. One of the decisions on which it relied was *Speiser v. Randall,* where, as noted a few pages ago, the Supreme Court overturned California's denial of a veterans property tax exemption to individuals who refused to swear that they did not believe in violent overthrow. It quoted with approval language from *Speiser* accepting the doctrine of rights-limiting conditions, including the thesis that though government may deny everyone a certain benefit, it often cannot accord it to some but not to others because the latter refuse to renounce a political or religious view or to resign from organizations that espouse it.[64] Without further ado, it struck down on First Amendment grounds those parts of the Medicare act that denied this crucial boon to elderly people who were members of a communist group or refused to state that they were not affiliated with one. Had it wanted to uphold these sections it could, of course, have distinguished *Speiser* on the grounds that there was no apparent indication in the Medicare statute that the burden of proof was on the applicants to demonstrate that they did not belong to the proscribed organizations.

Very different in tone and result from *Reed v. Gardner* is *Dworken v. Collopy* (1950).[65] This decision concerning Ohio's Unemployment Compensation Act was decided by the Court of Common Pleas of Ohio, Franklin County (Columbus). This measure denied unemployment compensation benefits to individuals who were members of parties that advocated the overthrow of the government by force or violence or who themselves espoused this political philosophy. Plaintiff Jack B. Dworken brought this suit against the chief of the state's Bureau of Unemployment Compensation not as a person who was out of a job, but as a taxpayer who contended that this clause of the statute was unconstitutional and that its enforcement would lead to a lot of expensive litigation. He relied heavily

on *Cummings v. Missouri* to back up his thesis that the ban on payments to members of parties such as the CPUSA and others who preached violent revolution was a bill of attainder and thus illegitimate. Franklin County Court of Common Pleas Judge Reynolds was obviously not thrilled by *Cummings,* pointing out that there were four, including the chief justice, who dissented from the majority opinion. Nonetheless, he thought that there was a clear difference between the oath demanded in the post-Civil War case and the affidavit required by the Ohio Unemployment Compensation Act to the effect that the applicant was not a member of a party advocating forcible overthrow and that he did not propagate that view. The *Cummings* oath was punitive and a bill of attainder because the affiant had to swear that he/she had not committed certain actions or said certain things in the past. Here, however, what the claimant had to disavow related to the present, and was not a perpetual bar to benefits, because she/he simply had to drop certain affiliations and stop uttering quasi-treasonable words in order to get unemployment aid. (Without using the language of Chapter 1, Judge Reynolds neatly illustrated its distinction between (a) our first type of rights-limiting classification and (b) rights-limiting conditions, one of the latter being what is present here.)

He then turned to the question of whether the attacked sections of the law ran counter to the First Amendment. He angrily and not-wholly-inaccurately pointed out that there are organizations in this country (the CPUSA was not named, but he obviously was referring to it) which, though their primary allegiance is to a foreign power, insist on all the liberties guaranteed to them by our Constitution, which rights they would obliterate if they ever took power here. To him, as to Justice Holmes in, e.g., *Commonwealth v. Davis,* the government can condition its largesse more or less as it wishes. Unemployment compensation (a highly complicated federal-state program) is a privilege, which can be "conditioned upon the recipient not being engaged in efforts to destroy the very source from which he seeks that gratuity...If he wishes to enjoy the benefits which a generous government provides, he should be willing to comply with a very simple condition."[66]

In many ways the opinion is a lot blunter than some of the Supreme Court cases upholding anti-communist measures (e.g., *Dennis v. United States,* sustaining the convictions of the leaders of the CPUSA). Unlike the *Dennis* plurality and concurring opinions, Judge Reynolds does not purport to perceive in communists any serious current threat to the stability of the government of the United States or to that of Ohio, though he believes that they could pose a real problem in the future. He does not claim that their activities and teachings create a "grave and not improbable danger" of a revolution. However, people "should be willing to stand up and

be counted as a loyal citizen."[67] More importantly for present purposes, why should someone who tries to bite the hand that feeds him/her be given any assistance by the one to whom that hand belongs? Or, as he puts it, "What logical reason may be interposed to conclude that the very government which makes it possible for its citizens to enjoy certain benefits, may not withhold those benefits from its avowed enemies and those who seek to destroy it?"[68] His point makes some sense, but it stereotypes all members of the CPUSA as being violent revolutionaries when, in fact, some joined simply because they felt that the American government should do more to help the working class or out of gratitude to Russia in its fight against Hitler. It also ignores the danger that denying benefits to communists may lead some men and women to refrain from taking unpopular stances for fear of losing government assistance.

Public housing is a type of governmental subsidy because the rent the tenant must pay is usually far below what he or she would have to spend to lease similar real estate offered by the private sector. The main purpose of public housing and analogous programs is, of course, to provide decent accommodations for poor people who cannot afford to pay the market rent for such a flat. Both the amount and quality of public housing have fallen short of the expectations of the reformers who pushed for its construction in the 1930s and 1940s, but the majority of its tenants (as well as those who benefit from direct rent or mortgage subsidy programs) are decently housed and could not afford adequate quarters were they dependent purely on the private sector. In the 1950s, attempts were made to bar supposed subversives from public housing, but the several courts that dealt with this problem were not sympathetic to these tries.

Lawson v. Housing Authority of City of Milwaukee (1955)[69] is a good example of such a case. The plaintiffs here, Joseph and Corrine Lawson, were a married couple with three very young children living in a public housing project in Milwaukee. The Milwaukee Housing Authority, which operated this complex, adopted a resolution providing that their tenants had to execute a certificate of non-membership in any organization that had the bad luck to make the U. S. attorney general's list of "subversive organizations." The authority imposed this prerequisite because the "Gwinn Amendment," passed by the U. S. Congress, provided that no housing built with federal funds could be occupied by any lessee who was a member of a group on that list. Mrs. Lawson belonged to one such group and so the authority sought to evict her and her family. The Lawsons then brought suit asking that they be allowed to stay in their flat. The Wisconsin Supreme Court, in declaring the authority's resolution invalid as a violation of the freedom of speech and assembly rights accruing to the plaintiffs under both the U. S. and Wisconsin Constitutions, adopted the rights-limiting con-

ditions doctrine. Asserting that it would be a violation of the First Amendment for the state to criminalize membership in an organization advocating political or economic change, it continued that "The holding out of a privilege to citizens by an agency of government upon conditions of non-membership in certain organizations is a more subtle way of encroaching upon constitutionally protected liberties than a criminal statute, but it may be equally violative of the constitution."[70] It continued by recognizing that the more social welfare legislation a polity enacts, the greater will be its ability, via attaching conditions waiving fundamental freedoms, to sweep liberty aside. Confessedly, the Lawsons' project is a rather small one. However, "if the government...owned 90 percent of all rental units available...in the nation as a whole...those in control of...[that] government could use such a device [e.g., the certificate of non-membership required here] to effectively undermine and render impotent any political party or other organization, which opposed their continued hold on the government, by simply labeling the same as 'subversive,' *if the courts were powerless to provide a remedy* [emphasis added]."[71]

The Wisconsin Supreme Court spent a considerable amount of time discussing *American Communications Association,* but had little trouble differentiating the facts of the public housing case before it from those before the Supreme Court in that labor relations case. There was considerable evidence demonstrating that labor unions controlled by communists might well engage in strikes to achieve the goals of the leaders of the CPUSA, e.g., hindering the production of material necessary for national defense. On the other hand, the Wisconsin Supreme Court had not been shown "how the occupation of any units of a federally aided housing project by tenants who may be members of a subversive organization threatens the successful operations of such housing projects."[72] If there had been testimony about communists living in projects burning apartments therein to make them unlivable in the hope of increasing the desperation of the working classes who inhabited developments such as these, the Court might have upheld the Housing Authority's resolution. But even at the height of Cold War hysteria, stories about communists vandalizing public housing did not crop up in any responsible newspaper or magazine.

Borrow v. FCC (1960)[73] was a decision of the Federal Court of Appeals for the District of Columbia Circuit. Here Mr. Morton Borrow had applied to the Federal Communications Commission (FCC), the agency charged with ensuring the orderly and fair operation of the nation's airwaves, for a renewal of his first-class radio operator's license. He had held similar renewable licenses since 1927 and was employed by Philadelphia radio stations. The license permitted him to operate transmitters at radio and television stations and aboard vessels of the Merchant Marine. On his application form

he was asked whether he was now or had ever been a member of the Communist Party or of any group that advocated the violent overthrow of the government of the United States. He refused to answer these queries and thus his request for a license renewal was turned down. Mr. Borrow contended, of course, that this denial violated his First Amendment rights, and there was no doubt that he was technically qualified to operate radio beam transmitters. Nonetheless, the FCC's regulations declared that not only technical qualifications, but also "character," was relevant in determining whether an individual should be accorded a transmitter operator's license. The *Borrow* decision upheld the FCC's action 2–1. The majority opinion written by Judge E. Barrett Prettyman emphasized the potential danger to the nation's security if CPUSA members or other subversives controlled radio transmission equipment. The operators of these could, for example, jam important broadcasts, intercept secret communications, and facilitate sabotage by sending out false messages. Whether the result of the case makes ultimate sense or not, surely there is more danger to the nation from putting its communication facilities into the hands of disloyal people than from renting these individuals inexpensive rooms in public housing projects. In other words, *Borrow* is a stronger case than *Lawson* for governmental denial of a benefit (here a license) because of the political views of the applicant. (The extent of the FCC's right to determine what can be broadcast over the radio and television stations it licenses is the major topic of the next chapter.)

All this talk about permits may well have readers thinking whether they could be denied, for political reasons, the license that most of them probably have and that they hold to be something that makes their lives a lot easier; i.e., a driver's license. The quantity of case law on this matter is not overwhelming, but one case, *Davis v. Hults* (1960),[74] should give them a bit of reassurance that they will be able to stay behind the wheel even if they embrace unorthodox ideas that those in charge of the nation label as subversive. Mr. Benjamin Davis was a leading black communist who was among the eleven CPUSA leaders whose 1949 conviction for advocating the violent overthrow of the U. S. government was approved by the U.S. Supreme Court in the *Dennis* case. As a result of this conviction, he spent five years in jail. After he left prison, he applied for a renewal of his New York State driver's license. The state commissioner of motor vehicles refused this request: under the state's vehicle and traffic law this official could deny a license to an individual he or she felt unfit to have one. State Supreme Court Justice Matthew M. Levy assumed that Mr. Davis was denied his permit because he was a communist; there was no allegation that he was physically or mentally incapable of driving. (The New York State Supreme Court is the highest *trial* court in New York State. The state's highest

court is known as the Court of Appeals.) In fact, as Davis asserted in the documents accompanying the lawsuit he brought to reverse the commissioner's decision, he was a graduate of Amherst College and Harvard Law School, a former member of the New York City Council, and a member of the Georgia bar.

Justice Levy began by establishing his own anti-communist credentials and dislike of the applicant's behavior. Davis was no innocent dupe, but a top-echelon American Red who did advocate violent overthrow. Levy quotes the great German playwright Bertold Brecht for the proposition that in the pursuit of his/her goal, the communist should be free to lie and break promises. He also rebukes Davis for listing his intellectual credentials in his complaint, implying that one can be bright as a whip and still morally or otherwise unfit to drive. Nor was he overjoyed by Davis's emphasizing that he was black. Moreover, the term fitness as used in the statute must mean more than mere physical and mental capacity; therefore the commissioner of motor vehicles does have discretion in determining who is fit to operate a motor vehicle on the streets and highways of the Empire State. But the justice added that if the legislature had thought to make membership in the CPUSA an indicium of unfitness for this purpose, it would have added a clause to this effect in its vehicle and traffic law, for it had in other acts restricted communists, e.g., in relation to their employment in certain public jobs. Thus he did not think that the commissioner of motor vehicles had any statutory authority to deny the license simply because Davis was a member of the CPUSA.

Cutting Off Government Benefits to the Extreme Right

The CPUSA and its front organizations were, throughout the twentieth century, the main objects of attempts by the federal government and the states to punish calls for violent revolution. However, the far left is not the only abode of groups that promote violence. Many groups on the extreme right do as well; Nazi groups and the Klu Klux Klan are the most obvious examples. In fact, in the early twenty-first century, hate groups are a much greater threat to tranquility in the United States than are extreme leftist parties. The prejudices they inflame can lead to discrimination in employment and housing and even to physical violence against men and women who happen to be of the "wrong" color or race. Certain American Nazis and fascist sympathizers were prosecuted by the U.S. government during World War II. Nonetheless, an attempt by Ohio to jail Klan leaders for calling for "revengence" against the president, Congress, and Supreme Court for their "suppression" of the Caucasian race was thwarted by the Supreme Court in *Brandenburg v. Ohio* (1969),[75] where that tribunal said

that speech demanding violence can be punished only if the danger of the lawlessness is imminent.

Brandenburg is a criminal case. What would the courts do if racist groups and their members were denied governmental benefits? (Note that the Gwinn Amendment mentioned in *Lawson,* the Milwaukee public housing case, applied to any organization on the attorney general's subversive list, not just to left-wing subversive groups; there were right-wing extremist groups included thereon.) A few government denial of benefits cases have involved racist groups or institutions: one, *Bob Jones University v. United States* (1983),[76] is dealt with in the chapter on benefit denials that impede freedom of religion. Likewise, the problem of whether groups, artists, or scholars who professionally preach racial or religious hatred should get government grants to pursue or disseminate their art or research will be considered in the chapter on "indecent" speech as well as at the end of the book. However, because the present chapter does deal with speech or associational activity that could result in violence, it makes sense to note here one instance where a court wrestled with the refusal of the government to accord a far-right-wing group a boon.

The U. S. Internal Revenue Code, as is well known, exempts from taxation charitable and educational institutions. The National Alliance, an anti-black and anti-Semitic group based in Virginia, applied to the Internal Revenue Service (IRS) for tax-exempt status under Section 501(c)(3) of the code claiming that it was an educational association. The main advantage from its point of view of being accorded this status would be that donors to it could deduct their gifts from their own taxes. It pointed out that it issues newsletters, bulletins, and leaflets and distributes books to arouse in white Americans of European ancestry a pride in their racial and cultural heritage and to make them aware of present dangers to that heritage. The IRS denied the Alliance this request. Under its regulations, an organization, even though it advocates one point of view, can get the tax exemption for educational institutions "so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion." The agency rejected the Alliance's petition because it felt that the latter's literature alleging black savagery against whites and Jewish domination of the media did not contain "full and fair" expositions of racial problems. The main publication of the Alliance called blacks inferior to whites and simultaneously brutal and dangerous. It also asserted that Jewish control of the media led the government to enact policy harmful to white America. Its pamphlets claimed that these, and other problems, could be solved only by removing Jews and nonwhites from society, violently if necessary.

In *National Alliance v. United States* (1983),[77] the Court of Appeals for the District of Columbia Circuit, reversing a lower federal court decision, sided with the IRS and ordered that the Alliance be declared not-tax-exempt. Its opinion recognized a certain vagueness in the word "educational" and in the IRS regulations, and even insisted that the Alliance's written garbage was protected by the First Amendment. However, it adjudged that the IRS's action "was consistent with any reasonable interpretation of the statutory term 'educational.'"[78] One of the factors that led it to side with the agency was a subregulation developed by the latter to explain what was meant by the regulation requiring the presentation of "sufficiently full and fair exposition of the pertinent facts" as a precondition for getting tax-exempt status. This subregulation, among other things, required the agency to see whether viewpoints unsupported by any facts formed a large part of the organization's communications and whether the organization's literature made substantial use of inflammatory language. These tests, in the Court's view, were a sufficient answer to the Alliance's assertion that the IRS regulation was too vague to stand constitutional muster. However, the *National Alliance* decision raises some disturbing questions. For example, the Alliance's newsletters, etc., did contain extremely provocative speech. However, political speech is intended to make its audience think and ultimately act. If we are to say that the exposition of political views must avoid strongly emotional terminology if groups that expound them are to be granted tax-exempt status, are we not condemning such discourse to dullness and thus to oblivion? And is not consigning political speech to oblivion the surest way of preserving the injustice in the socio-economic status quo?

Chapter Summary

This chapter has definitely shown that the U.S. Supreme Court and other American courts have not produced consistent results when it comes to considering attempts to deny governmental benefits to radicals and to individuals who refused to take a loyalty oath. Cases legitimating these refusals, such as *American Communications Association, Barsky, Konigsberg II, Flemming v. Nestor, Borrow v. FCC,* and *National Alliance,* are interwoven with holdings such as *Speiser v. Randall, Danskin v. San Diego Unified School District, Davis v. Hults,* and *Lawson v. Housing Authority of City of Milwaukee* overturning these disallowances on First Amendment or lack of statutory authority grounds. Sometimes the rights-limiting conditions theory is used, sometimes it is ignored. Sometimes a clear and present danger test is utilized, whereas on other occasions the courts based their decisions on a balancing of interests. (These days, as later chapters show, courts

involved in cases such as most of the above would use language such as "viewpoint discrimination," "public forum," and/or "compelling governmental interest" in analyzing the problem confronting them.) Even within the first set of cases alone, there are those (*American Communications Association, Borrow*) where it can reasonably be argued that the rejected individuals or group would have posed a genuine danger to the public welfare if they had been accorded the sought benefit, and those (e.g., *Konigsberg II, Flemming v. Nestor*) where such an argument does not hold water. Note, however, that in most of the cases where the denial of the largesse for political reasons was declared invalid (e.g., *Speiser, Lawson*), the individuals or groups who refused it clearly did not menace national security. The fact that individuals or organizations that obviously do not threaten the public welfare have a better chance of successfully challenging in the courts a refusal of government benefits than those who do pose such a danger, is at least something to be thankful for!

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CHAPTER 3

Government Benefits and the Liberty of the Electronic Media

The Importance and Failings of Radio/TV News

It is clear that the electronic media, i.e., radio and television, are among the most important influences on American life. "The average American adult spends more than four hours a day watching television, well over two hours listening to radio...On a typical evening, the television audience is close to 100 million people. This can double for extraordinary events, when more than 90% of the entire population may gather in front of the nation's television screens."[1] In the 1960s, 20% of Americans said they received most of their news from television: by 1991 that figure had jumped to 60%.[2] Most Americans learn about what is happening abroad as well as domestically from the tube. Nonetheless, these figures in and of themselves do not fully reveal the impact of radio and television in our society. Hearing about events and seeing them on the screen usually have a greater emotional impact on us than just reading about them. However, television reports are unlikely to provide us with the ideological and factual complexities surrounding an issue.[3] Additionally, and this is true as well for the print media, the news that is furnished to us over radio and TV is selected by the editors from a much larger universe of information.[4] At times the selection process is flawed. On the American airwaves, for example, there is a considerable amount of reportage about the endless conflict between Israelis and Palestinians, but much less about the fighting between the Indian Army and Muslim separatists in Kashmir even though the latter is just as bloody and as much of a threat to world peace. The president of the U. S. gets more television coverage than does the United States Congress,[5] though the total number of people in Congress is 535 while the president

is only one person and Congress plays at least as much of a role in formulating public policy. A study of fifty-four television stations around the nation by the University of Wisconsin and the Annenberg School for Communication of the University of Southern California showed that between September 18 and October 4, 2002 over half their half-hour newscasts carried no campaign coverage whatsoever. The period analyzed was less than two months before the November elections of that year, which featured some important state gubernatorial and U.S. House and Senate races.[6]

Of course, radio and television do much more than provide us with information about politics, social issues, the economy, and the weather. The bulk of both is devoted to entertainment, which is what the majority of the public prefers to serious programs.[7] There is, naturally, nothing wrong with programs that entertain. Even the most scholarly of us needs to relax at times; depending on our personality and interests, a sports program, a quiz show, an old romantic movie, a situation comedy, an hour of Elvis Presley songs, or thirty minutes of warmed-over jokes can act as a valuable catharsis. Without the diverting fare proffered by the airwaves, the lives of the sick, the shut-in, and the aged would be even more miserable. Of course, the distinction between entertainment and the providing of information is sometimes blurred. When the media during 1998 reported the "oral sex" affair between President Bill Clinton and White House intern Monica Lewinsky that ultimately resulted in the chief executive's impeachment albeit not conviction, the viewers and listeners both found out something about happenings in the nation's capital and also watched a soap opera featuring semen on a blue dress and the spiriting away of Christmas presents. More seriously, a reasonable number of children's shows both regale and simultaneously teach readin,' 'ritin, and 'rithmetic. Again, however, one matter that does worry many about radio and television is that there is just not enough treatment of serious and important issues there; the news that is presented often omits many significant events and is unaccompanied by any attempt to place it in a larger context.

The First Amendment: Protector of Self-Actualization and/or Nurturer of Political Discourse

Certain political and legal theorists are more concerned about the points mentioned in the above sentence than are others. To remind the reader, the First Amendment to the U. S. Constitution, made applicable to the states by the Due Process Clause of the Fourteenth Amendment, prevents government from abridging freedom of speech, press, religion, peaceable assembly, and the liberties to petition the polity for a redress of grievances and, by implication, to associate with others for common purposes. Just

about every American scholar has a great respect for the First Amendment. However, theorists split into two camps when asked about its major purpose. Some argue that the main function of its speech/press clauses is to provide individuals with the opportunity for self-development. Through arguing with others, writing, painting (a form of speech for First Amendment purposes), singing, and producing plays, one can fulfill his/her potential as an autonomous human being; i.e., to employ the words of a popular commercial put out by the U. S. Armed Forces, "be all that you can be." However, one can also visualize the primary goal of speech in a democratic society such as the United States to be the provision of the information necessary to enable its members to choose intelligently among various political, social, and economic alternatives, the opportunity for such choice arising in voting and other forms of political participation. Owen Fiss articulates well the difference between these positions when he notes that some writers feel that "The purpose of free speech is not individual self-actualization, but rather the preservation of democracy, and the right of a people, as a people, to decide what kind of life it wishes to lead. Autonomy is protected not because of its intrinsic value...but rather as a means or instrument of collective self-determination...Speech allows people to vote intelligently and freely, aware of all the options and in possession of all the relevant information."[8]

Fiss himself believes that the First Amendment embodies *both* of these values, i.e., "autonomy" and "rich public debate." His emphasis, though, is on their potential conflict and the possibility that too much of the former will be destructive of the latter.[9] Alexander Meiklejohn, one of the great pioneer defenders of freedom of speech,[10] and Cass Sunstein unambiguously accept the thesis that what Fiss terms "rich public debate" is at the core of what the First Amendment shields. Sunstein calls his the "Madisonian conception of free speech," and claims in the spirit of Meiklejohn[11] that the First Amendment safeguards speech on public issues more than any other sort of dialogue.[12] It is not that other types of speech are outside the scope of this amendment, but what gets *most* protection from it is speech or writing on political, social, or economic issues.[13] Not only is this the type of speech that government is most likely to suppress, but without its blossoming, necessary political change is less likely to come about peacefully if at all.[14]

One's view of the major purpose of the First Amendment will probably have a great effect on how one would decide the media cases presented in this chapter. If one believes that its most crucial function is to ensure that there is plentiful and well-informed colloquy about public issues, one will be predisposed to a result that would compel radio and television to do a better job of informing the public. The same would be true for one who believes with Fiss that both purposes of the amendment have equal

value, but that in reality the electronic media's emphasis on divertissement excessively reduces the amount of political, social, and economic data it transmits. On the other hand, if one holds that the primary end of the amendment is to facilitate individual growth, he/she will be less distressed when the media emphasize entertainment rather than news; for each of the performers, whether they be soap opera stars, comedians, ballerinas, tap dancers, opera divas, rock and roll singers, actors, actresses, or baseball players, as well as those who write the scripts or music that they perform and those who direct and/or coach them, is developing his/her potential as a human being. And even those in the immense audiences who get up off their couches and dance, sing, or act along with them will, to some extent, be realizing their own potentials.

Reasonable people can disagree as to whether the principal purpose of the First Amendment is "self-actualization" or "rich public debate." Everyone has to decide that for himself/herself—there are strong arguments to be made for both positions. Naturally, both sides are strongly opposed to government *censorship* of the electronic media. Doris Graber, who inclines to the "self-actualization" rationale, contends that "Because the Constitution commands that Congress shall make no law abridging the freedom of the press, it may be well to keep all [governmental] communications policy making to the barest minimum."[15] And Sunstein, an advocate of the "rich public debate" philosophy, emphasizes that "Government should not be permitted to stop adults from hearing things simply because the government believes them to be wrong or dangerously influential. Most generally, a democratic government should not intrude on the individual's decision about what to say, what to hear, and what to believe."[16] But when it comes to the relationship between the government and radio/TV, those who feel that it is the duty of the media to contribute information that makes feasible the copious public discourse that is needed in a democracy will be more willing than the "self-realization" camp to tolerate governmental measures and support court decisions that *increase* quantitatively or qualitatively the political information traveling over the airwaves.

Radio/TV Station Licensing: An Inevitable Fact of Life

Even the most avid libertarian has to admit that some sort of governmental regulation of the airwaves is necessary. If more than one person or group broadcast on the same frequency in the same geographical area, their signals would become intermingled and the listener would hear nothing.

> Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies

> constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without governmental control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard.[17]

Thus, that year Congress enacted the Radio Act of 1927, which established an agency known as the Federal Radio Commission. This agency had the power to award licenses to groups that wanted to broadcast over a given frequency. This license was, in effect, a monopoly to employ that frequency, which would expire at the end of a given period unless the commission renewed the license. The Radio Act of 1927 was replaced by the Communications Act of 1934, which albeit amended many times, is still on the books. Under the Communications Act, the Federal Radio Commission was succeeded by the Federal Communications Commission (FCC, still very much with us). It issues licenses to radio and television broadcasters, which licenses it has the authority to renew. Thus if WCBS-AM, the CBS network's radio news station located in New York City and now broadcasting at 88 on the AM dial, wants to stay in business, every x number of years it has to ask the FCC to renew its license. The agency must under current law grant this request if the station "has served the public interest, convenience, and necessity."[18]

Like WCBS-AM, Channel 2, the CBS television affiliate in the New York metropolitan area, has to get its license restamped every so often. Ditto for all the other TV broadcast stations in that region. However, the chances are that today you receive Channel 2 or any other TV station in the country not by signals radiated through the air, but through a cable coming into your house through a hole cut into your wall. About 70% of American homes are served by cable TV, which can carry many more channels than a system of television which relies solely on the airwaves. Moreover, cable delivers reception undistorted by the signals that sometimes interfere with non-cable transmissions. Some stations such as Channel 2 in New York can be received both on cable and via the airwaves. These stations therefore are available to those who do not want to or cannot afford to pay for cable service. However, programs disseminated by organizations such as Cable News Network (CNN) can be received only by those willing to bear the cost of such service. CNN is what is known as a *cable programmer,* and thus needs no license from anyone, because it produces television programs for cable (in its case, all-news and public information telecasts). Those who own the physical cable network are known as *cable operators.* In theory the cable operators are distinct from the cable programmers, though not infrequently the cable operating company owns a cable programmer or a cable programming corporation owns a cable operator. Cable operators do not have to get licenses from the FCC or any other federal agency. However, federal law (47

U.S.C. 541(b)) requires them to obtain a franchise from the local government or other franchising authority in the area where they wish to operate. This is necessary because the construction of the cable system will require their laying cables or optical fibers underground, which in turn will necessitate the digging up of streets or other public property. (This paragraph is based mainly on Justice Anthony Kennedy's well-written discussion of the difference between broadcast and cable TV appearing in *Turner Broadcasting System v. FCC* [1994].[19])

So in the electronic media area, it is inevitable that some level of government will be empowered to grant licenses or (what is for practical purposes the same thing) franchises to individuals, groups, and corporations that wish to use the airwaves. Obviously, this power to license poses a potentially very serious threat to fundamental freedoms, especially those of speech and press, because the license-granting and renewal decisions create an opportunity for the relevant government to refuse to accord or renew the permit unless the hopeful licensee agrees to toe its line on various issues or avoid certain speech that it views with disfavor. Unlike many other nations, America has opted for a system of radio and television that is overwhelmingly privately rather than publicly owned. However, the government's necessary power to license private radio and TV stations in theory creates as much of a danger to the electronic media's freedom as public ownership would. What is to prevent the FCC from saying, for example, that CBS stations can get their licenses renewed only if the network agrees never to interview a foreign leader with whose country the United States is at odds, and promises never to air the view of anyone opposed to a war in which the United States is embroiled? In the communist Soviet Union, where radio and TV were owned by the state, nary a peep critical of the nation's leaders ever was heard over the airwaves. Could not the American government's regulatory power over the electronic media lead to a similar state of affairs here? This is especially true because the license that a station owner could lose if she/he departs from the government's position can be a very valuable asset, worth millions of dollars. Thus, in 1997, CBS Corporation earned $9.6 billion in revenues and $549 million in profits.[20] Will not an individual or enterprise hopeful of great wealth if only it can get his/her/its hands on a TV license be especially tempted to say to the FCC "Okay, we'll agree not to show the president in a bad light; just give us the license, pretty please?"

But of course neither the FCC nor local governments according franchises to cable operators have used their licensing prerogatives to squelch dissent, any more than the United Kingdom government has forced the publicly owned British Broadcasting Corporation to defend the positions of the government of the day and to attack or ignore all opposing viewpoints.

If there is reluctance on the part of radio and TV station owners to accost controversial issues and even to eschew public affairs broadcasting or provide this in small dribs and drabs, this is the product of self-censorship on their part. For the great majority of them, most of their revenue comes from advertising.[21] No company is going to be willing to pay a lot of money to advertise on a station unless the audience for that station is large (or in some cases consists mainly of individuals who are most likely to purchase the advertised good or service). To get significant audiences, the media will often have to forego thorough news programming in favor of reporting that features images and emotion.[22] Thus it is not surprising that a few of the major Supreme Court cases on the government's power over the electronic media that comes from its licensing prerogatives have involved situations where the latter have been accused of failing to present information or viewpoints rather than one where the government has tried to repress speech.

Red Lion Broadcasting Co.: The Rights of the Audience Made Paramount

Red Lion Broadcasting Co. v. FCC (1969)[23] is a case that should appeal to anyone who believes that the main purpose of the First Amendment is to provide the American public with information that its members can use to make rational judgments about political matters. The Red Lion Broadcasting Company was a corporation operating a conservative radio station in a Philadelphia suburb. In 1964, the station, WGCB, carried a broadcast by a fundamentalist minister named Billy James Hargis, which discussed a book about Senator Barry Goldwater, the losing candidate in the 1964 presidential election. Goldwater, at that time the idol of conservative America, had been unflatteringly described in a book entitled *Goldwater—Extremist on the Right* written by Fred Cook, a liberal journalist. Most of Hargis's remarks about the book did not analyze its merits or lack of such but, rather, were personal attacks upon Cook. Hargis said that Cook had been fired by the *New York World Telegram* after making false charges about a New York City official; that he then went to work for *The Nation,* a venerable weekly that Hargis claimed was sympathetic to communism; and that he had attacked FBI head J. Edgar Hoover as well as the Central Intelligence Agency. Cook said Hargis's was a personal attack on him and demanded free time to reply under the "fairness doctrine" that the FCC had developed. Most generally, the fairness doctrine required that time had to be given by radio and TV licensees for the discussion of issues of public concern, including the expression of opposing views on these issues.[24] To make aspects of the doctrine more precise, the FCC had issued a regulation providing that if, during a radio or TV discussion of a public issue, an attack was made on the honesty of a person or group, the station should

give the person whose integrity had been impugned "a reasonable opportunity to respond over the licensee's facilities."[25] A companion regulation required that where a station endorsed a candidate for political office, his/her opponent should be accorded a reasonable opportunity to counter that imprimatur. The FCC found that Hargis had attacked Cook personally, and that therefore under the first-mentioned regulation, the station must, under pain of getting its license revoked, give Cook time to respond even if he were unwilling to pay for it. The Court of Appeals for the District of Columbia upheld the FCC.

In its appeal to the Supreme Court, WGCB, backed by other broadcasters, contended that the fairness rule, both in general and in its detailed versions applying to personal attacks on individuals and editorial support of political candidates, violated the First Amendment. The station's staff asserted that that amendment allowed them to use their frequency to broadcast what they wished and to bar whomever they desired from using it; that is, it gave them not only the right to speak their own minds, but also to keep opposing views off the airwaves they control. They contended, in a sense, that the First Amendment accords them a right to silence, a right to refuse to have uttered via their radio signals positions that they find repugnant.

Justice Byron White wrote the opinion for a unanimous tribunal sustaining the FCC and Cook. White pointed out that more individuals want to broadcast than there are frequencies to award. Thus a licensing system is necessary to avoid overcrowding of the airwaves. Some will get the franchise, and others must, of necessity, be turned down. However, there is no reason, he continued, why the First Amendment rights of those who have no access to radio and TV are inferior to those who have received the coveted licenses. Put another way, the Constitution does not demand that the franchisee be permitted to exercise monopoly power over his/her airspace. The government could have declared that each frequency could be shared among several licensees, with each one being entitled to use it x hours per day or y hours per week. Therefore, there is no reason why it cannot take a step less restrictive of a licensee's ability to broadcast and simply require it to give those who oppose its positions a reasonable amount of time.[26] Moreover, the radio/TV audience has First Amendment rights as well. To use a phrase of the opinion that is still frequently quoted, "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount...It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."[27] Given all this, White concluded, there is no constitutional problem with the FCC's general fairness doc-

trine or its more specific versions, including the one forcing WGCB to give Cook time to respond to Hargis's vitriolic comments about him. (Technically, the case upheld only this rule and the one requiring that the opponent of a political candidate endorsed by a broadcaster be given the opportunity to counter its editorial. However, later decisions have read *Red Lion* to sustain the fairness doctrine in general and so we, too, shall interpret it this way.[28]) Nor, White contended, was there any doubt that the regulation about which WGCB was complaining was consistent with the section of the 1934 Communications Act providing that when issuing or renewing a license, the commission must "consider the demands of the public interest."[29]

Red Lion is a clear choice of "rich public discourse" over "self-actualization" as the fundamental First Amendment goal. It assumes that the electronic media have no constitutional prerogative to present only their side of an issue, and that if we are to have meaningful political deliberations it is imperative that other views be heard; the audience has a First Amendment right to hear these ideas. In White's view, it is diversity of ideas that is cherished by the First Amendment, not simply the right to spout your own theories without giving your ideological adversaries a shot. Hardly surprisingly, the case was not popular with the broadcasting industry when it was issued and is no more popular with it now. For example, Corydon Dunham, who was the attorney for Dr. Frank Stanton of CBS when the latter was under fire in Congress for producing a courageous program exposing the distortions of Pentagon propaganda supporting the Vietnam War and an enlarged defense budget, declared in the book he wrote about the Stanton affair that "The time has come for *Red Lion* and its doctrine of press regulation to be abandoned. The Court should withdraw it as authority for the regulation of electronic news."[30] And even scholars without any ties to the media such as Graber are obviously unhappy with it. She complains that Cook's demand that he be allowed to respond to Hargis was a "set-up" job, "one of many examples of political manipulation of the regulatory process." She reveals that it "had been paid for and orchestrated by the Democratic National Committee as part of an effort to generate an avalanche of demands for rebuttal broadcasts to conservative radio and television programs."[31]

In support of *Red Lion* one can point out that the FCC fairness doctrine was not censorship in the traditional sense. WGCB was not being penalized for developing and then expressing its own opinions via individuals such as Hargis. The latter's attack was a vicious one, and it makes considerable sense to argue that those who listened to it should have been given the opportunity to hear Cook's rebuttal so that they could form their own opinion of him and determine for themselves whether his writings on political

matters deserved to be taken seriously. One criticism of the holding that could appeal to the "rich public debate" school is that the demand that the electronic media provide free or inexpensive response time to those demeaned via their airwaves will mean that they will cease broadcasting anything even mildly contentious. Graber believes that in fact *Red Lion* did produce this unhappy side effect. "The decision proved to be a hollow victory for supporters of free access, however, because it led to sharp curtailment of air time for controversial broadcasts...By 1975 the Christian Crusade (Hargis's program) had been dropped by 300 of its 350 stations."[32] Actually, Justice White was aware that his opinion could lead to a decline in the discussion of provocative issues over the air. "It is strenuously argued, however, that if political editorials or personal attacks will trigger an obligation in broadcasters to afford the opportunity for expression to speakers who need not pay for time and whose views are unpalatable to the licensees, then broadcasters will irresistibly be forced to self-censorship and their coverage of controversial public issues will be eliminated."[33] His short answer was that this possibility is speculative, and, that even if it materializes, the FCC can then compel the franchisees to have more and better-balanced discussion of controversial matters through its power to threaten not to renew a license.[34]

Perhaps a stronger argument against *Red Lion* is that someone is in essence being forced to say something that he/she feels is wrong. There is no doubt that the First Amendment includes a right to silence as well as a right to speak. In *Wooley v. Maynard* (1977)[35] the Supreme Court declared, for example, that Jehovah's Witnesses did not have to display on their New Hampshire license plates the state motto ("Live Free or Die") because this slogan ran counter to their religious views. It is true that radio station WGCB's owners, all good conservative fundamentalists, were not forced as a result of *Red Lion* to personally utter views they disbelieved. They were, however, compelled to transmit Cook's rebuttal under threat of losing their license if they did not; surely, there is no real difference between having to take a position you do not accept and having to let someone else use your property to enunciate this position. Would liberals be happy if, for example, left-wing radio station WBAI in New York City were compelled to give free time to a Klu Klux Klan leader because one of its broadcasters had lambasted the Klan? Actually, this contention that *Red Lion* violates the broadcaster's First Amendment right to silence makes more sense in the context of small, religiously affiliated or politically involved stations such as WGCB and WBAI than in the case of the big networks or any of their larger affiliates. CBS, NBC, and ABC, Inc. are in the business of making money, not of expounding one or another religious or ideological view. The same is true of their major stations such as Channels 2, 4, and 7 in New York

City or WCBS-AM or FM in the same metropolis. It is strange to talk about these corporations having any views whatsoever, except on the necessity of their accumulating as much profit as possible.

Returning to the defenses of *Red Lion,* one that has been underplayed by both its supporters and opponents, is that the airwaves are public property. Charles Reich made this point in his famous *Yale Law Journal* article "The New Property,"[36] referred to in Chapter 1. "A very large part of the American economy is publicly owned...The radio television industry uses the scarce channels of the air, free of charge."[37] As Reich points out, the federal government owns "hundreds of millions of acres of public lands valuable for mining, grazing, lumbering."[38] Surely it can require that those whom it permits (for a fee!) to carry out logging in national forests reseed the cleared areas so that future generations will once again be able to enjoy the cool greenery trees provide. Analogously, why should it not be able to demand that those who use public airspace gratis let their ideological opponents utilize this space for a small part of each broadcasting day? This is especially true because, as we saw White emphasizing, it would be possible for the FCC to let one group use the space in the morning and another in the afternoon and another in the evening. The commission could have declared, e.g., that Christian fundamentalists could use WGCB's frequency eight hours a day, Hasidic groups (Jewish fundamentalists) another eight hours, and Muslim fundamentalists the third eight hours. If, say, the proprietors of liberal station WBAI really would get sick at the thought of having a Klansman broadcast a few minutes in their studio, they could say emphatically before he took the mike that the positions he avows are his, not the station's.

One of the most frequently heard arguments against *Red Lion* is as follows. Is not the reasoning of the case outmoded in this age of cable television? *Red Lion* assumed, as we saw, that more people want to speak over the air than there are frequencies available for them to do so. In 1969, the year of the decision, the airwaves could be considered a scarce resource, the use of which would have to be controlled by government through a thorough system of licensing. However, cable TV provides viewers with many, many more channels than does broadcast TV: the New York City metropolitan area is "blessed" with over 100 channels. Thus, some contend, the air waves are no longer a "scarce" resource and *Red Lion* is out of date.[39] A glance at the *New York Times* television section for a Thursday evening in February 2002 shows a lot of light material it is true, e.g., the venerable sitcom *Seinfeld* on Channel 5 preceded by *The Hollywood Squares* on Channel 2. Competing with this pure entertainment was another sort of pure entertainment: the quiz shows *Jeopardy* and *Wheel of Fortune* on Channel 7. But the more serious viewer could get news with Jim Lehrer

on Channel 13 (public television) at 7:00 P.M. and watch a show on contemporary art at 9:00 P.M. on that same channel. At 8:00 P.M. he/she could have hit the remote control button for the City University of New York's Channel 75 and watched *Campus*, a book review program in French, until 9:00 P.M. Later that evening, she/he could have seen the film *Catherine the Great* on Arts and Entertainment. If he/she felt a bit worn out later in the evening with all that culture, he/she could have switched to ESPN to enjoy a basketball game between Seton Hall and Pittsburgh universities. And if, for some reason, one again got hungry for the day's depressing news, one always could have pressed the button for CNN or MSNBC. And these selections were but the tip of an iceberg! Obviously, in less-populated areas there is less variety, but thanks to cable, a large majority of viewers has more television to watch than before it came into wide use. Moreover, though very few of these programs will contain much that radically challenges the status quo, taken together, an evening's fare on cable does offer a great amount of information and diverse political views (which surely would have reached the ears of anyone brave enough to watch the U.S. House of Representatives proceedings on C-SPAN).

Quite arguably, accordingly, there is no need to compel any station to give a modern-day Fred Cook a right of reply on the same station to a modern-day Billy James Hargis who impugns his integrity; there is almost bound to be another radio or TV station where one will hear defenses of liberals such as Cook and blasts at fundamentalist Christians such as Hargis. (Chapter 8 will critique this position.) As Graber notes, summing up this thesis of *Red Lion*'s opponents, "print media, which are uncontrolled by government, face less competition in the age of one-newspaper towns than do electronic media with their competing networks and competition among multiple radio and television outlets...Therefore, the argument goes, the electronic media should be just as free as the print media to make publishing decisions."[40] (In *Miami Herald Publishing Corporation v. Tornillo* (1974)[41] the Supreme Court refused to extend *Red Lion* to the print media and thus concluded that a Florida statute requiring that candidates for public office attacked by a newspaper be allowed to write a rebuttal in that publication was a violation of the paper's First Amendment freedoms.) Certainly, most of those who argue that scarcity of airspace no longer exists were heartened by the 1987 demise of the fairness doctrine upheld in *Red Lion*. Congress tried to pass a statute that year embodying it, but President Ronald Reagan vetoed it and the FCC soon scrapped it totally. According to Graber, "the effect [of the doctrine's disappearance] on the airing of controversies has been minimal."[42]

The Retreat from *Red Lion*

Whether anything remains of *Red Lion* after the end of the fairness rule it defended will be seen in a few paragraphs. Certainly not only *Tornillo* but also *Columbia Broadcasting System v. Democratic National Committee* (1973),[43] henceforth abbreviated simply *CBS v. DNC,* are indications that it has been significantly weakened. The facts giving rise to this case occurred in 1970, at a time when the nation was bitterly divided about the necessity of continuing the war in Vietnam. BEM, a businessman's group opposed to the war, asked radio station WTOP in Washington to sell it time for a series of commercials opposing the conflict. The station refused, pointing out that it was providing thorough coverage of the fighting. The organization then requested that the FCC adjudge that WTOP had to allow it to air (for a fee) its political ads even assuming that it was complying with the fairness doctrine. A few months later, the DNC asked the commission for a ruling that broadcasters generally were under a duty to let it purchase time to expound to their audiences the virtues of the Democratic Party. The FCC held against BEM and the DNC. The Court of Appeals for the District of Columbia Circuit overturned these judgments and declared that broadcasters could not impose a total ban on public issue ads (as WTOP had done) because they were accepting ads for goods and services. It thus remanded the case to the commission to develop rules and regulations for determining how many issue ads a station had to air. CBS and other broadcasters then appealed this decision to the Supreme Court.

Chief Justice Warren Burger wrote the part-majority, part-plurality opinion giving the electronic media the victory. The chief justice in part IV of the opinion (a section backed by a Court majority and so good precedent) spent a good deal of time demonstrating that the FCC's refusal to grant a right of access for advertisements on public issues did not clash with the 1934 Communications Act, including its "public interest" standard. Nor did the station's refusal to broadcast the ads violate the First Amendment. Most importantly (and accurately), radio and television stations are not governmental agencies but private parties, and are thus not restrained by the that Amendment. Moreover, there was no discrimination against any political view here; WTOP had emphasized that it was reporting anti- as well as pro-Vietnam War sentiments. Also, the right of the DNC to buy time for extolling its positions on the issues of the day would, if it had been recognized, certainly have accorded the Republican National Committee and perhaps other political groups a similar prerogative, which would have reduced the discretion of a station to cover public affairs as it saw best. To articulate the holding of the case in a few words: (with an exception noted below) the electronic media do not have to sell political ads; neither the

Constitution nor the Communications Act nor any FCC regulations require that they must.

Technically *Red Lion* is consistent with *CBS v. DNC*. The former involved an attempt by a federal agency to compel a station to present more than one side of an issue; the latter sprang from a refusal by the self-same agency to force broadcasters to allow certain additional points of view to be transmitted over their airwaves. It is logical to say (1) that the government consistently with the First Amendment *may* use its licensing power to force the electronic media to transmit more political commentary, and also (2) that the government consistently with the First Amendment does not *have to* use its licensing power to require them to transmit more political commentary. Not only did *CBS v. DNC* not overrule *Red Lion*, it in fact quoted from it extensively and with approval. Justice White, the *Red Lion* author, joined most of the chief justice's opinion. And yet there *is* a philosophical difference between the two decisions. *Red Lion*'s prime concern is that the radio and TV audience get a balanced and full presentation of public issues. In *CBS v. DNC* the Court's main worry is that government will use its power over the electronic media to control the content of what they broadcast, especially on such issues. Thus Chief Justice Burger fears that

> Under a constitutionally commanded and Government supervised right-of-access system...the Commission would be required to oversee far more of the day-to-day operations of broadcasters' conduct, deciding such questions as whether a particular individual or group has had sufficient opportunity to present its viewpoint and whether a particular viewpoint has already been sufficiently aired. Regimenting broadcasters is too radical a therapy for the ailment respondents complain of.[44]

In other words, *Red Lion* primarily wants to safeguard what it views as the listeners' First Amendment rights; *CBS v. DNC* wants to protect what it sees as the electronic media's prerogatives under the very same provision of the Constitution!

Another instance where the Court upheld the refusal of the FCC to use its licensing authority in a way that would safeguard diversity was *FCC v. WNCN Listeners Guild* (1981).[45] The facts as stated in Justice White's majority opinion were simply that various "citizen groups interested in fostering and preserving particular entertainment formats"[46] protested an FCC "policy statement" declaring that diversity in the electronic media was best served by relying on market forces. Therefore, the document continued, it would not disallow a sale of a license or refuse to renew one because the type of programming provided on the frequency would change as a result of the sale or has changed between the granting of the license and its renewal date.

The Court of Appeals for the District of Columbia Circuit declared that

this statement violated the 1934 Communications Act's requirement that the commission allow a license transfer or renewal only if it finds that this would serve the public interest, convenience, and necessity. The need to adjudge the validity of the statement arose from the fact that WNCN was a classical music station in New York City, probably the best one in the metropolitan region. A group approached the owners of the station and made them an offer they could not refuse. The problem was that the buyers planned to convert 104.3 FM (WNCN's frequency) into a soft rock station and leave the metropolitan area with just one full-time classical music station, WQXR, owned by the *New York Times*. Some of WNCN's most fervent listeners formed the WNCN Listeners Guild to pressure the FCC to stop the sale or, in the alternative, to require that the purchasers maintain the classical music format. This guild solicited funds from members' friends, including the author of this book, and he happily gave a donation and joined it. Needless to say the Supreme Court's *WNCN Listeners Guild* decision reversing the Court of Appeals, approving the policy statement, and making possible the FCC's subsequent approval of the sale to the soft rock group made us unhappy indeed. To the argument that the commission's laissez-faire stance deprived classical music fans and afficionados of other types of "unpopular" music of their First Amendment right "to receive suitable access to social, political, esthetic, moral and other ideas and experiences," White, without much analysis, commented that the thrust of his *Red Lion* opinion was to ensure for the broadcast audience vigorous debate on public issues, not to prevent "the abandonment of their favorite entertainment programs."[47] 104.3 FM still emits popular music, as do the majority of other radio stations in the New York area. Fortunately, WQXR-FM still provides us classical music lovers with our diet of Bach, Brahms, and Beethoven, and its efforts are at times during the day supplemented by those of stations such as WNYC-FM.

Red Lion Revived: *CBS v. FCC*

Those who hoped that cases such as *CBS v. DNC* and *WNCN Listeners Guild* marked the abandonment of *Red Lion* received a setback in *Columbia Broadcasting System v. FCC* (1981),[48] henceforth called *CBS v. FCC*. Though CBS got the "honor" of being named as the appellant in the case, its competitors NBC and ABC had joined it for the purposes of this litigation. The dispute between the networks and the FCC began toward the end of 1979, when Jimmy Carter was president and Walter Mondale was vice-president. Carter and Mondale decided that they would like a second term in office, eventually denied them in November of 1980 by Ronald Reagan. So they set up a re-election organization known as the Carter-Mondale Presidential Committee, which sought in October 1979 to buy a thirty-

minute segment of time on each of the major networks early in December of that year for a show glorifying the accomplishments of the Carter-Mondale administration. The networks refused to make this slot available, saying that there were so many possible Democratic and Republican presidential candidates and that the election was so far off in the future that their regular programming would be unnecessarily disrupted by the Carter-Mondale propaganda. Selling a thirty-minute slot to Carter would have meant that they would have had to retail an equal amount of time to any other presidential hopeful of either party, e.g., Republican Reagan and Democrat Senator Edward Kennedy, who would have been willing to put up the necessary fee.

Irked by the networks' stonewalling, the Carter-Mondale Committee brought a complaint before the FCC. This step was based on Section 312(a)(7) of the Communications Act of 1934 (47 U.S.C. Sec. 312(a)(7)), which gives the commission the right to revoke the license of any station "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." In other words, Congress, by virtue of this statute, is telling the electronic media that if they want to retain their licenses, they had better be willing to allow candidates for the House, the Senate, the vice-presidency, and the presidency to purchase airtime for campaign ads. These ads are often the most effective way a candidate can get his/her position across to the voters, but a statute such as this would almost certainly be unconstitutional if it were to be applied to newspapers and magazines. The FCC agreed with the Carter-Mondale Committee that the networks should have permitted it to air its ad, the showing of which it had decided to postpone until January of 1980 because Iranian "students" had seized the American Embassy in Tehran and taken its personnel as hostages.

The Court of Appeals for the District of Columbia Circuit upheld the commission's order to the networks telling them to inform it how they intended to satisfy the requirements of Section 312(a)(7), enacted in 1972 as a supplement to, rather than as a replacement for, the rule that the licensee had to operate its station in the public interest. The Supreme Court, in an opinion by Chief Justice Burger, backed the Court of Appeals and the agency. He noted that under the regulations developed by the commission for interpreting Sec. 312(a)(7), broadcasters may refuse to sell airtime to candidates for federal office before a campaign begins. However, once it has started, they must give serious attention to requests from those running to purchase time. In considering these requests, the broadcasters may look to the amount of time previously sold to the candidate, how disruptive of regular programming his/her commercials will be,

and the likelihood of similar requests by his/her rivals. The regulations also provided that it was up to the FCC to determine, after looking at the world around it, when the campaign had taken off. In this case it had found that the race had started in November of 1979. The chief justice averred that the FCC's rules, determination of the time the campaign had commenced, and finding that the networks had failed to grant to the Carter-Mondale Committee the access required by the law were all reasonable, and thus declared that they would stand unless the law itself was unconstitutional.

The chief justice's finding that the statute did not infringe the First Amendment was rather brief. Not surprisingly, he quoted and actually italicized[49] *Red Lion*'s thesis that "It is the right of the viewers, not the right of the broadcasters which is paramount." Section 312(a)(7) "makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process."[50] These words are, of course, fully in accord with the thesis discussed earlier that the main purpose of the First Amendment is not to permit self-actualization but to promote the "rich public discourse" that is the lifeblood of a democratic system. The chief justice here also makes use of the little-cited theory that the airwaves are publicly owned, and that the licensees accept the franchise to use this domain "burdened by enforceable public obligations."[51] He had made a similar comment in *CBS v. DNC*: "the broadcast media utilize a valuable and limited public resource,"[52] but that comment there was pure dictum given his pro-broadcaster holding in that case. Somewhat surprisingly, Justice White dissented in *CBS v. FCC,* mainly on the grounds that, in his view, the commission's rules and regulations were an unreasonable reading of the law and unduly interfered with the "traditionally recognized discretion of the broadcaster."[53]

Imposing Rights-Limiting Conditions on Cable Operators

Section 312(a)(7), unlike the fairness doctrine, is still on the books. So is the Cable Television Consumer Protection Act of 1992. The constitutionality of this was considered in two cases with the same name: *Turner Broadcasting System v. FCC* (1994),[54] henceforth called *Turner I,* and *Turner Broadcasting System v. FCC* (1997),[55] henceforth called *Turner II.* The "Turner" referred to is, of course, Ted Turner, the founder of CNN, the pioneer in all-news telecasting. That 1992 law, enacted over President George Bush's veto, provides among other things that all cable systems have to carry a certain number of commercial broadcast stations; i.e., those that transmit signals through the air, as well as noncommercial educational TV stations. It was these "must carry" provisions that cable operators challenged

as violating their First Amendment rights but that were upheld by the *Turner I* and *Turner II* combination. Of the two, *Turner I* is more important as a statement of legal principles; therefore it is that case on which this book will concentrate. Neither holding involves an attempt by the U. S. government to impose a condition on the granting of a federal license to the cable operators, for they get their franchises from local governments, as seen. However, these nonetheless are true rights-limiting conditions-on-licensing cases, for the cable operators are aware that the localities may deny their request to renew their franchises if they have not complied with "applicable law,"[56] including of course the requirement that they "must carry" certain stations (and thus what is said on these channels) even though they do not desire to do so.

Here a digression about the standards the current Supreme Court normally uses to test the validity of laws alleged to infringe First Amendment freedoms is needed. These standards were referred to not only in *Turner I* and *Turner II,* but also will rear their heads in a reasonable number of the decisions noted in the next few chapters. The Court draws a distinction between content discrimination and viewpoint discrimination (but sometimes has difficulty keeping the two separate). A law or regulation creating content discrimination is one that declares that a certain *type* of speech will be penalized or otherwise burdened. A clear case of such a law would be one saying that a station may not broadcast political speech or, for that matter, that it must broadcast such speech. In the latter case, non-political speech would be the victim of content discrimination, for as a result of the law there would be less time for airing such speech. Viewpoint discrimination does not penalize or otherwise restrict all speech of a certain type, but penalizes or restricts some of the speech of that type. An obvious example would be an FCC regulation allowing Republican but not Democratic candidates to buy campaign advertising. The Court is highly skeptical of both content and viewpoint discrimination but, understandably so, is even more suspicious of the latter.

Red Lion implicitly used a test tolerant of government regulation of speech to judge the legitimacy of the fairness doctrine as applied to radio and TV. Justice Anthony Kennedy's opinion (most of which is majority rather than plurality) in *Turner I* rejects any such pro-government standard for laws affecting cable TV because the scarcity theory on which *Red Lion* was based is just not applicable to cable with its multiplicity of outlets and consequent opportunity for the expression of many points of view without the need for government interference. Rather, he is willing, if necessary, to give the cable operators the benefit of the Court's more anti-government "content discrimination" doctrine. However, though Justice Sandra O'Connor wrote a dissent for herself and Justices Ruth Ginsburg, Antonin

Scalia, and (to some extent) Clarence Thomas arguing that the law did impose content discrimination, Kennedy, in *Turner I,* found no discrimination of this sort and thus no need to subject the "must-carry" clauses to the "strict" scrutiny demanded if there were such. He correctly held that these clauses did not penalize on the basis of content; no cable operator was being punished for articulating a certain type of speech or failing to do so. What the clauses were designed to do, rather, was protect broadcast and educational TV stations from what Congress felt was unfair competition from cable TV.[57] Thus we have a "content-neutral" statute that imposes an "incidental burden" on speech. Laws of this sort may be sustained if they survive an "intermediate" degree of scrutiny; that is, if they further a substantial governmental interest unrelated to the suppression of freedom of expression and if the incidental restriction on speech is no greater than necessary to further that interest.[58]

Kennedy said that in the abstract the "must-carry" provisions serve substantial governmental interests, e.g., the protection of the 40% of Americans who have only broadcast TV (the figure is lower now) and the elimination of restraints on fair competition. However, rather than validating the clauses on the spot, he remanded the case to the District Court to see whether in fact broadcast TV was in jeopardy and what, if any, changes in the programming on their systems the must-carry provisions would force the cable operators to make. In *Turner II,* Kennedy's part-majority, part-plurality opinion was satisfied on the substantial interests point by the District Court's findings that in fact must-carry forced cable systems to add relatively few broadcast stations and thus that its impact on the operators was minimal, and that broadcast stations that were denied carriage by cable might well in the near future suffer serious financial harm and perhaps go out of business. Justices O'Connor and her colleagues in *Turner I* dissented here as well.

So what is the story with *Red Lion?* The best view is that, though weakened, it is still alive despite *WNCN Listeners Guild, CBS v. DNC, Turner I*'s declaration that tougher standards than it used should be applied to the regulation of cable TV, and the ending of the fairness doctrine. (Whether it *should* be overruled is a problem that will be considered in the last chapter.) *CBS v. FCC* was highly approving of it, as seen, and *Turner I* explicitly refused to overturn it as applied to radio and broadcast TV.[59] This probably means, for example, that the fairness doctrine could constitutionally be applied to at least the electronic broadcast media were it ever to be resuscitated by Congress or the FCC. But even if the *Turner I* court had said nothing about *Red Lion,* that decision would have kept it breathing. For the *spirit* of Justice White's opinion in the earlier case is that the radio/TV audience does have an important right to be exposed to a wide

variety of opinions. It is true that the immediate purpose of "must-carry" was to preserve broadcast TV. However, one of the most important reasons for doing this, as Kennedy recognized, was to assure "that the public has access to a multiplicity of information sources."[60] This assurance "promotes values central to the First Amendment" and is "a governmental purpose of the highest order."[61] For some reason *Red Lion* was not cited at this point in the opinion, but its thesis that the First Amendment rights of the viewers and listeners are paramount over those of the owners of the electronic media indubitably governs this language.

The Pacifica Foundation in the Courts

The dissenters in *Turner I* and *Turner II* suggest that if Congress wants to save certain broadcast TV stations it can subsidize them.[62] This is an amazing recommendation for a group that is worried almost to death about federal control over cable operators, for it will be tempting for the polity to offer subsidies on condition that the broadcasters who receive these boons surrender one or more First Amendment freedoms. That this is more than a wild possibility can be seen from the facts giving rise to *FCC v. League of Women Voters of California* (1984),[63] henceforth referred to as *FCC v. LWV*. The idea that some radio and television frequencies should be set aside for educational rather than commercial purposes is not new. In the 1940s the FCC reserved certain radio frequencies for educational use, and in the early 1950s it took the same step for the newer medium of television. In 1967 Congress passed, and President Lyndon B. Johnson signed, the Public Broadcasting Act of 1967, which created the Corporation for Public Broadcasting (CPB). The corporation, in turn, was to and still does fund the production of educational programs for TV and radio, and makes grants to stations to help defray the costs they incur in airing educational productions. Congress understandably wanted to ensure that local stations receiving CPB aid would not be subjected to governmental interference. Thus it banned federal agencies and officials from supervising the CPB or local stations. The CPB was barred from owning any radio or TV station, and was to act in a way that would not interfere with the programming of the recipients of its cash. The CPB legislation also enjoined noncommercial educational stations receiving CPB grants from "editorializing" or supporting or opposing any candidate for office. Pacifica Foundation, a non-profit group owning several non-commercial stations and leaning to the left of the political spectrum, protested that the restriction on its editorializing violated its First Amendment freedoms. (The above-mentioned station WBAI in New York City is one of its affiliates. Actually, Pacifica was the primary protestor against this clause of the Public Broadcasting Act despite the fact that the title of the case in the law reports refers to "League

of Women Voters of California," an organization that was not directly burdened by the "no-editorializing" rule.) Both those who believe that the main purpose of the First Amendment is to allow self-realization and those who hold that it exists primarily to further healthy public discourse must have hoped that the Supreme Court would invalidate this no-editorializing limit on expression. The self-realization group would have disliked this constraint because it denied individuals the opportunity to develop their thinking and writing abilities through penning editorials and doing the research needed to provide their positions with a solid factual base. The public discourse people would have been suspicious of it because it reduced the quantity of political ideas to which the self-governing people were exposed.

So both groups certainly were happy when the Supreme Court, in an opinion by Justice William Brennan, declared in *FCC v. LWV* that the "editorializing" bar *was* an infringement of the First Amendment. The justice first emphasized, using a "rich public discourse" approach, that political discussion (including editorials) is at the core of what the Constitution's freedom of speech and press clauses protect.[64] He then pointed out, rightly, that the law here restricted speech because of its content; that is, what it banned was that genre of speech known as "editorializing." (It did not create viewpoint discrimination because it restricted liberal as well as conservative, Democratic as well as Republican, etc., editorials.) The question he posed was whether this bar withstood serious scrutiny; i.e., whether it was "narrowly tailored to further a substantial governmental interest."[65] He made it clear that a similar limitation on newspapers and magazines would have had no chance of success, but the scarcity of broadcast frequencies that *Red Lion* emphasized demands slightly more governmental control over the electronic media. Here the substantial interests the government brought forth as justifications for this statute were to keep the subsidized stations from becoming instruments for governmental propaganda and from being taken over by private groups with an ideological axe to grind. He did not think that the editorializing proscription was of much use for achieving these goals. Among other reasons, the structure of the CPB would probably insulate grantee stations from political pressure anyway; and the appropriations of federal funds to go to the CPB for distribution to local broadcasters are long-term rather than yearly. The latter means, in turn, that a particular Congressional session will not be likely to stop subsidizing public radio even if the editorials on some public stations irritate a majority of its members. As for the worry that dogmatic groups would buy educational stations and use them to disseminate their creeds to the exclusion of all other positions, the FCC could prevent this by use of the fairness doctrine, not repealed until three years after Brennan's opinion was issued. In short, the "no-editorializing" provision

outlawed some speech and was simultaneously not very useful to anyone; thus it had to be declared unconstitutional.

Justice William Rehnquist wrote a dissent joined by Chief Justice Burger and Justice White. (Though probably not too many paid attention to Rehnquist's views on this occasion, they formed the basis of his decision in *Rust v. Sullivan* (1991),[66] a holding that is discussed in Chapter 5.) He claimed that when government subsidizes, it can attach any conditions it wants to the grant as long as these are not primarily aimed at suppressing speech it dislikes and are reasonably related to achieving the goal of the subvention.[67] Without providing his readers with much in the way of analysis, he said that the "no-editorializing" rule satisfies these easy-to-pass tests. Justice John Paul Stevens dissented on his own; he thought rightly or wrongly that "no editorializing" was necessary "to avoid the risk that some speakers will be rewarded or penalized for saying things that appeal to—or are offensive to—the sovereign."[68] There is also the danger, he felt, that if stations could editorialize they would tailor their positions to ensure that these pleased the politicians who held the purse strings.[69] The majority, of course, would say that these problems were highly unlikely to crop up because the CPB was a buffer between the paymaster and the recipients of the largesse.

FCC *v. Pacifica Foundation* (1978)[70] provides us with an excellent stepping-stone between this chapter on the licensing of media and freedom of speech and the next on the First Amendment problems posed by subsidies to artists, museums, and scholars. Here the FCC, acting under a statute that forbade the use of obscene, indecent or profane language over the radio, warned Pacifica Foundation, whose New York outlet is (as seen) WBAI, that the station could lose its license if it continued to permit indecent speech over its airwaves at hours when children would be likely to be exposed to it. The program in question was a twelve-minute monologue by humorist George Carlin over WBAI at 2:00 P.M., which consisted largely of "Filthy Words," including what the author's children when young used to call the "s..." and the "f..." words. A man driving along with his young son heard this broadcast and complained to the commission. The Supreme Court, in a part-majority, part-plurality opinion by Justice Stevens, upheld the FCC's action against Pacifica. What Carlin had in mind when he delivered this dreary oration is unclear, but the Court sustained the FCC's finding that it was indecent even though no one was arguing that it was obscene. (Under the First Amendment, a work cannot be found "obscene" and thus subject to proscription without any more ado unless, among other things, taken as a whole it appeals to prurient interest in sex, *Miller v. California* [1973].[71]) Just as importantly, it agreed that the commission

could take steps to keep indecent material off the airwaves, at least during hours when children were likely to be listening.

To the charge that the threat to revoke WBAI's license if it kept on allowing indecent matter to clog its frequency was an infringement of its First Amendment rights, the Court (we are utilizing only those parts of the Stevens opinion that are majority rather than plurality) made several points that, in the spirit of *Red Lion,* recognized the government's licensing power as a tool to regulate, albeit in a limited way, speech over the electronic media. First, the commission has a right to take note of "past program content" when deciding whether to renew a license; this is not censorship.[72] Second, of all forms of communication, broadcasting receives the "most limited" First Amendment protection.[73] Third, there are additional justifications for this above and beyond the "scarcity" theory of *Red Lion*. These include the fact that the electronic media invade the privacy of one's home and are "uniquely accessible to children."[74] To mollify what he knew would be severe criticism of his opinion, Stevens pulled in his horns a bit in his last paragraph and implied that Carlin's material might not be subject to banning if it were broadcast late at night and that an occasional expletive at any time of the day might be constitutionally safeguarded.

Whether *FCC v. Pacifica Foundation* was correctly decided or not, one of Justice Stevens's arguments is a weak one; i.e., that a justification for regulating the electronic media more rigorously than the print media is that the former is more likely to intrude upon the privacy of the home. As Justice Brennan's dissent says, the listener or viewer can just switch off the set![75] The sound of Carlin's voice mouthing this foul language need not remain with the listener a second longer than the image of these words would persist if they were inserted into a newspaper opened by the homeowner and accidentally turned to the page where they were printed. Stevens himself could not have believed the monologue that harmful, for he had the complete diatribe inserted as an appendix to his opinion![76] So any readers whose childhoods were insulated from Carlin's "wisdom" can simply open *United States Reports* and read all of it free of charge thanks to your friendly U.S. Supreme Court and U.S. Government Printing Office.

On a more serious note, it is informative to ask which of the two schools of First Amendment thought *FCC v. Pacifica Foundation* would most displease. Clearly, the "self-actualization" theorists would have to be extremely unhappy with it. Putting together monologues is one way that comics such as Carlin develop their talents, albeit many would believe that he was not very successful with this particular attempt. On the face of it, the "rich public dialogue" supporters should not be too worried by the case. It is hard to see how Carlin's stringing together all these expletives would

contribute anything significant to debates on public policy. Or would it? Maybe what he is trying to say in a way that shocks us and thus perhaps wakes us up is that society's standards of decency have changed and that public policy should take this into account. This difficulty of distinguishing between valuable speech on the one hand and offensive garbage on the other will continue to plague us in our next chapter.

Conclusion

The cases discussed in this chapter regarding the government's use of its licensing power to affect what goes over the airwaves run in different directions. Holdings such as *Red Lion, CBS v. FCC, Turner I*, and *Turner II* approve of the use of this authority to increase the quantity of views being broadcast. However, *FCC v. WNCN Listeners Guild* and *CBS v. DNC* allowed the electronic media to reduce the variety of what they transmit. *FCC v. Pacifica Foundation* upheld a government ban on the use of certain language; *FCC v. League of Women Voters of California* overturned a bar on employing other language. The real victor in this chapter is, however, the Federal Communications Commission! In almost every case in which it was involved, the Supreme Court upheld its position—witness *Red Lion, CBS v. DNC, WNCN Listeners Guild, CBS v. FCC,* and *FCC v. Pacifica Foundation*. The one exception is *FCC v. League of Women Voters of California*. However, the true loser there was not the FCC but Congress, for it was the latter that composed the proviso against "editorializing" by federally subsidized educational radio stations that the Supreme Court decided to invalidate.

The reason the FCC has accumulated such a fine won-lost record is not difficult to ascertain. The Supreme Court and lower federal tribunals are reluctant to interfere with decisions of an administrative agency regulating in a particular area. They feel, with considerable justification, that administrative agencies have over the course of the years developed expertise in the fields over which they have jurisdiction, expertise that the courts should respect. Thus, in *WNCN Listeners Guild* Justice White, when accepting the FCC policy that it would not interfere with the sale of a license merely because that would alter the type of programming the station featured, emphasized that he would defer to the interpretation of federal statutes by the agencies charged with giving them life.[77] Accordingly, the subconscious philosophy of the Supreme Court in cases involving the imposition of rights-limiting conditions on radio and TV licensees may be that it is neither the rights of the listeners nor those of the media moguls that are paramount, but, rather, those of the FCC!

CHAPTER 4

Governmental Subsidy of Offensive Speech

Rudy Giuliani Versus the Brooklyn Museum

Rudolph Giuliani, Mayor of New York City from 1994 through 2001, is as of the date of this writing a national hero. When terrorists on September 11, 2001 hijacked four airplanes and forced two of them to crash into Buildings One and Two of the World Trade Center, causing these 110-story structures to come tumbling down and killing almost 3,000 men and women, Mr. Giuliani did an outstanding job of organizing the rescue effort while simultaneously urging New Yorkers to resume their daily routines as much as possible and beseeching them to eschew acts of hostility against individuals of Islamic faith or Middle Eastern extraction. He consoled the relatives of the deceased, including those of the many fire fighters and police officers who had given their lives trying to rescue people trapped in the doomed structures. Though New York is a city that is dominated by the Democratic Party, his endorsement of Republican candidate Michael Bloomberg was important in the latter's uphill victory in the 2001 mayoral race. Giuliani left office with a stratospheric approval rating and a good chance of becoming a U. S. senator, vice-president, or even president during the next ten years. The United Kingdom's Queen Elizabeth even gave him an honorary knighthood as a reward for his superlative management of the 9/11 crisis.

However, not all of "Sir Rudy's" adventures were as productive of glory for him as was the 9/11 tragedy and its aftermath. Charles Saatchi is a British art collector who made his money in advertising. Among the triumphs of his agency were the commercials that helped sweep the extremely conservative Margaret Thatcher to victory as British Prime Minister in

1979. Given this background, he would be the last person one would expect to specialize in avant-garde art, but works by young British artists form an important part of his collection. In the late 1990s, a good number of these works were used in an exhibition titled "Sensation: Young British Artists from the Saatchi Collection." The first venue of the show was London; the second Berlin. In both of these European cities it drew raves from some but made others furious. Though the majority of the paintings were non-controversial, some shocked viewers. Particularly disquieting were a dead shark floating in a tank of formaldehyde, a man's head sculpted from his own frozen blood, and halves of a pig sliced lengthwise and placed in tanks. The title of the latter "sculpture" was *This Little Piggy Went to Market*.[1]

The next destination for this show was the Brooklyn Museum, located near downtown Brooklyn, New York, and thus in the city over which Mr. Giuliani presided in 1999. In July of that year the director of the museum discussed the exhibition with him and mentioned the poor shark in formaldehyde. The mayor raised no objections.[2] However, in September, he discovered that one of the works to be hung was a collage christened *The Holy Virgin Mary*. This was the brainchild of Chris Ofili, a British artist of Nigerian descent. It featured a portrait of the Virgin surrounded with cutouts from pornographic magazines and stained with clumps of elephant dung. The mayor hit the roof when he learned of this mishmash and said he would cut off all city funding for the museum unless it cancelled "Sensation." He pointed out that this collage "desecrated somebody else's religion" and that publicly subsidized institutions had no right to display material of this sort. (The mayor was clearly wrong on one point at least: Ofili did not desecrate "somebody else's religion," as he, like Mr. Giuliani, is a Roman Catholic.) The end of the funding would have seriously impaired this major museum's ability to continue in existence; in 1999 about $7 million of its $23 million expense budget came from New York's City Hall.[3] Had the museum been forced to shut its doors, it would have been a tragedy not only for the residents of Brooklyn but also for the inhabitants of the entire New York metropolitan area. It contains important collections of African, Egyptian, and Asian art as well as assemblages of furniture, costumes, and textiles. Its educational programs serve tens of thousands of children and adults.

There is a saying in the entertainment world that whatever the problem, "the show must go on." And go on this one did, in early October of 1999. Needless to say the mayor's denigration of this event had generated huge amounts of publicity for it, and lengthy queues formed in front of the museum. Just a few days before, it had gone into federal court to halt the threatened withdrawal of the city's subsidy. Mr. Giuliani reacted by order-

ing that the next installment of the subvention be cancelled and then had the city itself sue to evict the museum and its 1.5 million works of art from its building.[4] The battle lines were drawn. Supporting Mr. Giuliani were fellow Republicans Guy Molinari, borough president of Staten Island, Staten Island City Council members James Oddo and Stephen Fiala, and Staten Island state senator John Marchi, who himself had run unsuccessfully for mayor in 1969 and 1973. Also backing the mayor was the distinctly non-Catholic Orthodox Union, an association of Orthodox Jewish congregations, whose president pointed out that the Ofili collage could serve as a precedent for subsidizing works mocking Jewish religious symbols.[5] However, speaker of the City Council, Democrat Peter Vallone, as pious a Catholic as the mayor, declared that the exhibition ought to be permitted to continue and that the museum should be allowed to go on receiving city monies even though he too felt offended by the Ofili work. Other museum officials in the area supported their Brooklyn colleagues. Phillippe de Montebello, the director of the world-famous New York Metropolitan Museum of Art, declared that some of the efforts in "Sensation" were essentially garbage, "shock for shock's sake." However, though he agreed with Giuliani in his capacity as an art critic, he nonetheless thought that the museum had the right to display it and would "defend to the death their right to do so."[6] Hardly surprisingly, various artists' groups and the New York Civil Liberties Union lined up behind the museum, as did numerous Democratic Party office holders.

On November 1, 1999, the museum won a complete victory over the mayor in Federal District Court in Brooklyn. In *Brooklyn Institute of Arts and Sciences v. The City of New York and Rudolph W. Giuliani* (1999),[7] District Judge Nina Gershon issued an injunction ordering the mayor to stop withholding the city subsidy to the museum and to cease seeking to evict it from its premises. In the course of her opinion, Judge Gershon made it clear that works of art and the thoughts they express *are* protected by the First Amendment's guarantees of freedom of speech and press.[8] She is clearly correct here; paintings, sculptures, collages and other works whose genre is hard to pin down communicate ideas as much as do words, and sometimes even transmit views about political, social, and economic matters. Actually, the mayor was in full agreement that works of art are safeguarded by the First Amendment.[9]

His main argument was one that really was based on Justice Oliver Wendell Holmes's thesis in *McAuliffe v. Mayor of City of New Bedford* (1894).[10] This case, discussed in Chapter 1, declared that a city could fire a police officer who contravened its regulations and actively participated in politics because "The petitioner may have a constitutional right to talk

politics, but he has no constitutional right to be a policeman."[11] What Holmes was doing, as noted earlier, is distinguishing between a "right" and a "privilege" and declaring that the latter (in *McAuliffe* "public employment") can be conditioned as the polity according the privilege desires. Similarly in *Brooklyn Institute of Arts and Sciences* the subsidy to the museum was a privilege and thus, it was argued, could be terminated when that institution allowed a religious faith to be insulted. (Most of the funding for the "Sensation" exhibition itself came from private sources.[12]) The mayor was not attempting to throw Ofili in jail or have his works burned, and he was not contending that the artist could not show *The Holy Virgin Mary* in a private gallery. All he was asserting was that governmental aid to an institution is a gratuity that can be stopped when the recipient goes astray.

Judge Gershon's response was an application of what Chapter 1 termed the "rights-limiting conditions/classifications" theory, though she did not use that specific phrase or even "unconstitutional conditions," the more traditional language. It will be remembered that this doctrine maintains, among other things, that the polity cannot always qualify the grant of a benefit upon the recipient's surrender of one or more important constitutional rights, including First Amendment freedoms, or deny that grant because he/she has in the past exercised one or more such freedoms. And what is present here is a clear case of a "rights-limiting condition"—the museum is being told that if it wants to keep getting its city aid it has to cancel the exhibit containing *The Holy Virgin Mary.*

The judge reasoned that the mayor could not, even if he wanted to, directly ban Ofili's collage; this would be a brazen violation of the First Amendment. And, she continued, he cannot do indirectly via the subsidy cut-off route what he cannot do directly. "Governmental efforts to suppress expression can take many forms, and the courts have not hesitated to invalidate those efforts, no matter how indirect the form."[13] Cited immediately after these words is a holding analyzed in Chapter 2, *Speiser v. Randall* (1958),[14] where the Supreme Court declared that one otherwise eligible could not be denied a veterans property tax exemption because he refused to swear that he did not advocate the violent overthrow of the governments of California or of the United States. To the contention, raised frequently in the context of grants to artists and other creative sorts, that the taxpayers do not have to subsidize views they find objectionable, Judge Gershon declared, citing the Chapter 3 case of *FCC v. League of Women Voters* (1984),[15] where it was held that a ban on "editorializing" by noncommercial broadcasters receiving federal funding was unconstitutional, that there will be some taxpayers objecting to any given use of public monies.[16] She also emphasized that there was nothing in her opinion to prevent the

city from spending its dollars to further its own values without giving opposite opinions equal time.[17] Despite this tad of comfort accorded him by Judge Gershon, Mr. Giuliani knew that he had lost the game, and a few months later, after the exhibition was over, agreed to have the city continue to finance the museum at the same level that had prevailed prior to its mounting.[18]

The Problem of Government Subsidies of Hate Speech

Some of the more cynical observers of the New York scene believed that the mayor's objection to *The Holy Virgin Mary* was based more on political considerations than on a genuine belief that the collage denigrated the Catholic Church. At the time, the mayor was contemplating a run for the U. S. Senate in 2000 against Hillary Rodham Clinton, and the thinking was that this attack on the museum for showing this work would garner him votes from the members of that faith.[19] (For health reasons, he later decided to forego that race.) No one can have any true idea of the extent of his sincerity when he expressed his disgust at the Ofili work and a couple of other sculptures in the "Sensation" show. But his strong opposition to that collage and his consequent proposal to discontinue funding the museum cannot be dismissed with a quick sneer that the term-limited mayor wanted a seat in the U.S. Senate and that he is an authoritarian who likes to trample on his opponents. There *is* a strong argument for the proposition that art such as Ofili's should not receive public support and that institutions that insist on displaying it should lose public funding. This is that *The Holy Virgin Mary* may well be a diatribe against the Roman Catholic Church and thus hate speech. As the mayor accurately pointed out, American liberals take anti-Catholic statements in their stride and do not get as irate about them as they do about nasty remarks about some other religious groups or about racial minorities.[20] If (this is the author's example, not the mayor's) the dung-spattered collage had centered on Moses or Mohammed, the art and civil liberties communities would immediately have perceived it as anti-Semitic or anti-Muslim. They might still have defended the museum's right to show it, but probably would have done so with less enthusiasm. But they tend not to worry when an artist spatters the holiest woman in the Catholic pantheon with excrement.

Let us now analyze the hate speech issue. The mayor, as seen, did concede that Ofili's effort received First Amendment protection. And the 2003 case of *Virginia v. Black*[21] proves that this acknowledgment was a correct statement of the law. In *Black* the defendant had been convicted of burning a cross at a Klu Klux Klan gathering in an open field in the state of Virginia. The rally was held with the permission of the owner. Cross-burn-

ing is, of course, a technique employed by the Klan to express its hatred of blacks and other minority groups. Though there was no majority opinion in *Black,* seven members of the Court agreed that hate speech at events such as public rallies is safeguarded under the First Amendment, though there was also a majority in favor of the proposition that people who burn crosses can be jailed when this act is done to intimidate others, i.e., put them in fear of death or bodily harm. *Virginia v. Black* for practical purposes put the Court's seal of approval on *Collin v. Smith* (1978).[22] Here the Seventh Circuit Court of Appeals invalidated a Skokie, Illinois, ordinance barring a parade by an American Nazi group. (Skokie is a suburb of Chicago, and many of its citizens at the time were Jewish. In fact, several thousand were survivors of the Nazi Holocaust of the Second World War.)

Thus, like Mayor Giuliani, we have to assume that hate speech is constitutionally protected. However, this book cannot leave this issue here. Relevant for our purposes is *Chaplinsky v. New Hampshire* (1942),[23] where the U.S. Supreme Court upheld the conviction of a Jehovah's Witness who had called the police officer who had arrested him a "damned fascist" and a "God damned racketeer." Justice Frank Murphy (a liberal) referred to these as "fighting words." They "by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances 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."[24]

In other words, as *Chaplinsky* argues, racist and similar diatribes do tend to incite breaches of the peace; there is no reason why they have to be inserted into any discussion of ideas; and they are not productive of truth. Moreover, even where racial, religious, or ethnic tensions are not running high they serve to drive into their separate compartments the various groups that make up a pluralistic society such as the United States. They may well inflict serious emotional injury on the objects of the invective. As Japanese-American law professor Mari Matsuda avers, "As much as one may try to resist a piece of hate propaganda, the effect on one's self-esteem and sense of personal security is devastating...However irrational racist speech may be, it hits right at the emotional place where we feel the most pain."[25] And this squelching of self-esteem that racist speech (including vitriolic verbal attacks on a religion or on an ethnic group) could produce might well discourage the victims from getting the education they need to function successfully in this technical world.[26] To return to Mr. Ofili, the Brooklyn Museum, Mayor Giuliani, and the subject matter of this book, i.e., government largesse allocated in a way that limits fundamental rights and judicial

reaction thereto; one can reasonably contend that hate speech is so potentially destructive that even if those who utter it should not be jailed because of the First Amendment, government is under no obligation to subsidize works that feature it even when material of the same type, but not permeated with racial, religious, or ethnic bias receives public support.

However, there are compelling arguments on the other side; i.e., that when government funds a certain type of expression, it ought not to withhold its dollars or euros from particular works of that sort that convey bigotry. First, can we say dogmatically that racist remarks are of little or no help in attaining truth? The great philosopher of freedom of speech and press John Stuart Mill declared in his classic *On Liberty* that even if an idea is absolutely true, if one hears no critique of it, he/she will not take it very seriously and, in fact, cease holding it. As Mill puts it, if that true position "is not fully, frequently, and fearlessly discussed, it will be held as a dead dogma, not a living truth."[27] We can apply Mill's proposition to hate speech, racial, religious, and ethnic. Tolerance of different peoples is the correct attitude; but, paradoxically, attacks on tolerance are the best way to get those adhering to it to embrace it more warmly and thus to have it function as a guide to their conduct in the world. Second, if we refuse absolutely to fund bigoted speech, we run the risk of making martyrs out of the bigots or giving their works free publicity. As we saw, the "Sensation" art exhibit would never have attracted such large audiences had it not been for the fuss Mr. Giuliani raised over *The Holy Virgin Mary.* Third, and this is difficult for many to admit, bigoted speech can sometimes be great art—Shakespeare's anti-Semitic play *The Merchant of Venice* is the best example. (The author is incompetent to express an opinion about the artistic quality of *The Holy Virgin Mary*!)

Finally, it is not always possible to know whether a work of art or a verbalization is hate speech or not. To a considerable extent this depends on the context, and the context is not always immediately knowable. Law professor Amy Adler goes so far as to accept the "deconstructionist" philosophy that "the very same speech may give rise to entirely opposite and mutually excusive effects...[T]exts are radically indeterminate; they contain within them multiple contradictory and mutually exclusive readings."[28] Adler gives several examples of the ambiguity of superficially bigoted language or works of art. When, to point out the fact that black leader Jesse Jackson's color has stood in the way of his rising to high political position, a black artist painted a white, blonde-haired Jesse Jackson saying "How Ya Like Me Now?"; a group of black workmen thought it demeaned Jackson and destroyed the portrait.[29] One can contend that even *The Merchant of Venice* is not really anti-Semitic, for Shakespeare has Shylock, the Jewish

moneylender who is the villain of the play, utter the famous commentary "Hath not a Jew eyes? hath not a Jew hands, organs, dimensions, senses, affections, passions? fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same winter and summer, as a Christian is?"(Act III, Scene I). In other words, one could assert that though *The Merchant of Venice* has a Jewish villain—Jews as well as Christians, Muslims, Hindus, etc., can of course be wicked—the author is telling his audience that Jews are no less human than Christians.

The ambiguity of meaning that pervades many artistic and literary works is present in spades in the Ofili collage. Mayor Giuliani interpreted the work with its clumps of elephant dung and its cutouts from pornographic magazines as the equivalent of an assertion that Mary is a filthy slut and thus as a bitter attack on Roman Catholicism, the branch of the Christian faith that most fervently reveres her. But Ofili himself is, as noted, a Catholic. Would he be likely to have intended a sacrilege against his own faith? The retort to this would be that what else could the work be other than a desecration of the Catholic religion? In response to such a rejoinder, some suggested that in fact the artist was *exalting* Mary by his use of elephant dung in "her" collage, as in Africa elephants symbolize power, and dung, fertility.[30] As for the material from the pornographic magazines, this showed naked buttocks, and nude children were not uncommon in medieval and Renaissance paintings of the Virgin Mother.[31] In other words, the so-called sacrilege here arguably was not blasphemy at all but simply a restatement in an African idiom of an older tradition in Christian religious painting. Thus, it is far from totally absurd to aver that, contrary to Mr. Giuliani's view, *The Holy Virgin Mary* is not a spewing forth of loathing for Roman Catholicism. Of course, the mayor's interpretation may be the correct one; there is no way of knowing this definitively. "One of the casualties of political debates about art is always a complexity of interpretation, both sides needing to simplify the meaning of the work because contradictory connotations would undermine their arguments even though these contradictions make art art and not a political tract."[32] In sum, those who oppose cutting off public funding for bigoted speech or art can do worse than reason that such a funding termination is dangerous because meanings are often hazy and thus the artist, writer, or institution losing the money might in fact have been producing non-racist material that is at the heart of what is defended by the First Amendment.

Blasphemy in the College Press

When reading about the dispute between the Brooklyn Museum and the mayor, the author of this book was reminded of incidents that occurred

during 1969 and 1970 at The College of Staten Island of the City University of New York, the institution where he taught for over three decades. (Formally, The College of Staten Island came into being in 1976, the result of a merger between Staten Island Community College (SICC) and Richmond College, an upper-division institution.) To remind the readers of this book, the late 1960s and early 1970s were days in which college campuses saw many young women and men, some of them veterans themselves, protesting continued American involvement in the Vietnam War. Many of the opponents of the war were, at least temporarily, also antagonistic to capitalism and institutionalized religion. In its issue of January 13, 1970,[33] the *Richmond Times,* the newspaper of Richmond College, had a photograph of someone dressed like Jesus Christ sprawled out on a sidewalk. His arms were outstretched, and His right hand held a beer bottle. Underneath the photo there was a poem penned by one of the author's best civil liberties students humorously declaring that the hung-over Jesus would have been better off on New Year's Eve had he eschewed alcohol and stuck to pot.

The uncertainty of meaning that the Ofili collage featured was also present here. Is this verse an attack on the founder of the Christian religion or not? In the affirmative one could argue that it demeaned Christ in depicting Him asleep after a drunken bender. On the other hand, one can contend that it humanized Him and thus made Him more attractive by showing that He had one relatively minor failing, i.e., He got drunk every once in a while. Staten Island is a heavily Roman Catholic borough of New York City, and most of its residents who came across this piece interpreted it as a vilification of Jesus. Consequently, they complained about it to their representatives in the state legislature and the City Council. A state assemblyman from Staten Island introduced a bill in that legislature to bar any unit of the city or state universities of New York from supporting in any way the publication of student newspapers containing obscene or irreligious material.[34] However, the measure never passed.

Articles in the *Richmond Times* and in the SICC paper *Dolphin* appearing in 1969 had also angered Staten Island Catholics. The *Dolphin* article[35] was entitled "The Catholic Church—Cancer of Society." It went on to refer to Catholic ecclesiastics as the "holy Mafia," to Catholic saints as "neurotic masochists," and to Catholic schools as "institutions of lunacy." The *Richmond Times*'s effort[36] was a fantasy depicting prejudiced whites nailing to a cross and burning a Jesus Christ reborn in the second floor Richmond College bathroom to a black mother. The latter article, but not the former, contained a considerable amount of vulgar language. Conservative students at both institutions, represented by lawyers who subsequently became judges, sued for the equivalent of an injunction to force

the colleges to adopt and enforce rules prohibiting blasphemous material in student publications. In *Panarella v. Birenbaum* (1969)[37] the trial court held for the plaintiffs on the theory that the colleges were violating the First Amendment's "no establishment of religion" clause by allowing their facilities and a faculty advisor to be used to publish this irreligious material. According to Justice Vito Titone, who later became one of the most liberal members of the state's Court of Appeals, its highest court, the institutions had run afoul of the Establishment Clause because government is supposed to remain absolutely neutral in religious matters; here public colleges were in effect taking the side of irreligion. So they were ordered to prevent the publication of articles like this in the future (and, by clear implication, to stop giving any assistance to student editorial boards that published this sort of stuff).

This decision was reversed by the Second Department of the Appellate Division of the Supreme Court (New York's Supreme Court being its major trial court) in *Panarella v. Birnbaum* (1971),[38] and this reversal was upheld by the Court of Appeals in *Panarella v. Birenbaum* (1973).[39] For the purposes of this book, the Appellate Division decision is more interesting. Using reasoning analogous to the rights-limiting conditions/classifications doctrine, it proclaimed that the colleges had set up a "forum" for the free expression of the ideas of their students and that once such a forum had been established, "the authorities may not then place limitations upon its use which infringe upon the rights of the students to free expression as protected by the First Amendment."[40] (This concept of "forum" will become critical in the Chapter 6 analyses of cases dealing with governmental boons that threaten freedom of religion, which is why it does not get much consideration here.) The main thrust of the Court of Appeals opinion in *Panarella* was that the colleges did not violate the Establishment Clause because there was no showing that they intended either to ridicule or advance religious beliefs. There was no indication, for example, that they banned pro-Catholic material from these publications. In fact, the *Dolphin* published several letters to the editor attacking the anti-Catholic onslaught that had earlier appeared in its pages.

Frankly, rereading the offending 1969 essays over three decades later it is hard to know what all the fuss was about. The *Dolphin* article was terribly unfair to the Catholic Church, listing its misdeeds such as papal debauchery and overzealous attempts at movie censorship, but mentioning nothing of its great accomplishments throughout the ages. Nonetheless, what appears here may be found in well-known thinkers such as Voltaire who were bitter critics of the church into which they had been born. For example, in one of his essays he asserts that monks are useless, that they suck

money from the people, and that they would be better employed if they were defrocked and placed in useful work and their buildings converted into factories, public schools, or hospitals.[41] And the *Richmond Times* fantasy had little or nothing to do with religion. It certainly did not portray Jesus in a bad light and its target was clearly white racism, not Roman Catholicism.

Art Galvanizes Cuban Exiles

To return to Mayor Rudolph Giuliani, whether one agrees with him or with the Brooklyn Museum about whether the mounting of Ofili's *The Holy Virgin Mary* should have resulted in the cancellation of the city's funding of that venerable institution, there are, as seen, reasonable arguments on both sides. In *Cuban Museum of Arts and Culture v. City of Miami* (1991)[42] there was only one route a court in a free country could have taken, and to its credit the U. S. District Court for the Southern District of Florida did follow it. The Cuban Museum was founded in 1982 to acquaint the residents of greater Miami, Florida, and the nation with Cuban history and the accomplishments of artists and sculptors of Cuban heritage. The museum obtained from the city a $1-per-year lease of a former firehouse in an area inhabited mainly by exiles from Fidel Castro's communist regime in Cuba and their children. In 1988 to raise money, the museum held an auction at which some of the paintings to be sold were works by Cubans who were still living in Cuba or who had never criticized Mr. Castro. This sale created great anger in Miami's large Cuban community, many members of which were and are bitterly anti-Castro. Protesters marched, pipe bombs were set off, and one angry individual bought a painting for $500 and burned it in public on a Miami street. The city then declared it would not renew the lease and tried to evict the museum from its premises. That institution sued to contest the eviction, claiming that the city's action violated the First Amendment.[43]

Cuban Museum of Arts and Culture v. City of Miami enjoined the nonrenewal of the lease and the eviction. There was an undoubted First Amendment violation here: the museum was being penalized because the city did not like the political views of some of the artists whose oeuvres it was exhibiting and then selling.[44] It is true, said Chief Judge James Lawrence King, the opinion's author, that the museum has no "right" to have its lease renewed by Miami. However, using without specifically citing the rights-limiting conditions/classifications doctrine, he emphasized that a benefit cannot be denied to someone for reasons that abridge his/her freedom of speech or other fundamental rights. It is important to realize that this case involves the cut-off of public funds solely for political reasons. The works here were "decent," unlike George Carlin's "Filthy Words"; they were not

attacks on a religious faith such as *The Holy Virgin Mary* might or might not have been. In fact, the art itself here was not political, but simply painted or sculpted by Cubans who had never expressed the same loathing for Fidel Castro that most people in Miami's Little Havana felt. (Even if these works had praised Fidel, they still would have been protected political speech under the First Amendment, the safeguarding of such speech being one of the major reasons for the adoption of that clause.[45]) Chief Judge King discussed some of the reasons the city gave for evicting the museum from its ex-firehouse that were unrelated to freedom of expression, e.g., that its continued presence in the neighborhood could lead to breaches of the peace, and found them essentially phony excuses for the suppression of the museum's First Amendment rights via the attempted eviction. Hardly surprisingly, Judge Gershon relied heavily on *Cuban Museum of Arts and Culture* in her *Brooklyn Institute* decision. However, the Cuban Museum is now out of business: despite the court victory in its favor, its funding sources dried up and it lacked the world fame and access to wealthy donors that just possibly might have kept the Brooklyn Museum alive even if the city had been permitted to cease its financial assistance.[46]

Government Support of the Arts in the United States: A Thumbnail Sketch

Municipal support of art and other museums is nothing new in the United States. Much rarer until recently is federal, state, or local aid to individual humanities scholars, social scientists, creative writers, and artists, though even in the nineteenth century the federal government funded scientific research because it could produce tangible results such as a stronger national defense, a better transportation network, and a healthier population. In the second decade of that century, Congress did pay $32,000 to artist John Trumbull for four paintings on Revolutionary War themes to decorate the Capitol building. Members of Congress who felt that the U. S. government was one of extremely limited powers and thus had no business subsidizing the arts in any way, shape, or form expressed their strong dislike of the finished products. John Randolph of Virginia objected, for example, to the depiction, in the painting entitled *The Declaration of Independence,* of the members of the Second Continental Congress in knee breeches. Ultimately, the artist felt compelled "to cover the various shins by painting clothed tables in front of several Congressmen."[47] Over a hundred years later, during the Great Depression, President Franklin Roosevelt's New Deal created programs to relieve the widespread unemployment from which persons blessed with creative abilities were suffering in common with millions of their fellow citizens. His Works Progress Administration

(WPA) supported programs for jobless musicians, writers, actors, and artists. The Writers Project was probably the most well known of these, as it produced popular travel guides for the various states. Some of the individuals who were funded by this project later became famous, e.g., Nelson Algren and Studs Terkel. Some of the graduates of the Arts Project, such as Mark Rothko and Jackson Pollock, are ranked among the greatest painters of the twentieth century. Because some of the artists and writers receiving funds from the WPA were left-wing, the WPA's arts-related projects became the target of conservative members of Congress such as Republican J. Parnell Thomas of New Jersey. With the return to economic prosperity occasioned by the outbreak of the Second World War, they were shut down in 1943.[48]

By the 1960s, though, Congress contained an influential group of members who were devoted to the arts and felt that the federal government should set up an agency to fund writers, scholars, art institutions, and artists. Among these individuals were New York's Senator Jacob Javits and Representative John Lindsay (who later became Mayor of New York City) and Senator Claiborne Pell from Rhode Island. Riding the wave of confidence in federal legislation that featured the mid-1960s, a bill was passed in 1965 creating a National Endowment for the Arts (NEA) to fund sculptors, painters, musicians, and actors; and a National Endowment for the Humanities (NEH) to accord subventions to scholars doing research in areas of the humanities such as history, philosophy, and literature. Both the NEA and the NEH also were to, and do, make grants to state arts and humanities councils.[49] The life of the NEH has been relatively untroubled, but the NEA has had to weather some severe political storms and is lucky to have survived.

The NEA actually did very well under the administration of Richard M. Nixon due to the unceasing efforts of his adviser Leonard Garment and NEA Chairperson Nancy Hanks. "During the Nixon years, the annual budget for the [NEA] increased from $8.3 million for the fiscal year 1970 to $80 million for fiscal 1975."[50] By fiscal 1979, close to the end of the administration of President Jimmy Carter, its budget had swollen to $149 million.[51] Of course, Ronald Reagan was opposed to most federal domestic spending. Nonetheless by the end of his first term it had almost as much to disburse as it had at the end of the Carter era.[52] Its real troubles began when George H. W. Bush took office in 1989. Mr. Bush was not the problem; the turmoil was caused by the interface between two controversial exhibits that had received endowment money and some conservative members of Congress.

Serrano's "Blasphemy" and Mapplethorpe's "Sadomasochism" Endanger the NEA

One of these exhibitions was of works by an artist named Andres Serrano. The NEA had given $15,000 to a museum in Winston-Salem, North Carolina, to show the Serrano efforts; it, in turn, had given some of this money to Serrano. One of his "masterpieces," *Piss Christ,* was a color snapshot of Christ on a cross submerged in the artist's urine.[53] Just as *The Holy Virgin Mary* was ten years later to enrage Mayor Giuliani, *Piss Christ* in 1989 infuriated fundamentalist Christians and quite a few Congress members, though the tempest over Serrano did not erupt until several months after the show had closed. Senator Alfonse D'Amato, Republican of New York, declared that Serrano could not be jailed for producing "filth," but that money from taxpayers should not be used to promote it,[54] an argument almost identical to that which Mayor Giuliani made about the Ofili collage. Senator Jesse Helms, Republican of North Carolina, called the artist a "jerk."[55] House member Dick Armey, Republican from Texas, said that he himself was not especially religious, but that many of his constituents were and that they were outraged by the Serrano work.[56] (The arguments pro and con public funding of apparently blasphemous works such as *Piss Christ* are identical with those about cutting off aid to the Brooklyn Museum for showing *The Holy Virgin Mary,* and thus will not be brought up in this part of this chapter.) Serrano, himself a lapsed Catholic, denied that his photograph was blasphemous and said that it was designed to reflect his attraction to Christ and his simultaneous rejection of organized religion.[57]

A gay photographer named Robert Mapplethorpe died prematurely of AIDS in March 1989. Before he passed on, an institute affiliated with the University of Pennsylvania had organized an exhibition of his prints with the help of $30,000 in NEA funding. There were 175 pictures in all, "most of them fairly innocuous shots of flowers and celebrities. But [the exhibit] also included a collection (the *X Portfolio*) of raunchier stuff—a picture of a man urinating in another man's mouth, several of men with things like bullwhips and fists stuck up their rectums, and so on. There were also two shots of children with their genitals exposed."[58] One of these was of a nude boy; the other of a toddler with her dress raised.[59] The Mapplethorpe show was seen in Philadelphia and Chicago, but in June of 1989 the prestigious Corcoran Gallery of Art in Washington, D.C., dropped its plans to feature it because it feared that it would infuriate Congress.[60] But that legislative body was already foaming at the mouth about the NEA's backing of Serrano and Mapplethorpe, and was in the process of cutting its fiscal 1990 appropriation by $45,000, the total sum it had expended on behalf

of the exhibits featuring these gentlemen. Also, Senator Helms secured the passage of an amendment to that appropriations measure banning the NEA and the NEH from funding "materials which in [their] judgment may be considered obscene, including but not limited to, depictions of sado-masochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political or social value."[61] Despite the fuss in Congress, the Mapplethorpe collection was shown without incident in another Washington gallery in July of 1989. It then traveled to Cincinnati, Ohio, a hotbed of antipornography sentiment. In this conservative city, the director of the museum that housed it was actually indicted for "pandering obscenity." However, a jury composed mainly of good, solid Cincinnati suburbanites acquitted him, and the art world breathed a sigh of relief.[62]

The Helms Amendment had trouble when it reached the judicial system. To implement it, the NEA inserted into its "Request for Advance Reimbursement" form a statement requiring its awardees to certify, before they received any of its cash, that none of it would be used "to promote, disseminate, or produce materials which in the judgment of the NEA...may be considered obscene." Two organizations that had received many endowment grants over the years brought suit against it and its chair, John Frohnmayer, asking that this "certification" statement that had to be signed by an awardee as a precondition of getting funding be declared unconstitutional. One plaintiff was a modern dance company known as the Bella Lewitzky Dance Foundation; the other was an art museum. Many arts organizations and the Rockefeller Foundation filed friend-of-the-court (amicus curiae) briefs against the new pledge, which was declared invalid in *Bella Lewitzky Dance Foundation v. Frohnmayer* (1991).[63] They charged that the certification statement was too vague and thus violated the Due Process Clause of the Fifth Amendment as well as the First Amendment. The plaintiffs contended that the excessive fuzziness sprang from the fact that the endowment was to make the judgment that the work was obscene. How could an applicant possibly know at the time she/he needed the money whether what he/she was going to paint, sculpt, or perform would be determined by the government to be pornographic? (In the event of such a decision, the endowment would take its cash back.) The NEA denied that the statement was too imprecise, employing the argument that the standard it would use in judging whether material was "obscene" was that of the leading case of *Miller v. California* (1973).[64]

Miller was noted in passing in the last chapter when discussing George Carlin and his dirty words. According to Chief Justice Warren Burger's majority opinion, a work can be considered obscene (and thus not shield-

ed by the First Amendment) when and only when the following conditions are met: (a) the average person, applying contemporary community standards, would find that the work as a whole appeals to prurient interest in sex; (b) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable law; and (c) the work taken as a whole lacks serious literary, artistic, political or scientific value.[65] Though some feel that the *Miller* criteria are intelligible, this promise by the endowment to use *Miller,* the *Bella Lewitzky* District Court said, did not cure the vagueness of the certification statement because there was no guarantee that the agency would keep to its promise to use the *Miller* tests, and also because the grantee could have no clear idea of how the NEA would discover and use the standards of the applicant's "community." Because the certification statement was so imprecise, it violated not only the demands of the Due Process Clause but also the plaintiffs' First Amendment freedoms of speech and press. When the contours of a law or rule regulating expression that has no constitutional protection are too indeterminate, people are likely to refrain from statements that *are* constitutionally protected because they fear that the finder of fact will wrongfully determine that they have made unprotected remarks and thus infringed the statute or regulation. In other words, vague legislation limiting speech "chills" First Amendment rights.[66] To the contention that the NEA grants are a privilege, not a right, the Court responded that the polity cannot impose rights-infringing conditions on its largesse, especially where those conditions limit freedom of speech.[67]

Karen Finley Versus the NEA: The Lower Court Decisions

As it reads now, the law governing the NEA declares simply that obscenity is without artistic merit, that it is not protected speech, and that it shall not be funded. If in fact a funded artwork, play, poem, etc., turns out to be obscene, the government can get its money back.[68] Additionally, in the 1990 law reauthorizing the agency, a provision was added requiring that in making awards it look to "artistic excellence and artistic merit...taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[69] It is the segment of this requirement from "taking into consideration" onward that came to the U. S. Supreme Court eight years later.

The main "troublemaker" here was Ms. Karen Finley, an individual for whom cultural conservatives feel as much aversion as they do for Andreas Serrano and Robert Mapplethorpe. Ms. Finley is a type of actress known as a "performance artist." Though not anti-male, she feels too many men are prone to treat a woman as an object for their own self-satisfaction. In

her opinion, this attitude spawns rape, other forms of physical violence against women, and pornography depicting them as sex objects. In one of her best-known acts, *We Keep Our Victims Ready,* she portrayed a rape by smearing her partly naked body with chocolate and simultaneously using curse words to describe the attack. This bedaubing is held by Ms. Finley to symbolize the truth that many women are being treated like dirt.[70] In 1990, when the NEA was fighting for its life in a Congress with Mapplethorpe and Serrano on its mind, she applied for an NEA grant. NEA applications are submitted to a peer panel and then to an advisory board known as the National Council on the Arts. Ms. Finley's request and seventeen others were approved by the NEA's theater panel. However, NEA Chair Frohnmayer rejected her submission and the applications of three of the other seventeen, Holly Hughes, John Fleck, and Tim Miller. He admitted that he took this step in the light of "political realities."[71] To discover the problems with Hughes, Fleck, and Miller, we cannot do any better than quote an excerpt (itself taken from a law review note) from Justice Scalia's concurring opinion in the Supreme Court case that ultimately resulted from the NEA's rejection of these four artists. "Holly Hughes' monologue 'World Without End' is a somewhat graphic recollection of the artist's realization of her lesbianism and reminiscence of her mother's sexuality. John Fleck, in his stage performance 'Blessed Are All the Little Fishes,' confronts alcoholism and Catholicism. During the course of the performance, Fleck appears dressed as a mermaid, urinates on the stage, and creates an altar out of a toilet bowl by putting a photograph of Jesus Christ on the lid. Tim Miller derives his performance 'Some Golden States' from childhood experiences, from his life as a homosexual, and from the constant threat of AIDS. Miller uses vegetables in his performances to represent sexual symbols."[72] Given the content of these performances and the Congressional brouhaha over his endowment's funding of alleged blasphemy and obscenity, one can understand why Mr. Frohnmayer decided not to accord these actors an award.

However, politically smart decisions by administrators are not necessarily constitutional, and it is the courts that have the final say on the latter matter. After her rejection, Finley complained at a New York City news conference that "A year ago I was in a country of freedom of expression; now I am not."[73] Hardly surprisingly, she and the three others brought suit against Frohnmayer and the NEA asking that they be given their awards and arguing, among other things, that their failure to get the grants was a violation of their First and Fifth Amendment rights because the provision Congress added in 1990 to the effect that in making awards the NEA should take into consideration "general standards of decency and respect

for the diverse beliefs and values of the American public" was too vague. Actually, Finley, Hughes, Fleck, and Miller had received their rebuffs before this amendment was enacted on November 5, 1990, and had even brought their suit before that date. However, once that clause went on the books, the plaintiffs did their own bit of amending to alter their complaint to include the charge that this fledgling "decency and respect" clause (20 U.S.C. 954(d)(1)) was so unclear that it violated the First Amendment and the Due Process Clause of the Fifth Amendment. Before the decision by the U.S. District Court for the Central District of California, to be analyzed shortly, the NEA agreed that the plaintiffs were correct in their original argument that the way their requests for an award in 1990 had been processed violated the NEA statute itself as well as the First Amendment since the denial was clearly politically motivated. Thus it paid them the amounts they would have received under the grants plus damages and attorneys' fees. As a result of that concession, the trial court and the courts hearing the appeal, i.e., the 9th Circuit Court of Appeals and the U.S. Supreme Court, focused solely on the constitutionality of the "decency and respect" language; the following pages will follow the lead of these tribunals.

In *Finley v. National Endowment for the Arts* (henceforth referred to as *Finley I*)(1992),[74] the District Court agreed with Finley and her colleagues that Sec. 954(d)(1), the "decency and respect" exhortation, was unconstitutional as too vague and broad, thus contravening both the First Amendment and the Due Process Clause. It emphasized that "Artistic expression, no less than academic speech or journalism, is at the core of a democratic society's cultural and political vitality" and protected by the First Amendment.[75] Discussing the First Amendment issue, it feared, for example, that the broad sweep of the word "decency" would deter artists from expressing ideas that might be offensive to some or even to many, but which nonetheless were constitutionally shielded.[76] It admitted that both Hughes and Finley had in fact received the NEA grants they had applied for in 1991 (the rejections related to awards requested in 1990), the former for a performance using non-Western traditions to explore current issues and the latter for a talk show to discuss mental illness.[77] Nonetheless, it continued, both these women were still adversely affected by the "decency and respect" provision and thus continued to have what lawyers call "standing to sue." Because of this language, they would have to make doubly sure that the acts they performed under the 1991 grants were "decent," and in covering themselves this way they might have to edit out some speech or activity that was safeguarded by the First Amendment. (An "indecent" skit would allow the NEA to cancel the subsequent installments of their grants.) Because Hughes and Finley continued to have standing, it was irrelevant

for the purposes of deciding the "decency and respect" issue that Fleck and Miller might have lost theirs because they did not apply for a 1991 grant.

In *Finley v. National Endowment for the Arts,* from now on called *Finley II* (1996),[78] the Ninth Circuit Court of Appeals upheld 2–1 the victory for Finley et al. in the District Court. It agreed that the "decency and respect" proviso was too vague and so violated both the First Amendment and the Due Process Clause of the Fifth. It emphasized what it saw as the main evils of an imprecise measure: it does not give adequate notice to those regulated by it of what is prohibited; it provides little guidance for those who are to apply it, such as police officers and juries; and, if it touches upon speech, it deters protected expression.[79] It rejected a suggestion that the clause was not really binding on the endowment; i.e., that the statute governing the endowment really required it to adjudge grants solely on the basis of artistic merit. A reader who remembers the details of the previous chapter's case of *FCC v. Pacifica Foundation* (1978),[80] where the Supreme Court allowed the FCC to threaten to sanction the Pacifica Foundation for indecent words broadcast by humorist George Carlin over radio station WBAI, may reason that "decency" in the NEA legislation should not have been found too vague because the Stevens majority/plurality opinion and the concurring opinion in *Pacifica Foundation* did not even worry about whether "indecency" when used as a weapon against Pacifica was overly hazy. The Court of Appeals answered this argument by looking to the legislative history of the NEA amendment and discovering that Congress had explicitly rejected a proposal that the FCC's definition of "indecent" be used to clarify the meaning of "decency" in that amendment. To the contention that the NEA can pick and choose among various viewpoints because it is a government agency and government can expound one point of view rather than another, the Ninth Circuit accurately responded, among other things, that what the agency subsidizes is private, not public, speech.[81]

The dissent in *Finley II* by Judge Andrew Kleinfeld was intellectually interesting. It began as if it were a brief for Ms. Finley, pointing out that throughout the ages much great and good art has been indecent and disrespectful. "Molly Bloom's soliloquy [in James Joyce's *Ulysses*], Aristophanes' jokes about passing gas, Shakespeare's double entendres, the indecent kiss in Chaucer's *Miller's Tale,* and countless works by lesser artists, such as...Vladimir Nabokov's *Lolita* [about an affair between a middle-aged man and a twelve-year-old girl], are all part of the ancient artistic tradition of using the impolite or indecent in art."[82] But there is no censorship in the *Finley* case. "That offensive or indecent expression cannot be censored does not mean that government has to pay for it."[83] The state is under no duty "to replace the market and pump up the incomes of less popular

artists."[84] (He was being overly simplistic here about the reasons people apply for NEA grants. Artists wants NEA subventions and thus might be willing to go overboard to ensure that their work contains no annoying images or discourse not only because they might need the money to pay the rent on their studio or buy oil paints, but also because the very fact of getting such an award stamps them as legitimate artists and thus increases their chances for funding from private sources. On this point see Justice David Souter's dissent in the Supreme Court's *Finley* decision to be analyzed in a moment.[85]) Judge Kleinfeld did admit that if the "decency and respect" language were applied in such a way as to force artists to adhere to it in their *unfunded* paintings, skits, etc., it might be unconstitutional.[86] To him it was clear however that private, not government, money was the best, because most freedom-preserving, source of aid for the creative individual.[87]

Karen Finley Versus the NEA: The Supreme Court Decision

A "mere" eight years after Finley, Hughes, Fleck, and Miller applied for their NEA grants, the United States upheld the "decency and respect" clause and overturned *Finley II. National Endowment for the Arts v. Karen Finley, et al.,* henceforth referred to as *Finley III* (1998),[88] was a 6–2–1 decision, with eight of the nine justices giving their imprimatur to this language. Justice Sandra O'Connor wrote the majority opinion, joined by liberals John Paul Stevens, Ruth Bader Ginsburg, and Stephen Breyer, as well as by conservatives Anthony Kennedy and Chief Justice William Rehnquist. Justice Scalia filed an opinion concurring in the judgment but not in the majority's reasoning: Justice Clarence Thomas joined him. As noted, Justice Souter dissented. The Court had a marvelous opportunity here to clarify the extent to which the granting of government largesse may be conditioned upon the recipients' willingness to surrender First Amendment and other important rights, but chose not to do so. The main thrust of Justice O'Connor's opinion was that Finley's suit had been changed into what she called a "facial" attack on the "decency and respect" clause. What this means is that the judiciary was asked to invalidate it a priori rather than as applied to any particular person. It was asked to assert that it was unconstitutional for all times and all places, rather than that it was invalid as applied to a specific applicant. O'Connor declared that the Court is not fond of "facial" challenges. "To prevail, [plaintiffs] must demonstrate a substantial risk that application of the provision will lead to the suppression of speech."[89] This they are unable to do, as this language is, according to the majority, primarily advisory rather than mandatory.[90] It merely "admonishes" the NEA to employ "decency and respect" as one of the criteria it uses

when deciding to whom to allocate its funds.[91] Unlike obscenity, which may not be funded under the statute governing the NEA, works lacking in "decency and respect" could be subsidized by it if they were of sufficient artistic merit.[92]

Justice O'Connor did make one pioneering piece of law respecting the government as grantor of largesse, i.e., as "patron rather than as sovereign."[93] Statutes such as those defining criminal conduct must be clear. However, grants legislation can be framed with less precision. Government does have latitude to set priorities in spending, and it is more likely that people will refrain from constitutionally protected activities that they wrongly believe are unprotected in order to stay out of jail or avoid a fine than in order to get a grant.[94] More importantly, there are many "valuable government programs" according scholarships and grants on the basis of vague criteria such as "excellence," and were the Court to invalidate the NEA "decency and respect" clause, the validity of all these other laws awarding government money would be called into question.[95]

Justice Scalia's concurring opinion is adamant that the language that Ms. Finley was asking to have declared invalid was mandatory rather than "advisory." "The Statute Means What It Says."[96] However, one wonders if the gulf between himself and Justice O'Connor is that great, because he too admits that "decency and respect" are not the only standards the NEA is to look to when making its decisions, and that the endowment may legally subvent some "indecent" or "disrespectful" material.[97] Nonetheless this proviso is constitutional even if it is viewed as a command rather than as an admonition. He contends that even if it is construed thusly, it does not infringe the First Amendment. That amendment prohibits abridgment of speech and press, and here no expression is suppressed. "Those who wish to create indecent and disrespectful art are as unconstrained now as they were before the enactment of this statute. *Avant-garde artistes* such as [plaintiffs] remain entirely free to *epater les bourgeois*; they are merely deprived of the additional satisfaction of having the bourgeoisie taxed to pay for it. It is preposterous to equate the denial of taxpayer subsidy with measures 'aimed at the *suppression* of dangerous ideas.'"[98] All government funding legislation discriminates; the very existence of the NEA (which he admits is constitutional) is in a sense a discrimination against the idea that the fine arts are dangerous, and in its activities it "discriminates" against scientific expression because it does not and cannot fund the latter.[99]

Justice Souter in dissent takes the position that because of the First Amendment, governmental discrimination on account of viewpoint is highly suspect. "It goes without saying that artistic expression lies within this First Amendment protection."[100] Thus, though Congress does not have

to subsidize art at all, when it does so, "it may not discriminate by viewpoint in deciding who gets the money."[101] To him, this "decency and respect" clause embodies discrimination on the basis of viewpoint[102]; under the Constitution expressions of disrespect to America's diverse beliefs are as protected as those that venerate them. Even when the government acts as "patron...it may not prefer one lawfully stated view over another."[103] As for Justice O'Connor's thesis that the Finley suit must fail because it is a "facial" attack on a law and there is no proof that the proviso will deter speech, he per contra thinks that it could be used to rationalize a considerable amount of unconstitutional discrimination because of viewpoint.

This book will reach no final determination about the rights and wrongs of the NEA's refusal to fund Ms. Finley and her co-plaintiffs. But, concentrating on the photographs by Robert Mapplethorpe and the performances of Karen Finley described earlier, the reader should perhaps think about the following points, some but not all of which were brought up somewhere or other in the various *Finley* opinions, including concurrences and dissents. (In doing so, he/she should assume that the Mapplethorpe photos and the Finley skits were not "obscene" under the standards of *Miller v. California*.)

1. How true is it that denying governmental aid to the Finleys and Mapplethorpes would be less of a deterrent to their expressing themselves in the ways they desire than would sending them to jail or fining them?
2. The main criteria the NEA is supposed to apply in making awards are "artistic excellence" and "artistic merit." Are these phrases not as vague as "decency and respect?" But is Justice O'Connor not correct when she clearly hints that any governmental program that wishes to increase the quality of some endeavor, whether it be scientific, historical, or artistic, must almost inevitably use fuzzy terms such as "outstanding" or "superlative" in deciding who will get the benefit?
3. Are Finley's skits and Mapplethorpe's photographs (or for that matter Serrano's *Piss Christ* and Ofili's *The Holy Virgin Mary*) imbued with artistic excellence and artistic merit? Or are some or all of them just junk that any fool can replicate and that the public ergo should not fund? Because reputable performance artists put their seal of approval on the theatrical sketches of Finley, Hughes, Fleck, and Miller, and many consider Mapplethorpe one of the greatest photographers of the twentieth century, do we laypeople have the right to say that their efforts are not good art?
4. With respect to Justice Souter's dissent in *Finley III*, is the "decency and respect" clause really viewpoint discrimination? Or, assuming that it is

to some extent mandatory, is it not in essence a *procedural* requirement that Finley act and Mapplethorpe take pictures *in a way* that adheres to standards of decency and respects the "diverse beliefs and values of the American public?"[104] But even if it is just a procedural requirement, is it not true, as Karl Marx once said in an essay protesting government censorship, an essay which the Soviet dictators who set up what they mistakenly thought was a polity based on Marxist principles never were aware of even though it was available in the bookstores they owned, that "not only the result, but also the route, belongs to truth?"[105] As Marci Hamilton expresses much the same idea, does not art best perform its liberating functions when it permits individuals to experience worlds that are alternatives to our humdrum daily existence.[106]

5. Is it not true that what one generation considers "indecent" or "disrespectful" another will not? When the author of this book was young, Erskine Caldwell's novel about poor southern whites entitled *God's Little Acre*[107] was considered pornographic: he remembers school friends proudly smuggling it into the classroom in their briefcases and passing it around surreptitiously. Now it would be deemed rather mild stuff.
6. Most of the discussion in the three *Finleys* lumps together the requirements that the NEA consider (a) "general standards of decency" and (b) "respect for the diverse beliefs and values of the American public." Should they have been treated as indistinguishable? Does not the "respect for the diverse beliefs and values" language have merit in that it improves the odds that artists out of the racial, ethnic, or religious mainstream will get serious consideration from the endowment? Does it not make it more probable that, for example, gay performers will receive NEA assistance, because though gays are in a minority, they are a part of the "diverse" patchwork of groups that makes up the United States in the first decade of the twenty-first century? In this connection, it is interesting to note that the NEA insists that members of the advisory panels reviewing grant applications "represent geographic, ethnic and aesthetic diversity."[108]

A Crude Poem Antagonizes New Hampshire's Governor

Other than the *Finley* trio, there are very few court cases dealing with funding determinations by the NEA or its twin the National Endowment for the Humanities. As Justice O'Connor points out in *Finley III,* up until 1998 the NEA distributed about 100,000 awards totaling over $3 billion, yet only a "handful" of its stipends aroused controversy.[109] (But the controversy they did arouse was bitter!) One earlier decision that did deal with

public funding of creative work was *Advocates For the Arts v. Thomson* (1976).[110] Here *Granite,* a New Hampshire-based journal of poetry and fiction, applied to the New Hampshire Commission on the Arts for a grant to support a new issue. (This state body itself received some of its funds from the NEA.) The commission initially voted to allot *Granite* the sum of $750 to enable that issue to be printed, and that decision was approved by the state's very conservative governor, Meldrim Thomson. The governor was then shown a poem in an earlier, also commission-aided, issue, and decided to revoke the award. He referred to this poem, "Castrating the Cat," as "an item of filth." Crude it was, though it was indecent in the manner of Carlin's "Filthy Words" rather than obscene. Readers who are interested in the full text can find it on p. 798 of 532 F.2d just as they can find the Carlin monologue in full at the end of Justice Stevens' majority/plurality opinion in *FCC v. Pacifica Foundation*!

The First Circuit was clearly not overjoyed by the governor's action. "What is perhaps most troubling about this case is not that *Granite* should be denied public support; but that the denial should be based upon a reading of just one poem in a back issue, without consideration of the overall quality of the publication either alone or as compared to competing grant applicants."[111] But it felt there was no constitutional remedy for this bit of stupidity[112]; that is, it found no First Amendment violation. Taking the approach of Justice Scalia in *Finley III* and of Judge Kleinfeld in *Finley II,* it declared that there had been no suppression or censorship of speech. Rather, a literary journal other than *Granite,* or even perhaps a budding poet, playwright, or short story writer will be getting the $750; its/his/her efforts are entitled to First Amendment protection too.[113] "[C]ourts have no particular institutional competence warranting case-by-case participation in the allocation of funds."[114] This is true, but the trouble with the First Circuit's argument is that it justifies fund cut-offs even for grossly political reasons. Suppose that the governor had denied money to *Granite* because it had featured an article criticizing him. Would the First Circuit have dared to sustain that decision using its theory that, after all, some other publication would then get the cash? Somehow, the author doubts this. *Advocates For the Arts v. Thomson* was cited[115] in Justice O'Connor's opinion in *Finley III* but played a minor role there. In light of *Advocates For the Arts,* the reader might like to add the following to the list of questions for consideration posed above. Assuming that the government can refuse to fund "indecent" speech, should it be able to cut off assistance when, as here, the offensive material makes up just a tad of what is published or exhibited?

Postal Rate Breaks for a "Raunchy" Journal?

Different in spirit from *Finley III* and *Advocates for the Arts* is *Hannegan v. Esquire* (1946).[116] *Esquire* contains pictures of provocatively dressed women as well as racy jokes and cartoons. Though only a small portion of this men's magazine is devoted to this type of material, the postmaster general in 1943 denied it second-class mailing privileges. In doing so, he cited the federal law governing what publications could be granted these rates. One clause of the relevant legislation declared that a book or magazine shall be eligible for second-class mailing rates (which are inexpensive) when it is published "for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry." He contended that the salacious, albeit confessedly not obscene, nature of some of *Esquire*'s material took it out of this category. In an opinion by Justice William O. Douglas, the Court found that the postmaster general's action was not justified by the statute under which he purported to act. The second-class mailing privilege is a subsidy, one in fact worth $500,000 a year to *Esquire*.[117] To allow the postmaster general to deny a journal this subsidy simply because he believes that its contents are "bad" would be a form of censorship. "Such a power is so abhorrent to our traditions that a purpose to grant it should not be easily inferred."[118] In fact, serious constitutional issues would be raised if the statute "undertook to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country."[119] Individuals and generations differ as to what is good art and literature, and to have a public official determine whether a publication contributes to the public good is an undemocratic notion.[120]

It should be noted that *Hannegan v. Esquire* is philosophically also contrary to *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson* (1921),[121] where, as seen in Chapter 2, the postmaster general was allowed to get away with canceling the second-class mailing privileges of a newspaper that vehemently opposed American participation in World War I. The two cases are technically reconcilable, of course. *Milwaukee Social Democratic Publishing Co.* declared that it was *constitutional* for the head of the American postal system to withdraw the second-class mailing subsidy from a newspaper whose viewpoint he disliked, while *Hannegan v. Esquire* can be taken as simply saying that one of his successors *lacked the statutory authority* to deny this boon to a magazine whose contents got under his skin. But Justice Douglas makes it quite clear that, if the statute had empowered the postmaster general to pull the second-class mailing rug out from under *Esquire*'s feet, it probably would have been a violation of the First Amendment. Thus we cannot help but conclude that his post-World War II opinion is fundamentally inconsistent with the post-World War I hold-

ing. Why the discrepancy? Partly because *Milwaukee Social Democratic Publishing Co.* was a politically radical paper that came to the Court's attention at a time when such publications were considered real dangers to the well-being of the country. *Esquire* might have annoyed some of the cultural conservatives of the day, but no person in her/his right mind could have deemed it a threat to national security. Also, as of early 1946, when *Hannegan v. Esquire* was issued, World War II had been over for only a few months; and that conflict was waged against countries dominated by governments who took almost as much pleasure in censoring writers they disliked as in murdering innocent men and women. Most importantly, as of early 1946, there were five individuals on the Court committed to a strong First Amendment: Justices Douglas (*Hannegan v. Esquire*'s author), Hugo Black, Wiley Rutledge, Frank Murphy, and Chief Justice Harlan Fiske Stone. Rutledge, Murphy, and Stone were soon to leave the Court and be replaced by men less fervently committed to the idea that freedom of speech and the press are of extreme importance in American life. It is quite possible that if the personnel of the Court had not changed by the beginning of the 1950s, *American Communications Association v. Douds* (1950),[122] also noted in Chapter 2, would have seen it invalidating rather than sustaining the section of the Taft-Hartley Act demanding that officials of labor unions must sign non-communist affidavits.

Chapter Summary

Relatively few cases have been considered in this chapter, but most of those it has analyzed have been suspicious of state actions that threatened to cut off governmental assistance to individuals or institutions who or which produced or exhibited works that offended or shocked many because of their "indecent" and/or "blasphemous" content. *Hannegan v. Esquire*, of course, falls into this category. *Brooklyn Institute of Arts and Sciences v. City of New York* and the Appellate Division and Court of Appeals holdings in *Panarella v. Birenbaum* protected, respectively, an institution that had exhibited arguably blasphemous materials and two college newspapers in which had appeared articles that many in their community viewed as sacrilegious. *Bella Lewitzky v. Frohnmayer* invalidated one governmental attempt to prevent the National Endowment for the Arts from subsidizing obscene works, while *Finley I* and *II* overturned a statutory clause saying that the endowment, when making a funding decision, should take into account standards of decency and respect for the diverse beliefs and values of the American public. *Finley III*, which upheld that provision, nonetheless diluted it in declaring it "advisory" and imposing "no categorical requirement."[123] And even *Advocates For the Arts v. Thomson*, though it sustained

the denial of a state arts commission award to a literary magazine that had once published an offensive poem, was very unhappy that the New Hampshire governor had cancelled the funding for a reason it thought was highly unfair given the overall quality of the journal. In fact, one gets the feeling that had a similar case come before it a few years later, the First Circuit would have slapped the governor down.

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CHAPTER 5

Government Largesse Impacting the Right to Privacy/Abortion

The Right to Privacy: Historical Background

Thus far this book has discussed language attached to laws providing government boons such as licenses, cash grants, and second-class mailing privileges, that restricts freedom of speech and press and related First Amendment liberties such as freedom of association. Freedom of speech *is* fundamental in a democracy; in fact, "the prevalence of freedom of speech" is part of any reasonable definition of that form of government. But it is not the only liberty featured by a genuinely democratic society. Certainly freedom of religion (including freedom for irreligion) is another building block; this will be considered in the next chapter. Though not mentioned in so many words in the U. S. Constitution, some sort of right to privacy is another constituent of a democratic order. It would be intolerable if the state could, as a matter of course, place police agents on your sidewalk to report your comings and goings; have them walk into your home whenever they desired; listen to your phone conversations at will; and/or open your mail whenever they felt like doing so. Life in such a nation would be as wretched as one in a country where criticism of the prime minister meant that you would end up in a slave labor camp. In fact, what the government's infernal and endless spying might be trying to discover is a statement from you condemning the nation's political leaders, and so freedom of speech and the right to privacy are related albeit different.

In a famous 1891 article, future Supreme Court Justice Louis Brandeis and his law partner Samuel Warren complained that scientific developments were threatening one's right to privacy. If they were to return to earth today, they would be even more distressed at how the march of technol-

ogy has resulted in instruments that enable both the state and private institutions to know every step we take. Tiny transmitters inserted into a piece of your home furniture without your knowledge can convey your conversation to a listener stationed miles away; the phone company knows what numbers you have dialed and may give this information to law enforcement investigators[1]; and at least three nationwide companies know your complete credit history, as the author of this book discovered when he was the victim of a credit card scam and had to tell these companies his concerns about the theft in order to ensure that his credit rating remained favorable. Because of the threats to the privacy right coming from the unstoppable tidal wave of science, it is important that the courts give it significant protection not only from direct assaults from the state, but also from indirect erosion arising from governments making largesse conditional upon the recipients' waiver of this liberty or categorically denying the favor to those who have in the past exercised one or another aspect of this prerogative. Dissenting in *Olmstead v. United States* (1928), where the majority allowed the conviction of bootleggers, the evidence against whom was secured by warrantless tapping of their phones, Brandeis passionately contended that the framers of the Constitution "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."[2]

But if the framers thought so much of the right to privacy, why did they not explicitly insert it either into the original Constitution or into the Bill of Rights, adopted just three years after the original Constitution was ratified? Actually, there are several paragraphs that show they did treasure this immunity. The Third Amendment, for example, severely limits the power of the government to "quarter" soldiers in private citizens' homes. More influential, of course, is the Fourth Amendment, which declares that "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause...particularly describing the place to be searched, and the persons or things to be seized." Normally, therefore, the police cannot search your residence or tap your phone without obtaining a search warrant, though there are many exceptions to this general proposition, which it is not the purpose of this book to describe.

During the heyday of the liberal Supreme Court under Chief Justice Earl Warren, the right to privacy was expanded above and beyond protection from unreasonable searches and from having to feed and provide a bed for members of the military. In *Griswold v. Connecticut* (1965),[3] Justice William O. Douglas, who was seen at the end of the last chapter invalidating in *Hannegan v. Esquire* (1946)[4] the revocation of the second-class mailing priv-

ileges of a magazine that contained some pictures of sexily attired young women, wrote the majority opinion striking down, as applied to married persons, Connecticut laws banning both the use of contraceptives and giving advice on how to use them. Douglas felt that these statutes violated a right to marital privacy. "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."[5] Clearly this right to marital privacy had to be based on more than the Third and Fourth Amendments, as what it safeguarded here, the freedom of a married couple to use condoms, has nothing to do with quartering soldiers and is only indirectly related to the Fourth Amendment's ban on unreasonable searches and seizures. Douglas reasoned that many of the clauses in the Bill of Rights have "penumbras," i.e., "halos" that protect rights other than those specifically mentioned in the relevant clause. He found this right to marital privacy in the penumbras of not only the Third and Fourth Amendments, but also in, e.g., the Fifth Amendment's privilege against self-incrimination and the First Amendment's freedom of association, itself implied from the language of that amendment.

Roe v. Wade: Abortion Joins the Right to Privacy

In *Eisenstadt v. Baird* (1972),[6] *Griswold*'s "right to marital privacy" was now labeled more broadly a "right to privacy," and unmarried couples were recognized as having the constitutional right to use contraceptives. Then came *Roe v. Wade* (1973),[7] one of the most controversial decisions the Court has ever rendered and one that may be overturned by the time this book reaches the stores. The opponents of this decision have never become reconciled to it, and have helped elect presidents (Ronald Reagan, George Bush I and II) who also dislike it. It held, as is widely known, that under the Constitution abortion can be only minimally regulated during the first trimester of pregnancy, and can be limited only to protect the mother's health during the second trimester. During the third trimester, in order to meet the state's interest in protecting potential life, it may ban abortion except where that procedure is necessary to save the life or health of the mother. This scheme has remained in place for the past three decades, except that a government can now proscribe abortion when the fetus becomes capable of life outside the womb even though that event occurs before the start of the seventh month.[8]

It is most definitely not the purpose of this book to add to the chorus of whether *Roe v. Wade* was correctly decided. What is important to recognize here is that the constitutional right of a woman to have an abortion rested, according to Justice Harry Blackmun's majority opinion, on the right to privacy. This may seem strange at first glance, as a safe abortion is not

carried out on a woman in the seclusion of her bedroom but in a hospital or clinic with a doctor performing the operation and a nurse or two in attendance. It is likely that the doctor and nurse are strangers to the woman and her family, and that in this sense this particular medical procedure is no more a private event than is an appendectomy. Nonetheless the principle of respecting precedent requires us to accept Blackmun's thesis that the right to an abortion rests on the right to privacy. And where did he find the right to privacy? Not in a penumbra emanating from any one or a group of portions of the Bill of Rights, but in the provision of the Fourteenth Amendment declaring that no state shall "deprive any person of... liberty...without due process of law."[9] In other words, the right to privacy, insofar as it gives a woman the constitutional right to an abortion, is part of the "liberty" safeguarded by the Due Process Clause of the Fourteenth Amendment. In case of threats to abortion rights coming from the federal government, the Due Process Clause of the Fifth Amendment would be implicated, i.e., those seeking to blunt the threat would have to cite the Fifth rather than the Fourteenth Amendment, for the latter is a limitation on state and local government action only.

Must the Polity Fund Poor Women's Abortions? *Maher v. Roe* and *Harris v. McRae*

Roe v. Wade may have constitutionalized abortions, but its opponents have included not only several U. S. presidents but also quite a few members of Congress and state legislators. Consequently, ever since this right was promulgated it has been subject to constant attempts to narrow it. It was early realized that abortions are not free; they can cost hundreds of dollars. This means that because the United States is the only country in the industrialized world that does not guarantee all its residents inexpensive health care, poor women will not be able to afford abortions unless they get a subvention from one level of government or another. The several hundred dollars that they cost means nothing to Mrs. Bill Gates and not very much even to the average middle-class American family, but to a pregnant girl living independently of her parents and having a part-time job or to a welfare mother whose income is perhaps $5,000 a year and who has to pay the rent and feed her children, it is a princely sum, which she is unlikely to scrape together without outside help. For the needy, the most obvious source of assistance to pay for this operation is Medicaid, the program of medical insurance for the poor that is jointly funded by the national and state governments. If the girl living independently or the welfare mother has swollen tonsils, she can have them removed in a hospital and not pay very much thanks to this scheme. However, suppose she needs an abortion, which

is in one sense just another type of operation; is Medicaid constitutionally required to fund this?

Maher v. Roe (1977)[10] answered this question in the negative. Here a regulation of Connecticut's Welfare Department declared that it would not use Medicaid to subsidize even first-trimester abortions unless these were "medically necessary." As a result, if a poor woman were with child, but felt that she did not want the baby even though carrying it the full nine months and the procedures involved in childbirth would not endanger her life or health, she could not get Medicaid money for it. (A healthy woman might not want to give birth because she wanted a full-time job, because she wanted to complete her education, because she felt she already had enough offspring, or for a variety of other reasons.) Two indigent women, Ms. Poe and Ms. Roe, were unable to get a note from a doctor declaring that abortions were medically necessary for them, and so sued Maher, the state's commissioner of social services, in the U.S. District Court for the District of Connecticut for a declaration that the above-mentioned regulation was unconstitutional. (A companion case, *Beal v. Doe* (1977),[11] found that the federal Medicaid law, as distinguished from the U.S. Constitution, did not require states to subsidize first trimester, non-medically necessary abortions.)

The issues raised by the Poe/Roe complaint are extremely interesting, but some are not the main concern of this book. The most obvious of the latter is whether the regulation directly infringes the right to privacy/right to an abortion accorded by *Roe v. Wade* because it may deprive a large group of people of the ability to take advantage of this right. The second is whether it violates the Equal Protection Clause of the Fourteenth Amendment because its inevitable consequence will be to continue to allow Connecticut's middle-class and upper-class women to have abortions while in effect barring their impecunious counterparts from choosing this procedure. In this connection, it is entirely possible, of course, that Ms. Suburban Matron will fancy the operation simply because she wants to be able to continue to play bridge every afternoon with her friends at the country club! Ms. Poe desired the abortion because she was only sixteen, while Ms. Roe wanted one because she was unwed and already had three children. (In fact, Ms. Poe managed to get an abortion but wanted the state via Medicaid to pay her hospital bills. Thus the rest of this narrative will refer to Ms. Roe only.)

What is most important to us about this case is that there are those who feel that it presents a rights-limiting conditions issue. One can argue that Connecticut is not directly contravening the right to an abortion, but is rather doing so indirectly by using its power to accord largesse to get Ms. Roe to surrender that constitutional right. Just as Mayor Rudolph Giuliani cannot tell the Brooklyn Museum to give up its First Amendment right to

exhibit a piece of possibly blasphemous but non-obscene art as a condition of continuing to get city monies, Connecticut cannot inform these women, much less well connected than the museum with its distinguished list of private patrons, that if they want Medicaid funding they may not get an abortion.

Whoa there, the perceptive reader may say! Connecticut is not pressuring these women in this particular way to waive a constitutional right. It is not telling them, for example, that if they want Medicaid money to set their broken arms, they must not get an abortion. It is rather simply notifying them that the Connecticut variety of Medicaid will not pay for an abortion. How can this be equated with the state's influencing them to give up their right to that procedure? People have a constitutional right to read Shakespeare, but when government fails to give them coupons so they can go to the nearest bookstore to buy a copy of *Hamlet*, it cannot reasonably be said to be pressuring them to give up this right! What we have in the *Maher v. Roe* situation is, it would seem, simply (using the language of Chapter 1) a "failure to fund," a situation where a government has decided not to subsidize a particular activity, and not a rights-limiting condition or classification. Maybe Connecticut should, as a matter of public policy, enable poor women to choose not to have a child, but any constitutional or moral obligation, if any, to do so springs not from the fact that a denial of the aid will induce them to surrender the abortion right but from the fact that this denial violates Equal Protection by keeping the poor in a very disadvantaged position compared to the middle or upper classes.

How, then, can as brilliant an analyst of the rights-limiting conditions problem as Kathleen Sullivan feel that *Maher v. Roe* does pose a serious rights-limiting conditions issue?[12] As noted in Chapter 1, such an issue always involves arm twisting of the individual by the state, with the latter promising something on condition the former waive a right. On the facts as presented so far, Connecticut probably cannot be said to have pressured Ms. Roe to surrender any right. We have, however, so far omitted one item in discussing the background of the case. This is that Connecticut did fund *childbirth* expenses under Medicaid. As the Court itself framed the issue: "we must decide whether the Constitution requires a participating [in Medicaid] State to pay for nontherapeutic abortions when it pays for childbirth."[13] Now one can see some similarity to Mr. Giuliani and the Brooklyn Museum. There the mayor is telling the museum "I'll give you aid if you give up your constitutional right to show the public the exhibition containing *The Holy Virgin Mary*." Here, Connecticut is arguably saying to Ms. Roe that "we'll pay you to have your baby if you waive your constitutional right to an abortion." Given this additional bit of information, one can understand why some commentators do contend that *Maher v. Roe* does

present a rights-limiting conditions question, the right limited, of course, being that to an abortion.

Maher v. Roe was a 6–3 case, with Justice Lewis Powell writing the opinion sustaining the denial of Medicaid monies to fund abortions. As noted, some of the dilemmas with which he wrestled (e.g., does the failure to fund violate the Equal Protection Clause), though of intrinsic importance, are not immediately relevant for our purposes and so we can simply say dogmatically that he (unlike the District Court, whose judgment for the plaintiffs was reversed) found no infringement of this clause without even bothering to analyze the reasons he gave for this segment of the decision. Nor did he find that sustaining the Connecticut rule was inconsistent with *Roe v. Wade*. In that case, Texas made it a crime to procure an abortion: this was "a stark example of impermissible interference with the pregnant woman's decision to terminate her pregnancy."[14] Here Connecticut is not stopping Roe from getting an abortion. If the Texas Roe had had this operation, she would have gone to jail or been fined. Thus Texas took positive steps to stop her from exercising this constitutional right. Connecticut, though, has done nothing to prevent Roe from undergoing this procedure. It is her indigence, not state action, that may force her to add an extra person to her household.[15] Powell quickly dealt with the rights-limiting conditions matter by simply saying that the state did no more than make "childbirth a more attractive alternative [than abortion], thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there."[16]

Justice William Brennan's dissent disagreed with the majority on every major point. He, joined by *Roe v. Wade*'s author Justice Harry Blackmun and Justice Thurgood Marshall, felt that the majority had significantly retreated from *Roe v. Wade*; that the result in the case infringed Ms. Roe's *Roe v. Wade* right to privacy and, as well, the Fourteenth Amendment's Equal Protection guarantee. He does deal directly with the rights-limiting conditions issue. Citing *Sherbert v. Verner* (1963),[17] a holding to be discussed in the next chapter that allowed a woman to get unemployment compensation benefits even though she refused to work on Saturdays because to do so would violate the tenets of her religion, he declared that "The Connecticut scheme cannot be distinguished from other grants and withholdings of financial benefits that we have held unconstitutionally burdened a fundamental right."[18] It is true the fundamental right in this case is not a First Amendment freedom, but Connecticut cannot do what it does here and accord and withhold awards in a way that pressures someone to waive *any* fundamental right.[19] The state's regulation granting aid for childbirth on condition that the woman does not obtain an abortion

coerces poor women who are "vulnerable to the financial pressures imposed by the Connecticut regulation" to surrender their right to an abortion.[20]

Brennan's comments certainly are not unreasonable. Assuming that poor women know that it will be difficult to beg, borrow, or steal from private sources the money to pay for an abortion, what real choice do they have other than to accept the government money to pay for the childbirth? Having the babies and then having to care for them is likely be a financial and emotional nightmare for them.[21] Taking the government assistance to pay for the cost of the accouchement will reduce, albeit slightly, the economic harm resulting from having a child they cannot really afford. They are thus arguably put under strong pressure to go for the money and have the child (which by definition they can do only by waiving their constitutionally protected abortion right). The *Maher v. Roe* majority would of course retort that it is their indigence, not any state action or inaction, that causes them to add to the world's population.[22]

In light of the above analysis of *Maher v. Roe,* the follow-up case of *Harris v. McRae* (1980)[23] can be treated relatively quickly. This decision considered the constitutionality of a federal attempt to restrict Medicaid funding, the so-called Hyde Amendment. The sponsor of this was Illinois Republican Representative Henry Hyde, who twenty years later achieved temporary fame when, as chair of the House Judiciary Committee, he was instrumental in convincing the House to impeach President Bill Clinton on the grounds, among others, that he had lied to a grand jury and encouraged White House intern Monica Lewinsky to file a false affidavit. The version of the Hyde Amendment before the Court in *Harris v. McRae* read that no federal Medicaid money shall be used to fund abortions except in cases where the fetus was the product of rape or incest or where the life of the mother would be endangered in case of childbirth. This provision is slightly broader than the Connecticut rule at issue in *Maher v. Roe* because it did not permit the funding of abortions to safeguard the health of the mother, just her life. Nonetheless, Justice Potter Stewart's opinion upheld it. He ignores the rights-limiting conditions issue, even though the Hyde Amendment most emphatically did not bar Medicaid funds to cover the expenses of childbirth. There is no infringement, he said, of the right to privacy in its *Roe v. Wade* manifestation. Again, what stops the woman from having the abortion is not the government but her poverty.[24] He also followed *Maher v. Roe* in declaring that the non-funding is not a violation of the equal protection component of the Due Process Clause of the Fifth Amendment.[25]

Justices Brennan, Marshall, Stevens, and Blackmun dissented. Brennan notes that the Hyde Amendment as well as Connecticut's *Maher v. Roe* rule imposed rights-limiting and, in his view, unconstitutional conditions on the

abortion right. Though government does not have to subsidize, when it does so it cannot "condition the grant of such benefits on the recipient's relinquishment of his constitutional rights. It would belabor the obvious to expound at any great length on the illegitimacy of a state policy that interferes with the exercise of fundamental rights through the selective bestowal of governmental favors. It suffices to note that we have heretofore never hesitated to invalidate any scheme of granting or withholding financial benefits that incidentally or intentionally burdens one manner of exercising a constitutionally protected choice."[26] Not only *Sherbert v. Verner* but also *Speiser v. Randall* (1958)[27] are cited in support of this thesis. Getting to the facts of this case, he argues that the Hyde Amendment entices women into surrendering their right to an abortion. "By funding all of the expenses associated with childbirth and none of the expenses incurred in terminating pregnancy, the Government literally makes an offer that the indigent woman cannot afford to refuse. It matters not that in this instance the Government has used the carrot rather than the stick."[28] And, for reasons mentioned in the analysis of *Maher v. Roe,* Brennan's thesis here is certainly not unreasonable. (Despite the Hyde Amendment, states such as New York still pay for Medicaid abortions, but out of their own tax revenues as opposed to cash coming from Uncle Sam.)

In *Maher v. Roe* and *Harris v. McRae,* as seen, the polity would subsidize the childbirth expenses of financially strapped women if they gave up their abortion right. It is this factor that makes it reasonable to conclude that they both present a rights-limiting *conditions* problem. Suppose, however, that Connecticut would fund neither the costs of an abortion nor those of lying-in. In that event no rights-limiting condition would be attached to its Medicaid program; by definition the state would not be telling Ms. Roe that it will fund their confinements if they surrender their right to an abortion. However, a rights-limiting *classification* would then be in force. This would not be a rights-limiting classification of the sort where the hopeful recipients are being permanently penalized for a past use of a constitutional liberty, but rather one of the type where the government refuses to fund an exercise of a fundamental right (that to an abortion) even though it is subsidizing similar activities; and, moreover, is not making an implicit or explicit promise of public aid if the right is not exercised. Abortions are simply one form of medical operation, and Medicaid does pay for most types of surgery performed upon indigents. Because Connecticut would bankroll the removal of Ms. Roe's tonsils, its refusal (under the hypothesis of this paragraph) to pay the tab for the removal of her fetus (a constitutional right) and for childbirth thus would be a rights-limiting classification and not a simple failure to fund. However, it still might be legitimate; as mentioned before, rights-limiting conditions and classifications are

not *per se* invalid. Our final chapter adds a few more words about the matter of the constitutionality of a polity's refusal to subvent abortions.

No Abortion Advocacy in Federally Funded Family Planning Projects: *Rust v. Sullivan*

Rust v. Sullivan (1991)[29] is a case showing how the right to privacy can become intertwined with First Amendment claims. A federal law of 1970 (Title X of the Public Health Service Act, henceforth simply referred to as "Title X") authorizes the Secretary of Health and Human Services to make grants to non-profit agencies to help them with their family planning projects. This law was enacted only a half decade after *Griswold v. Connecticut* held that the use of contraceptives by married couples is protected by a new "right of marital privacy." This short period of time was enough for the country's mores to change so much that a Republican president (Richard Nixon) inked a measure approving federal financing of organizations that doubtlessly would devote considerable effort to getting couples to use the prophylactics that the state of Connecticut had been banning until it ran headlong into Justice Douglas in *Griswold*. However, the measure also barred the use of federal monies in any project where one of the methods of family planning was abortion. Three years later *Roe v. Wade* became a player on the legal scene and was bound to shed some doubt on the constitutionality of that particular prohibition.

In 1988 Louis Sullivan, anti-abortion President Reagan's Secretary of Health and Human Services, issued regulations to clarify this restriction. These declared that individuals, when working on Title X projects, may not advocate abortion as a means of family planning; must refer every pregnant client for appropriate prenatal services; and may not send her to an abortion provider. Irving Rust and others were doctors working in Title X projects. They brought suit to have these regulations held unconstitutional asserting, among other things, that they infringed their First Amendment right to freedom of speech. Why does the First Amendment come into this abortion case? The main reason is that the rules prohibit *advocacy* of abortion by doctors and other family planning agency workers when participating in a Title X project. Chief Justice William Rehnquist wrote the 5–4 opinion sustaining Secretary Sullivan's dictate. After dismissing a challenge that it was not justified by the wording of Title X, which contained no explicit ban on promoting abortions as opposed to performing them in Title X clinics, he turned to the First Amendment problem. This *is* one involving rights-limiting conditions, for what the government is in essence telling family planning clinic staff is that if they want to keep getting the federal cash, they, while employed on a Title X task, must not counsel their clients to have their pregnancies terminated. Yet under the First Amendment one clearly

has a right to speak on behalf of abortion; the Court itself did so in *Roe v. Wade* and various cases springing from that decision. The plaintiffs contended that this rights-limiting condition violated the First Amendment because its proscription embodied "viewpoint discrimination," which, it will be remembered from Chapter 3's discussion of the electronic media, is the type of constraint on speech that the Court most fears. Viewpoint discrimination is present here, they asserted, because the clinic staff is being told that if they take position A (counsel their clients to get an abortion) they will lose federal aid, but if they adopt position B (tell their clients to go to prenatal counseling and have their children) the money from the U.S. Treasury will keep rolling in.

To demonstrate that this scheme did not impose a rights-limiting condition on anyone, Chief Justice Rehnquist added a new fillip to the law of such conditions. He made a distinction between a Title X grantee and a Title X project. Title X and the regulations do not totally ban a grantee, usually what the chief justice calls a "health-care organization,"[30] from promoting or even carrying out abortions. It is perfectly free to do so in those of its activities that are not funded by Title X: the abortion-advocacy taboo applies only to those of its projects that are so financed. It is only, the chief justice continued, where the recipient of public dollars is constrained from engaging in a constitutionally protected right when she/he is acting *outside* the scope of the governmentally assisted program (e.g., while in the office where he/she carries on a private practice), that the doctrine of rights-limiting conditions/classifications (which he called the doctrine of "unconstitutional conditions") comes into play.[31]

There are also powerful echoes of Judge Oliver Wendell Holmes's *McAuliffe v. Mayor of City of New Bedford* decision (1892)[32] in the chief justice's discourse. As will be remembered, *McAuliffe* was the case where then Massachusetts Supreme Judicial Court Judge Holmes allowed New Bedford to fire a police officer who was active in party politics on the ground that he had a constitutional right to talk politics but not to be a gendarme. Similarly Rehnquist contends in *Rust* that the federal cash is no more than a bounty. If the clinic does not wish to be bound by Secretary Sullivan's regulations, it may simply decline the subsidy.[33] Likewise, if its employees do not like these guidelines, they can get another job. "The employees' freedom of expression is limited during the time that they actually work for the [federally funded] project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority."[34]

One must obviously ask at this point whether *Rust v. Sullivan* has not written *finis* to the whole rights-limiting conditions/classifications doctrine. The most natural meaning of the expression quoted in the previous para-

graph and appearing in a *majority opinion* is that the polity can impose any conditions on its largesse that it desires, which means that no rights-infringing language attached to public subventions can be unconstitutional because the recipient can always turn his/her back on the aid. Professor Nicole Casarez feels that these words could be interpreted this way.[35] However, it is clear that the "rights-limiting conditions/classifications" thesis is still alive. The Court's 1998 opinion in *Finley III* accepts this doctrine,[36] even though it upheld the requirement that the National Endowment for the Arts take into account "decency and respect" when making its grants. And *Legal Services Corporation v. Velazquez* (2001),[37] where certain restrictions on the speech of government-funded lawyers were invalidated, relies heavily on this theory. Even the chief justice admitted in *Rust* that government assistance to an institution such as a university that is "a traditional sphere of free expression" cannot be qualified upon the awardee's agreement to propound a particular viewpoint.[38] (At the end of his *Rust* opinion, he added that the refusal to subsidize abortion counseling did not violate the right of the clients of the Title X clinics to have this operation: to no one's surprise *Maher v. Roe* and *Harris v. McRae* were among the decisions cited for this proposition.)

Justice Blackmun in dissent was shocked at the idea that almost any condition mandating viewpoint discrimination by the recipient may be tacked onto a federal subsidy.

> Until today, the Court never has upheld viewpoint-based suppression of speech simply because that suppression was a condition upon the acceptance of public funds. Whatever may be the Government's power to condition the receipt of its largess upon the relinquishment of constitutional rights, it surely does not extend to a condition that suppresses the recipient's cherished freedom of speech based solely upon the content or viewpoint of that speech.[39]

Speiser v. Randall (1958) is the holding cited for this point. In his eyes, there is not only viewpoint but also content discrimination built into Secretary Sullivan's regulations. Not only do they prevent an organization's staffers from advocating abortion, they bar them from even discussing it except to say, when the client asks about the possibility of having this procedure, that this is not an appropriate method of family planning. To the majority's more general proposition that the First Amendment rights of the plaintiffs were not infringed simply because they could have refused to accept employment at a federally subsidized project, Justice Blackmun retorts heatedly that "it has never been sufficient to justify an otherwise unconstitutional [what we are terming "rights-limiting"] condition upon public employment that the employee may escape the condition by relinquishing his or her job."[40] And unlike the *Rust* majority, the author

of *Roe v. Wade* thinks that the Sullivan rules are a gross violation of the right to privacy/abortion recognized in that decision.

To return to the majority opinion, one of the chief justice's arguments was that government and governmental officials have a right to take positions, and that they are under no obligation to encourage the opposite point of view to be brought forth. President George W. Bush believes that the federal estate tax is undesirable. He surely has a right to say this in his various speeches and is under no First Amendment duty to call to the podium an individual who believes that that tax is advisable because its effect is to cut down the amount of unearned money going to legatees and heirs. Senator Edward Kennedy of Massachusetts favors the enactment of a national health plan guaranteeing inexpensive medical care to all. Certainly when he talks or writes on this matter he is under no obligation of any sort to trumpet the views of his opponents. Mark Yudof has written that "It is absurd then...to adopt the position that government speech, in its many manifestations and irrespective of its advantages, is an illegitimate enterprise in a liberal democratic state."[41] And even law professor David Cole, a strong critic of the *Rust* result, declares that at least on occasion, "Government must be free to control the content of the speech it supports...Because a government functions in large measure through communication and persuasion, [it] would be disabled by a mandate that it maintain only neutral positions."[42] On the basis of reasoning such as this, the chief justice averred that "When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles...it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism."[43] However, the National Endowment for Democracy example, though colorful, is not completely relevant to *Rust v. Sullivan*. Though declared to be a non-governmental agency, the endowment, for practical purposes, must be considered at least quasi-governmental.[44] Not only was it created by the federal government, but its activities and programs are regulated by federal law. On the other hand, the recipients of Title X funds are in the private sector just like actress Karen Finley and photographer Robert Mapplethorpe. Thus the fact that the Department of Health and Human Services may eschew viewpoint neutrality when addressing the public does not necessarily mean that it may do so when granting funds to Title X clinics and other groups.

Justice Blackmun's dissent also tore into the majority's thesis that the rights-limiting conditions doctrine applies only to the extent that the rights-limiting qualification hobbles an aid recipient's non-governmentally funded activities, a novel thesis that was buttressed with practically no authority. "Under the majority's reasoning, the First Amendment could be read to

tolerate *any* [emphasis in original] government restriction upon an employee's speech so long as that restriction is limited to the funded workplace. This is a dangerous proposition, and one the Court has rightly rejected in the past."[45] The dissent is clearly correct here. Suppose, for example, one of the qualifications imposed on Title X clinics was that while administering their projects funded by the government, the staff had to tell the patients that Ronald Reagan was the greatest movie actor and president who ever lived, or that Franklin D. Roosevelt's New Deal saved the country from communism. Certainly this requirement would infringe the "right to silence" implicit in the First Amendment,[46] a right with no exception built in for time spent laboring on federally funded activities. As with his resuscitation of *McAuliffe*, which he did not have the chutzpah to cite by name, the chief justice in his "the rights-limiting conditions notion is irrelevant to moments spent in federally-assisted projects" comment promulgated a dictum (a statement in an opinion upon which the result is not logically dependent) that could only further irritate those who would be unhappy with *Rust*'s outcome. That this comment never became enshrined into law is another point proven by *Legal Services Corporation v. Velazquez*, where the speech that the Court found unconstitutionally limited by the funding statute was speech *during* the assisted work activities of the recipients. Though Rehnquist's opinions are normally well reasoned, his effort in *Rust* was an unnecessarily sloppy and overreaching one that few of the scholars who commented on it defended. This does not necessarily mean, however, that the result he reached was erroneous.

The Caseworker Enters the Home of Welfare Recipients: *Wyman v. James*

As mentioned already, few social programs have been as unpopular as the welfare law that used to be called Aid to Families with Dependent Children (AFDC) but which, since 1996, has been denominated Temporary Aid to Needy Families. These paragraphs will refer to it as AFDC, because the case arising under it that will be analyzed was decided when it had that name. During his 1976 presidential campaign, Ronald Reagan scored points by describing a "welfare queen" with eighty names, thirty addresses, twelve social security cards, and a tax-free income of at least $150,000.[47] Even a liberal such as Bill Clinton called, in his 1992 presidential quest, for "ending welfare as we know it." The leading welfare rights-limiting conditions case is *Wyman v. James* (1971).[48] The liberty arguably unconstitutionally constrained here was another aspect of the protean right to privacy, the right to keep people you do not want in your house from entering it against your will. As seen, this aspect of the right does receive considerable protection from the Fourth Amendment's ban against unreasonable search-

es and seizures. However, this bar is not, nor ought it to be, an absolute one. There are certainly some instances where the public weal demands that law enforcement officials enter private premises even though the owner or tenant does not want them to, e.g., where there is good reason to believe that a thief has accumulated a cache of stolen property there.

Wyman v. James arose because under New York State law and regulations, beneficiaries of AFDC had to permit a caseworker to visit their homes. If they kept him or her out, they would lose their benefits. Ms. Barbara James was a welfare mother living in New York City with her son Maurice. She and her son had been awarded AFDC as of his birth. A couple of years later a caseworker said she would drop in shortly to see her in her apartment. Ms. James then called her to say that she would not let her into her flat, but that she was willing to discuss her continued need for welfare with her elsewhere. When she was told that her benefits were to be terminated because of her recalcitrance, she sued alleging that the home visit rules were unconstitutional; that she was agreeable to discussing her severe financial problems with a social worker at any reasonable time and place other than her home; and, therefore, that she should be permitted to keep receiving benefits. Justice Blackmun, whom we have just seen having a fit about the chief justice's failure to find an unconstitutional condition in *Rust v. Sullivan,* wrote the majority opinion here sustaining the home visit requirement. Blackmun, who had just been appointed to the Court at the time of *Wyman v. James,* did not begin his move to the moderate left until 1973, the year of *Roe v. Wade,* and the *Wyman* decision reflects his then-conservative stance. He, for all practical purposes, ignored the rights-limiting conditions issue and analyzed the New York regulation as a traditional search and seizure problem after first asserting that there is no real search here because the AFDC recipient is not really compelled to welcome the visitor.[49] If she does not let her into her apartment, all that will happen to her is that she will stop receiving welfare checks; she will not, under these circumstances, go to jail.

As he wrote this it dawned on him that the beneficiary might feel she was being coerced into letting the welfare worker into her domicile. So in good lawyerlike fashion he marshaled evidence to demonstrate that even if the home visit had to be considered a "search," it nonetheless was not an "unreasonable" one and thus did not infringe the proscriptions of the Fourth Amendment. The litany of reasons he adduces is rather predictable albeit not unconvincing. For example, the caseworker's visit can show whether the needs of the child are being met; after all, the main purpose of the AFDC program is to help young people who are members of indigent families. Likewise, the taxpayers have a right to know that their money is in fact being used to achieve the goals of the program, and the home vis-

itor can counsel the welfare mother on how she can become self-supporting. Also, under the federal manual written to provide caseworkers and other employees of public assistance agencies with guidance, written notice of the appointment had to be given and forcible entry, prying outside the house, and dropping in outside of regular working hours were all prohibited.

Justice William O. Douglas, in dissent, did emphasize the rights-limiting conditions issue. He pointed out how common governmental largesse is in modern America, citing Charles Reich's leading article on the subject.[50] Subsidies are disbursed to farmers and airlines, TV and radio stations have to apply for licenses, and so forth. Most beneficiaries have homes in which they have a right to privacy, and the "question in this case is whether receipt of largesse from the government makes the *home* [emphasis in original] of the beneficiary subject to access by an inspector of the agency of oversight."[51] That is, the real issue here in his eyes is whether government, through handing out boons, can entice the recipients into surrendering their constitutional right to privacy in their residences. As an obviously incensed Douglas puts the matter: "Whatever the semantics, the central question is whether the government by force of its largesse has the power to 'buy up' rights guaranteed by the Constitution."[52] (The extent to which courts have gone along with government's attempts to exercise this power is of course the focus of this book.) Among other decisions, he cited *Speiser v. Randall* and his own *Hannegan v. Esquire* to answer this question in a resounding negative insofar as it concerned Ms. James. It was irrelevant that *Speiser,* etc. involved attempts to force beneficiaries of government aid to surrender First Amendment freedoms, whereas in this case Ms. James was being coerced into relinquishing her Fourth Amendment right to privacy in her living accomodations. To Douglas, the right to privacy where one lives is as important as the freedom of speech and press embodied in the First Amendment, and throughout the history of the Supreme Court no one has surpassed this justice in the defense of the First. "[T]he right of privacy which the Fourth protects is perhaps as vivid in our lives as the right of expression sponsored by the First."[53] There is little doubt that on this point at least he is one hundred percent correct.

Justice Thurgood Marshall, also in dissent, joined by Justice Brennan, *Speiser's* author, likewise wrestles among other things with the rights-limiting condition posed by the New York visitation requirement. He rightly indicates that the majority did not adequately consider this problem, and continues by declaring that it should have found this limitation on the welfare grant an unconstitutional one. "Had the Court squarely faced the question of whether the State can condition welfare payments on the waiver of clear constitutional rights, the answer would be plain. The decisions of this Court do not support the notion that a State can use welfare bene-

fits as a wedge to coerce 'waiver' of Fourth Amendment rights."[54] *Speiser* is, to no one's surprise, one of the cases cited for this proposition. After these comments, he extended his congratulations to Justice Douglas for his "eloquent discussion of the law of unconstitutional conditions" in the latter's *Wyman v. James* dissent.[55]

The Welfare State Pursues the Homeless and the Hippie: *Wilkie v. O'Connor* and *USDA v. Moreno*

One can imagine Justice Douglas's and Justice Marshall's anger if they had ever come across the result in *Wilkie v. O'Connor* (1941),[56] handed down by the Fourth Department of the Appellate Division of New York State Supreme Court. (Again, in New York the "Supreme Court" is not really that, but rather the highest trial court in the state. The Appellate Divisions of the Supreme Court are in effect the state's intermediate appeals courts.) The facts here are simple but touching. Mr. David Wilkie was what we today would refer to as a homeless person; in the coarser language of six decades ago, many of his neighbors in Seneca County in upstate New York would have called him a "bum." Unlike Ms. James, who fully appreciated the benefits of living within four walls and under a roof but did not want any social workers prying into how she comported herself there, Mr. Wilkie wanted to sleep "under an old barn, in a nest of rags to which he has to crawl upon his hands and knees."[57] The commissioner of public welfare of the county felt that this was not a suitable way to live, and told him that he would have to move into a house or lose his $24.50 (probably monthly, it is not clear from the opinion) in public assistance. In fact, the comissioner had found a suitable place for him and had even offered to increase his "old age assistance" award so he could afford it. (Again, it is not clear whether this "old age assistance" program the court referred to was the joint federal/state program of that name set up by the federal Social Security Act of 1935 and now largely federally funded under the name of Supplemental Security Income [SSI].) Mr. Wilkie sued the commissioner, Emerson O'Connor, for the equivalent of an injunction ordering the official to keep giving him his checks even if he continued to hole up in his rags under the barn. Mr. Wilkie maintained that he had a "right" to live this way; however neither he nor the court ever specified in what section of the U. S. or New York State Constitutions this prerogative was to be found. Justice Douglas might well consider it part of the "right to privacy" protected by the Third, Fourth, and other amendments—remember his opinion in *Griswold v. Connecticut* described earlier in this chapter; this is certainly a reasonable label to accord it.

The court was not unsympathetic to this stubborn old man, who obviously was an individual of considerable intelligence and imagination. "One

is impressed by appellant's argument that he enjoys the life he lives in his humble 'home' as he calls it. It may possibly be true that his health is not threatened by the way he lives...It is true, as appellant argues, that the hardy pioneers of our country slept in beds not better than the one he has chosen."[58] However, he is a recipient of charity, and thus the public has some right to control the way he lives. "[U]nlike the applicant [the pioneers] did it from necessity, and unlike the appellant, they did not call upon the public to support them, while doing it."[59] Though *McAuliffe v. Mayor of City of New Bedford* is not cited, Judge Holmes's philosophy that the policeman has a right to talk politics but no right to public employment is clearly ascendant in *Wilkie v. O'Connor*. This pensioner normally would have the right to live as the pioneers did, but not when he is a recipient of public charity and welfare officials decide that he would be much better off indoors. No such concept as "rights-limiting conditions/classifications" is discussed. However, the Appellate Division did not leave him without any hope. It pointed out to him that what he should have done is appeal the Seneca County Commissioner of Public Welfare's decision to the state Department of Public Welfare, which could reverse it. In fact, the court said, he was improperly before it, but it nonetheless could not restrain itself from uttering the words both of praise and rebuff appearing above. Hopefully, he did take his case to the state and the latter did overturn the decision of Seneca County's paternalistic bureaucracy and let Mr. Wilkie live in his makeshift "palace" while continuing to collect his paltry welfare check. We can dream, can't we?

In 1971 the U. S. Congress stooped to a level even lower than that reached by Seneca County's Commissioner of Public Welfare. The Federal Food Stamp Program was established in 1964 as part of the social safety net to ensure that no American would go hungry. Under the provisions in force in 1971, poor households bought food stamps for less than their face value and then took them to the supermarket to purchase their groceries. (The stamps are now being replaced by plastic credit cards.) As originally defined, "household" included any group of "related" or "non-related" individuals who lived in one economic unit sharing common cooking facilities and customarily buying food in common. In 1971 Congress deleted "non-related" from the definition, and thus the Department of Agriculture, which administers the program, had to issue regulations mandating that no group of individuals living together could get food stamps unless all of its members were related to each other. As a consequence of this, for example, if the impecunious household of Mom, Pop, Dick, and Jane allowed a young Mr. Wilkie, to whom they were not related by blood, to sojourn in their dwelling, they could no longer purchase food stamps, and so all five might well be staring at starvation in the near future. (Were they to have

taken in someone as old as Mr. Wilkie was at the time he sued, they would have remained on the rolls because, under the regulations, people over sixty were automatically deemed "relatives.") The motivation behind Congress's action was to prevent "hippie communes" from subsisting on food stamps. The hippie movement of the late 1960s and early 1970s infuriated many Americans. The hippies often rejected the work ethic, wore their hair long, smoked pot, and had sex outside marriage. They also were avid opponents of the Vietnam War in particular and American militarism in general. They were not violent, but "respectable" society viewed them as more of a menace to the American way of life than motorcycle gangs or white-collar criminals.

Several groups of people living together brought suit to invalidate these regulations. None of the plaintiffs, though, was a hippie. For example, Ms. Jacinta Moreno was a fifty-six-year-old diabetic who lived with one Ms. Ermina Sanchez and the latter's three children. Ms. Moreno received $75 a month from public assistance; Ms. Sanchez and her children got $133, for a "princely" household total of $208 per month, of which $135 a month had to go for rent, gas, and electricity, and much of the remainder for transportation, hospital visits, and laundry. This left very little for food, yet Ms. Moreno was denied food stamp assistance and the Sanchez family was told that they would share the same fate unless the "unrelated" Ms. Moreno moved out of their apartment.

In *United States Department of Agriculture v. Moreno* (1973)[60] the U. S. Supreme Court declared the deletion of "unrelated" from the food stamp law's definition of "household" unconstitutional. The majority opinion by Justice Brennan rightly found this step "unreasonable" and thus invalid under the equal protection component of the Due Process Clause of the Fifth Amendment. Normally economic or social legislation will survive equal protection challenges if one can discover some useful purpose it serves, but here the Court could find no such end. In fact, the amendment effecting the deletion excluded from the program not those most likely to abuse it, but people in such desperate straits that they could not even afford to change their living arrangements so that at least some of them continued to qualify for the subsidy.[61]

The decision ignored the problem of "rights-limiting conditions" posed by the 1971 food stamp amendment and the regulations issued thereunder. To have discussed this matter arguably would have been to subject to overkill a law that was based on the ignoble motive of detesting a nonconformist lifestyle. However, a rights-limiting condition issue is clearly present.[62] The law and regulations in essence told poor people that if they wanted food stamps they would have to boot out of their house or flat anyone not related to them. Or, if it were a man and woman living together

in "sin," they would have to tie the knot in order to remain eligible for food aid. The right limited here can legitimately be characterized in either of two ways. It can first be viewed as part of the "right to privacy" in the home. This right not only means that people should not be worried about unreasonable visits by the police to rummage through their residences. It also demands, it can be argued, that you can choose to abide with whomever you want as long as they are not fugitives from the law and, for that matter, that you can squat like Mr. Wilkie beneath a barn as long as you have the owner's permission and are not in the public eye so that you mar the view for tourists who are on the road to Seneca Falls to visit the National Historic Site honoring the birth of the Women's Rights Movement there in 1848. Second, the liberty limited by the 1971 food stamp amendment can be denominated an aspect of the freedom of association protected by the First Amendment. It is not the aspect of this freedom that grants the right to combine to aim for a change in legislation, but the aspect that allows you to get together for short or long periods of time with people for whom you have an affinity.[63]

Justice Douglas's concurring opinion in *Moreno* did view the 1971 law not only as a violation of equal protection pure and simple, but also as an unconstitutional rights-limiting condition imposed on the latter type of freedom of association. He makes his point colorfully. "The right of association, the right to invite the stranger into one's home is too basic in our constitutional regime to deal with roughshod."[64] "The 'unrelated' person provision of the present Act has an impact on the rights of people to associate for lawful purposes with whom they choose."[65] This right may be limited, admittedly, to satisfy a pressing purpose, or what the Court calls a "compelling state interest." But, Justice Douglas said, no such interest is ascertainable here.

Chapter Summary

The courts have not been willing to say that clauses of government assistance measures that are alleged, or could reasonably be alleged, to restrict the right of privacy embody conditions or classifications unconstitutionally limiting this right. They often do not even bother in the first place to discuss whether these provisos are conditions or classifications impacting this particular freedom. According to the majority in *Maher v. Roe* and *Harris v. McRae,* it was merely their poverty rather than any sort of governmental action that led several poor women to give up their privacy right to an abortion. *Wilkie v. O'Connor* could have analyzed the denial of an old age assistance grant to the old man who wanted to live under a barn as a limitation of his right to privacy but did not, and supported the local welfare office's refusal to continue to send him his checks until he moved into a

"proper" domicile. The *Wyman v. James* majority, upholding New York State rules that welfare recipients had to let caseworkers visit their homes, relied on traditional search and seizure doctrine, and ducked the issue of whether these rules set a condition limiting the right to privacy. *Moreno* did invalidate a law that eliminated from the food stamp rolls households admitting into their midst anyone who was not related to their members, but it did so on equal protection rather than on limiting-right-to-privacy grounds. Even Justice Douglas, who did perceive that this amendment was a rights-limiting condition and declared that it was an unconstitutional one, viewed it as restricting a First Amendment freedom rather than the right to privacy. And *Rust v. Sullivan* allowed a qualification to be placed on the First Amendment right of free speech in a situation where the restriction was imposed because the Reagan administration disliked the abortion aspect of the right to privacy and thus was unwilling to fund any plan where this type of surgery would be recommended as a method of family planning.

The 2002 Sixth Circuit Court of Appeals case of *Marchwinski v. Howard*[66] sums up in a nutshell the tolerant attitude of the American judiciary to conditions and classifications in largesse legislation that invade the privacy right. Indubitably this right also includes the right not to be subjected to a search of your body and bodily fluids by agents of the state. Yet the Sixth Circuit made it clear in *Marchwinski* that Michigan's demand that all welfare applicants undergo a urinalysis to determine if they were using illegal drugs before they could be added to the rolls was constitutional, though for technical reasons its decision was not a final one. The court pointed out that "[W]elfare assistance is a very heavily regulated area of public life *with a correspondingly diminished expectation of privacy* [emphasis added]."[67] Given that premise, it was easy for it to find the testing requirements valid on the grounds that welfare recipients will be better parents if they are not engaged in substance abuse and that, in any event, they should use their money for their children rather than for pot and cocaine.

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CHAPTER 6

Government Largesse Impacting Freedom of Religion

Religion in America

The United States is a very pious country. "[T]here are more churches, synagogues, temples and mosques per capita in the United States than in any other nation on Earth...More than 4 of 5 Americans say they have 'experienced God's presence or a spiritual force' close to them."[1] Several of the original Thirteen Colonies were settled by individuals who were fleeing persecution for their doctrinal beliefs. Thus Massachusetts was created as a haven for Puritans, Pennsylvania as a refuge for Quakers, and Maryland as a shelter for Roman Catholics. The First Amendment to the U. S. Constitution begins with a mention of religion: "Congress shall make no law respecting an establishment of religion, [which scholars refer to as the 'Establishment Clause'] or prohibiting the free exercise thereof [which scholars term the 'Free Exercise Clause']." There is no doubt that freedom of religion (which includes the right to be an atheist or agnostic) is a cornerstone of American, or for that matter any, democracy. And, in fact, since the Puritans stopped exiling those such as Roger Williams who questioned aspects of their doctrine and ceased burning witches in the 1690s, there has never been any significant outbreak of government-sponsored religious intolerance in what is now the United States. The country has blessedly been free of Spanish Inquisitions, fatwas ordering the death of those who anger a mullah, or destructions of the holy shrines of one faith in order to replace them with a synagogue or temple.

Early Cases on Government Boons Restrictive of Religion

In light of the above, it is somewhat surprising to realize that there are a relatively large number of U. S. Supreme Court cases that have wrestled

with the question of whether various rights-limiting conditions or classifications built into federal or state largesse measures have violated the Free Exercise Clause. As will be seen, most of the situations covered in these cases were not produced by attempts by the government to persecute religious dissenters. In fact, a good number were motivated by a desire to ensure that the Free Exercise Clause's twin, the Establishment Clause, was given adequate respect. Others had as their sole purpose no more than a mundane desire to save taxpayers' money. Only in the two earliest cases, and a 1974 holding, could the rights-limiting condition or classification reasonably be considered to be tinged with a mistrust of unorthodox religious viewpoints. And the two early decisions upholding rights-limiting conditions, to which holdings we shall now turn, most likely would not be followed today. They can be viewed as the early offspring of a Court attempting on a trial-and-error basis to develop a jurisprudence reconciling freedom of religion with other values. Or, alternatively, they can be seen as dinosaurs from an era in which suspicion of differences was more intense than it is today. Unlike dinosaurs, however, they are not "extinct"; they have never been overruled, and thus are available to any justice who needs them to defend a position he or she has adopted.

Hamilton v. Regents of the University of California (1934)[2] involved a state program furnishing a "hidden" governmental subsidy. California, as is well known, maintains an excellent system of state universities and colleges at which the fees are significantly lower than those charged by private universities in the state. Consequently, each student in the California public college/university system receives a subvention whose amount can be calculated in several different ways, but which nonetheless is a subsidy coming from the state's taxpayers. In 1931, the regents of the University of California, acting by authority of a state law, issued a regulation providing that every able-bodied male student at the university's campuses under the age of twenty-four who was a citizen of the United States had to take six units of instruction in military science and tactics before his junior year. Albert Hamilton and others were members of the Methodist Episcopal Church, and their fathers were ministers of that denomination. They were conscientious objectors, believing that "war, training for war, and military training are immoral, wrong, and contrary to the letter and spirit of [Christ's] teaching and the precepts of the Christian religion."[3] They therefore refused to enroll in the university's required military science course and were consequently suspended, though they were told they might be readmitted anytime they would agree to learn how to fire a rifle and whatever else is taught in military science classes. They asked the Supreme Court of California for the equivalent of an injunction ordering their admission. Defeated there, they appealed to the U. S. Supreme Court.

Hamilton, it can be seen, features a condition in a program of governmental largesse that pressures individuals to surrender the constitutional right of free exercise of one's faith. What the state is telling these young men is that if they want it to subsidize their education, they had better waive that part of their religious principles that compels them to shun taking classes in the techniques of war. Nonetheless, a unanimous U. S. Supreme Court upheld the university's position that requiring a course in military science for all male students under twenty-four was constitutional even as applied to the conscientious objector plaintiffs here. The doctrine of rights-limiting conditions was not discussed as such, but it was clear that the Court did not consider this particular rights-limiting condition invalid. Justice Pierce Butler's opinion, after noting that the government owes its people a duty to protect them, pointed out that "every citizen owes the reciprocal duty, according to his capacity, to support and defend government against all enemies."[4] He concluded that "Plainly there is no ground for the contention that the regents' order, requiring able-bodied male students...as a condition of their enrollment to take the prescribed instruction in military science and tactics, transgresses any constitutional right asserted by these appellants."[5] Liberal justice Benjamin Cardozo, though he joined in Justice Butler's opinion, wrote a brief concurrence in which he worried that exempting young Hamilton and his friends might encourage future conscientious objectors to refuse to pay their taxes on the grounds that some of the monies would be used for defense.[6]

Shortly before the end of World War II, another conscientious objector case came before the Supreme Court, *In Re Summers* (1945).[7] If at the time there existed a host of scholars who tried to predict what the Court would do in a particular situation, some might have emphasized that the Court would realize that the "democracy" being fought for in the war includes the right to radically dissent from prevailing opinion, and thus concluded that the conscientious objector was likely to be the winner. Others might have felt that the Court would focus on the immense quantity of person-power that was being employed to win the conflict and so forecast that the victory would go to the government. As it was, the latter group would have been correct, but this time the decision was five to four rather than unanimous. Clyde Summers was a gentleman who had passed the Illinois Bar exam and wanted to be sworn in as a member of the bar of that state. To do so, he had to be approved by a Committee on Character and Fitness. That group refused to grant him the needed certificate on the ground that he was a conscientious objector to war. A letter from the committee's secretary told Mr. Summers that he had a perfect right to hold his anti-war philosophy but that "your position seems inconsistent with the

obligation of an attorney at law."[8] The Illinois Supreme Court sustained the committee's decision on the ground that Summers could not in good faith swear to defend the Illinois Constitution, which he had to do to get admitted, because he would not be willing to use force to guard the state no matter how unjustified the attack upon it. (Actually he was willing to take the oath if it did not require him to affirm that he would shoot back in case the state were invaded by a horde of barbarians from Wisconsin, Iowa, or Indiana.)

Justice Stanley Reed's majority opinion was lacking in any analysis of the serious constitutional issue involved; i.e., is the state's conditioning the award of a license to a person to practice his chosen profession on a renunciation of his religiously based opposition to war a violation of the Free Exercise Clause as applied to the states by the Due Process Clause of the Fourteenth Amendment. Reed pointed out that under the Illinois Constitution, men of Summers' age group, those between eighteen and forty-five years old, had to serve in the militia in time of war. The federal government's recognition of conscientious objector status is simply a matter of Congressional "grace,"[9] and prior decisions of the Supreme Court itself allowed the country to deny citizenship to an alien who refused to pledge to take up arms in its defense. End of an intellectually not-very-satisfying argument; at least Justice Butler in *Hamilton* had emphasized how important it was for everyone to come to the aid of the nation in times of peril.

Justice Hugo Black's dissent was joined by Justices William Douglas, Frank Murphy, and Wiley Rutledge. Though the rights-limiting conditions/classification doctrine was not explicitly mentioned, it was clearly in the back of Black's mind as he ran through a litany of reasons why this particular rights-limiting condition was, in his opinion, unconstitutional. It was generally admitted that Summers was "honest, moral and intelligent, has had a college and a law school education. He has been a law professor and fully measures up to the high standards of legal knowledge Illinois has set as a prerequisite to admission to practice law in that State."[10] (Considering the number of political hacks from the Chicago Democratic organization and downstate Republican machines who were already members of the Illinois Bar, Black must have been talking with tongue in cheek about the "high standards" then necessary for admission thereto.) As for that Illinois militia provision that the majority took so seriously, the state had not drafted anyone into that body since 1864! Moreover, the Illinois Constitution itself gives broad recognition to the right of conscientious objection. "Thus the probability that Illinois would ever call the petitioner to serve in a war has little more reality than an imaginary quality in mathematics."[11] In

other words, Justice Black and his colleagues believed that the rights-limiting condition imposed upon Mr. Summers was useless. It kept a talented man out of the field of law and did not, in the slightest, increase the ability of the state to defend itself against those who waged war against it.

Can Those Who Refuse to Work on Their Holy Day Be Denied Unemployment Compensation? *Sherbert* v. *Verner* and Its Progeny

The next pages will take a break from conscientious objectors and justices who believe that the defense of a state against a foreign enemy requires recalling its overweight lawyers from their offices and golf courses to man the battlefields. *Sherbert v. Verner* (1963)[12] is, together with *Speiser v. Randall* (1958),[13] the case where the Court invalidated California's denial of a veterans property tax exemption to one who refused to swear that he did not advocate the violent overthrow of the state and federal governments, the holding most frequently cited by the justices who believe that a particular rights-limiting condition/classification attached to government largesse is unconstitutional. It was employed, for example, by Justice William Brennan in his dissent in *Maher v. Roe* (1977)[14] where, as noted in Chapter 5, the majority upheld a Connecticut regulation denying Medicaid funding to women who desired abortions, and by Justice Sandra O'Connor in *Bowen v. Roy* (1986),[15] where, as will be seen, the issue was the question of whether a Native American who refused to provide his state's welfare department with his daughter's social security number could be removed from the public assistance rolls. Mrs. Adell Sherbert was a member of the "Sabbatarian" Seventh Day Adventist Church, a Christian faith whose holy day is Saturday rather than Sunday, and whose adherents thus are not supposed to labor on the former. She lived in the area of Spartanburg, South Carolina, a city whose main industry in the early 1960s was textile mills. When the workweek at these enterprises was lengthened to six days, she told her employer that her religious principles prevented her from punching the clock on Saturdays. He then fired her, and she applied for unemployment compensation benefits. The state's unemployment compensation agency, the South Carolina Employment Security Commission, turned down her request because she had failed, without good cause, to accept suitable work; the state's unemployment compensation law denied benefits to any worker who rejected a suitable position. The reason she was unable to find a job that, in her opinion, fit her needs was that most jobs in the region were mill positions, and just about all mill workers had to come in on Saturdays. She was willing to go back to the mills, but there was none in the area that would exempt her from Saturday employment.

Sherbert v. Verner held 7–2 that South Carolina had deprived Ms. Sherbert of her right to practice her religion freely. Justice Brennan wrote the majority opinion for himself and five colleagues. He had no trouble finding that her disqualification burdened the free exercise of her faith, even though the state was not jailing her for her acceptance of Seventh Day Adventist doctrine or for refusing to work six days a week. He emphasized that the cause of her ineligibility was not laziness but her insistence on following the tenets of her religion. Moreover, the ruling that she was not entitled to unemployment assistance put her under great pressure to violate her religious beliefs—it placed her in the dilemma of working on her holy day on the one hand, or possibly undergoing severe economic deprivation on the other.[16]

South Carolina argued among other things that conditioning the award on her willingness to labor on Saturdays was constitutional because unemployment compensation is not a right but a privilege. Brennan's retort is a classic statement of the doctrine of rights-limiting conditions/classifications. "It is too late in the day to doubt that the liberties of religion and expression may be [unconstitutionally] infringed by the denial of or placing of conditions upon a benefit or privilege."[17] That is, government largesse cannot be granted with qualifications that unnecessarily or too severely deprive men and women of fundamental rights. One of the cases cited was *Speiser v. Randall,* where

> we emphasized that conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms...While the State was surely under no obligation to afford such an exemption, we held that the imposition of such a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of First Amendment rights...and thereby threatened to 'produce a result which the State could not command directly.'[18]

Another holding Justice Brennan relied on was *Hannegan v. Esquire* (1946),[19] where, it will be remembered, the Court not only refused to find that the postmaster general had statutory justification for refusing valuable second-class mailing privileges to a magazine that contained racy but not obscene pictures and cartoons, but also strongly hinted that the denial of these privileges for this reason would have violated the First Amendment. Much more surprising was Brennan's invocation of *American Communications Association v. Douds* (1950),[20] where, as seen in Chapter 2, the Court did permit a government boon to be accompanied by a limitation of First Amendment rights—that case, it will be remembered, approved the denial of invaluable National Labor Relations Board succor to labor unions whose officers refused to swear loyalty oaths. In any event,

whatever the appropriateness of the precedents he called to his aid, he made it clear that denying unemployment compensation to Mrs. Sherbert, because she had been unwilling to ignore a major tenet of her religion, deprived her of her rights under the Free Exercise Clause.[21]

Of course, not every restriction of freedom of religion is invalid. Mormons could be stopped from practicing polygamy even when their religion required that they do so if circumstances permitted (*Reynolds v. United States* [1878]),[22] and very young Jehovah's Witness children could be prevented under child labor laws from selling newspapers on the streets or in other public places (*Prince v. Massachusetts* [1944]).[23] As Brennan correctly put the issue in *Sherbert,* limitations on free exercise may be upheld when they serve a "compelling state interest."[24] (This is often referred to as a "compelling governmental interest.") But, he said, limiting Mrs. Sherbert's religious liberty would serve no such interest. South Carolina did not even bother to claim here that its rule resulting in the ineligibility of Sabbatarians for unemployment compensation was instituted to prevent indolent people who would rather live from the government trough than work for their supper from filing phony claims saying that their religion prevented them from laboring on Saturdays.

Justice Potter Stewart wrote an opinion concurring in the result. He felt that the decision ran counter to cases such as *School District of Abington Township v. Schempp* (1963),[25] where the Court declared that saying prayers or reading the Bible in public schools violated the Establishment Clause. He pointed out that as a consequence of the majority opinion, religious grounds for not working were being preferred to non-religious motives, which might be just as valid, e.g., the inability of the mother to get a babysitter on Saturdays.[26] Nonetheless he supported Mrs. Sherbert's claim because he felt that holdings such as *Schempp* were wrong. Justice John Marshall Harlan, joined by Justice Byron White, dissented. He declared that compelling South Carolina to carve out an exception to ineligibility for unemployment benefits for those whose refusal to work on Saturday was based on religious rather than secular grounds did run afoul of the Establishment Clause.

There is one interesting distinction between the situation of Mrs. Sherbert and the parties in the three other unemployment benefit cases to be discussed below, on the one hand, and that of most of the private individuals or institutions involved in the other rights-limiting conditions cases so far analyzed, on the other. This is that her need for governmental assistance was caused by her invocation of her fundamental rights. In most of the other instances this book has considered, it was not the use of the right but other factors that made the individual or group that exercised it

or intended to utilize it desire, hope for, or require governmental assistance. It was federal law applicable to all broadcasters, not its airing of George Carlin's seven indecent words, that made radio station WBAI dependent on the FCC for its license. It was Mr. Speiser's service in the armed forces, not any advocacy of violent overthrow, that led him to expect the veterans property tax exemption. The Brooklyn Museum exhibit featuring *The Holy Virgin Mary* that so irritated Mayor Rudolph Giuliani was privately funded and thus was not the factor that compelled the museum to rely on a certain quantum of annual city aid. Had Mrs. Sherbert, however, stayed with her job, even though her employer now demanded that she work on Saturdays, she would have continued to receive a living wage. So it was her insistence on adhering to the tenets of her faith that got her into financial trouble and pushed her to seek state aid. The Court could have considered this matter, albeit they should not have permitted it to tilt the scales against her.

In the light of *Sherbert,* the result in *Thomas v. Review Board of Indiana Employment Security* (1981)[27] was a foregone conclusion. Mr. Eddie Thomas was a Jehovah's Witness and a conscientious objector to war. Like Mrs. Sherbert, he was a hard worker. He had for several years toiled away in Indiana's Blaw-Knox Foundry and Machinery Company helping make sheet steel for a variety of uses. Alas, his division closed and he was transferred to a department fabricating turrets for the army's tanks. As a conscientious objector, he could not reconcile his religious principles with continuing his employment in that division. Thus he perused the company's bulletin board to see whether any of the firm's other branches had room for him. To his dismay, he found that they were all engaged in war production; therefore, he quit his job even though one co-worker, who was a Witness, declared that there was nothing in that group's beliefs that prohibited its adherents from engaging in defense work. After he left his position he was denied unemployment compensation benefits on the grounds that his departure was not based on the "good cause" that the relevant Indiana statute required as a precondition for eligibility. He appealed, won in the intermediate Indiana appellate court, but lost in the state's Supreme Court on the ground that his choice was not religious but simply the product of his personal philosophy.

Chief Justice Warren Burger's 8–1 opinion held for Thomas. He emphasized how important the Free Exercise Clause is in the American scheme of things. He rejected the Indiana Supreme Court's position that Mr. Thomas had invoked a personal philosophy rather than religion as the reason for his leaving Blaw-Knox. The chief justice pointed out correctly that one who takes an action based on what he or she claims is a religious posi-

tion cannot be said to have acted on a secular rather than a religious ground simply because he or she, like Mr. Thomas, is unable to clearly articulate his/her position or is "struggling" with his/her beliefs. Nor is the fact that some Jehovah's Witnesses would accept war work relevant. It does not follow from this that Mr. Thomas's rejection of such employment was not religiously motivated; members of the same faith often differ about what their creed demands. The chief justice not only followed *Sherbert,* but articulated well the rights-limiting conditions/classifications thesis. The benefit requested here cannot be qualified by a requirement that a recipient waive a fundamental right in order to receive it or denied because he/she has already exercised such a right.

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is substantial.[28]

The burden might be justified if it furthered a compelling state interest, but, as in *Sherbert,* no such interest was present. There was no evidence, for example, that the solvency of Indiana's unemployment compensation scheme was being threatened by a vast horde of people leaving their jobs for religious reasons. Moreover, there was no showing that employers such as Blaw-Knox would be compelled to inquire in detail into their staffers' religious views were Mr. Thomas to get his award.

Justice Rehnquist was the solitary dissenter. One would expect that there would be a forecast in his opinion of the great suspicion Chapter 5 saw him manifesting toward the whole rights-limiting conditions/classifications doctrine in the family-planning clinic funding case of *Rust v. Sullivan* (1991).[29] But there was not much in his *Thomas* dissent that was a harbinger of that attitude. Instead he felt that the burden on Thomas's free exercise was only indirect and that the purpose of the statute was a secular one. Moreover, those who enacted the unemployment compensation law certainly did not intend to deprive anyone of his/her freedom of religion. Therefore, though Indiana could grant unemployment benefits to those who left work for religious reasons, it was not constitutionally compelled to do so.

Actually, a point in the Rehnquist dissent was the same as one found in the Stewart concurrence in *Sherbert* and in the Harlan dissent there. That is, as a result of the majority holdings in these decisions, Mr. Thomas and Mrs. Sherbert are getting more favorable treatment than people whose departure from their employment is not due to their religious beliefs but

to secular ideals.[30] These pages will ignore the Establishment Clause problem this poses, since that is not relevant to the subject matter of this book. However, there is still one corollary of this point that none of these relatively conservative gentlemen would have been pleased to draw. In fact, it is likely that no Supreme Court justice would be willing to evoke it. Suppose *Thomas* is correct and assume, further, that Ms. Jones, an agnostic, leaves the same job that Mr. Thomas held because as a student of global history she believes and declares that military spending threatens world peace. Is not the holding and the articulation of a philosophy protected by the Free Speech and Press clauses of the First Amendment? Are these clauses not as important as the Free Exercise Clause? And, if they are, when one leaves a job for philosophical reasons as opposed to simple anger at his/her supervisor or simply because he/she is just fed up with working, ought not he/she as well as Mr. Thomas and Mrs. Sherbert be deemed to have a constitutional right not to be deprived of unemployment assistance? To put this in another way, is not denying one such benefit because he/she has put into practice a secular philosophy as constrictive of fundamental rights as denying them to one because he/she has followed the tenets of his/her religious faith? If this method of limiting Thomas's and Sherbert's fundamental rights is invalid, should it not also be invalid when used as a way of limiting Ms. Jones's?

That the majority of the Court would be unwilling to consider this question appears in the worshipful approach to the Free Exercise clause of yet another of *Sherbert*'s children, *Frazee v. Illinois Department of Employment Security* (1989).[31] Here the individual appealing from the denial of his application for unemployment compensation, William Frazee, turned down a temporary job because he would be required to work on Sunday, his holy day. The Court correctly could find no real difference between these facts and those presented in *Sherbert v. Verner*. If one has to be granted unemployment compensation when he/she is unwilling to labor on the day of the week most sacred to him/her, it is irrelevant whether that day is Saturday, Sunday, Friday (the Muslim holy day), or even, say, Monday, which for all one knows is sacrosanct to worshippers of some moon-goddess. Perhaps the only real surprise of the case, which resulted in a victory for the applicant, is that it was written by Justice White, who had dissented in *Sherbert*. The only other difference between this case and *Sherbert* was that Mr. Frazee did not belong to a particular sect: he was neither a Seventh Day Adventist, nor a Jehovah's Witness, nor a Mormon, nor a Roman Catholic, nor an Episcopalian, nor a Methodist, nor a Baptist. But this fact rightly was deemed unimportant. What was crucial is that the refusal of the benefit burdened a sincere religious belief; Mr. Frazee genuinely felt

himself to be a true Christian and thought, moreover, that no real Christian could work on a Sunday. "Undoubtedly, membership in an organized religious denomination, especially one with a specific tenet forbidding members to work on Sunday, would simplify the problem of identifying sincerely held religious beliefs, but we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."[32] Of course, direct and indirect burdens on religion can be sustained if they satisfy a compelling governmental interest, but Illinois proffered none such here except that one of its courts made the incredible argument that the American way of life would collapse if people could get out of working Sundays thanks to unemployment compensation accorded people who balked at toiling on that day because it was sacred to them. That way of life, in the opinion of that particular tribunal, includes Sunday shopping and watching professional athletics. White, the only Supreme Court justice ever to have played professional football, found ridiculous the thesis that "there will be a mass movement away from Sunday employ if William Frazee succeeds in his claim."[33]

White is absolutely on target in his thesis that preferring members of religious sects to religious people who have not joined a church in allocating government largesse would be a gross violation of the Free Exercise Clause. But, again, why should it be only those with religious doctrines who can avoid work that violates their creed and still get government assistance to tide them over the rough times? It is unquestionable, as he notes, that the Free Exercise Clause protects only religious beliefs[34]; that statement is true by definition (if we add to this that it safeguards attacks on religion as well). But why give this part of the First Amendment preferred treatment over its speech and press clauses? Suppose Mr. Frazee had declared that he was unwilling to work more than five days in a week because he believed on philosophical grounds that human well-being depends on having adequate time for rest, and that he was denied unemployment benefits because he refused to accept a six-day-per-week job tendered him by the Illinois Department of Employment Security. Why, looking at the matter logically, does not his right to free speech and press entitle him to the government checks even though his is now a "secular conviction," as White labels this sort of viewpoint?[35]

The final, though chronologically not the most recent, unemployment benefits case these pages will analyze is *Hobbie v. Unemployment Appeals Commission of Florida* (1987).[36] The only way this dispute differed from the *Sherbert-Thomas-Frazee* trio was that the applicant here denied her unemployment compensation had adopted the religion whose tenets triggered her leaving her job *after* she had begun working in a jewelry store.

Two and one-half years after she started in that emporium, she told her supervisor that she had just converted to Seventh Day Adventism and could no longer work Saturdays. Shortly afterward, the company fired her. The state Department of Labor and Employment Security refused to grant her benefits because, in its view, she had been discharged through misconduct at work. Justice Brennan's majority opinion declared, correctly, that there is no real difference between this case, *Sherbert,* and *Thomas.* Florida had argued that she was more the agent of her loss of work than were Mrs. Sherbert and Mr. Thomas, as she had turned to the faith that prevented her from working on a certain day after she had entered the gem merchant's employ. Justice Brennan laconically and accurately replied that the Free Exercise Clause protects the convert as well as the longtime believer. More important for present purposes is that he quoted at length Chief Justice Burger's assertion in *Thomas* to the effect that the state may not disqualify one from receiving an important benefit because he/she has refused to take a step barred by his/her religious faith. Brennan in fact went so far as to italicize the words in that assertion averring that these disqualifications are unconstitutional where the polity "denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs."[37] As in the other unemployment compensation case, no compelling governmental interest could be found to justify the burden Florida had placed on Ms. Hobbie's exercise of her religion.

One may wonder why there is any language in any of the *Sherbert* quartet of cases about rights-limiting *conditions.* The states involved were not saying to the hopeful recipients of unemployment assistance that "we'll give you the aid on condition that you work on your holy day or on military projects your faith declares to be immoral." In fact, had Mrs. Sherbert, Mr. Thomas, Mr. Frazee, or Ms. Hobbie done what the state wanted, i.e., returned to work despite their religious feelings, they would not have received a red cent from the polity under its unemployment scheme, because then they would have been gainfully employed and ineligible for that reason![38] What we have in all these cases are rules and regulations that created rights-limiting (and, in the eyes of the Court, unconstitutional) *classifications* rather than conditions. They erected, moreover, the second sort of rights-limiting classifications described in Chapter 1. That is, they denied aid to people threatened with poverty and exercising a fundamental right without promising them governmental aid if they stopped exercising the right, but granted the same type of assistance to other potentially poor individuals. If the reader will glance again at the previous paragraph and reread Burger's words that Brennan italicized in *Hobbie,* he/she will

see that the Court may have been aware that it was not dealing with rights-limiting *conditions* in these cases, since the italicized material does not include the word "condition." However, the justices did not bother to give any other label to the rights-limiting provisions in the quartet of cases that negated the grant of unemployment benefits; with all due respect, it would have been helpful if they had referred to them as "classifications" or a similar term.

Tax Breaks for Racist Educational Institutions? The *Bob Jones University* Case

Sherbert and its offspring treat religious belief as something sacred in itself. In a free society it ought to be seen this way, and the Free Exercise Clause is the written realization of this desideratum. But, again, it is not the only item of great value in American society, and so on the odd occasion it must be restricted so that other goals can flourish. Thus in *Bob Jones University v. United States* (1983),[39] the same Chief Justice Burger who had successfully insisted that Jehovah's Witness Eddie Thomas get unemployment compensation thwarted attempts by two institutions to obtain a significant boon from the federal government.

These institutions were Bob Jones University in Greenville, South Carolina, and Goldsboro Christian Schools, a kindergarten through twelfth grade institution located in the North Carolina town of that name. What both these schools desired was agreement from the United States Internal Revenue Service (IRS) that they were entitled to tax-exempt status. As will be remembered from Chapter 2's *National Alliance v. United States* (1983),[40] the main advantage of a non-profit organization's being accorded this status is that potential donors can deduct their contributions to it from their own taxes. Certainly one of the main incentives to charitable giving in the United States is that gifts to educational, religious, healthcare, and other eleemosynary organizations are deductible for federal and (usually) state income tax purposes—the revenue laws thus ensure that one does well by doing good.

Both Bob Jones University and Goldsboro Christian Schools were denied the coveted tax-exempt designation. The IRS took this step because they discriminated against blacks. Bob Jones did accept a few blacks, but prohibited its students, both black and white, from interracial dating. Students who violated this ukase or even advocated interracial dating were subject to expulsion. Bob Jones was more "tolerant," however, than Goldsboro Christian Schools, which refused to admit blacks except for a handful of children from racially mixed marriages. Both institutions adopted racially discriminatory policies because of their peculiar interpretations

of the Christian faith. Bob Jones's administration believed that the Bible forbids interracial mixing. Goldsboro's leaders claimed that there are three races in the world: whites other than Jews, who descended from Noah's son Japheth; Jews, who descended from his son Shem; and Orientals and Negroes, who descended from his son Ham. They declared that God Himself banned racial or cultural mingling of these three groups.

Bob Jones and Goldsboro argued, among other things, that their rights under the Free Exercise Clause were infringed by the IRS ruling. Burger pointed out that while government cannot regulate religious *belief,* it may on occasion regulate *conduct* that springs from a religious credo. Various decisions, though none that this chapter has considered, were cited for the proposition that burdens on religious liberty are permissible when necessary to achieve a "compelling" or "overriding" governmental interest. Here that interest was easy to ascertain—the elimination of racial discrimination in both public and private education.[41] Earlier in the opinion the chief justice had described many laws of Congress and presidential executive orders that sought to eradicate from American life the stain of enforced racial separation in schools and other institutions, which rules taken together are clear evidence that ending racial bias in education is one of the most important goals sought after by the American political system.[42] It is, he concluded, so crucial an objective that it can be allowed to override Bob Jones's and Goldsboro's claims that their Free Exercise rights had been severely burdened. Therefore, the denial of tax-exempt status to these educational institutions was permitted to stand.

There was no specific consideration in *Bob Jones University* of the "rights-limiting conditions/classifications" doctrine. Of course, the lawyers for the schools could have made an argument to this effect here. There is no doubt that tax-exempt status is a major benefit that governments can accord non-profit institutions. As seen, such cases as *Speiser v. Randall* and *Sherbert v. Verner* declare that though government is under no obligation to enact any particular scheme of largesse, once it does so it often cannot condition it upon the recipients' surrender of their fundamental freedoms. Thus, Bob Jones and Goldsboro could have contended that the government could not condition their tax exemption on their renunciation of their religiously based belief in maintaining racial segregation. There is little doubt, however, that this argument would have been a waste of time. As *Sherbert* made clear, even indirect burdens on religious liberty are valid when they further a compelling governmental interest, as the indirect burden clearly did here.

Given the evils that racism, both in and outside the educational system, has brought and continues to bring to American life, there is little doubt

that *Bob Jones University* was correctly decided. Yet it poses some intriguing questions for those interested in the extent to which governmental assistance can be used as a tool to restrict religious freedom in order to achieve other goals that many regard as important. Despite the Establishment Clause, schools and colleges operated by many religious groups receive a good deal of federal, state and local assistance. It is constitutional, for example, for the polity to fund the transportation of students to and from parochial schools, to lend such schools textbooks free of charge, to reimburse them for the expenses they incur in state-mandated testing of students, and to have public school teachers provide remedial classes on parochial school premises for those of their students that need these. In 2002 the Supreme Court legitimated the system under which children living in areas served by failing public schools are given vouchers by their city to enable them to attend a school operated by a religious institution.[43]

Let us assume that these and other forms of public assistance to educational institutions operated by religious groups do not contravene the Establishment Clause. Suppose, however, that some of these academies operate under policies that the administrators of the schools believe are demanded by their particular faith, but which seem to many outsiders detrimental to the public welfare. To what extent may the flow of tax monies to the schools and universities be conditioned on their agreeing to dispense with these practices? Many although not all Americans believe, for example, that gender discrimination in education is almost as deleterious as race discrimination. Some Christian, Orthodox Jewish, and Muslim schools are single sex; that is, they discriminate in their admissions policy against either women or men and argue that their religion mandates or at least favors this type of segregation. Can the federal government when supplying them with, e.g., free textbooks, tell them that if they want to get this aid they have to admit students of both sexes? If the ending of gender discrimination is a compelling governmental interest, does not the logic of *Bob Jones University* require the courts to sustain any attempt by a government to condition its aid to parochial schools on their becoming co-ed?

Similarly, one could argue that there is a compelling governmental interest not only in encouraging different racial groups to mingle, but also in facilitating socializing among members of different religious faiths. Some feel religious schools are divisive, preventing interaction among young people of different beliefs. Would it not be constitutional in the light of *Bob Jones University* to use government assistance as a lever to compel or entice them to open their doors more widely? (To be fair, a considerable number of Catholic schools, especially those located in minority areas, accept many non-Catholics even now.) In various communities students from schools

maintained by different denominations meet for a few days a year to exchange ideas. Could federal funding be used as a lever to encourage more gatherings of this sort? Or suppose the classes of a school operated by a religious group preach religious hatred—their mullahs, rabbis, or priests saying that their students are under a religious duty to engage in a jihad, expel the Arabs from all of Palestine, or go on a crusade. Is there not a compelling governmental interest in ensuring that impressionable students are not exposed to this sort of tripe? Thus, should not the state be able to tell these establishments that if they want to continue getting their state funding, they had better muzzle their teachers when they seek to foment religious wars in the guise of instructing their charges in the doctrines of their faith?

Government Largesse and Native American Religions: *Bowen v. Roy*

In *Thomas v. Review Board* Chief Justice Burger uttered a dictum to the effect that "One can...imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause."[44] When the newspapers reported that the Supreme Court had agreed to hear *Bowen v. Roy* (1986),[45] some observers probably thought that the plaintiffs might lose simply because their beliefs would seem outlandish to most Americans. However, the First Amendment protects all creeds, even those that appear weird to the average person.

Stephen Roy was a Native American descended from the Abenaki tribe. The religious views of this group declare that control over one's life is essential and that technology is robbing human beings of their spirit. Unfortunately, the couple earned little money for themselves and their two-year-old daughter, Little Bird of the Snow. So they applied to the Pennsylvania Department of Public Welfare for food stamp, Medicaid, and Aid to Families with Dependent Children (AFDC) benefits for the three of them. They received these for a time, but then the department expelled them from the welfare and Medicaid rolls and attempted to reduce the amount the family was getting in food stamps. The reason for this step was that federal law required that participants in the AFDC and food stamp schemes furnish their state welfare department with their social security numbers. Mr. Roy, on religious grounds, refused even to apply for one for his daughter, stating that he believed that its use as an identifier would rob her of her spirit. Because of the aid cut-off, he sued the secretary of the Pennsylvania Welfare Department and the U.S. Secretary of Health and Human Services asking that his family be restored to the AFDC and Medicaid lists, and that its food stamp allotment not be reduced. To frame

his contention in rights-limiting-condition parlance, he asked that the federal District Court declare that the condition imposed on his getting these types of aid to the effect that he give the Pennsylvania Welfare Department his child's social security number, violated his rights under the Free Exercise Clause.

During the trial a complicating factor arose; it was discovered that Little Bird of the Snow *had* been assigned a social security number at the time of her birth. Therefore, Mr. Roy asked the court to order not only that the family's full benefits be restored without his having to give the state that number, but also that the government be enjoined from using it in any way, including giving it to any agency or private individual. The District Court went along with both of these requests, and Dr. Otis Bowen, then the secretary of the U.S. Department of Health and Human Services, appealed this holding to the Supreme Court.

Bowen v. Roy is another of these cases where it is extremely hard to discover exactly what the Supreme Court decided. Chief Justice Burger wrote an opinion that was supported by a majority on one point, but only by Justices Powell and Rehnquist on the second. All the justices (except White, who did not even comment on the matter in his brief dissent) declared that the part of the District Court's order commanding that the government could not use Little Bird of the Snow's social security number in any way whatsoever had to be overturned. They asserted that that portion of the decree told the government how to conduct its own internal affairs. The Free Exercise Clause protects individuals from pressure and compulsion, but it cannot be used as a device to force the government to adopt certain internal procedures. "Roy may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets."[46] It is what happened to the other portion of the decree, that requiring the government to restore full benefits even though Mr. Roy refused to furnish the state Welfare Department with Little Bird of the Snow's social security number, that is of more importance to us and not easy to ascertain.

In fact it too was reversed and the case was remanded for a new trial. However, the Court did *not* declare that conditioning the AFDC and other aid on providing the social security number was a constitutional limitation on the family's religious beliefs and practices. Burger with Rehnquist and Powell thought that it was, but they were the only three to adopt this position. Justices Blackmun and Stevens agreed that the "restore full benefits" aspect of the order should be overturned, but their reasons for adopting this position were technical and did not include any assertion by either

that the government's restriction on Mr. Roy's religious liberty was proper.

Justice Sandra Day O'Connor, joined by Justices Brennan and Thurgood Marshall, dissented from the reversal of that part of the order. She believed that the government's refusal to provide assistance to Mr. Roy and his family because of his failure to provide the number for religious reasons was a violation of the Free Exercise Clause. She quoted the chief justice's language in *Thomas* to the effect that the state's conditioning the receipt of an important benefit on conduct proscribed by a religious belief does severely burden religion.[47] This burden is legitimate only if it serves an overriding governmental interest, which is lacking here. The government had argued that its obtaining the social security number was necessary to prevent welfare cheating. However, she felt that granting Mr. Roy the prerogative of not handing over to the Welfare Department Little Bird's social security number would not encourage fraud. She concluded by quoting language from *Sherbert v. Verner* among other cases to the effect that "'It is too late in the day to doubt that the liberties of religion and expression may be [unconstitutionally] infringed by the denial of or placing of conditions upon a benefit or privilege.'"[48]

White would let Mr. Roy and family have their benefits despite his stubbornness because he believed that *Sherbert* and *Thomas* controlled here.[49] Blackmun, though he voted for technical reasons to overturn the "restore full benefits" order, nonetheless made it perfectly clear that he agreed that demanding that Mr. Roy give the number to the state was unconstitutional.[50] Stevens refused to take a position on this matter one way or the other. The upshot of the head count is that there are five justices (O'Connor, White, Blackmun, Brennan, and Marshall) agreeing that the government could not condition the Roy family's AFDC and other benefits on a surrender of Mr. Roy's religiously based unwillingness to inform the state Welfare Department of Little Bird of the Snow's social security number, and only three declaring that this restriction on his freedom of religion was valid. One thesis of the case is, therefore, that this condition was illegitimate.

Burger's opinion on this particular point can thus be called a dissent though it is not labeled as such. It is a surprise indeed to read the author of *Thomas,* with its strong affirmation of the notion that conditioning receipt of public monies on conduct proscribed by one's religious belief is valid only if the condition serves a compelling governmental interest, seemingly tossing out the doctrine of rights-limiting conditions/classifications in his *Bowen v. Roy* opinion. While O'Connor in this case almost literally throws his *Thomas* quote in his face,[51] the chief justice contends that cases such as *Hamilton v. Regents of University of California* "have often recit-

ed the fact that a mere denial of a governmental benefit by a uniformly applicable statute does not constitute infringement of religious liberty."[52] To the Burger of *Bowen v. Roy,* most conditions on or classifications in government grants that require the recipient to contravene the tenets of his or her faith or penalize him for not doing so are valid, which is about 165 degrees removed from the Burger of *Thomas.* All that is needed to legitimate such a condition or classification, as opposed to a law criminalizing the exercise of one's religious faith, is that it is a "reasonable means of promoting a legitimate public interest,"[53] which is less than a compelling governmental interest. He had no trouble unearthing such an interest—the need to combat welfare fraud, especially the receipt of duplicate benefits.[54] It is not, of course, that Justice O'Connor thinks that in the abstract stopping welfare fraud is an unimportant goal; the reason she believes the condition here does not serve a "compelling governmental interest" is that it will, at least as applied to Mr. Roy, not be of much use in putting paid to this evil.

A Throwback to *Summers*

Johnson v. Robison (1974)[55] is the only Supreme Court case since *in Re Summers* where that body legitimated a proviso in a governmental largesse measure that discriminated against an unpopular religious viewpoint though no great need for that proviso could be conjured up. Upheld 8–1 was a federal law of 1966 granting veterans educational benefits to those who had served in the armed forces, but not to conscientious objectors who had satisfactorily completed alternative civilian service (in this case, at Peter Bent Brigham Hospital in Boston). The author of this opinion was, surprisingly, the Justice Brennan who had penned *Sherbert v. Verner.* He based his result on the theory that draftees' freedoms were more limited than those of conscientious objectors, that they would have more difficulty adjusting to civilian life, and that the denial of veterans educational benefits to conscientious objectors did not create great economic hardship. These reasons are not very satisfactory; it is possible, for example, that many conscientious objectors cannot afford college on their own whereas army veterans from middle-class families can. The outcome, from which Justice Douglas was the one dissenter, is best explained by the Court's desire to avoid the political storm that might have been unleashed by a holding that conscientious objectors were constitutionally entitled to educational assistance if veterans were accorded this boon.

The "Public Forum" Doctrine

The final quartet of cases in this chapter arose from occasions when government assistance was accorded to many groups but not religious ones, thus creating a rights-limiting classification. In one of these situations the boon

was funding; in the remainder, it was the use gratis or at low cost of public property such as school classrooms for meetings. This is the type of assistance, it will be remembered from Chapter 2, that the San Diego branch of the American Civil Liberties Union sought and was eventually granted by the Supreme Court of California in *Danskin v. San Diego Unified School District* (1946).[56] The rights-limiting classification in all four cases was of the sort where the polity refused to help a particular type of group (e.g., a student religious club) exercise a fundamental right while giving assistance to similar organizations (e.g., a student political club).

These decisions cannot, however, be understood without presenting a set of distinctions which in one form or another is articulated by the courts when individuals desire to use a publicly owned facility and are turned down. This set of distinctions is known to scholars as the "public forum" doctrine, and is thoroughly discussed in a law review article by Steven Gey and in the Supreme Court's holding in *Perry Education Association v. Perry Local Educators' Association* (1983).[57] The dispute that was the centerpiece of *Perry Education Association* arose when the Metropolitan School District of Perry Township, Indiana, entered into a collective bargaining agreement with Perry Education Association, the union with the exclusive right to represent the teachers of the district. A minor clause in the agreement, but the one that led to the lawsuit here, provided that no other union except Perry Education Association would have access to the teachers' mailboxes in the district's schools. Perry Local Educators' Association, a rival union, brought suit challenging this arrangement as violating the freedom of speech and press guaranteed by the First Amendment. For present purposes, it is the scheme developed by Justice White in his 5–4 majority opinion describing various categories of publicly owned property that is crucial.

In the first place, there are places that traditionally have been devoted to assembly and debate. He quoted[58] the famous statement of Justice Owen Roberts in *Hague v. CIO* (1939) that these include streets and parks that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."(Frank Hague was an iron-fisted mayor of Jersey City who had barred the labor federation known as the Congress of Industrial Organizations from distributing materials to discuss the National Labor Relations Act. The Court overturned this ban, though there was no majority opinion.) Locales such as these, according to White, are "traditional public forums," and to enforce "content" or "viewpoint"-based limitations on speech here the state must show that the legislation or regulation "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[59] In

Chapter 3 on the electronic media, it may be recalled, "content" discrimination was defined as one burdening a certain *type* of speech while "viewpoint" discrimination did not proscribe a certain type of speech entirely but banned *some* speech of that type. Allowing no groups to use a public school classroom to pray is "content" discrimination, allowing all religions except Muslims to use it for this purpose is "viewpoint" discrimination. It was also mentioned in that chapter that the Court sometimes has difficulty separating the two[60]; and that it is highly suspicious of both, viewpoint even more than content discrimination. (White's comments relating to the presumption against limiting speech in traditional public fora actually used only the phrase "content discrimination," though there is absolutely no doubt that he meant that viewpoint limitations covering speech in such locales should be subjected to the "compelling state (governmental) interest" test as well.) It is interesting to see how far White's "public forum" philosophy is from Judge Holmes's in Chapter 1's *Commonwealth v. Davis* (1895),[61] where the Massachusetts Supreme Judicial Court upheld the conviction of a preacher for speaking in Boston Common without a permit on the grounds that because the city could shut the park completely, it could set any condition it desired on its use by the public.

The second type of publicly owned property White refers to is of the sort not traditionally reserved for speech, but which the polity has designated as open to the public for this purpose. Examples he gives are university meeting facilities and municipal theaters. Though government can close areas of this "designated public forum" type, as long as they remain open, content or viewpoint discrimination is permissible there only under a showing of "compelling governmental interest." The reader should note that this compelling governmental interest rule governs both "designated" and "traditional" public fora.

The final type of publicly-owned property that is sometimes open for speech is what White terms a "non-public" forum.[62] Here limitations on speech are valid, even though not serving a compelling governmental interest, "as long as the regulation...is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[63] The non-public forum is property that the governmental agency uses primarily for internal purposes, such as employees' mailboxes. (White did not explicitly make the point, but even viewpoint discrimination with respect to the use of this sort of property would certainly be valid if it served a compelling governmental interest.) To make a long story short, White felt that the Perry Local Educators' Association's literature was being kept out of these mailboxes not because the school district disagreed with its ideology, but simply because it, unlike the recognized union, had no official

responsibilities in connection with the district's public schools. Though the Holmes of *Commonwealth v. Davis* would have disagreed with White's "traditional" and "designated" public forum theses, he would certainly have applauded the *Perry Education Association* result, which will be further analyzed in the next chapter.

Religious Groups Denied Space by Public Educational Institutions: *Widmar v. Vincent* and Its Progeny

Widmar v. Vincent (1981)[64] is the first chronologically in our group of cases where religious groups were refused the use of public facilities or made ineligible for a program of public funding while others were accorded this assistance. The case arose when the University of Missouri at Kansas City, a state university, denied a religious group known as Cornerstone the right to meet on university premises. All other types of student organizations (e.g., political, ethnic) were allowed to assemble in the university's classrooms. The reason for the exclusion was not a desire to persecute religion but a fear that granting Cornerstone and other religious clubs free space for their gatherings would be a violation of the First Amendment's Establishment Clause. Justice Powell speaking for the majority found that the university had created what White a few years later in *Perry Education Association* would call a "designated" public forum, though Powell did not use the adjective "designated." Though a state is under no obligation to create a forum such as this, once it does so it may not impose a content-based ban such as it did here unless the limitation serves a compelling state interest and is narrowly drawn to achieve that goal. The university argued that denying Cornerstone the use of its meeting rooms served the compelling public interest of maintaining the separation of church and state that is mandated by the Establishment Clause. However, the Court felt that opening up university rooms for Cornerstone's functions would not violate that clause because, first, no one would believe under the circumstances that the state was giving its approval to religion in general or to one faith in particular. Second, the university's allowing Cornerstone and similar religious clubs to gather in its buildings would not have the "primary effect" of advancing religion, because so many secular groups, over one hundred in fact, had been given similar approvals. Thus, Cornerstone's rights under both the Free Speech and Free Exercise Clauses were unconstitutionally abrogated by the university's content-based discrimination.

Justice Stevens concurred in the judgment. He was unhappy with Powell's use of the "public forum" and "compelling state interest" doctrines. He felt that it is primarily up to educators to decide what uses should be made of the limited time and space available to them. Nonetheless when

the college's decision is based on viewpoint discrimination, it must have a valid reason for doing so, which was not present here. It is interesting to note with Professor Nicole Casarez[65] that he termed the university's action here "viewpoint" rather than "content" discrimination. He did so because he felt that it would have permitted an agnostic society to use its classroom and so it had discriminated against views that adopted a religious approach to the problems of human behavior and the mysteries of human existence.

Given *Widmar v. Vincent,* the decision in *Lamb's Chapel v. Center Moriches Union Free School District* (1993)[66] was highly predictable. Though it was under no legal obligation to do so, Center Moriches School District in Long Island, New York, opened up its buildings after school hours for social, civic, and recreational purposes. Lamb's Chapel, an evangelical Protestant Church in Center Moriches, asked the district if it could use a school auditorium to show a six-part film series on child raising and family life. The films discussed these problems from what the chapel called a "Christian" perspective. They emphasized that young people should be brought up in line with traditional Christian values and that they should be exposed to these at an early age. Fearing that allowing the presentation of this religious perspective would violate the Establishment Clause, the district denied the request. Both the Federal District Court for the Eastern District of New York, the one that was to find unconstitutional Mayor Giuliani's refusal to continue funding the Brooklyn Museum because of its display of *The Holy Virgin Mary,* and the U. S. Court of Appeals for the Second Circuit backed the school district.

The Supreme Court, in an opinion written by Justice White, reversed the Court of Appeals and held that the exclusion of the Lamb's Chapel program was unconstitutional. The latter tribunal had declared that the school building was neither what White had termed in *Perry Education Association* a "traditional" nor a "designated" public forum, where content or viewpoint limitations on speech would be subject to the compelling governmental interest standard. It asserted that it was what it termed a "limited" public forum, which was the same as what White had in *Perry Education Association* referred to as a "non-public forum." Therefore, it concluded, limitations on speech there were valid if reasonable and viewpoint neutral. White clearly thought that the district's opening of school facilities for social, civic, or religious uses really created a designated or even a traditional public forum, because the record showed that "the District's property is heavily used by a wide variety of private organizations."[67] But even assuming that it is a "non-public forum," the exclusion of Lamb's Chapel has to fall because it discriminates on the basis of viewpoint. Because the district permits its facilities to be used for social or civic purposes, clearly

discussions about how children should be brought up may take place there. By banning the films that Lamb's Chapel wanted to show, the religious view on child rearing is excluded from any debate on this topic. Here we see the "content" versus "viewpoint" distinction playing a crucial role because "content," though not "viewpoint," discrimination is apparently legitimate in a "non-public" forum as long as it is "reasonable."

In *Good News Club v. Milford Central School* (2001),[68] Central School in Milford, New York, like Center Moriches School District in the same state, had opened its facilities after school hours for social, educational, civic, artistic, and recreational events. Good News Club, a fundamentalist Christian group, asked if it could meet in the school cafeteria once a week after classes had finished for the day. Because during these sessions children would be taught how to come closer to God through Jesus Christ as well as learning the Christian point of view on morals and character development, the school administrators, fearing that it would violate the Establishment Clause if they acceded to Good News Club's request, denied it, a determination which was eventually sustained by the U.S. Second Circuit Court of Appeals, whose holding was overturned by the Supreme Court here as it had been in *Lamb's Chapel*.

Justice Clarence Thomas wrote the opinion of the Supreme Court declaring that the Good News Club's freedom of speech rights had been wrongfully infringed. He made life much more difficult for himself by finding the school building to be a "limited" public forum, i.e., what the Justice White of *Perry Education Association* had called a "non-public forum." Again, restrictions on speech are valid in such fora if they are reasonable and do not constitute viewpoint discrimination even though they do not serve a compelling governmental interest. Had he labeled the school facility a "designated public forum," as he should have because it was open after school hours for so many purposes, he would have had clear sailing, for the ban here clearly involved at least content discrimination and it is hard to ascertain any "compelling public interest" served by excluding the Good News Club. There was no indication, for example, that its leaders preached religious hatred or urged the students to disrupt classes. In fact, the club "instructs children to overcome feelings of jealousy, to treat others well regardless of how they treat the children, and to be obedient, even if it does so in a nonsecular way."[69] But with a "limited public forum" in front of him, he had to find viewpoint and not simply content discrimination in order to hold for Good News Club, which finding he made albeit not in a clear manner. What the club leaders were doing, he felt, was teaching morals and character from a Christian perspective accompanied by religious instruction and prayer. Thus it was their "viewpoint" that was disfavored by the school's refusal to let them have the club's sessions in its cafeteria.

Justice Stevens wrote one dissent and Justice David Souter, joined by Justice Ruth Ginsburg, another. Both opinions rival the majority's in fuzziness. For example, Souter at one point refers to Milford School as a "designated public forum"[70] and a few pages later as a "limited forum."[71] Stevens perceives it as the latter,[72] though it makes more sense to accord it the former rubric. They both denied, however, that Good News Club merely intended to present a religiously inspired view on ethical problems, declaring that its gatherings were either prayer meetings (Stevens) or evangelical services (both Stevens and Souter). Noticeably absent from both majority and dissent is the clear, precise analysis distinguishing the various types of fora that White provides in *Perry Education Association*.

Rosenberger v. Rector(1995)[73] is not the last of this chapter's classifications-hurting-religious-groups cases chronologically, but it is being discussed last because it involves a refusal by a public institution to fund a religious organization as opposed to denying it the use of space on its campus. Here the classification was invalidated as too extensive a burden on freedom of speech. The University of Virginia, whose founding free-speech advocate Thomas Jefferson believed to be one of the three greatest achievements of his life, subsidized newspapers and magazines of student organizations from a Student Activity Fund (SAF). Though this fund received its cash from mandatory fees levied on students, the Court considered the subsidies here expenditures of government funds, the taxpayers in this case being the men and women enrolled at the university.[74] Wide Awake Productions, a student organization recognized by the university, applied for SAF assistance to enable it to publish a magazine entitled *Wide Awake*. This publication was a collection of articles viewing personal and university issues from a Christian perspective. The university refused to accord the club SAF monies because it felt its journal was a religious publication and the relevant guidelines, doubtlessly drawn up to avoid conflict with the Establishment Clause, barred SAF dollars from going to religious activities. The editors sued to get the aid, but lost in the District Court and in the Fourth Circuit Court of Appeals.

Justice Anthony Kennedy's majority opinion in *Rosenberger* held that Wide Awake Productions' First Amendment rights to freedom of speech and press had been unconstitutionally limited by this denial of aid. He first drew a nice distinction between content discrimination and viewpoint discrimination ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant"[75]), but then muddied the waters by declaring viewpoint discrimination simply "an egregious form of content discrimination."[76] Because this case involved a cut-off of dollars rather

than a denial of space, the reader would expect and even hope to find no mention of the "public forum" doctrine. However, Kennedy pulled a rabbit out of a hat and declared that the SAF *was* a forum, albeit "more in a metaphysical than in a spatial or geographic sense."[77] Because this bundle of cash magically transformed by the jurist's wand into a spooky sort of park is a forum, albeit a *limited* public forum (again, what the White of *Perry Education Association* would have termed a "non-public forum"), no viewpoint discrimination may constitutionally be tolerated there. Justice Kennedy found that unfavorable treatment of this sort had taken place, as what the organization's newspaper did was present religious viewpoints on a wide variety of issues, viewpoints that ought to be included in any "marketplace of ideas" on these problems.[78]

The four-person dissent here was penned by Justice Souter. He did not deal with Justice Kennedy's clever trick of converting the SAF into a forum, but denied that the university's refusal to fund student religious publications was viewpoint discrimination (again, a "no-no" even in a non-public or limited forum) since it covered all religious publications, not merely Christian ones. The university, he averred, denied funding for attempts to promote any religion, not just the one founded by Jesus[79], and had to do so because of the demands of the Establishment Clause.

Chapter Summary

The Supreme Court for the past several decades has largely been hostile to attempts by government to refuse to provide aid of one sort or another to those holding or putting into practice particular religious views, or to deny religious associations the largesse it accords secular groupings. *Johnson v. Robison,* sustaining the denial of veterans educational benefits to conscientious objectors who had served their nation in a non-combatant role, is the only fairly recent case where a court-approved cut-off of a boon to people with certain religious ideals was not clearly based on a compelling governmental interest. After its first tries at wrestling with religious-freedom-limiting conditions attached to government largesse in *Hamilton v. Regents* and *In Re Summers,* which, respectively, allowed states to expel conscientious objectors from public universities and exclude them from admission to the bar, it spiked attempts to deny unemployment compensation to individuals with religious positions that made it taboo for them to work on certain days of the week or on defense contracts. Primarily on free speech grounds, it overturned refusals by public schools and universities to accord space or money to religious organizations when they gave similar boons to secular clubs. Even in the odd case of *Bowen v. Roy,* where it reversed a lower court decision on behalf of an adherent of a Native

American faith, five of the justices made it clear that Roy could not be enjoined from getting welfare and Medicaid merely because his religious beliefs kept him from taking a step that would have made the lives of the civil servants administering these programs a bit simpler. One of the few instances in recent years where the Court sustained a condition or classification attached to government largesse that burdened freedom of religion was *Bob Jones University* v. *United States*, where eliminating racism was surely a extremely compelling governmental interest justifying the restriction.

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CHAPTER 7

Government Largesse and Miscellaneous Free Speech Problems

The Denial of Public Facilities to Secular Groups

This chapter will discuss qualifications appended to various government boons that have limited speech in situations, most of which have not yet been discussed in depth. Chapter 6 analyzed public forum issues primarily in one context—that where religious groups were denied facilities or money because educational authorities were afraid of contravening the Establishment Clause. A moment's reflection will show that any sort of governmentally owned forum, "traditional," "designated," or "non-public" (now apparently renamed "limited"), can be closed to individuals, groups, or speech defined by characteristics other than religious (e.g., racists, communists, advertisers, lobbyists, candidates for public office, and so forth). When this happens, the exclusion poses a freedom of speech, press, assembly, or association issue but not a freedom of religion dispute. Recall *American Civil Liberties Union v. Board of Education* (1961)[1] from Chapter 2, where the Los Angeles Board of Education tried to prevent the American Civil Liberties Union from using a junior high school auditorium for a series of meetings on the Bill of Rights.

As seen in Chapter 6, *Perry Education Association v. Perry Local Educators' Association* (1983)[2] arose when an Indiana Board of Education closed teachers' mailboxes to all unions except the one recognized as the teachers' collective bargaining representative. The case gave Justice Byron White the opportunity to draw his elegant distinctions between the various sorts of fora. It also will be remembered that he upheld the mailbox ban on the literature of the rival Perry Local Educators' Association because the forum here was "non-public" and the bar was reasonable and not

viewpoint discriminatory. He admitted that the board treated the recognized union more favorably than the Local Educators' Association, but this was not because it preferred its positions to those of its opponent. The board extended this boon, and it was reasonable for it to act this way, because Perry Education Association was the union chosen by the educators as their collective bargaining representative. Thus that association had to be in touch with all of them in order to inform them about any ongoing contract negotiations and to speak for them in disputes with the school administration.

A four-person minority believed White was being naive in thinking there was no viewpoint discrimination here. It looked to them as if Perry Education Association had demanded that it be the only union that could use the mailboxes in order to wall out the arguments of its potential opponents. In the words of Justice Brennan, "access is denied to [Perry Local Educators' Association] because of the likelihood of their expressing points of view different from [Perry Education Association's] on a range of subjects."[3] One factor indicating that Perry Education Association's desire to monopolize the discussion of labor issues was the true motive for the access denial was that it had no objection to the district's letting groups such as the YMCA and Cub Scouts put pamphlets in the boxes. The Y and the Scouts certainly posed no threat to its stranglehold on collective bargaining in Perry Township schools. On the other hand, as White points out, the mailbox restriction did not greatly hurt its rival, which still was permitted to post notices on school bulletin boards and meet in schoolrooms after classes were finished for the day.

Southeastern Promotions v. Conrad (1975)[4] involved a rock musical of several decades ago that offended many in conservative communities. Southeastern Productions wanted to stage *Hair* in Chattanooga, Tennessee. It applied to a board charged with managing two municipal theaters and asked for permission to present the extravaganza at one of these two facilities, the only ones that had the seating capacity and acoustical equipment needed to make a show such as this a success. Its appearance in Chattanooga was hardly a pre-Broadway run. In fact it had already played for three years on the Great White Way and in about 140 American cities in toto. But the board refused to let it be shown. None of its members had ever seen a performance of this show or read the script, but they had "heard" that it contained nudity and obscenity. The actors did use quite a few of the words George Carlin employed that got Radio Station WBAI into trouble a few years later. It also contained nudity and simulated sex, and attacked militarism, racism, and the Vietnam War. Most of it almost seemed designed to irritate people like the good burghers of Chattanooga who sat on boards

like this at the time. Southeastern Promotions then went into federal district court and asked for an injunction ordering the board to allow the larger of the two municipal theaters to be used for *Hair*. That bench found that the play violated Tennessee law's prohibitions against obscenity and public nudity and refused to issue the injunction. The Sixth Circuit Court of Appeals affirmed; no judge involved had even bothered to spend an evening at the show to see what it really was like.

The Supreme Court reversed with Justice Blackmun writing the majority opinion. He never did get to the questions of whether *Hair* was obscene or of whether the refusal to allow its performance effected a rights-limiting classification because other shows could be staged in these theaters. He did refer to the playhouses as "public forums," but in reality that label proved irrelevant. There is none of *Perry Education Association*'s elaborate distinctions between various classes of fora and discussion of what types of speech can be kept out of each of these types. What Blackmun did was resurrect an old friend that jurists who wish to protect a particular piece of speech or writing are overjoyed to have available—the doctrine of "prior restraint." "Prior restraint" (to oversimplify) involves staunching speech before it reaches the ears of the public rather than punishing its authors after they have subjected it to their ideas. It is exemplified by enjoining the publication of a newspaper advocating violent overthrow of the Tennessee government rather than sending the editors to jail after they have recited that "subversive" doctrine. In the eyes of the Supreme Court, prior restraint poses the greatest threat possible to First Amendment freedoms and can only be sustained if extremely necessary under the circumstances. It feels that censorship is a variety of prior restraint, and found Chattanooga's scheme for determining who could hold performances in the municipal theaters a form of censorship. Under this plan, as seen, it was a board that made the decision, and it was supposed to permit only those performances that provided "cultural advancement" and "clean, healthful, entertainment which will make for the upbuilding of a better citizenship."[5] Furthermore, the Court will not legitimate even an essential system of censorship for films and plays unless it is hedged about by satisfactory procedural safeguards such as prompt judicial review with the relevant government having the duty to ask for review. Neither of these features was present here. Thus, the decisions in the lower courts were overturned, giving Chattanooga the alternative of either immediately providing its "theater censorship" arrangements with adequate procedural safeguards or allowing *Hair* into its auditoria.

Rights-Limiting Conditions in Campaign Finance Laws: *Buckley v. Valeo*

Interest groups are a major part of the American political scene. "It is doubtful whether there is any other nation in which so many organizations are represented in its capital."[6] They speak for almost every segment of American society: business, labor, agriculture, veterans, racial groups, ethnic groups, religions, senior citizens, gun fans, civil libertarians, gays, etc. We have already come across the American Civil Liberties Union (ACLU). The National Rifle Association (NRA), the U. S. Chamber of Commerce, and the National Association for the Advancement of Colored People (NAACP) are just as well known. The freedom of association implicit in the speech, press, assembly, and petition-for-a-redress-of-grievance clauses in the First Amendment accords individuals resident in the United States not only the right to join groups based on emotional ties, a right considered in Chapter 5 in *United States Department of Agriculture v. Moreno* (1973),[7] but also the prerogative to work for organizations to further one's political, economic, and/or philosophical goals. The latter is the branch of this freedom that protects the NAACP, the ACLU, the NRA, the U.S. Chamber of Commerce, General Motors, the United Auto Workers, etc., when they seek to influence public policy.

The constitutionally protected techniques that interest groups use to sway members of the legislature and executive branches to their side are myriad. They include testifying before a committee of the U. S. Senate, drafting a bill for Congressional consideration, and buying advertisements on television urging the passage of that measure. They also encompass donating money to candidates for public office. Here, of course, lies the rub. It is certainly legitimate for representatives to follow the wishes of their constituents. This is what democratic theory demands, though most lawmakers contend with justification that on some occasions they may permissibly ignore the wishes of their electorates and vote in accordance with their conscience. But when a legislator has received a bundle of money from an interest group, the worry is that it has "bought" his/her vote, or at least that it exercises undue influence on him/her, irrespective of whether its position is in the public interest. Cognizant of this, and under pressure from the mass media, legislatures including the U. S. Congress over the past several decades have enacted limitations on the amount one can contribute to a political campaign. New federal restrictions appear in a campaign finance law passed in March 2002. In *Buckley v. Valeo* (1976)[8] the Supreme Court upheld the contribution maximums embodied in the Campaign Finance Law of 1974; those in the 2002 act were declared constitutional while this book was being printed.

The portion of the 1974 act that is of most interest for the purposes of this volume is that still on the books providing for public financing of U. S. presidential elections. As much a threat to the common weal as would be the purchase of a senator or a member of the House of Representatives, the acquisition of a president by an interest group or two would be a much greater tragedy. Thus the act provides that, to simplify, in presidential primaries a dollar obtained from private sources will be matched by a dollar from the federal government. In the general election all the candidates' expenses will come from public funds. In 1976, the first year this scheme was in operation, the candidates for the Democratic and Republican parties each received $20,000,000 from the U.S. Treasury for the general election; by 2000 this sum had increased to more than $67 million. (There are clauses in the law allowing presidential candidates of minor parties who pull 5% or more of the total vote to get public money as well.) No candidate has to participate in this public financing scheme; billionaire H. Ross Perot shunned it in 1992 running on a third party ticket. However, a candidate who does accept its benefits has to agree to limit his/her campaign expenditures to the amount he/she receives in public funds. Similarly, those candidates for New York City office (mayor, comptroller, public advocate, city council) who participate in the city's public financing plan under which a candidate receives $4 from the municipality for every $1 he/she collects from private sources, are limited in the amounts they can spend in their primary and general elections.

What these public financing laws demand of nominees who take advantage of them presents a classic case of a rights-limiting condition. When the government gave George W. Bush and Al Gore their $67.6 million to disburse in the 2000 general election, it told them that they could not dispense more than this in their campaigns. This bar was rights-limiting because it reduced the amount of speech Messrs. Bush and Gore could inflict upon the American public. Had there been no restriction on their expenditures, both might have bought two, three, or four times the amount of TV and radio spots that they actually purchased, and flooded our mailboxes with two additional brochures each and every day the month before the election. What they said in these extra ads might have been insipid and repetitive, but there is nothing in the First Amendment that demands that the speech it protects from abridgment be sparkling and stimulating. In *Buckley v. Valeo,* however, the Supreme Court legitimated, without the slightest bit of analysis, this limit on presidential candidates' expenditures and thus on the quantity of their exhortations. It accomplished this "feat" in just one footnote, as Professor Seth Kreimer points out.[9] This reads, in pertinent part, "Congress may engage in public financing of election campaigns and

may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations."[10]

Why did the court uphold this speech-limiting condition so quickly and dogmatically? There were practical reasons for this: the 1974 Campaign Finance Law contained many controversial and complicated provisions and the Court had to resolve these by the start of the primary season of 1976, which was right around the corner. Thus, it probably did not have time to think about the act's limitation on the quantum of presidential campaign speech. Moreover, this restriction enjoyed at the time considerable public support because of the revelation that large, illegal corporate contributions had been funneled into President Richard Nixon's 1972 re-election campaign, and the Court might have been queasy about upsetting a restriction so popular. Yet the constitutionality of the constraint cried out for a couple of pages of discussion, at least. Obviously, the federal government may limit the amount it allots each candidate; its funds are not inexhaustible. It is the qualification that candidates may not expend additional funds from private sources if they wanted the federal financing that poses a genuine First Amendment problem. The purpose of this qualification is obvious but could have been explicitly stated anyway. That is, it is needed to keep the new chief executive from becoming too indebted to one or a small number of interest groups. Had the Court made this point, it then could have asked itself the following questions: (1) May not some of the extra speech produced by the additional contributions contain something of great value to the electorate? Not all campaign rhetoric is inane! (2) In practice, does not this condition banning private donations to presidential campaigners getting federal funding unduly constrict the speech of would-be contributors? Another section of *Buckley v. Valeo* admitted that campaign donations are a form of speech.[11] Though they can be limited in amount,[12] it does not follow from this that they can be subjected to what is basically a prohibition. (3) Yet another section of *Buckley v. Valeo*[13] said that the 1974 law was invalid to the extent that it made it illegal for supporters of any candidate for federal office, including a presidential contender accepting public financing, to spend more than a certain amount of money on his/her behalf *independently* of his/her campaign. Does not the Court's quashing of this proviso give interest groups and rich individuals a real opportunity of making the new president beholden to them, and thus torpedo the very purpose of limiting expenditures in a publicly financed contest? And if the expenditure maximums covering publicly subsidized presidential candidates serve no real purpose and simultaneously constrain speech, may they not be invalid under the First Amendment? (4) Is not campaign speech, as *Buckley v. Valeo* itself admitted,[14] at the core of the language protected by

the First Amendment and thus to be tampered with only in extreme cases? Wrestling with queries such as these would not have, and should not have, produced a different result, but at least the Court's opinion upholding the rights-limiting condition in a pioneering public campaign-financing act would have been a reasoned judgment rather than a carelessly tossed-out out aside.

Strikers Lose Food Stamps: *Lyng v. International Union, UAW*

Striking is, of course, a technique used by some of the interest groups known as labor unions. *Lyng v. International Union, UAW* (1988)[15] involved an amendment to the federal Food Stamp Act passed in the first year (1981) of Ronald Reagan's presidency. This barred a household from participating in the food stamp program if any of its members were on strike. Professor Richard Epstein uses this case to introduce and conclude a stimulating *Harvard Law Review* article on unconstitutional (i.e., on what this book is calling "rights-limiting") conditions.[16] Yet neither Justice White's opinion upholding the amendment nor Justice Thurgood Marshall's dissent, joined by Justices Blackmun and Brennan, considers whether rights-limiting conditions or classifications are present.

This omission is somewhat surprising because the case bears considerable resemblance to *Sherbert v. Verner* (1963)[17] where, it will be remembered, Brennan relied heavily on the doctrine of rights-limiting conditions and classifications to invalidate South Carolina's refusal to accord unemployment compensation to a woman who, on religious grounds, refused to work on Saturdays. Both *Lyng v. International Union* and *Sherbert* are rights-limiting classification (rather than rights-limiting condition) cases—both involve the polity's denial of aid to people exercising fundamental rights, without promising to grant them state aid if they ceased exercising these rights, while giving similar assistance to other necessitous individuals. In *Sherbert* the right limited was, of course, freedom of religion; in *Lyng v. International Union* it was freedom of association.

That freedom of association is involved in *Lyng v. International Union* is not as obvious as is the fact that freedom to worship as one sees fit was at the heart of *Sherbert*. However, the right to strike in conjunction with one's mates seemed to be admitted by White to be part of a worker's freedom of association.[18] He even confessed that the food stamp cut-off does pressure him/her to go back to work and abandon his/her fellow employees. That is, it has a negative impact on his/her freedom of association. But what the government is doing here, he declared, is simply refusing to fund the exercise of this constitutional right. Adopting the philosophy of the Medicaid abortion case of *Maher v. Roe* (1977),[19] he declared that the fail-

ure to subsidize the exercise of a right does not violate the right.[20] But there is more than a simple "failure to fund" here; there is a rights-limiting classification, since individuals are being denied government aid because they are exercising their First Amendment right to strike, while other poor people are getting food stamps. Moreover, the end of the strike will not provide them with cash from the public treasury. Of course, it arguably is a *legitimate* rights-limiting classification because it puts an end to a situation in which government in essence supported all strikes.[21]

The minority opinion should have rested (but did not) on *Sherbert v. Verner* because of the similarities between the two situations. Likewise, the majority simply shrugged off *Sherbert* in a footnote.[22] It should have taken pains to distinguish the cases so as to make the *Lyng v. International Union* result more intellectually acceptable. Epstein, who favored the results in both cases, found considerable difference as well as some resemblance between them.[23] However, he does not really explain successfully where the difference lies. He contends that the food stamp termination does not hurt the workers because if they had gone on strike before the food stamp measure's enactment, they would have had to fend for themselves; with the "no food stamps for strikers" exception built into the food stamp law, they have to continue to fend for themselves.[24] But if Mrs. Sherbert had quit her job before unemployment compensation was enacted, she would have had to look out for herself. After the passage of the law she is denied benefits for her adherence to her faith, which of course leaves her in a situation where she has to continue to take care of herself. So she is no more "hurt" by her disqualification than are the strikers. Perhaps the real reason why some would aid Mrs. Sherbert but not striking workers is that they do not think much of strikes but respect those who stand up for their religious views.

No Tax Breaks for Lobbyists: *Taxation with Representation* and *Cammarano*

One holding White relied heavily on in *Lyng v. International Union* was *Regan v. Taxation with Representation of Washington* (1983).[25] This case involved another common interest group tactic, lobbying. *Lobbying* is a slightly pejorative synonym for petitioning the government for a redress of grievances; and thus is squarely within the protections of the First Amendment as long as it is not accompanied with a wad of dollar bills that you wave in the face of your legislator to tempt him/her to vote as you wish. *Taxation with Representation* arose when a group calling itself Taxation with Representation of Washington (TWR) was formed to promote federal tax reform by putting forth its ideas on this matter to Congress, the executive

branch, and even the federal judiciary. It asked the IRS for tax-exempt status under Section 501(c)(3) of the Internal Revenue Code, the same provision that racially discriminatory Bob Jones University from Chapter 4 and the neo-Nazi National Alliance from Chapter 2 sought to use. Section 501(c)(3) grants such status to groups organized for religious, charitable, literary, or educational purposes. TWR, of course, was not a racist gang; it considered itself an educational group. The IRS denied its request because a good portion of its activities consisted of lobbying, and associations that carry on a considerable amount of lobbying are explicitly denied tax-exempt status under Sec. 501(c)(3).

TWR sued in federal district court to have the disallowance of Sec. 501(c)(3) tax-exempt status to lobbying groups declared unconstitutional. It alleged that this denial violated the First Amendment and the Equal Protection component embedded in the Due Process Clause of the Fifth Amendment. Again, the most important reason why TWR wanted to be sheltered by Sec. 501(c)(3) is that contributions to it would then be tax deductible.

Justice Rehnquist's unanimous opinion rejected TWR's theories and thus upheld the IRS's determination that it was not entitled to tax-exempt status under Sec. 501(c)(3). He admitted that both tax exemptions and tax deductions are a form of governmental subsidy. "A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions."[26] What Congress has done here, he continued, is chosen not to subsidize lobbying activities even by non-profits. TWR's First Amendment claim rested on the theory that denying it 501(c)(3)'s "subsidy," as long as it devotes a good deal of its resources to lobbying, was the sort of unconstitutional rights-limiting condition voided in *Speiser v. Randall* (1958),[27] the decision mentioned often in these pages rejecting California's attempt to deny a veterans property tax exemption to individuals who refused to swear a loyalty oath. Rehnquist admitted that under *Speiser*, "the government may not deny a benefit to a person because he exercises a constitutional right."[28] However, he chose not to view what had happened to TWR in this light. Rather, all that Congress had done was refuse to employ the taxpayer's money to assist the group's lobbying efforts. "This Court has never held that the Court must grant a benefit such as TWR claims here to a person who wishes to exercise a constitutional right."[29] The government has no duty to subsidize First Amendment rights.[30]

Thus what the Court is faced with here, according to Rehnquist, is not the use of a subsidy to infringe a First Amendment freedom but simply a

classification, *not,* he would add, the rights-limiting ones that are one major subject matter of this book. Charitable and other organizations that do not lobby are accorded valuable 501(c)(3) status; those that do lobby do not get this boon. Classifications in economic and regulatory legislation must stand if they are reasonable.[31] This one certainly is. Congress was certainly not irrational when it concluded that there is no reason why it should subsidize lobbying by organizations when this lobbying could produce legislation that might promote the private interests of the members of the associations.[32]

Taxation with Representation was not made up by Rehnquist out of the blue. There was, rather, a precedent rather clearly demanding this result. In *Cammarano v. United States* (1959),[33] partners in a wholesale beer company in the state of Washington had spent money to lobby against an initiative that would have given the state the exclusive right to operate retail stores for the sale of wine and beer. The initiative was defeated, but Mr. and Mrs. Cammarano sought to deduct the $900 or so they had expended for lobbying from their federal tax returns as an ordinary and necessary business expense. The other party in this case was an Arkansas liquor wholesaler named F. Strauss and Son, Inc., which had spent over $9,000 to help crush an initiative that would have mandated prohibition throughout that state. Strauss too sought to have this lobbying cost deducted from its federal tax return as an ordinary and necessary business expense. Both appealed from the IRS denials of their request. Long-standing IRS regulations classified lobbying expenses as among those that could not be deducted under this rubric, and the Supreme Court here, in a unanimous opinion by Justice John Harlan, sustained these regulations. One case relied on by the Cammaranos and F. Strauss was *Speiser v. Randall.* However, Justice Harlan said it was not applicable here. The parties in the case are not being denied a tax deduction because they are exercising their constitutional rights, "but are simply being required to pay for those activities entirely out of their own pockets."[34] The government here is not trying to suppress any idea: it is simply and in a non-discriminatory fashion denying a particular type of tax break. Justice Douglas, though he joined in Harlan's opinion, wrote a concurring piece in which he made it clear that the lobbying by the Cammaranos and F. Strauss was an exercise of their First Amendment rights. Had the government sought to "penalize" them for exercising these rights, *Speiser* would have controlled. It was not trying to punish these taxpayers, but was simply refusing to grant them a deduction, which is "a matter of grace, not of right."[35] Though a stout defender of free speech, he emphatically denied[36] that "First Amendment rights are somehow not fully realized unless they are subsidized by the State."

No Tax Breaks for General Interest Magazines? *Arkansas Writers' Project*

Actually, despite *Cammarano* and *Taxation with Representation,* the Court sometimes overturns exceptions to allowances of tax deductions or of tax exemptions when the exceptions are detrimental to individuals or groups exercising fundamental rights. In addition to *Speiser v. Randall,* there is *Arkansas Writers' Project, Inc. v. Ragland* (1987),[37] decided after *Cammarano* and *Taxation with Representation*. This case arose after Arkansas had imposed a tax on the receipts from sales of tangible personal property. Under a 1941 act newspapers were exempted from the tax, and in 1949 magazines dealing mainly with religion, sports, and trade and professional journals were also excluded from its ambit. This left magazines other than sports, religious, and trade journals as the only print media liable to pay the tax, which in 1987 was pegged at 4% of gross receipts. The Arkansas Writers' Project published a monthly magazine called *Arkansas Times,* a general interest periodical that did not focus mainly on sports or religion. It complained that the state's refusing to accord its journal the tax exemption that had been furnished to many other publications infringed its First Amendment rights.

The Supreme Court, in an opinion by Justice Marshall, invalidated the disallowance of the tax exemption to journals such as that published by the Arkansas Writers' Project. It admitted that Arkansas was not attempting to censor the *Arkansas Times.* No one was arguing that the state was trying to drive this magazine out of business because of its editorial views on political or other matters of public concern, assuming it had ever expressed any. Nonetheless, the refusal to include general interest periodicals in the tax exemption was found to be "content" discrimination, of which, as already seen, the Court is highly suspicious though perhaps a tad less so than of "viewpoint" discrimination. Why was there "content" discrimination here? Because had the *Arkansas Times* uniformly devoted itself "to religion or sports, the magazine would be exempt from the sales tax...However, because the articles deal with a variety of subjects (sometimes including religion and sports), the [Arkansas Commissioner of Revenue] has determined that the magazine's sales may be taxed."[38] Because it found that the tax exemption effected discrimination between magazines with different contents, the Court refused to consider the further issue of whether it was constitutionally permissible to apply the tax to one type of print medium (periodicals) and not to another (newspapers). Arkansas could have had its exemption refusals upheld despite the "content discrimination" if they had served a "compelling governmental interest," but they did not. The Court refused to accept the state's contention that the need to raise rev-

enue, standing alone, could justify the differential treatment. The state also argued that the exemption for religious, sports, and trade magazines was needed to encourage fledgling publishers. Marshall rightly thought this point somewhat ludicrous, since many sports and professional journals are quite well established and profitable, while quite a few general interest periodicals struggle. As to the commissioner's contention that the selective exemptions were needed to foster "communication" in Arkansas, Marshall retorted that they foster dialog on only a few subjects.[39]

Justice Antonin Scalia dissented. In his view, the denial of the exemption to the *Arkansas Times* was simply a failure to fund the exercise of a fundamental right, the very sort of inaction that *Taxation with Representation* and *Cammarano* had legitimated. He implied, grasping at a theme in Justice Douglas's opinion in *Cammarano* without citing that concurrence, that had the state's refusal to exempt the *Arkansas Times* from the sales tax been an attempt to coerce that journal into printing a piece it liked or into excising an article it disliked, it would have been unconstitutional.[40] But, as indicated, no one believed that the Arkansas commissioner of revenue was trying to play a modern-day Huey Long of Louisiana and attempting to drive out of business, via a selective tax, a publication that opposed him. That ploy by Governor Long was, as Chapter 1 noted, thwarted by the Supreme Court in *Grosjean v. American Press Co.* (1936).[41]

Actually, *Arkansas Writers' Project, Cammarano,* and *Taxation with Representation* are quite similar to *Lyng v. International Union*. All involve the second type of rights-limiting classification covered in Chapter 1, that where the polity fails to succor the exercise of a fundamental right by a group or individual (without promising any governmental aid if the right is not exercised), even though it assists similar groups or individuals or subvents similar actions. In *Arkansas Writers' Project* the assisted "similar groups" were, of course, sports and professional journals; in *Taxation with Representation* they were educational groups that did not lobby. In *Cammarano,* the "similar actions" were incurring legitimate business expenses other than lobbying. Thus these three cases do involve rights-limiting classifications rather than a simple failure to fund, despite the language of Justice Rehnquist in *Taxation with Representation,* Justice Douglas in *Cammarano,* and Justice Scalia in *Arkansas Writers' Project*. Of course the presence of a rights-limiting classification rather than a mere failure to fund in *Taxation with Representation* and *Cammarano* does not necessarily mean that they were wrongly decided. It is hard, however, to see any justification for the classification quashed in *Arkansas Writers' Project*!

Using Government Largesse to Restrain Professionals' Speech: *Legal Services Corporation v. Velazquez* and *Conant v. Walters*

Legal Services Corporation v. Velazquez (2001)[42] (henceforth *LSC v. Velazquez*) is an important recent case in the battle over rights-limiting classifications and conditions in government programs granting largesse. The victor here was the camp that is highly suspicious of such limitations. The Legal Services Corporation (LSC) was created in 1974 to meet what liberals in Congress thought was a major need—the provision to the indigent of legal assistance in civil cases. Thanks to *Gideon v. Wainwright* (1963),[43] most poor criminal defendants can get a free lawyer either via a public defender or through court-appointed attorneys. But the poor, just like the rest of us, often need legal advice in situations other than the criminal. They may be on the verge of being unjustly evicted from their flat, or the dry cleaner to whom they have entrusted the few good clothes the family has may have burned them and refuses to reimburse them for the loss. Under the 1974 law, the LSC is to distribute federal funds to hundreds of organizations throughout the nation that employ lawyers who are willing to serve the poor even though their own salaries are low. Conservatives have never been happy with the LSC, and thus its attorneys are prohibited from taking cases dealing with non-therapeutic abortions, secondary school desegregation, and draft evasion.[44] In 1996, with both houses of Congress under Republican control and with the conservative wing of that party riding high under Speaker Newt Gingrich, further restrictions were placed on lawyers funded by the LSC. These included barring them from handling cases intended to fight for the passage of, or push for the defeat of, a proposed constitutional amendment or initiative; those involving a class action lawsuit; and those on behalf of prisoners.[45] The ban that was at issue in *LSC v. Velazquez* was a rights-limiting condition prohibiting LSC-funded lawyers from handling cases challenging existing welfare laws. Many of these so-called "poverty lawyers" had been fighting legislative attempts to cut welfare benefits, and the political right that controlled Congress was fed up. As conservative Representative Robert Dornan (R-Cal.) declared, the time had arrived to "defund the left."[46]

To clarify this ban (Sec. 504(a)(16) of a mammoth 1996 appropriation act) on attacking current welfare laws, the LSC issued regulations. These allowed an LSC-funded lawyer to challenge determinations that her/his client was ineligible for welfare on the grounds that the agency had misread the statute or made an erroneous finding of fact. However, he/she could not attack the denial on the grounds that a state welfare statute contravened federal welfare law or that either a state or federal welfare law

infringed the Constitution. Nor could he/she argue that welfare legislation be changed. The Court's decision on the constitutionality of Sec. 504(a)(16) was somewhat nervously awaited by scholars interested in issues involving free speech and/or the representation of the poor.

Justice Anthony Kennedy, who had authored *Rosenberger v. Rector* (1995)[47] declaring unconstitutional the refusal of a public university to fund the printing of a student magazine that viewed issues from a religious perspective when it financed secular student publications, wrote the *LSC v. Velazquez* opinion, which overturned Sec. 504(a)(16). Kennedy was the "swing person" in this 5–4 decision, being joined by liberal Justices Ruth Ginsburg, David Souter, Stephen Breyer, and John Paul Stevens. The most obvious hurdle he had to overcome was *Rust v. Sullivan* (1991).[48] There, as seen, the Court had legitimated a section of a law according federal funds to family planning clinics that barred doctors and other personnel there from advocating abortion as a method of family planning while working on federally funded projects. In both cases, there was a federal grant to nonprofit groups that restricted professionals from saying certain things; the only difference seemed to be that in *Rust* the professionals were doctors and other health care experts while in *LSC v. Velazquez* they were lawyers. Kennedy circumvented *Rust* by a stratagem almost as clever as his finding a "metaphysical" public forum in *Rosenberger*. This was to declare that *Rust* really did not involve government's funding speech by private parties but, rather, speech by the government itself, which can adopt a particular viewpoint without violating the First Amendment. Of course, Chief Justice Rehnquist did not explicitly say in *Rust* that speech in the funded clinics was government speech; he simply contended there that the government does not have to fund viewpoints it rejected. However, Kennedy, who joined with Rehnquist in *Rust* but now seemed rather unhappy about the result, contended that we have "explained" *Rust* on the "understanding" that the speech limited there was by people who were in essence government employees.[49]

Kennedy was tempted to bring up the metaphysical public forum idea again here, perhaps to say that the act funding the LSC was such a forum. However, he resisted that blandishment and declared that the LSC law created not a forum but a "subsidy" situation, and thus cases such as *Perry Education Association* and *Rosenberger* were not "controlling in a strict sense."[50] (It is hard to know why he dismissed *Rosenberger*, which really was a subsidy case. Had he been so blinded by his having converted *Rosenberger*'s Student Activity Fund into a metaphysical forum that he forgot that what it really did was finance, i.e., subsidize, student publications?) There is little doubt, he thought, that lawyers have a constitutional right to contend

that welfare laws violate either federal law or the U. S. Constitution and/or that statutes of this genre should be modified. Congress, obviously, disliked this point of view; however, under the First Amendment that body cannot use its subsidy powers to restrict ideas it does not like. Advocacy by the poverty lawyers is not government speech, and "Where private speech is involved, even Congress's antecedent funding decisions cannot be aimed at the suppression of ideas thought inimical to the government's own interest."[51] There are two decisions cited to support this proposition. One, no surprise, is *Speiser v. Randall*; the other amazingly is *Taxation with Representation,* where as just seen, non-profit groups that engaged in a certain type of speech were denied tax-exempt status.

There was another point above and beyond the First Amendment that worried Justice Kennedy. A question posed at oral argument before the Supreme Court in *LSC v. Velazquez* queried what would happen if in litigation involving the interpretation of a welfare law, the LSC-funded attorney were asked whether one of the possible constructions of the law made it unconstitutional. The government's lawyer admitted to the justices that because of Sec. 504(a)(16) the poverty attorney could not answer that query even though to do so would be of great help to the Court as, other things being equal, it prefers to adopt the meaning of a statute that does not call into question its constitutionality. The fact that the LSC-assisted advocate could not provide the tribunal with this information implicated not only the First Amendment but also the power of the judiciary under Article III of the Constitution. "Interpretation of the law and the Constitution is the primary mission of the judiciary when it acts...to resolve a case or controversy."[52] To carry out this responsibility satisfactorily, the judiciary has to be "informed" and "independent." But how can it achieve this state of bliss when the attorneys before it may not "advise the courts of serious questions of statutory validity. The disability is inconsistent with the proposition that attorneys should present all the reasonable and well-grounded arguments necessary for proper resolution of the case."[53] Of course, the attorney when asked a question such as this can tell his/her client that he/she has to withdraw from the case. However, this is an impractical solution because an indigent is unlikely to be able to afford lawyers who are not funded by the LSC.[54]

There were four dissenters here. Justice Scalia wrote the dissenting opinion, with Chief Justice Rehnquist and Justices Thomas and O'Connor joining him. The presence of O'Connor is a bit of a surprise, for she was one of the dissenters in *Rust* and had written a powerful opinion in *Bowen v. Roy* (1986)[55] firmly declaring, as seen, that it was unconstitutional to cut a Native American from the welfare rolls simply because for religious rea-

sons he refused to provide a state welfare department with his young daughter's social security number. That the chief justice was in dissent in *LSC v. Velazquez* is not at all astounding, for the majority strongly limited the reach of his beloved *Rust* opinion. In fact, one could reasonably have expected that it would be he who would write the dissent.

In any event, Scalia believed that this case was governed by *Rust,* and that the differences between it and the earlier situation were irrelevant. *Rust* involved a refusal to subsidize the normal work of doctors; L*SC v. Velazquez* the normal work of lawyers. The result in the latter, he claimed, is explicable only because the majority "displays...an improper special solicitude for our own profession."[56] Whether this solicitude for lawyers is "improper" or not is open to question, but there is little doubt that the fact that the restriction on the poverty lawyers could hamper himself and his colleagues when they performed their constitutionally mandated task of explicating the law was among the factors convincing Justice Kennedy that Sec. 504(a)(16) was unconstitutional.

What is most significant about the Scalia dissent is his thinking about the circumstances under which conditioned subsidies become invalid. His ideas here are important because, among other things, in a closely divided Court they could well become the majority viewpoint in the near future, especially if one of the tribunal's "liberals" leaves and is replaced by a "conservative." He stuck closely to the theory articulated in his dissent in *Arkansas Writers' Project* that exclusions from the benefits of subsidies are unconstitutional only when they have a coercive effect on a speaker. "The LSC Act is a federal subsidy program, not a federal regulatory program ...Regulations directly restrict speech; subsidies do not. Subsidies, it is true, may *indirectly* [emphasis in original] abridge speech, but only if the funding scheme...[has] a 'coercive effect' on those who do not hold the subsidized position."[57] Then he wandered off into a morass about how it is hard to prove coercion, especially where "a spending program is...limited, providing benefits to a restricted number of recipients."[58] He next declared that *Rosenberger* was the only holding where "selective spending" was found "unconstitutionally coercive."[59] (Actually, *Speiser v. Randall* is for practical purposes another example of such a case.) In general, he continued, the only real chance of proving coercion in case of a "limited" spending program is where it creates a public forum, "because simply denying a subsidy does 'does not coerce belief.'"[60] What he forgets is that though the threat of denial here does not coerce belief, it puts strong pressure on LSC-funded attorneys to remain silent about the possible unconstitutionality of a welfare law!

Moreover, he went on, the 1996 law's ban on LSC-funded lawyers' attacks on welfare legislation did not discriminate on account of viewpoint, as it banned funding for defending as well as challenging laws of this sort.[61] What he fails to say, though, is that it involves at least content discrimination, which like its viewpoint "cousin" can be sustained only if it serves a compelling governmental interest. All in all, his dissent is unworthy of the brilliant person he is; it is misleading and rambling. Of course, it does not follow from all this that the side he favored is necessarily the wrong one!

Any doctor angry that *Rust* and *LSC v. Velazquez* taken together treat the practice of law better than his/her profession might take a bit of consolation from the 2002 Ninth Circuit Court of Appeals decision in *Conant v. Walters.*[62] This case arose because California enacted legislation decriminalizing the use of marijuana for medical reasons and immunizing from prosecution under state law doctors who recommended its use for these purposes. Various patients suffering from serious illnesses, California doctors who treated such patients, and a physicians' organization, among others, sued to enjoin the enforcement of a federal policy revoking the federal license to prescribe certain drugs of any physician who recommended marijuana to critically ill patients to relieve their pain, to stimulate their appetite, or to control their nausea and vomiting. The Ninth Circuit opinion upheld the federal district court decision granting the injunction. The opinion for the three-judge panel, written by Chief Judge Mary Schroeder and concurred in even by conservative Judge Alex Kozinski, declared that revoking a doctor's license for recommending (not prescribing!) pot for a patient violated the physician's First Amendment right to talk frankly and openly to patients. *LSC v. Velazquez* was a case the chief judge relied on heavily. As for *Rust,* she distinguished it wrongly on the basis that it "did not uphold restrictions on speech itself."[63] Of course it sustained restrictions of this type—it discouraged doctors working in clinics on Title X programs from bringing up the topic of abortion as a method of family planning! A better distinction would have been that *Rust* involved *less* of a constraint on professional speech than did the threatened license-revocation procedure enjoined in *Conant.* A doctor inhibited by federal policy in *Rust* could still counsel abortion when not working in a Title X project, while as a result of the policy involved in *Conant,* physicians could not recommend pot to anyone, anywhere, at any time.

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CHAPTER 8

Conclusion

Judicial Zigzagging in Rights-Limiting Conditions/Classifications Cases

That the American judicial system has somewhat haphazardly handled cases dealing with rights-limiting conditions and classifications attached to government largesse is hardly a new idea. Professor Kathleen Sullivan asserted in 1989 that "As applied...the doctrine of unconstitutional conditions is riven with inconsistencies."[1] Richard Epstein has referred to the "unruly law of unconstitutional conditions."[2] This book too has revealed examples of decisions about rights-limiting conditions and classifications at variance with one another. For example, Chapter 2 analyzed a good number of cases dealing with the withholding of governmental largesse as a tool against radicals. Some, despite the First Amendment's guarantee of freedom of speech, press, and association, permitted the polity to deny radicals benefits it granted to others. For example, *Konigsberg v. State Bar of California* (*Konigsberg II*) (1961)[3] allowed the state to refuse an otherwise qualified individual admission to the bar because he refused to say whether he ever had been a member of the Communist Party. *Flemming v. Nestor* (1960)[4] upheld a cut-off of social security benefits to a man who had been deported to Bulgaria in 1956 because he had been a Communist Party member in the 1930s, years when there was no doubt of the legality of joining that group. On the other hand, *Speiser v. Randall* (1958)[5] overturned California's requirement that ex-soldiers, sailors, and marines who wanted to take advantage of the state's property tax exemption had to swear that they did not advocate the overthrow of the governments of the United

States and of California. In addition, a Federal District Court in that state declared in *Reed v. Gardner* (1966)[6] that because of the First Amendment the government could not deny Medicare coverage to a woman who refused to say whether she was a member of the Communist Party or a related organization. *Reed* stands in contrast to *Dworken v. Collopy* (1950),[7] a Franklin County, Ohio, Court of Common Pleas holding that rejected a First Amendment challenge to an Ohio law denying unemployment compensation to members of so-called subversive parties. At least some of the various inconsistencies above cannot be satisfactorily reconciled by logic; they are due, as seen, to political attacks on a U.S. Supreme Court that was accused of being too sympathetic to radicals, to changes in the personnel of that tribunal, and to the obvious fact that the United States judicial system is in practice a very decentralized one with lower federal courts and various levels of state courts whose differing holdings the U.S. Supreme Court has no time to totally harmonize even if it always acted consistently itself.

With respect to the regulation of the electronic media, there have also been zigs and zags. Sometimes the Supreme Court approves a demand that the media air (or not air) particular material and sometimes it rejects such a demand. Although *Red Lion Broadcasting Co. v. FCC* (1969)[8] allowed the Federal Communications Commission to require that a radio station whose airwaves were used to attack the integrity of an individual give that person a reasonable opportunity to respond to the abuse, *Columbia Broadcasting System v. Democratic National Committee* (1973)[9] declared that the commission did not have to force a Washington, D.C., station to accept political advertising even though the hopeful sponsors were willing to pay for it. But the two *Turner Broadcasting* cases (1994 and 1997)[10] upheld a federal law requiring cable systems to carry a certain number of broadcast stations. *FCC v. League of Women Voters of California* (1984)[11] declared that a part of a statute banning "editorializing" by non-commercial stations receiving federal funding violated the First Amendment; however, *FCC v. Pacifica Foundation* (1978)[12] upheld a commission ban on indecent speech (George Carlin's "Filthy Words") on the radio during daytime hours.

The two major cases decided by the Supreme Court on the issue of barring professionals subsidized by the government from addressing certain issues are at odds. *Rust v. Sullivan* (1991)[13] smiled upon a federal regulation declaring that physicians and others working in federally funded projects in family planning clinics could not, while on the job, advocate abortion or even simply discuss it. Yet *Legal Services Corporation v. Velazquez* (2001)[14] held unconstitutional, on the First Amendment and other grounds, a measure prohibiting lawyers working in federally subsidized legal services agencies from arguing that welfare laws should be changed.

Consistencies in Rights-Limiting Conditions/Classifications Cases

However, one should not overstate the extent of incoherence in the judiciary's treatment of rights-limiting conditions and classifications. *Rust* can also be viewed as an abortion rights case, and the Supreme Court has on only one occasion invalidated largesse measures that limited the right to abortion or other aspects of the right to privacy. *Maher v. Roe* (1977)[15] legitimated Connecticut's refusal to accord Medicaid benefits to indigent women for abortions while granting it for childbirth, whereas *Wyman v. James* (1971)[16] declared that it was permissible for New York to remove a woman from the welfare rolls if she refused to let a caseworker visit her home. *United States Department of Agriculture v. Moreno* (1973)[17] was the only Supreme Court right-to-privacy case where a rights-limiting condition or classification in grants legislation was overturned. Here an anti-hippie act, declaring that no group of individuals living together could get food stamps unless all its members were related, failed to pass muster. However, even in this situation, irrationality and thus equal protection pure and simple (by the majority) and an unconstitutional burden on the First Amendment's freedom of association (by Justice Douglas, concurring), rather than an unjustifiable obstruction of the right to privacy, were the handles the Court used to invalidate the relevant measure.

When it comes to restraints on free exercise of religion, every attempt by a state to deny an individual unemployment compensation benefits because he or she refused to work on his/her holy day or to take a job that violated his/her religious convictions was thwarted by the U. S. Supreme Court. *Sherbert v. Verner* (1963),[18] involving South Carolina's refusal of unemployment compensation benefits to a Seventh Day Adventist who refused to labor on Saturday, is the best known of this series. Likewise, all the turndowns by public educational institutions aiding secular groups of requests by religious groups for space or funding were stricken by that tribunal. *Good News Club v. Milford Central School* (2001)[19] is the most recent of this contingent. Here, it will be remembered, the Court declared that a public school district in New York State could not deny the use of its cafeteria once a week after classes to a fundamentalist religious sect that wanted to teach the children who came to its meetings Christian morality and how to come nearer to God through Jesus. The only decision during the past five and one-half decades where the Court upheld a governmentally imposed condition on largesse to a religious organization that demanded that its adherents take actions running counter to their religious beliefs was *Bob Jones University v. United States* (1983),[20] where two private educational institutions that engaged in racial discrimination

because they believed Christianity required this were denied federal tax-exempt status. Admittedly, *Johnson v. Robison* (1974)[21] upheld a federal law that in essence penalized religious dissenters by granting educational benefits to veterans but denying these to conscientious objectors even though the latter had satisfactorily completed alternative civilian service. It thus stands in contradiction to the Supreme Court's recent history of striking down classifications or conditions in grants of government largesse that adversely impact religious individuals and organizations that (unlike Bob Jones University) do not take steps inimical to the general welfare.

Even when it comes to subsidization of speech that someone declares indecent or repulsive, the judiciary, as noted at the end of Chapter 4, has trod a fairly straight path. New York City Mayor Rudolph Giuliani's try at stopping the flow of city funds to the Brooklyn Museum because it exhibited a collage of the Virgin Mary stained with elephant dung and surrounded with cutouts from pornographic magazines was thwarted by federal District Judge Nina Gershon in *Brooklyn Institute of Arts and Sciences v. the City of New York and Rudolph W. Giuliani* (1999).[22] The Second Department of the Appellate Division of the New York State Supreme Court and the New York Court of Appeals overturned, in *Panarella v. Birenbaum* (1971 and 1973),[23] a lower court order commanding the presidents of two City University of New York colleges not to allow their student newspapers to print any more supposedly sacrilegious material. In *Bella Lewitzky Dance Foundation v. Frohnmayer* (1991)[24] a federal district court invalidated a law requiring that those awarded grants by the National Endowment for the Arts (NEA) certify before they received their checks that they would not use them to produce materials that in the judgment of the NEA might be considered obscene. Even *National Endowment for the Arts v. Finley* (*Finley III*) (1998),[25] where the Supreme Court upheld the clause in an NEA reauthorization law to the effect that in making awards it was to take "into consideration general standards of decency and respect for the diverse beliefs and values of the American public," reached the result it did because Justice Sandra O'Connor, the author of the majority opinion, found that language to be more advisory than mandatory. In fact, *FCC v. Pacifica Foundation* (1978) is the only occasion on which the Supreme Court cleanly backed a rights-limiting condition on governmental favors aimed at offensive speech. Here, as indicated, it upheld an FCC bar on indecency on daytime radio.

Actually, some of the decisions that appear to be philosophically at odds concerning the validity of rights-limiting classifications and conditions ancillary to the awarding of government largesse are, on their facts, arguably reconcilable. As mentioned in Chapter 3, most of the Supreme Court's hold-

ings concerning the use of the licensing power of the federal government to determine what goes out over the airwaves simply put their imprimatur on policies developed by the FCC, the relevant regulatory agency. National security could hardly have been impaired by giving Mr. Speiser of *Speiser v. Randall* his veterans property tax exemption. However, if in the days of the Cold War with the Soviet Union labor unions could have been headed by communists, the country might possibly have been plagued by strikes hindering its defense efforts. Thus *American Communications Association v. Douds* (1950),[26] denying essential National Labor Relations Board assistance to unions whose officers refused to swear that they were not members of the Communist Party, is arguably compatible with *Speiser*. *FCC v. Pacifica Foundation* was based in large part on the need to protect young children from indecent language. No such rationale existed in the college newspaper cases of *Panarella v. Birnbaum*. Nor were very many youngsters likely to take time off to visit the elephant dung-stained collage of the Virgin Mary at the Brooklyn Museum that so incensed Mayor Giuliani unless they were in the company of their parents, who presumably could explain it to them in a way that would make it a bit less shocking to a little boy or girl.

To sum up this subsection, the courts will be likely to, which does not mean that they always will, uphold rights-limiting conditions and classifications in governmental largesse where an administrative agency with expertise in an area has developed these; where the group whose rights are being constrained is perceived as a threat to national security; where young people will be protected by the condition or classification; or where the right limited is the right to privacy. On the other hand, they will be likely, though again this is not guaranteed, to annul the conditions and classifications where they are detrimental to an individual or group that is not seen as threatening the safety of the country; where they adversely affect sacrilegious or indecent material to which children are unlikely to be exposed; or where they harm religious groups. (There are so few cases dealing with the cut-off of benefits to extreme right-wingers that it is impossible to determine whether the American judiciary is less sympathetic to rights-limiting conditions and classifications imposed on governmental aid to these individuals and groups than to similar constraints impacting their far-left counterparts.)

Judicial Backbone and Rights-Limiting Conditions/Classifications

The prior paragraphs set forth enough data to show that the judiciary does not blindly bow to the other branches when they add rights-limiting

conditions and classifications to government boons. If this were not true, if the judiciary were simply carrying over into the twenty-first century the nineteenth-century decisions of *McAuliffe v. Mayor of Bedford* (1892)[27] and *Commonwealth v. Davis* (1895),[28] it would be abdicating its crucial responsibility of preserving basic freedoms, and the fears even of writers on the left, such as Charles Reich, that the welfare state is causing the "weakening of civil liberties" and "may undermine the independence of the individual"[29] would be in the process of being realized. But most American judges are aware that it is imperative not to automatically legitimate such conditions/classifications. As noted in Chapter 1, conservative Justice George Sutherland insisted in *Frost v. Railroad Commission of State of California* (1926)[30] that "If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."[31] Remember, as well, the Wisconsin Supreme Court case of *Lawson v. Housing Authority of City of Milwaukee* (1955),[32] analyzed in Chapter 2, which refused on First Amendment grounds to let the Milwaukee Housing Authority eject tenants who had declined to complete a certificate declaring that they were not members of any entity on the U.S. Attorney General's list of subversive organizations. Pointing out that those in control of the state could use its housing stock and other boons "to effectively undermine and render impotent any political party or other organization, which opposed their continued hold on the government, by simply labeling the same as 'subversive,'"[33] it added that this disaster might well materialize "if the courts were powerless to provide a remedy."[34] But the courts have shown not only that they have the power to avert such a tragedy, but also that they are not afraid to use it. For this they deserve warm congratulations from any supporter or opponent of the welfare state who is attached to the Bill of Rights.

Criteria the Judiciary Should Use in Rights Conditions/Classifications Cases

The above paragraph including its concluding sentence should not be misinterpreted. As this book has emphasized in many spots, not every time the courts uphold a rights-limiting condition or classification stapled to what Justice Sutherland referred to in *Frost* as a government "favor" are they making an erroneous decision. Sometimes a condition or classification should be annulled; sometimes it should be allowed to remain in force. Just about every reader will agree with this as a general proposition. But she/he will rightly wonder what *criteria* should be used by judges when they wrestle

with the legitimacy of these conditions and classifications. What follows is a group of standards that the author of this book feels ought to be employed to determine whether a rights-limiting condition or classification appurtenant to some piece of government largesse is constitutional. Not all of these standards will be applicable in every case, and in any particular situation some may pull in the direction of upholding the condition or classification and others may suggest that that condition or classification be labeled illegitimate. Except for item 2 below, the presence or absence of one of these criteria in any given situation should not be determinative. Doubtlessly some readers will deny the importance of one or more of these boundary markers while other readers may wish to add a few of their own. However, the author strongly believes that all of these criteria are reasonable. Perhaps that is all that can be demanded of any set of suggestions for improving areas of the law.

Intent

1. Did the legislator or government official *intend* to limit the right? If the answer is in the negative, this is one factor arguing for the constitutionality of the classification or condition. Writers such as Seth Kreimer are skeptical of this approach,[35] for determining legislative intent is admittedly tricky; however, there are times it can be discovered from the reports of legislative debates, the comments of the committees handling the measure, the statements of a government official, or the totality of the circumstances. In quite a few of the cases we have considered, the motive behind the classification or condition was not to limit rights but something else. In *Sherbert v. Verner* and the other freedom of religion versus unemployment compensation situations, the administrators denying the benefits were not out to penalize a particular religious view, but just wanted to save the unemployment compensation fund money by denying aid to individuals who it seemed to them could have kept or obtained a job. Likewise, the several cases (e.g., *Widmar v. Vincent* [1981][36]) involving a public educational institution's denial of funding or the use of its facilities to religious groups sprang not out of any animosity to religion but out of a fear that granting these organizations their requests would violate the First Amendment's Establishment Clause. The regulation considered and upheld in *Wyman v. James* to the effect that welfare recipients had to permit visits by caseworkers was formulated not out of any desire to spy on a recipient's private life, but to make sure that the beneficiary was using the money properly, which included her treating her children decently. On the other hand, the refusal of California (overturned in *Speiser v. Randall*) to accord veterans property tax exemptions to ex-soldiers who refused to

swear that they were not "subversives" was clearly intended by the state to burden certain exercises of freedom of speech. And it would be naive to declare that the refusal of Connecticut to grant Medicaid funding to poor women who wanted an abortion, upheld in *Maher v. Roe,* was not actuated by a hostility to the abortion right on the part of some Connecticut policy-makers.

Bills of Attainder

2. Is the law or administrative decision denying the largesse intended to chastise, or does it in effect chastise, an individual or organization for having exercised a right in the past? If so, it should always be invalidated. To use the disallowance of government aid as a tool for rebuking someone or some group for what they did a while ago (as happened in *Flemming v. Nestor*), and which there is no evidence they are doing now, smacks of a bill of attainder, a legislative punishment without trial banned by the Constitution's Article I, Sections 9 and 10. Kathleen Sullivan's article on unconstitutional conditions makes this point.[37] And Charles Reich rightly lambasted *Flemming v. Nestor* by averring that "At stake was the security of the old age Social Security pension system, together with all the social values which might flow from assuring old people a stable, dignified, and independent basis of retirement. Yet Congress and the Supreme Court jeopardized all these values to serve a public policy both trivial and *vindictive*—the *punishment* [emphasis added] of a few persons for Communist Party membership now long past."[38]

Impact of Non-receipt

3. Will the non-receipt by a class or group of largesse because of its exercise of a crucial right be likely to leave it in poor condition? If so, that is one factor that argues against upholding the denial of the largesse. Looking at some of the relevant cases, it is, on the one hand, doubtful whether a "subversive" homeowning veteran would have had to surrender his/her home to the bank if he/she did not get the property tax exemption at issue in *Speiser v. Randall.* On the other hand, as noted, Mr. Nestor, the man deported to Bulgaria because he had once been a Communist Party member, might well have been placed in a disastrous position by the cut-off of his social security benefits. And owners of radio and TV stations who lose their FCC licenses because of something that went, or failed to go, over their airwaves could suffer serious economic loss.

Lobbying organizations, as seen, are denied tax-exempt status, but most seem to be able to survive even though contributions to their coffers and the money they spend therefrom are not tax deductible. Washington and state and city capitols are swarming with their employees. And it is not

only the Microsofts with their megabillions that petition the government for a redress of grievances—associations representing the poor, minority groups, firm believers in civil liberties, etc. also abound in the nation's capital. The groups and businesses involved in the *Regan v. Taxation with Representation of Washington* (1983)[39] and *Cammarano v. United States* (1959)[40] cases were modest in size but did not argue that they would have to fold their tents if they were not deemed tax-exempt groupings or not permitted to deduct their lobbying expenses. The unrecognized labor unions denied the right to use school mailboxes in *Perry Education Association v. Perry Local Educators' Association* (1983)[41] still could communicate with teachers by posting letters on school bulletin boards and meeting in schoolrooms after classes were over for the day. On the other hand, starvation might well have been in store for the families which the anti-hippie law would have deleted from the food stamp rolls if the Supreme Court had not intervened in *Moreno* to invalidate it.

Viewpoint and Content Discrimination

4. Is the right that is limited as a condition or classification ancillary to the government largesse a First Amendment right, and does the condition or classification effect "viewpoint" or "content" discrimination? If so, there is present a factor creating a strong presumption against the legitimacy of the condition or classification. The main problem with viewpoint and content discrimination comes from the fact that one of the major purposes of the First Amendment is, as seen in Chapter 3, to further democracy by giving citizens the information they need to make rational choices among competing public policies and candidates for public office. As Martin Redish and Daryl Kessler contend:

> A democratic communitarian theorist values free expression because it facilitates performance of the community's self-governing function by providing the electorate with information and opinion about the issues that require community decisions. To the extent that government-subsidy decisions chill expression, that chilling deprives the electorate of whatever information or opinion speakers would have contributed but for the government's decision. To the extent that subsidy decisions cause individuals to assert viewpoints that they would not have asserted of their own free will, they artificially skew the tenor and direction of public debate.[42]

Another reason for being suspicious of viewpoint/content discrimination in government largesse measures is that the victim of the discrimination is likely to be a small, unpopular group with little representation in the legislature and with little clout with the executive branch. Thus, it is up to the *judiciary* to protect associations and individuals of this sort, as well as to be vigilant to thwart attempts to restrict "those political processes which can

ordinarily be expected to bring about repeal of undesirable legislation."[43]

It is reassuring to see that the Supreme Court has not infrequently declared it unconstitutional to have government's favors accompanied by viewpoint-discriminatory or content-discriminatory conditions or classifications. For example, *Rosenberger v. Rector* (1995)[44] held it was illegitimate for a public university to fund secular but not religious publications of student groups. *Legal Services Corporation v. Velazquez* overturned the section of a federal appropriations act declaring that lawyers working in federally funded law offices could not attack welfare legislation. *Speiser v. Randall* invalidated a clause in a California law denying veterans property tax exemptions to individuals who refused to take a loyalty oath. However, sometimes viewpoint or content discrimination has survived court challenges. The cases analyzed in Chapter 2 that upheld laws denying some government boon to radicals or people who refused to take loyalty oaths are examples. It is highly doubtful, for instance, that the Supreme Court would have sustained a regulation of the California Committee of Bar Examiners requiring Mr. Konigsberg to tell them whether he ever had been a Republican! But that tribunal legitimated the committee's demand that he inform them whether or not he was or ever had been a member of the Communist Party.

Viewpoint/content discrimination should normally stand if and only if it serves a "compelling governmental interest," as when the speech creates a clear and present danger of violence. *American Communication Association v. Douds* is an example of a situation where a rights-limiting condition arguably served a compelling governmental interest. This is true even though the "balancing" test actually used by the Court there is much less pro-speech than is the "no-viewpoint-discrimination-without-a-compelling-governmental-interest" standard defended in these pages. The ban on National Labor Relations Board assistance to communist-controlled unions that was sustained there significantly reduced the influence in the American labor union movement of individuals who history showed might call work stoppages not to get better wages for the employees they represented, but for a political goal such as weakening the nation's economy or defenses so that it would be a less threatening adversary of the Soviet Union. On the other hand, there is no evidence that if Mr. Konigsberg had been admitted to the California Bar he would have encouraged his clients to bring unfounded suits or to lie while testifying under oath. It is true that he would have been likely to represent radicals or minorities that traditionally experience discrimination, but, to put it mildly, there would be absolutely nothing wrong with his developing a clientele of this sort.

Though its cursory treatment of the rights-limiting condition problem

presented by restricting the quantity of speech of U.S. presidential candidates who receive federal financing was criticized in the previous chapter, *Buckley v. Valeo* (1976),[45] upholding this limitation, was a correct result. Certainly this limit makes it less likely that an American president will need big contributions from wealthy individuals and giant enterprises to get elected, which in turn reduces the odds that he/she will be controlled by these and ergo serves a compelling state interest. *Taxation with Representation* and *Cammarano,* the no-tax-exempt-status-for-lobbyists and no-tax-deduction-for-lobbying holdings, also further such an interest. Many lobbyists squeeze millions or even billions from the taxpayers to minister to the selfish needs of their clients. Thus, there is no reason for Congress to make their task even easier by subsidizing their activities via the tax code. On the other hand, giving tax breaks to sports, trade, and religious journals but not to general interest magazines makes little sense, and thus the Court was more than justified in invalidating this content-discriminatory, rights-limiting classification in *Arkansas Writers' Project v. Ragland* (1987).[46] (One situation where viewpoint discrimination built into government grants would serve a compelling governmental interest will be noted in item 8 below.)

"Liberty Expanding" Conditions and Conditions on Governmental Speech

5. Will the surrender of the right induced by a rights-limiting condition lead to a net increase in the rights or develop the potentials of the largesse recipients who execute the waiver? If so, this is a factor arguing in favor of the validity of a rights-limiting condition in a government largesse measure. Kreimer mentions the paradox that conditions which limit rights can have the effect of expanding individual autonomy.[47] It is not too easy, though, to think of an example. Perhaps if artists take seriously the implied condition in their NEA grants that they are supposed to observe "general standards of decency" in what they write, paint, or sculpt with the government's cash, these works will be of higher quality.[48]

6. Is the right that is to be foregone as a condition of the largesse the speech of an employee of government during working hours? If so, we have a factor lending support to the validity of the condition. As seen, *Rust v. Sullivan* made this point strongly, though its relevance to that case is not clear because the individuals whose speech was restricted were not government workers but employees of non-profit agencies. Chapter 5 quoted scholars insisting that government can discriminate among viewpoints when speaking itself. University of California at Berkeley law professor Robert Post makes the identical point when he declared that:

> First Amendment doctrine within managerial [governmental] domains differs fundamentally from First Amendment doctrine within public discourse. The state must be able to regulate speech within managerial domains so as to achieve specific governmental objectives. Thus the state can...regulate speech within the military so as to preserve the national defense...As a result of this instrumental orientation, viewpoint discrimination occurs frequently within managerial domains. To give a few but obvious examples: the president may fire cabinet officials who publicly challenge rather than support Administration policies.[49]

Those supporting the decision in *Rust v. Sullivan* could argue that because the government can set up its own family planning clinics and restrict abortion advocacy there, it may take the same step when funding non-governmental agencies of this type. In fact, the health departments of some subnational governments in the United State do offer family planning advice. Thus "family planning" can to some extent be deemed a governmental function, while the art, music, and drama funded by the NEA are activities normally carried out by private parties. But it is stretching things a bit to say that the clinics funded in *Rust* were "really" government agencies. Education is a major program of state and local governments, but there are private as well as public schools and it would be misleading to contend that Harvard University is a government institution merely because the Commonwealth of Massachusetts can and does operate its own colleges and universities.

The Electronic Media

7. One can make a strong argument that the much-criticized and somewhat-weakened *Red Lion Broadcasting Co v. FCC* case's insistence that the FCC could compel a radio station on pain of losing its license to give an individual whose integrity had been attacked in its broadcasts ample opportunity to respond, upheld a much-needed rule. As mentioned in Chapter 3, Justice Byron White, the author of the case, declared: "It is the right of the viewers and listeners...which is paramount...It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than countenance monopolization of that market, whether it be by the Government itself or a private licensee."[50] More generally, the judiciary usually ought to welcome any federal policy that increases the quantity of speech going over the air and, likewise, it should be suspicious of any governmental act that reduces this quantity.

It is imperative that people get a wide range of information about politics, society, the economy, art, science, and literature from the channels of communication they use. It is true that thanks to cable, the majority of viewers have access to considerably more television programs now than they did

in 1969 when *Red Lion* was authored. But there is a minority without cable, some radio and television stations present little or no news, and the media often superficially report what is happening and sometimes merely parrot the views of those in power. Only a relatively small and already knowledgeable elite watches public television, perhaps the best source of information about what is happening in the world. Chapter 3 did describe the extensive variety of presentations available to the cable viewer on a typical night. But that variety is available only to those who switch frequently from channel to channel, and there are quite a few people who avoid much "channel-surfing."[51] Thus it is crucial that every station discuss public affairs and give some time even to points of view disliked or shrugged off by those who own it. Whatever the purposes of the First Amendment, expanding "rich public debate" is one of the most important.

Accordingly, were Congress or the FCC not only to demand the broadcasting of rebuttals of attacks on personal integrity, but also to fully restore the old fairness doctrine by requiring that radio and broadcast TV stations devote a reasonable amount of time to the presentation of diverse views on issues of public concern, the Supreme Court ought to sustain the pertinent laws or regulations. Even on the unlikely assumption that they involve content discrimination, they would still serve a compelling governmental interest. Similarly, if the commission ever decides that classical music is an illustrious segment of American life and makes it difficult for the owners of a classical music station that makes a profit to sell to someone who will convert it into a home for pop, country, rap, or rock and roll, the Court should sustain this step. Pop, country, and other types of music certainly deserve respect, but numerous stations play their performers while the number of classical music stations in the nation is declining[52] though many men and women still love it. (Chapter 3 mentioned that *FCC v. WNCN Listeners Guild* [1981][53] allowed the agency to adopt a policy that resulted in its approving the sale of New York City classical music station WNCN to individuals who made its format soft rock.) Also, many would like to see Congress condition the issuance or renewal of a radio or TV license on a promise by the station to give a certain amount of free time to candidates for public office to air their views.[54] This condition, which should be sustained by the courts, would significantly lessen the cost of political campaigns and thus the amounts that office seekers have to raise in contributions from the rich and the powerful.

Hate Speech

8. As noted in Chapter 2, in *National Alliance v. United States* (1983)[55] the U.S. Court of Appeals for the District of Columbia affirmed the hold-

ing of the IRS that the racist National Alliance was not entitled to tax-exempt status. The Alliance claimed that it should be handed this boon because it was an "educational" institution, but the IRS declared that its inflammatory anti-black and anti-Semitic propaganda took it out of that category. Let us set aside the narrow issue in this case and note once more the broader question: When government accords favors, should it be permitted to impose a condition on these boons to the effect that the recipient avoid using the grant from the state to create or disseminate hate speech, speech denigrating a person or a group of people because of his/her/its race, religion, ethnicity, gender, sexual orientation, etc.? That is, does a ban in government largesse measures on hate speech serve a compelling governmental interest, and thus become valid, even though such a bar is "viewpoint discrimination?" (For the reasons seen in Chapter 4, we must concede that such speech gets significant First Amendment protection.)

The analysis in that chapter of New York Mayor Rudolph Giuliani's unsuccessful try at cutting off public funding to the Brooklyn Museum on the ground that it exhibited a collage that he thought mocked the Virgin Mary and Roman Catholicism set forth most of the pros and cons of restricting hate speech by the recipients of governmental aid. On the one hand, such speech increases tensions between groups, lessens the self-esteem of the vilified group, and thus perhaps impedes its ability to obtain a decent education. Additionally, it may make it harder for the political views of members of that group to be taken seriously and may reduce the number of offerings in the marketplace of ideas through deterring these men and women from expressing their opinions. As law professor Charles Lawrence III comments, "Racist speech...distorts the marketplace of ideas by muting or devaluing the speech of Blacks and other despised minorities. Regardless of intrinsic value, their words and ideas become less saleable in the marketplace of ideas. An idea that would be embraced by large numbers of individuals if it were offered by a white individual will be rejected or given less credence if its author belongs to a group demeaned and stigmatized by racist beliefs."[56]

On the other hand, on at least some occasions, restricting hate speech by the beneficiaries of government largesse may sometimes not be a very satisfactory device for achieving the laudable goal of reducing intergroup tensions. As the discussion of *The Holy Virgin Mary* collage indicated, it is sometimes unclear whether words, etc., are hate speech. As also indicated there, speech of this sort, especially when couched in the language of science or social science, may spur anti-racists to gather more evidence for their position. For example, when Richard Herrnstein and Charles Murray tried to prove in their *The Bell Curve*[57] in the language of science and statistics

that blacks are inherently intellectually inferior to whites, a work came out soon afterward that featured essays many of which rebutted this thesis.[58] And, unfortunately, some great works of art are racist or contain racist passages. Thus, declaring dogmatically that conditioning government subsidies to artists, scholars, and writers on their totally eschewing hate speech in their funded works would be a dangerous road to take. However, telling them that they will have to return their grants if what they paint, declaim or write consists *predominantly* of unambiguous hate diatribes clearly serves the compelling governmental interest of preventing an increase in racial, religious, or ethnic hatred. Thus this approach should be adopted and deemed constitutional. In addition to the harms mentioned in the previous paragraph, this blatant vilification usually contains nothing of social value, and can produce fear and high levels of anger in the individuals against whom it is directed when they hear or read it. The fear and anger may be so great that the person so afflicted might become physically ill.[59] So even though hate speech cannot be banned, a very strong argument can be made that government ought not to subsidize art or scholarship that features it and little else. In fact, conditioning governmental largesse on the avoidance of reams of hate speech might well function as what item 5 above termed a "liberty-expanding" condition. If the recipients eschew large amounts of racist vitriol, they may well discover after they have laid down their pens and palettes that their plays, poems, collages, and paintings are of a much higher quality!

Some Fundamental Rights Are More Fundamental Than Others: Free Speech versus Abortion

9. Is the right limited by a classification or condition attached to a government favor fundamental but not basic to democracy? If so, the classification/condition should be sustained, even if it serves no compelling governmental interest, if it nonetheless furthers a "substantial governmental interest." (A substantial government interest is one that would be valuable to achieve, but is not fully necessary to effect.) To put this in another way, limits on the sort of right mentioned above in a government largesse measure should be subject only to what the courts call an "intermediate" level of scrutiny[60] rather than to "strict scrutiny," of which the compelling governmental interest test is an application. The author is aware that what follows will be controversial, but that characteristic, certainly, is no sin in a work dealing with civil liberties.

Clearly, for reasons stated several times in these pages, the First Amendment freedoms of speech, press, peaceable assembly, petitioning the government for a redress of grievances, and association are of the essence

of a democratic system—no polity that lacks these to any significant degree could justifiably be given this label. The same is true for freedom of religion (including freedom for religious skepticism and for atheism). For government to penalize individuals for adopting this rather than that view of the ultimate meaning of life and death could not be deemed anything other than tyrannical. Also autocratically governed would be a nation where the right to privacy was lacking in the sense that you could be penalized for choosing your housemates. Ditto for a land where your property could be taken by government without the receipt of just compensation.

This brings us to the right to an abortion, not only deemed part of the right to privacy by *Roe v. Wade* (1973),[61] but denominated there a "fundamental" right. Again, it is not the purpose of this book to take a position on whether *Roe v. Wade* was correctly decided; there are certainly strong arguments in its favor, which it is not necessary to recite here. Nor are these pages going to take issue with its contention that the abortion right is a "fundamental" one. What the author cannot be convinced of is that the right to an abortion is a necessary element of a democratic order. Was the United States not a democracy before *Roe v. Wade*? Are not Chile and Ireland democracies now even though the right to abortion is extremely limited there?[62] The main reason the right to an abortion is not a necessary component of a democracy is that, like it or not, it involves the taking of a potential life. And it is impossible to argue that a nation that bans abortion, i.e., safeguards a potential life, is ipso facto not a democracy. *Roe v. Wade* may well be sensible policy and also be required by the U.S. Constitution, but one cannot reasonably contend that the position of its opponents is authoritarian and that the governments that convert that position into the law of the land are necessarily autocratic.

Because the right to an abortion is not part of the lifeblood of a democratic order, classifications and conditions in laws that burden this right may legitimately be treated somewhat more leniently than those limiting other aspects of the right to privacy or most First Amendment freedoms. Chapter 5 spent a considerable amount of time discussing *Maher v. Roe*. This was no accident. In the first place, it is an intellectually interesting case because it is ambiguous as to whether it was Connecticut's inaction or her own poverty that prevented Ms. Roe from getting an abortion, and also because the situation is complicated by the state's providing Medicaid funding for childbirth. It is also intriguing because the equities are split between the majority and the dissent. On the majority side, one can legitimately ask why the state should have to fund a procedure that takes away a potential life and is abhorrent to many of its citizens. In favor of the dissent is that Connecticut's failure to finance this type of medical operation leaves

unwillingly pregnant poor women in a worse position than unwillingly pregnant women with some financial resources. In any event, one strong argument in favor of the *Maher v. Roe* majority opinion is that, even assuming that the Connecticut scheme of refusing Medicaid funding for abortions but allowing it for childbirth was a condition pushing Ms. Roe into surrendering her right to an abortion, there is nothing unconstitutional about this. The right to an abortion is not an essential ingredient of a democratic order; and because preserving potential life is a "substantial" governmental interest, using conditions to restrict that right for this purpose is valid.

In light of the discussion in the above paragraphs, what of *Rust v. Sullivan?* Those who support the decision could contend that one reason the ban on abortion referrals and abortion advocacy by health professionals working on federally funded family planning projects is constitutional is the very fact that the right to an abortion is not the most important right in a democracy and ergo may be limited to further the substantial state interest of protecting potential life. One can make this point without accepting some of Chief Justice Rehnquist's wilder dicta there or the view that the speech of the people working on the projects is "governmental" speech. On the other hand, those antagonistic to the result in the case could contend that the right limited is not that of abortion but of speech, which *is* among the building blocks of democracy and so protected by the "compelling governmental interest" test.

Speech by Professionals

Somewhat more subtly, those opposed to *Rust v. Sullivan* could distinguish between the types of speech barred by the challenged ban. Referrals to an abortion provider are so closely linked to the abortion act that one can say that if the right to an abortion is not at the top of the fundamental rights hierarchy, neither is the right to recommend a specific abortion clinic. On the other hand, a physician's telling clients with severe emotional, financial or family problems (but not mentioning a particular doctor willing to perform abortions) that abortions are for persons in their particular situations a sensible method of family planning, is professional speech. That is, it is a thesis developed by an individual as a result of intensive training and experience. Only an extremely "compelling governmental interest" should be allowed to justify restrictions on professional speech; it is difficult to perceive any such interest in the outright ban on abortion advocacy present in *Rust v. Sullivan* or, a fortiori, in the restrictions on welfare lawyers challenged in *LSC v. Velazquez.*

The Future of Rights-Limiting Conditions/Classifications in Government Largesse Measures: Various Scenarios

A few words about the possible paths the law of rights-limiting conditions/classifications in government largesse may take in the near future. The Supreme Court could go in the direction of the majority in *LSC v. Velazquez* and adopt a skeptical position vis-à-vis the power of Congress, the U.S. executive branch, and the states to use aid as a lever to abridge fundamental rights. Or it could accept the *McAuliffe v. Mayor of City of New Bedford* thesis, echoed in *Rust v. Sullivan* by Chief Justice Rehnquist, that because government assistance is a privilege, the polity may attach to it almost any qualification it desires. A third possibility, not quite as restrictive of liberty as is the *McAuliffe* route but more so than is the *LSC v. Velazquez* alternative, is that it will follow the suggestion of Justice Antonin Scalia dissenting in *Velazquez* and *Arkansas Writers' Project v. Ragland* to the effect that rights-limiting qualifications appended to government boons are invalid only when they "coerce" people into surrendering fundamental rights.

It will be remembered that Scalia was joined by three other justices in *Velazquez*. The U.S. president as of this writing is the conservative George W. Bush, who would like nothing better than to appoint individuals of similar ideology to the supreme bench. If the first person he replaces is a member of the *Velazquez* five-person majority, there soon will be a majority in support of Scalia's and/or Rehnquist's expansive view of the legitimacy of rights-limiting conditions/classifications, unless the new appointee turns out to be a closet liberal or, like his conservative forerunner Justice George Sutherland in *Frost v. Railroad Commission of State of California,* fears that rights limits built into government "favors" may well erode most of our liberties. Of course, if a Democrat becomes president as a result of the 2004 elections and one or more of the dissenting contingent in *Velazquez* leaves the Court and is replaced by a liberal, that decision becomes more likely to remain good law. Triumphant then, at least until the next conservative president is elected, will be Justice William Brennan's declaration in *Sherbert v. Verner* that "it is too late in the day to doubt that the liberties of religion and expression may be [unconstitutionally] infringed by the placing of conditions upon a benefit or privilege."[63]

The June 2003 case of *United States v. American Library Association*[64] shows how close the court is at present to embracing the Scalia/Rehnquist reluctance to invalidate rights-limiting conditions and classifications accompanying governmental largesse measures. This decision sustained 6–3 a law enacted by the U. S. Congress declaring that public libraries receiving federal subsidies to purchase internet access had to install filters on their computers to make it impossible for their clientele to receive obscene images

and for their youthful visitors to receive pictures harmful to minors. This Children's Internet Protection Act (CIPA) had been invalidated by a U. S. district court on the grounds that the filtering software available blocked a good amount of constitutionally protected material and was unable to occlude a certain amount of adult and child pornography.

Rehnquist wrote the plurality (*not* majority) opinion for himself and Justices O'Connor, Scalia, and Thomas. When discussing the unconstitutional conditions issue present in the case, the chief justice relied on *Rust v. Sullivan,* and now interpreted it to stand for the proposition that when government funds a program, it is entitled, within broad limits, to structure that program as it wishes. This thesis, of course, leaves little leeway to invalidate rights-limiting conditions and classifications in governmental assistance laws. The reader should note, though, that this proposition was supported by four rather than five justices. Justices Anthony Kennedy and Stephen Breyer, both in the majority in *Velazquez,* concurred in *American Library Association* in the judgment only, and most definitely not in the chief justice's opinion. These two justices went along with CIPA solely on the grounds that it is important to protect children against harmful material, and that any adult who wanted to glance at constitutionally protected material blocked by the filter could simply ask a librarian to unblock the site he/she wanted to peruse.

Author's Last Words to His Readers

In conclusion, the author of this book will be satisfied if he has accomplished several things. First, the reader should now have some idea of the major American court cases dealing with rights-limiting conditions and classifications tacked onto government largesse measures. He/she should be sensitive to the complexity of this field and aware of the extent to which the decisions in this area are consistent or inconsistent with one another. She/he should be cognizant of some of the factors the courts do and should take into account in resolving disputes in this realm. And the author would be thrilled if one or more of his audience were stimulated to study how courts in other democratic countries have settled similar controversies.

Much in this book has been presented tentatively, but one thing that can be posited with a great deal of certainty is that the American judiciary will be confronted in the not-too-distant future with many more situations where a condition or classification affixed to governmental benefits limits fundamental rights. Its members should not void these conditions/classifications mindlessly. Nonetheless, neither should they give them too warm a welcome, for our freedoms are too precious to bargain away for thirty pieces of U. S. government silver.

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Notes

NOTES TO CHAPTER 1

1. 468 U.S. 841.
2. *New York Times,* September 26, 2001, p. C6.
3. Friedman, Milton, and Rose, *Free to Choose* (New York: Harcourt Brace Jovanovich, 1980), p. 119.
4. The expenditure figures in this and the two previous paragraphs are taken from Office of Management and Budget (OMB), *Fiscal Year 2003 Budget of the United States Government* (Washington: OMB, 2002), Tables 1.1, 1.3.
5. See OMB, op. cit. n. 4, Table 3.2; *New York Times,* February 11, 2001, Sec. 1, p. 24.
6. OMB, *Fiscal Year 2002 Budget of the United States Government* (Washington: OMB, 2001), Sec. 12, p. 2; *New York Times,* May 26, 2002, Sec. 1, p. 26.
7. OMB, op. cit. n. 6, Sec. 15, p. 1,2; OMB, op. cit. n. 4, Table 3.2.
8. OMB, op. cit. n. 6, Sec. 11.
9. *New York Times,* January 10, 2002, p. A1.
10. OMB, op. cit. n. 6, Sec. 14, p. 3,4,5.
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13. Hair, William I., *The Kingfish and His Realm* (Baton Rouge: Louisiana State University Press, 1996), p. 162.
14. Ibid. at 164, 177.
15. Ibid. at 202–205.
16. See ibid. between 160 and 161.
17. 297 U.S. 233.

18. 73 *Yale Law Journal* 733 (1964).
19. Ibid. at 734–737.
20. Ibid. at 756.
21. Ibid. at 760.
22. Ibid. at 774.
23. See her "Government Benefits: A New Look at an Old Gifthorse," 65 *New York University Law Rev* 247, 250–251 (1990).
24. New York: E.P. Dutton, 1970.
25. 249 U.S. 47.
26. 249 U.S. at 52.
27. 250 U.S. 616.
28. 250 U.S. at 630.
29. 29 N.E. 517.
30. 29 N.E. at 517–518.
31. 39 N.E. 113.
32. 39 N.E. at 113.
33. Op. cit. n. 24 at 16.
34. 132 *University of Pennsylvania Law Rev* 1293 (1984).
35. 397 U.S. 254.
36. 397 U.S. at 261–262. In *Perry v. Sindermann* (408 U.S. 593 [1972]), the Court held that it would be a violation of the First Amendment if a non-tenured college teacher were not to have his contract renewed simply because he criticized his institution's administration. In the course of his majority opinion, Justice Potter Stewart commented that "this Court has made clear that, even though a person has no 'right' to a valuable governmental benefit, and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interest, especially his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." (408 U.S. at 597.)
37. 271 U.S. 583 at 594.
38. "The Demise of the Right-Privilege Distinction in Constitutional Law," 81 *Harvard Law Rev* 1439 (1968).
39. Ibid. at 1445–1446.
40. Ibid. at 1461–1462.
41. Ibid. at 1454–1457.
42. See Sunstein, Cass, *Democracy and the Problem of Freedom of Speech* (New York: Macmillan, 1993), p. 115.
43. 102 *Harvard Law Rev* 1413 (1989).
44. 29 N.E. at 518.
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3. 262 U.S. 390.
4. Nash, George, *The Life of Herbert Hoover,* Vol. 3 (New York: W.W. Norton, 1996), p. 249.
5. 249 U.S. 47.
6. See Draper, Theodore, *The Roots of American Communism* (New York: Viking Press, 1957), Chaps. 9 through 16 for a discussion of the splits in the American Socialist Party and the eventual emergence of a unified American Communist Party.
7. Murray, op. cit. n. 2 at 213.
8. 71 U.S. (4 Wall.) 277.
9. 71 U.S. at 319–320.
10. 71 U.S. (4 Wall.) 333.
11. 328 U.S. 303.
12. 381 U.S. 437.
13. 468 U.S. 841.
14. 255 U.S. 407.
15. 255 U.S. at 410.
16. 255 U.S. at 414.
17. For example, 255 U.S. at 415.
18. 29 N.E. 517.
19. 39 N.E. 113.
20. 255 U.S. at 437.
21. See Murray, op. cit. n. 2 at 226–229.
22. Haynes, op. cit. n. 1 at 14–15.
23. Ibid. at 35–36.
24. Ernst, Morris, and David Loth, *Report on the American Communist* (New York: Holt, 1952), p. 14.
25. Haynes, op. cit. n. 1 at 14.
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27. Spicer, George, *The Supreme Court and Fundamental Freedoms* (New York: Appleton Century Crofts, 1959), p. 205.
28. 324 U.S. 494.
29. 171 P.2d 883.
30. 274 U.S. 357.
31. 171 P.2d at 896.
32. 171 P.2d at 891.
33. 171 P.2d at 899.
34. 359 P.2d 45, cert. den. 366 U.S. 819 (1961).
35. 339 U.S. 382.
36. 339 U.S. at 402.
37. 339 U.S. at 430.
38. 347 U.S. 442.
39. 347 U.S. at 451.
40. 347 U.S. at 473.
41. 347 U.S. at 474. The unflattering reference to *McAuliffe* is found in 347 U.S. at 472.
42. 357 U.S. 513.
43. 357 U.S. at 518.
44. 357 U.S. at 541.
45. Spicer, op. cit. n. 27 at 259–260.
46. Haynes, op. cit. n. 1 at 190–192.
47. 347 U.S. 483.
48. 354 U.S. 298.
49. 354 U.S. 178.
50. 354 U.S. 234.
51. 353 U.S. 232.
52. 353 U.S. 252.
53. Spicer, op. cit. n. 27 at 239.
54. Ibid.
55. 366 U.S. 36.
56. 366 U.S. at 51–52.
57. 366 U.S. at 50–51.
58. 366 U.S. at 52.
59. 366 U.S. at 54.
60. 363 U.S. 603.
61. 363 U.S. at 617.
62. 363 U.S. at 612.
63. 261 F. Supp. 87 (C.D. Cal.).
64. 261 F. Supp. at 92.
65. 91 N.E.2d 564.

66. 91 N.E.2d at 572.
67. 91 N.E.2d at 571.
68. Ibid.
69. 70 N.W.2d 605.
70. 70 N.W.2d at 608.
71. 70 N.W.2d at 609.
72. 70 N.W.2d at 615.
73. 285 F.2d 666 (D.C. Cir.), cert. den. 364 U.S. 892 (1960).
74. 204 N.Y.S.2d 865.
75. 395 U.S. 444.
76. 461 U.S. 574.
77. 710 F.2d 868 (D.C. Cir.).
78. 710 F.2d at 875.

NOTES TO CHAPTER 3

1. Graber, Doris, *Mass Media and American Politics,* 4th ed. (Washington: Congressional Quarterly Press, 1993), p. 206.
2. Sparrow, Bartholemew H., *Uncertain Guardians: The News Media as a Political Institution* (Baltimore: Johns Hopkins University Press, 1999), p. 17.
3. Graber, op. cit. n. 1 at 4, 391.
4. Ibid. at 5.
5. Ibid. at 289.
6. *New York Daily News,* October 18, 2002, p. 139.
7. Graber, op. cit. n. 1 at 36.
8. *Liberalism Divided: Freedom of Speech and the Many Uses of State Power* (Boulder, CO: Westview Press, 1996), p. 13.
9. Ibid. at 13–14.
10. See his classic *Political Freedom* (New York: Oxford University Press, 1965).
11. Ibid. at 79.
12. Sunstein, Cass, *Democracy and the Problem of Free Speech* (New York: Macmillan, 1993), p. 132. In fact, Meiklejohn believed that speech other than speech on non-public issues was protected not by the First Amendment, but only by the Due Process Clauses of the Fifth and Fourteenth Amendments, op. cit. n. 10 at 79.
13. Sunstein, op. cit. n. 12 at 132–134.
14. Ibid. at 136.
15. Op. cit. n. 1 at 322.
16. Op. cit. n. 12 at 140.
17. *Red Lion Broadcasting Co. v. FCC,* 395 US 367 (1969) at 375–376.
18. 47 U.S.C. 309(k).
19. 512 U.S. 622 at 627–629.

20. Sparrow, op. cit. n. 2 at 75.
21. Ibid. at 76.
22. Ibid. at 84.
23. 395 U.S. 367.
24. See 395 U.S. at 369.
25. See 395 U.S. at 373–374.
26. 395 U.S. at 390–391.
27. 395 U.S. at 390.
28. See *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984) at 378.
29. 395 U.S. at 379.
30. *Fighting for the First Amendment: Stanton of CBS vs. Congress and the Nixon White House* (Westport, CT: Praeger, 1997), p. 196.
31. Graber, op. cit. n. 1 at 71.
32. Ibid.
33. 395 U.S. at 392–393.
34. See 395 U.S. at 393–394.
35. 430 U.S. 705.
36. 73 *Yale Law Journal* 733 (1964).
37. Ibid. at 736.
38. Ibid.
39. Justice Kennedy in the first *Turner Broadcasting System v.* FCC case, 512 U.S. 622 (1994), lists at 638 some of the works criticizing *Red Lion*'s "scarcity" thesis.
40. Graber, op. cit. n. 1 at 71.
41. 418 U.S. 241.
42. Graber, op. cit. n. 1 at 72.
43. 412 U.S. 94.
44. 412 U.S. at 126–127.
45. 450 U.S. 582.
46. 450 U.S. at 585–586.
47. See 450 U.S. at 603–604.
48. 453 U.S. 367.
49. 453 U.S. at 395.
50. 453 U.S. at 396.
51. 453 U.S. at 395.
52. 412 U.S. at 101.
53. 453 U.S. at 417.
54. 512 U.S. 622.
55. 520 U.S. 180.
56. See 47 U.S.C. 546(b),(c),(d).
57. 512 U.S. at 652.

58. 512 U.S. at 662.
59. 512 U.S. at 638.
60. 512 U.S. at 663.
61. Ibid.
62. See *Turner I* at 684 of 512 U.S.; *Turner II* at 254 of 520 U.S.
63. 468 U.S. 364.
64. 468 U.S. at 381.
65. 468 U.S. at 380.
66. 500 U.S. 173.
67. 468 U.S. at 407.
68. 468 U.S. at 414.
69. 468 U.S. at 417.
70. 438 U.S. 726.
71. 413 U.S. 15.
72. 438 U.S. at 736.
73. 438 U.S. at 748.
74. 438 U.S. at 748–749.
75. 438 U.S. at 765.
76. 438 U.S. at 751–755.
77. 450 U.S. at 598.

NOTES TO CHAPTER 4

1. *New York Times,* April 8, 1991, p. E1.
2. *New York Times,* October 5, 1999, p. B1.
3. *New York Times,* September 23, 1999, p. A1; September 24, 1999, p. B1. In addition, it receives public monies for capital improvements. *New York Times,* March 17, 2002, Sec. 4, p. 3 has a black and white reproduction of the Ofili effort.
4. *New York Times,* September 29, 1999, p. A1; October 21, 1999, p. B1.
5. *New York Times,* September 29, 1999, p. A1.
6. *New York Times,* October 5, 1999, p. A25.
7. 64 F. Supp.2d 184 (E.D. N.Y.).
8. See 64 F. Supp.2d at 199.
9. Ibid.
10. 29 N.E. 517.
11. 29 N.E. at 517.
12. *New York Times,* October 31, 1999, Sec. 1, p. 1.
13. 64 F. Supp.2d at 199.
14. 357 U.S. 513.
15. 468 U.S. 364.
16. See 64 F. Supp.2d at 201.

17. Ibid.
18. *New York Times,* March 28, 2000, p. A1.
19. See, e.g., *New York Times,* September 25, 1999, p. B1.
20. Ibid. at B6.
21. 123 S. Ct. 1536.
22. 578 F.2d 1197 (7th Cir.), cert. den. 439 U.S. 916 (1978).
23. 315 U.S. 568.
24. 315 U.S. at 572.
25. Matsuda, Mari J., "Public Response to Racist Speech" at p. 17, 25 of Matsuda, Mari J. et al. *Words That Wound: Critical Race Theory, Assaultive Speech and the First Amendment* (Boulder, CO: Westview Press, 1993).
26. See *Brown v. Board of Education,* 347 U.S. 483 (1954) at 494.
27. See Mill, John Stuart, *Essential Works of John Stuart Mill* (New York: Bantam Books, 1961). *On Liberty* begins at p. 255 and the quote can be found at p. 285.
28. "What's Left?: Hate Speech, Pornography and the Problem for Artistic Expression," 84 *California Law Rev* 1499 (1996) at 1563.
29. Ibid. at 1553–1554.
30. *New York Times,* October 5, 1999, p. E1.
31. *New York Times,* September 24, 1999, p. B1.
32. *New York Times,* October 1999, p. E1, E3.
33. At p. 7.
34. *Staten Island Advance,* February 5, 1970, p. 6.
35. March 6, 1969, p. 8.
36. March 13, 1969, p. 6.
37. 302 N.Y.S.2d 427.
38. 327 N.Y.S.2d 755.
39. 343 N.Y.S.2d 333.
40. 327 N.Y.S.2d at 757.
41. Voltaire, F. M., *L'homme aux Quarante Ecus* at p. 302, 320–321, 336–341 of Voltaire, F. M., *Romans et Contes* (Paris: Editions Garnier Freres, 1960).
42. 766 F. Supp. 1121 (S.D. Fla.).
43. *New York Times,* October 23, 1999, p. B1.
44. 766 F. Supp. at 1129.
45. *Mills v. Alabama,* 384 U.S. 214 (1966) at 218–219.
46. *New York Times,* October 23, 1999, p. B1.
47. Levy, Alan H., *Debates over Federal Support of the Arts in America from George Washington to Jesse Helms* (Lanham, MD: University Press of America, 1997), p. 14.
48. Ibid. at 62–84.
49. See Anillo, Alvaro I., "The National Endowment for the Humanities: Control of Funding versus Academic Freedom," 45 *Vanderbilt Law Rev* 455 (1992) at 458–465; Cummings, Milton C. Jr., "Government and the Arts: An Overview" at p. 31, 46–52

of Benedict, Stephen (ed.), *Public Money and the Muse: Essays on Government Funding for the Arts* (New York: W.W. Norton, 1991).

50. Cummings, op. cit. n. 49 at 55.
51. Ibid. at 56.
52. Ibid. at 59.
53. Ibid. at 63; *New York Times,* June 14, 1989, p. C2; June 20, 1989, p. C15.
54. *New York Times,* June 20, 1989, p. C15.
55. Garvey, John H., "Black and White Images," *56 Law & Contemporary Problems* 189 (fall 1993) at 191.
56. Ibid.
57. *New York Times,* August 16, 1989, p. 13.
58. Garvey, op. cit. n. 55 at 190.
59. *New York Times,* September 24, 1990, p. A14.
60. *New York Times,* June 14, 1989, p. C22.
61. Garvey, op. cit. n. 55 at 191–197.
62. *New York Times,* September 24, 1990, p. A14.
63. 754 F. Supp. 774 (C.D. Cal.).
64. 413 U.S. 15.
65. 413 U.S. at 24.
66. See 754 F. Supp. at 783.
67. 754 F. Supp. at 785.
68. 20 U.S.C. 954(d)(2), 954(L).
69. 20 U.S.C. 954(d)(1).
70. *National Endowment for the Arts v. Karen Finley et al.,* 524 U.S. 569 (1998) at 596 (Scalia concurring opinion); *New York Times,* May 25, 1990, p. A26.
71. *New York Times,* June 30, 1990, p. 1.
72. *National Endowment for the Arts v. Karen Finley et al.,* 524 U.S. 569 at 596 (Scalia concurring opinion).
73. *New York Times,* July 12, 1996, p. C19.
74. 795 F. Supp. 1457 (C.D. Cal.).
75. 795 F. Supp. at 1473.
76. 795 F. Supp. at 1475–1476.
77. *New York Times,* January 5, 1991, p. 9.
78. 100 F.3rd 671 (9th Cir.).
79. 100 F.3rd at 675.
80. 438 U.S. 726.
81. 100 F.3rd at 682.
82. 100 F.3rd at 684.
83. Ibid.
84. 100 F.3rd at 691.

85. *National Endowment for the Arts v. Karen Finley et al.*, 524 U.S. 569 at 621–622.
86. 100 F.3rd at 690.
87. 100 F.3rd at 691.
88. 524 U.S. 569.
89. 524 U.S. at 580.
90. 524 U.S. at 581.
91. 524 U.S. at 582.
92. See 524 U.S. at 579.
93. 524 U.S. at 589.
94. 524 U.S. at 588–589.
95. 524 U.S. at 589.
96. 524 U.S. at 590.
97. 524 U.S. at 592.
98. 524 U.S. at 595–596 (emphasis in original).
99. 524 U.S. at 597.
100. 524 U.S. at 602.
101. 524 U.S. at 603. Our discussion of the cable television regulation case of *Turner Broadcasting System v. FCC,* 512 U.S. 622 (1994), touched upon the problem of "viewpoint discrimination."
102. 524 U.S. at 603.
103. 524 U.S. at 613.
104. See Post, Robert C., "Subsidized Speech," 106 *Yale Law Journal* 151 (1996) at 181–-184.
105. "Comments on the Latest Prussian Censorship Instruction," in Easton, Loyd, and Kurt Guddat (eds.), *Writings of the Young Marx on Philosophy and Society* (New York: Anchor Books, 1967), pp. 67, 72.
106. "Art Speech," 49 *Vanderbilt Law Rev* 73 (1996) at 87–88. However, (at 116) she somewhat surprisingly opposes government funding of the arts because she is worried it might lead to their control by the polity.
107. (New York: Random House, 1961), originally published 1933.
108. Justice O'Connor's opinion in *Finley III,* 524 U.S. at 577.
109. 524 U.S. at 574.
110. 532 F.2d 792 (1st Cir.).
111. 532 F.2d at 797.
112. Ibid.
113. 532 F.2d at 795–796.
114. 532 F.2d at 796.
115. 524 U.S. at 585–586.
116. 327 U.S. 146.
117. 327 U.S. at 151.
118. Ibid.
119. 327 U.S. at 156.

120. 327 U.S. at 157–158.
121. 255 U.S. 407.
122. 339 U.S. 382.
123. 524 U.S. at 581. However, the NEA has in recent years taken the road of eschewing the funding of individual artists and channeling most of its cash into museums and schools. See *New York Times,* December 22, 2001, p. A19; December 3, 2002, p. A31; *Staten Island Advance,* August 2, 2002, p. A22. It does so because of 1995 amendments to the statute creating it.

NOTES TO CHAPTER 5

1. See *Smith v. Maryland,* 442 U.S. 735 (1979).
2. 277 U.S. 438 at 478. The Brandeis and Warren article is entitled "The Right to Privacy" and can be found at 4 *Harvard Law Rev* 193 (1890).
3. 381 U.S. 479.
4. 327 U.S. 146.
5. 381 U.S. at 485–486.
6. 405 U.S. 438.
7. 410 U.S. 113.
8. See *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992) at 860.
9. See 410 U.S. at 153.
10. 432 U.S. 464.
11. 432 U.S. 438.
12. "Unconstitutional Conditions," 102 *Harvard Law Rev* 1413 (1989) at 1499–1500.
13. 432 U.S. at 466.
14. 432 U.S. at 472.
15. See 432 U.S. at 474.
16. Ibid.
17. 374 U.S. 398.
18. 432 U.S. at 488.
19. 432 U.S. at 489.
20. Ibid.
21. Sheehan, Susan, *A Welfare Mother* (Boston: Houghton Mifflin, 1976) describes the trials and tribulations of a woman on welfare.
22. 432 U.S. at 474.
23. 448 U.S. 297.
24. 448 U.S. at 316.
25. 448 U.S. at 322.
26. 448 U.S. at 334.
27. 357 U.S. 513.
28. 448 U.S. at 333–334.

29. 500 U.S. 173.
30. 500 U.S. at 196.
31. 500 U.S. at 196–197.
32. 29 N.E. 517.
33. 500 U.S. at 199.
34. Ibid.
35. "Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination," 64 *Albany Law Rev* 501 (2000) at 554.
36. See 524 U.S. 569 at 587–588.
37. 531 U.S. 533.
38. 500 U.S. at 199–200.
39. 500 U.S. at 207.
40. 500 U.S. at 212.
41. *When Government Speaks* (Berkeley: University of California Press, 1983), p. 50.
42. "Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech," 67 *New York University Law Rev* 675 (1992) at 702.
43. 500 U.S. at 194.
44. See Corn, David, "Our Gang in Venezuela?" *Nation,* August 5, 2002, p. 24.
45. 500 U.S. at 213.
46. See Sunstein, Cass, *Democracy and the Problem of Free Speech* (New York: Macmillan, 1993), p. 117.
47. Cannon, Lou, *President Reagan: The Role of a Lifetime* (New York: Simon and Schuster, 1991), p. 518.
48. 400 U.S. 309.
49. 400 U.S. at 317.
50. "The New Property," 73 *Yale Law Journal* 733 (1964).
51. 400 U.S. at 327.
52. 400 U.S. at 327–328.
53. 400 U.S. at 330.
54. 400 U.S. at 344.
55. 400 U.S. at 345.
56. 25 N.Y.S.2d 617.
57. 25 N.Y.S.2d at 618.
58. 25 N.Y.S.2d at 619.
59. Ibid.
60. 413 U.S. 528.
61. 413 U.S. at 538.
62. See Baker, Lynn, "The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions," 75 *Cornell Law Rev* 1185 (1990) at 1239–1240.
63. *Roberts v. U.S. Jaycees,* 468 U.S. 609 (1984), notes that freedom of association encompasses both of these distinct aspects.

64. 413 U.S. at 543.
65. 413 U.S. at 544.
66. 309 F.3d 330.
67. 309 F.3d at 337.

NOTES TO CHAPTER 6

1. *U.S. News & World Report,* May 6, 2002, pp. 40, 42.
2. 293 U.S. 245.
3. 293 U.S. at 253.
4. 293 U.S. at 262–263.
5. 293 U.S. at 265.
6. 293 U.S. at 268.
7. 325 U.S. 561.
8. 325 U.S. at 564.
9. 325 U.S. at 572.
10. 325 U.S. at 574.
11. 325 U.S. at 577.
12. 374 U.S. 398.
13. 357 U.S. 513.
14. 432 U.S. 464.
15. 476 U.S. 693 at 732.
16. See 374 U.S. at 404.
17. Ibid.
18. 374 U.S. at 405.
19. 327 U.S. 146.
20. 339 U.S. 382.
21. 374 U.S. at 406.
22. 98 U.S. 145.
23. 321 U.S. 158.
24. 374 U.S. at 403.
25. 374 U.S. 203.
26. 374 U.S. at 416.
27. 450 U.S. 707.
28. 450 U.S. at 717–718.
29. 500 U.S. 173.
30. 374 U.S. at 416 (Stewart in *Sherbert*); 374 U.S. at 422 (Harlan in *Sherbert*); 450 U.S. at 726 (Rehnquist in *Thomas*).
31. 489 U.S. 829.
32. 489 U.S. at 834.

33. 489 U.S. at 835.
34. 489 U.S. at 833.
35. Ibid.
36. 480 U.S. 136.
37. 480 U.S. at 141.
38. Lynn Baker makes this point. See her "The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions," 75 *Cornell Law Rev* 1185 (1990) at 1214.
39. 461 U.S. 574.
40. 710 F.2d 868 (D.C. Cir.).
41. 461 U.S. at 604.
42. See 461 U.S. at 593.
43. The voucher case is *Zelman v. Simmons-Harris,* 122 S.Ct. 2460.
44. 450 U.S. at 715.
45. 476 U.S. 693.
46. 476 U.S. at 700.
47. 476 U.S. at 727.
48. 476 U.S. at 732.
49. 476 U.S. at 733.
50. 476 U.S. at 715–716.
51. 476 U.S. at 727.
52. 476 U.S. at 704.
53. 476 U.S. at 707–708.
54. 476 U.S. at 710.
55. 415 U.S. 361.
56. 171 P.2d 883.
57. "Reopening the Public Forum from Sidewalks to Cyberspace," 58 *Ohio State Law Journal* 1535 (1998, Gey article); 460 U.S. 37 (*Perry Education Association*).
58. 460 U.S. at 45. *Hague v. CIO* is 307 U.S. 496.
59. 460 U.S. at 45.
60. Nicole Casarez agrees. See her article "Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination," 64 *Albany Law Rev* 501 (2000) at 510, 521.
61. 39 N.E. 113.
62. 460 U.S. at 53–54.
63. 460 U.S. at 46.
64. 454 U.S. 263.
65. Op. cit. n. 60 at 524–525.
66. 508 U.S. 384.
67. 508 U.S. at 391.
68. 533 U.S. 98.

69. 533 U.S. at 108.
70. 533 U.S. at 135.
71. 533 U.S. at 143.
72. 533 U.S. at 133.
73. 515 U.S. 819.
74. See 515 U.S. at 840.
75. 515 U.S. at 829.
76. Ibid.
77. 515 U.S. at 830.
78. See 515 U.S. at 831.
79. 515 U.S. at 895.

NOTES TO CHAPTER 7

1. 359 P.2d 45, cert. den. 366 U.S. 819 (1961).
2. 460 U.S. 37.
3. 460 U.S. at 65.
4. 420 U.S. 546.
5. 420 U.S. at 549.
6. Wilson, James Q., and John J. DiIulio, *American Government: The Essentials* (Boston: Houghton Mifflin, 2001), p. 217.
7. 413 U.S. 528.
8. 424 U.S. 1.
9. "Allocational Sanctions: The Problem of Negative Rights in a Positive State," 132 *University of Pennsylvania Law Rev* 1293 (1984) at 1376.
10. 424 U.S. at 57.
11. 424 U.S. at 16–17.
12. 424 U.S. at 29.
13. 424 U.S. at 39–51.
14. 424 U.S. at 14.
15. 485 U.S. 360.
16. "Unconstitutional Conditions, State Power and the Limits of Consent," 102 *Harvard Law Rev* 1 (1988). See especially at 5–7 and 96–103.
17. 374 U.S. 398.
18. See 485 U.S. at 366–368.
19. 432 U.S. 464 (1977).
20. 485 U.S. at 368.
21. See 485 U.S. at 371.
22. 485 U.S. at 369.
23. Op. cit. n. 16 at 101.
24. Ibid. at 101–102.

25. 461 U.S. 540.
26. 461 U.S. at 544.
27. 357 U.S. 513.
28. 461 U.S. at 545.
29. Ibid.
30. 461 U.S. at 546.
31. 461 U.S. at 547.
32. 461 U.S. at 550.
33. 358 U.S. 498.
34. 358 U.S. at 513.
35. 358 U.S. at 515.
36. Ibid.
37. 481 U.S. 221.
38. 481 U.S. at 230.
39. See 481 U.S. at 232.
40. See 481 U.S. at 237.
41. 297 U.S. 233.
42. 531 U.S. 533.
43. 372 U.S. 335.
44. 531 U.S. at 537.
45. Casarez, Nicole, "Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination," 64 *Albany Law Rev* 501 (2000) at 566.
46. Quoted ibid. at 567.
47. 515 U.S. 819.
48. 500 U.S. 173.
49. 531 U.S. at 541.
50. 531 U.S. at 544.
51. 531 U.S. at 548–549.
52. 531 U.S. at 545.
53. Ibid.
54. 531 U.S. at 546.
55. 476 U.S. 693.
56. 531 U.S. at 562.
57. 531 U.S. at 552.
58. Ibid.
59. Ibid.
60. Ibid. The internal quote is from *Lyng v. International Union* at 369 of 485 U.S.
61. 531 U.S. at 553.

62. 309 F.3d 629, cert. den. *Walters v. Conant*, 03–04, Oct 14, 2003.
63. 309 F.3d at 638.

NOTES TO CHAPTER 8

1. "Unconstitutional Conditions," 102 *Harvard Law Rev* 1413 (1989) at 1416.
2. "Unconstitutional Conditions, State Power, and the Limits of Consent," 102 *Harvard Law Rev* 1 (1988) at 13.
3. 366 U.S. 36.
4. 363 U.S. 603.
5. 357 U.S. 513.
6. 261 F. Supp. 87 (C.D. Cal.).
7. 91 N.E.2d 564.
8. 395 U.S. 367.
9. 412 U.S. 94.
10. 512 U.S. 622 and 520 U.S. 180.
11. 468 U.S. 364.
12. 438 U.S. 726.
13. 500 U.S. 173.
14. 531 U.S. 533.
15. 432 U.S. 464.
16. 400 U.S. 309.
17. 413 U.S. 528.
18. 374 U.S. 398.
19. 533 U.S. 98.
20. 461 U.S. 574.
21. 415 U.S. 361.
22. 64 F. Supp.2d 184 (E.D. N.Y.).
23. 327 N.Y.S.2d 755 (Appellate Division); 343 N.Y.S.2d 333 (Court of Appeals).
24. 754 F. Supp. 774 (C.D. Cal.).
25. 524 U.S. 569.
26. 339 U.S. 382.
27. 29 N.E. 517.
28. 39 N.E. 113.
29. "The New Property," 73 *Yale Law Journal* 733 (1964) at 774.
30. 271 U.S. 583.
31. 271 U.S. at 594.
32. 70 N.W.2d 605.
33. 70 N.W.2d at 609.
34. Ibid.

35. "Allocational Sanctions: The Problem of Negative Rights in a Positive State," 132 *University of Pennsylvania Law Rev* 1293 (1984) at 1333–1340. *United States v. O'Brien,* 391 U.S. 367 (1968), was also suspicious of looking to the intent of legislators. Here the Court upheld a law making it illegal to burn a draft card even though it seemed to many that the purpose of the law was to punish individuals protesting United States involvement in the Vietnam War. See 391 U.S. at 382–385.
36. 454 U.S. 263.
37. Op. cit. n. 1 at 1427.
38. Op. cit. n. 29 at 775.
39. 461 U.S. 540.
40. 358 U.S. 498.
41. 460 U.S. 37.
42. "Government Subsidies and Free Expression," 80 *Minnesota Law Rev* 543 (1966) at 556.
43. See the famous Footnote 4 of Justice Harlan Fiske Stone's opinion in *U.S. v. Carolene Products Company,* 304 U.S. 144 (1938) at 152–153. This footnote is celebrated because it developed the concept of "preferred position," the doctrine that the courts should be harsher on laws restricting, e.g., First Amendment freedoms than on acts reducing property rights. The idea, developed in the subsection to which this note is appended, that measures effecting viewpoint and content discrimination are invalid unless they further a compelling governmental interest is an application of the preferred position doctrine.
44. 515 U.S. 819.
45. 424 U.S. 1.
46. 481 U.S. 221.
47. Op. cit. n. 35 at 1351–1352.
48. Item 8 below will give another possible example.
49. "Subsidized Speech," 106 *Yale Law Journal* 151 at 164 (1996).
50. 395 U.S. at 390.
51. Sparrow, Bartholemew H., *Uncertain Guardians: The News Media as a Political Institution* (Baltimore: Johns Hopkins University Press, 1999), pp. 189–195 (weaknesses in news presentation); "Those Flippin' Grazers," *American Demographics*, March 1999, p. 17 (channel surfing).
52. *Rocky Mountain News,* May 18, 2002, p. 7E.
53. 450 U.S. 582.
54. See, e.g., Sparrow, op. cit. n. 51 at 187.
55. 710 F.2d 868 (D.C. Cir.).
56. "If He Hollers Let Him Go: Regulating Racist Speech on Campus" in Matsuda, et al., *Words That Wound: Critical Race Theory, Assaultive Speech and the First Amendment* (Boulder, CO: Westview Press, 1993), pp. 53, 78.
57. New York: Free Press, 1994.
58. Jacoby, Russell, and Naomi Glauberman, *The Bell Curve Debate: History, Documents, Opinions* (New York: Times Books, 1995).

59. Delgado, Richard, "Words That Wound: A Tort Action for Racial Insults, Epithets and Name Calling" in Matsuda et al., op. cit. n. 56, pp. 89, 93.
60. See *Turner Broadcasting System v. FCC* (*Turner I*), at 661–662 of U.S. 512.
61. 410 U.S. 113 at 152, 155.
62. *Economist,* June 1, 2002 at 37 notes that Chile stringently limits the right to an abortion.
63. 374 U.S. at 404.
64. 123 S.Ct. 2297.

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