

Bill of Rights in Action

THE 'BUSINESS PLOT' TO OVERTHROW FDR



Major General Smedley Butler addresses the "Bonus Army" of nearly 16,000 World War I veterans in Washington, D.C., in 1932. Gen. Butler was soon to be offered a role in a plot to topple the government of President Franklin D. Roosevelt. It was a role Gen. Butler sharply refused.

During his campaign for president in 1932, Franklin D. Roosevelt (FDR), who came from a wealthy family, appealed to common people to help him rebuild America during the Great Depression. He promised to help suffering Americans by putting them back to work, stopping farm foreclosures, and regulating the banks. Central to his appeal was his criticism of the banks and financial investors that had come to be known as Wall Street.

As president, he ended the gold standard. In this system, the value of the dollar was based on the total amount of gold held by the federal government. The fixed amount of gold restricted government spending. These spending limits would have hindered Roosevelt's New Deal programs to bring relief to Americans.

Roosevelt seized failing banks and placed them under federal control. Wall Street bankers and stockbrokers were happy that the banks were saved, but they did

not like the idea of federal regulation of banks. They were even more opposed to ending the gold standard. They feared Roosevelt would spend wildly, and that their fortunes would shrink.

Gen. Smedley Butler

Smedley Butler was a well-admired military leader and supporter of FDR. Butler was born in 1881 in Chester, Pennsylvania, into a Quaker family. His father was a long-time Republican member of Congress. Though Quakers are traditionally pacifist, 16-year-old Smedley insisted on joining the fight when the Spanish-American War broke out in 1898. He badgered his mother to take him to join the U.S. Marine Corps.

Butler had a long military career, rising through the ranks to become an officer and ultimately a major general. He served in the Philippines, Haiti, Mexico, and other Caribbean countries, as well as China during the Boxer

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SPECIAL NOTICE

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President Franklin D. Roosevelt signs the Gold Reserve Act in 1934, a law that culminated Roosevelt's policy to end the gold standard for U.S. currency.

Rebellion (1899–1901) and in World War I. He won two Congressional Medals of Honor. By the 1920s, he was widely known as “the soldiers’ general,” beloved by the rank and file.

Over time, his views about the use of Marines abroad changed. He spoke out that the Marines were being used mainly to protect American business investments and called the use of the military abroad a “racket,” which got him into trouble with his superiors.

In 1931, he retired and began to make public speeches against the power of Wall Street. Around the same time, Butler took up another cause: the bonus payment for World War I veterans that had long been promised by the U.S. government. In July 1932, 14 years after the end of World War I, a group of thousands of veterans and their families held a demonstration in Washington, D.C.

Known as the “Bonus Army,” they set up camp, demanding that Congress pass a law to give them their bonus pay. Now a celebrity among veterans, Butler was invited to speak to the Bonus Army. His speech received a standing ovation.

Butler was shocked when President Herbert Hoover ordered Gen. Douglas MacArthur to clear and burn the Bonus Army’s camp. A long-time Republican, Butler decided to campaign for the Democrat FDR in the 1932 election.

The Plot Begins

In July 1933, Butler was approached at his home by two well-dressed men. One of the two men was Gerald MacGuire, who identified himself as part of the Connecticut American Legion. At this first meeting, MacGuire tried to convince Butler to run for commander of the American Legion at the upcoming convention. For years, Butler had been critical of the American Legion’s leadership. He believed the leaders had failed to adequately support veterans. However, Butler turned down the offer.

A month later, the two men went to Butler’s home again with a new plan. They wanted Butler to gather hundreds of American Legion members (“Legionnaires”) to back Butler for commander at the Legion convention in Chicago. MacGuire assured Butler that \$100,000 was in the bank to support the expenses of the Legionnaire backers.

MacGuire also gave Butler a prepared speech to deliver at the convention. Butler refused MacGuire’s new plan. The prepared speech demanded that the Legion pressure Roosevelt to restore the gold standard, supposedly to pay the Bonus Army. Butler became suspicious about the motives of MacGuire and the other man.

MacGuire approached Butler about the new plan a third time in September. Butler asked who was backing this plan. MacGuire mentioned several wealthy Wall

Street businessmen, including his boss, stockbroker Grayson Murphy, a founder of the American Legion. MacGuire boasted that Murphy had received a medal from Benito Mussolini, the Fascist leader of Italy, whom Butler despised.

MacGuire also named Robert Clark as a backer of the plan. Clark was a stock investor whom Butler knew as the “millionaire lieutenant” in China. To convince Butler of the plan, MacGuire pulled 18 one-thousand-dollar bills from his wallet and offered them to Butler. (This would be the equivalent of around \$400,000 in 2023.) Butler angrily refused what he considered an obvious bribe.

A few days later, Butler realized he needed to gather evidence about the financial backers of MacGuire’s proposal. He wrote to MacGuire saying he would carry out the plot, after all, but only with proof that the Legionnaires would be paid.

Meeting the Financier

MacGuire arranged a meeting between Gen. Butler and Robert Clark. Clark pressed Butler to make the gold standard speech. Clark said he paid the chief lawyer for the J.P. Morgan Wall Street firm to write the speech. “We want the gold,” Clark told Butler, supposedly for the benefit of the soldiers. Clark revealed to Butler that he had \$30 million and did not want to lose it because of the New Deal.

Clark told Butler that FDR was weak. Butler’s speech at the Legion convention, he argued, would gain the soldiers’ support and force FDR to restore the gold standard. When Butler refused again to make the speech, Clark became irritated. He offered to pay Butler’s home mortgage. He also said that other wealthy backers of the plan preferred Gen. MacArthur to Gen. Butler, whom they considered “too radical.”

Later, the American Legion convention voted to endorse the gold standard without Butler’s speech. But Roosevelt did not change his policy.

Fascist Influences

Meanwhile, MacGuire went to Europe to study fascist groups in Italy, Germany, Spain, and France. In particular, he studied how veterans’ groups in those countries helped support fascism and dictatorship. He would later testify that Robert Clark funded his study-trip.

Upon his return in the spring of 1934, he met with Smedley Butler again. This time, he tried to persuade Butler to assemble and lead a veterans’ army, like the Cross of Fire group that had staged an insurrection in France. He told Butler it would be a peaceful military

takeover of Roosevelt’s presidency. The pretext, he said, would be FDR’s poor health. Butler’s patriotism, beloved reputation among veterans, and his speech before the Bonus Army two years earlier made him the perfect man for the job, MacGuire thought.

If Gen. Butler’s army would topple Roosevelt, the plot involved Roosevelt turning over power to a “Secretary of General Affairs” who would act as dictator and restore the gold standard. FDR would remain as a figurehead, like the powerless king of Italy. If FDR resisted, he would be forced to resign.

Butler was appalled. He believed that MacGuire’s new plot was treason. He told MacGuire he needed time to think about it, but really, he wanted time to carefully think about how he should alert the government. The plot was so outrageous, who would believe it?

Alerting the Press

Alarmed, Butler first went to the press. He contacted reporter Paul French of the *Philadelphia Record* who investigated Butler’s story. Butler introduced him to MacGuire as someone sympathetic to MacGuire’s cause, so that MacGuire revealed to French all the details of the plot.

Butler himself went to J. Edgar Hoover, director of the federal Division of Intelligence (which later became the FBI). But Hoover said there was no federal crime, yet, for him to investigate. In reality, Hoover was already investigating American fascist groups and may have been aware of MacGuire’s activities.

The House Committee Investigation

Beginning on November 20, 1934, members of the House Un-American Activities Committee met secretly in New York City to take testimony about what the press would call the “Business Plot” (because it was funded by wealthy and prominent businessmen). Rep. John McCormack (D-Mass.) and Rep. Samuel Dickstein (D-NY) led the hearing. Smedley Butler, Gerald MacGuire, and the reporter Paul French each gave testimony under oath.

Butler testified to what he experienced in the meetings he had with MacGuire and Clark. At the first meeting, MacGuire told Butler that Roosevelt himself did not want Butler to attend the American Legion convention. “I thought I smelled a rat, right away,” Butler testified, “that they were trying to get me mad — to get my goat.” Butler continued, “I could not reconcile . . . their desire to serve the ordinary man in the ranks, with their other aims.”

Butler recounted what he said to Clark in their first meeting:

*The plot was
so outrageous,
who would
believe it?*



I have one interest and that is the maintenance of democracy. That is the only thing. I took an oath to sustain democracy, and that is what I am going to do and nothing else. I am not going to get these soldiers marching around and stirred up over the gold standard.

Regarding MacGuire's plot to replace FDR with a dictator, Butler quoted MacGuire:

You know the American people will swallow that. We have got the newspapers. We will start a campaign that the president's health is failing. Everybody can tell that by looking at him, and the dumb American people will fall for it in a second.

Next, Paul French testified about his independent investigation of Butler's claims. He confirmed Butler's story to the committee. "During the course of [our] conversation," French said, "[MacGuire] continually discussed the need for a man on a white horse, as he called it, a dictator who would come galloping. . . [with] a group of organized veterans to save capitalism."

Committee members McCormack and Dickstein questioned MacGuire for three days. He denied almost all of Butler's story. Frequently, he answered the committee members' questions by saying "Not to my recollection," or "I do not remember." In sworn testimony, he denied Butler's and French's assertions about the plot to overthrow FDR.

The committee wanted to question financier Robert Clark, who Butler had said offered him a bribe to lead an insurrectionary veterans' army. But Clark was in Europe and never appeared before the committee.

The Press Reacts

On November 21, 1934, the day after the committee first met to take testimony, Paul French broke the story in the *Philadelphia Record* and the *New York Post*. Most of the rest of the press did not seem to take the plot very seriously.

The New York Times barely covered the plot but quoted denials of men named by Butler. Thomas Lamont, a partner in J.P. Morgan & Co., called Butler's story "perfect moonshine!" Grayson Murphy, MacGuire's boss, said the plot was "an absolute lie." Gerald MacGuire told reporters that he had only gone to see Butler to sell him some bonds and that Butler's testimony was "a publicity stunt."

Later *The New York Times* declared the plot "a gigantic hoax." In December 1934, *Time* magazine labeled Butler's story a "Plot without Plotters."

The Committee's Final Report

Despite the press's mockery, the McCormack-Dickstein Committee staff dug up bank records, letters, and other documents that verified Butler's testimony. Then, on February 15, 1935, it submitted its final report to the House of Representatives. Among its findings were the following:

- The committee "received evidence showing that certain persons had made an attempt to establish a Fascist organization in this country."
- "There is no question that these [fascist] attempts were discussed, were planned, and might have been placed in execution when and if the financial backers deemed it expedient [suitable]."

What is Fascism?

Fascism is a political system based on absolute state power. The defining examples of fascism took place before and during World War II in Mussolini's Italy and Hitler's Germany. But there are variations of fascism in the world even today, often called neo-fascism. The Golden Dawn political party in Greece is one example, winning many seats in Greece's parliament before a Greek court found party leaders guilty of murder and attempted murder in 2020.

Fascist political parties and movements often gain strength during a national political crisis or economic distress. There is no one universally accepted definition of fascism, but most fascist regimes share common characteristics, including the following:

- The nation has one absolute leader or dictator who typically comes to power by military force or rigged elections. The nation owes unquestioning obedience to the dictator. The dictator controls the military.
- Democratic institutions, like fairly elected legislatures and presidents, and independent courts are either abolished or controlled by the dictator. The law allows only one political party to exist: the dictator's party.
- Individual rights are not important. Only the state is important. There is little or no tolerance of freedom of speech, the press, or religion. Dissent against the dictator's regime is forbidden.
- Strong emphasis is placed on national superiority or nationalism. The dictator uses extreme patriotism, flags, slogans, and military values to stir up support for his regime.
- The economic system favors capitalism as long as it serves the state. Socialism and communism are treated as threats to the nation and are brutally suppressed.

Fascist groups and regimes tend to hold racist views. They scapegoat certain minorities, blaming and punishing them for all the nation's problems, such as Nazi Germany's genocide against European Jews during the Holocaust.

Source: Soucy, Robert. "Fascism-Politics." *Encyclopaedia Britannica*, www.britannica.com/topic/fascism. Accessed 9 Mar. 2023.

- “MacGuire denied these allegations under oath, but your committee was able to verify all the pertinent statements made by General Butler with the exception of the direct statement suggesting the creation of the organization. This, however, was corroborated [proved] in the correspondence of MacGuire with his principal, Robert Sterling Clark, of New York City, while MacGuire was abroad studying the various forms of veterans organizations of Fascist character.”

The committee concluded, “Armed forces for the purpose of establishing a dictatorship through the instrumentality of the proletariat [working class], or a dictatorship predicated on racial and religious hatreds, have no place in this country.”

The final report deleted the identity of nearly all the plotters and censored some of the testimony. No criminal charges were ever filed against the alleged plotters. Nonetheless, Butler seemed satisfied that the plot had been stopped due to the publicity.

The committee sent a copy of its report to President Roosevelt. FDR said he was “interested” in the report. Otherwise, FDR remained silent about its findings.

The Business Plot Ends

The Business Plot hardly has made a footnote in American history. The press mostly ignored the committee’s findings. However, journalist John Spivak published the testimony in 1935 with the names and businesses that had been deleted. Even then, there was a muted reaction from the press, Congress, and the public.

Some have speculated that this silence — and FDR’s silence — was due to the fact that some of FDR’s own advisers within the Democratic Party were involved in the Business Plot. Therefore, the details were mostly hidden from the public for national security. Spivak was also a communist, which did not enhance his credibility with the press, members of Congress, or the White House.

Author Jules Archer interviewed committee chair John McCormack in 1971. McCormack said Butler was telling the truth. He told Archer that the plotters got “the wrong man for the job.”

Historians and journalists have puzzled over the fact that the plotters sought “the wrong man’s” help. After all, Butler was a friend and supporter of FDR and an outspoken critic of Wall Street and of war. Therefore, some have theorized that the Business Plot may have been an attempt by powerful people to discredit one of FDR’s strongest allies, Smedley Butler.

In other matters, Congress passed the long-delayed World War I veterans’ Bonus Act in 1936 — over FDR’s veto. (FDR said the bill was technically not a relief bill for veterans.) Meanwhile, Gen. Smedley Butler wrote

War is a Racket, a 1936 book that examined how U.S. industries and Wall Street profited from America’s entry into World War I. He died in 1940.

Extremist, neo-fascist, and seditious movements have arisen in the United States since Butler’s time. Recently, some extremists were convicted of the crime of seditious conspiracy in the January 6, 2021, attack on the U.S. Capitol. Unlike the McCormack-Dickstein Committee, the House hearings about “1/6” were not secret, and the mainstream press did not ignore the hearings’ findings.

WRITING & DISCUSSION

1. Why do you think the major press did not take the Business Plot seriously?
2. Do you think the U.S. Justice Department should have prosecuted anyone? If so, who?
3. Why do you think fascism was popular among some Americans in the 1930s?

Author: Carlton Martz is a longtime contributor to *Bill of Rights in Action* (BRIA) and other CRF publications. See our feature on Carlton in the next issue of BRIA!

ACTIVITY: Is This a Crime?

You are a member of the McCormack-Dickstein Committee. The committee cannot prosecute anyone criminally for the Business Plot, but it can refer the case to the Department of Justice. What criminal charges, if any, would you recommend for Gerald MacGuire? How about Richard Clark? How about Grayson Murphy?

Form a group with three other committee members to discuss the above questions. Find evidence in the article to support your group’s answers. Be ready to have a spokesperson present your group’s recommendations to the class.

Charges to consider are:

Treason. Article III, Sec. 3, of the Constitution defines treason as “levying war against the United States, adhering to [the United States’] Enemies, giving them Aid and Comfort.”

Seditious conspiracy. Federal law defines this crime as two or more people *conspiring to use force* to (1) overthrow the U.S. government, (2) hinder the execution of any U.S. law, or (3) seize any property of the United States.

Perjury. Federal law defines this crime as a person knowingly and intentionally lying to a “competent tribunal” (e.g., a court of law or congressional hearing) after swearing an oath to testify truly.

THE STRUGGLE FOR THE RIGHTS OF DISABLED PERSONS



New York City's Metropolitan Transit Authority celebrates the 31st anniversary of the passage of the Americans with Disabilities Act (ADA) in 2021. Under the ADA, public transportation like that of the MTA was made more accessible for people with disabilities.

The movements for the rights of disabled people emerged in the 20th century, reflecting a history of disabled people's struggle and determination. Toward the end of the century, the enactment of the landmark law called the Americans with Disabilities Act was a major breakthrough.

Disabilities are varied. They can be sensory (such as blindness or deafness); physical (like an inability to walk); mental (such as schizophrenia); or developmental (like various kinds of learning difficulties or nervous-system conditions).

Through modern medicine, we have greater scientific understanding of disabilities today. And largely thanks to the disability rights movement, today many view discrimination against disabled people as more disabling than any sensory, physical, or mental condition.

Throughout much of U.S. history, however, blindness, deafness, and other inherited or acquired disabling conditions were considered personal defects. We will now take a look at how acceptance and treatments of people with disabilities have changed in U.S. history.

Early History of Disability in the U.S.

In Colonial America, settlers from Europe favored the "able-bodied" and generally restricted immigration of people with disabilities. Disabled persons born in the colonies were the responsibility of the family or community. Communities often confined them to workhouses where they made simple items for sale.

In 1773, Virginia opened the first hospital (called an "asylum") for treating people with mental illness. This hospital served as a shelter where supposed treatments

were crude and harsh, including bloodletting (a common medical practice at the time), immersion in cold water, and chaining patients to walls.

An important step forward occurred in 1817 when Thomas Gallaudet and others founded an asylum for people with deafness and muteness (inability to speak). This asylum is considered the nation's first school for people to try to overcome their disabilities. Schools for blind people, mentally ill people, and others spread quickly.

During the Civil War, around 476,000 soldiers were wounded. Of those, over 60,000 had to have limbs amputated by doctors, which was the state of wartime medicine. Some of these veterans required prosthetics (artificial limbs) or wheelchairs.

Doctors also began to recognize veterans' psychological problems resulting from their battlefield experiences. Established in 1852, St. Elizabeths Hospital in Washington, D.C., was a prominent care facility for Civil War veterans suffering from psychological distress. It was the United States' first federally funded mental hospital.

After the Civil War

By the late 1800s, large state-operated institutions where disabled people were isolated from the rest of the population became common. These institutions were frequently little more than warehouses for disabled people where they received little meaningful treatment. Some institutions housed workers who lost fingers, arms, and hands on the job from industrial machinery.

Many veterans of World War I returned home physically and mentally disabled, especially suffering from that war's use of bombs. Soldiers frequently suffered

from “shell shock,” a traumatic reaction to the overwhelming sound of explosions. Shell-shocked soldiers suffered nightmares, confusion, tremors, and even loss of sight or hearing.

An epidemic of the disease poliomyelitis, or “polio,” broke out in New York City in 1916. It quickly spread to other parts of the nation. Polio paralyzes the nervous system and can be either deadly or severely disabling. (Through vaccines, polio was eradicated in the U.S. in 1979.)

Though children are especially vulnerable, Franklin D. Roosevelt was paralyzed from the waist down from polio as an adult in 1921. As president during the Great Depression, Roosevelt could walk short distances with leg braces but also used a wheelchair. Due to discriminatory attitudes against disabled people, Roosevelt — an extremely popular president — was not generally presented in public, in the press, or on film with his wheelchair visible.

One of the main agencies of Roosevelt’s New Deal was the Works Progress Administration (WPA), which oversaw helping jobless Americans find employment. WPA policy was to label disabled people as “unemployable.” In protest, several people with disabilities in New York City held a sit-in for nine days in 1935 at the local relief office. Eventually, their protests pressured the WPA to create 1,500 jobs for disabled people in New York City.

Roosevelt was also president during World War II. That war brought home a new wave of disabled veterans who were less willing to just accept pre-war, warehouse-like institutions for housing. In addition, during the war, a labor shortage in the U.S. resulted in the hiring of many disabled persons for the assembly lines needed to manufacture airplanes, tanks, and ammunition.

Steps Forward in the Law

After the war, veterans’ groups and others began to question the practice of placing disabled persons in institutions. They called for independent living in the community, employment, and the constitutional right of equal protection of the law. Advocates argued that disabled persons deserved civil rights alongside racial minorities and women, who also were demanding greater recognition of their rights.

The first significant federal bill was presented to President Richard Nixon in 1972. The bill declared that no disabled person could be “excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance.”

President Nixon vetoed the bill. He said it would be too expensive and would require increased taxes. His veto provoked the young activist Judy Heumann into action.

Heumann suffered polio as a young child and had to use a wheelchair for most of her life. In 1970, the 22-year-old Heumann passed her exams to become a teacher in New York but was denied her license because of her physical disability. She sued the state and became the first wheelchair user to become a teacher in New York.

In 1973, Heumann would not accept Nixon’s argument about the costliness of the law. She led a protest with about 60 others in the nation’s capital. Nixon finally signed the Rehabilitation Act of 1973 into law. State and local governments, public schools, colleges, many private businesses, and other organizations that received federal funds were covered under this law.

The federal Individuals with Disabilities in Education Act (IDEA) passed in 1975 (originally titled the ▶

HELEN KELLER

Helen Keller became a well-known and inspirational person with disabilities. She was born in Alabama in 1880 and became blind and deaf at age two due to an illness. By age seven, she had invented a system of “home signs” to communicate with her family. Her lifelong friend and teacher, Anne Sullivan, helped her learn to read Braille and write. Braille is a written language system through which visually impaired people can use their fingers to feel a language code on paper. She later became the first blind and deaf person to graduate from Radcliffe College at Harvard University.

Keller also became an activist for many causes and learned to become a public speaker. She was an advocate for people with all kinds of disabilities, labor unions, women’s right to vote, birth control, and Black civil rights. She joined the Socialist Party and spoke out against the draft in World War I. She wrote numerous books, including her autobiography, *The Story of My Life*. She died at her home in Easton, Connecticut in 1968 at age 87.





President George H.W. Bush signs the Americans with Disabilities act into law in 1990.

Meanwhile, inside the Capitol, one senator made a big difference. This was Sen. Robert Dole, a Republican from Kansas and World War II veteran who had lost the use of his right arm in combat. Dole mounted a campaign to lobby businesses and his fellow senators for passage of the ADA.

Dole negotiated compromises so that accommodations to help the disabled had to be “reasonable” and small businesses could qualify for tax credits. Congress passed the ADA in May 1990, and President George H. W. Bush signed it into law on July 26, 1990.

Education for All Handicapped Children Act). This law provides “a free appropriate public education” for all students, including special education and related services for disabled students’ needs. IDEA requires a written plan for each disabled child that includes learning goals and as much integration in regular school programs as possible.

Passage of the Americans with Disabilities Act

The Rehabilitation Act of 1973 had many inadequacies. The law and its regulations did not clearly define barriers faced by disabled persons in their daily lives or ways to eliminate or even modify any barriers.

In 1988, a new comprehensive law was proposed in Congress: the Americans with Disabilities Act (ADA). In that same year, senators heard testimonies from disabled people and their families who described the barriers they experienced in their lives. They described architectural barriers, such as the lack of ramps for wheelchairs, as well as communication barriers that affected people with vision and hearing impairments. The senators also heard from them about incidents of prejudice.

For two more years, members of Congress heard testimonies and debated the ADA. By 1990, over 40 million Americans were disabled in some way. However, some business owners still objected to the expense of making changes necessary to tear down or modify barriers to people with disabilities.

On March 12, 1990, as Congress debated the ADA, hundreds of disabled persons and their allies assembled at the steps of the Capitol Building. Many abandoned their wheelchairs, crutches, and canes and literally crawled up the steps of the Capitol. They shouted “I want to be treated like a human being!” and chanted “ADA Now!”. The “Capitol Crawl” gained nationwide attention.

What the ADA Says

The ADA had two clear purposes: (1) creating a “national mandate for the elimination of discrimination against individuals with disabilities” and (2) providing “enforceable standards” to address that discrimination.

For the first time, Congress enacted a legal definition of disability. The ADA defined disability as “a physical or mental impairment that substantially limits one or more major life activities of such individual.” However, “life activities” themselves were not defined in the ADA.

The Supreme Court and the ADA

In 2004, the Supreme Court ruled that the ADA was constitutional. George Lane was a paraplegic man (his legs were paralyzed) and wheelchair-user in Tennessee. He was charged with two misdemeanor crimes. The courthouse had no elevator, however, so to attend his own trial he had to crawl up two flights of stairs. He sued the state under the ADA. The Supreme Court held that courthouses must be made more accessible.

However, in other decisions the Supreme Court limited the definition of disability. In 2002, the court decided that a worker who claimed she was disabled but who could do ordinary life tasks, like household chores, was really not disabled. This decision eliminated coverage of large numbers of workers by the ADA.

In 2008, Congress amended the ADA to broaden the definition of disability that the Supreme Court had narrowed. The amendments stated that a disability is a substantial limitation of a person’s “major life activity.” Major life activities include seeing, hearing, walking, standing, lifting, bending, speaking, reading, communicating, and working. In expanding the meaning of disability, the amendments increased the number of people covered by the ADA.

'Reasonable Accommodations'

As a result of the original 1990 law, 2008 amendments, and other changes to the ADA made by Congress, the current ADA requires that disabled persons have a right to "reasonable accommodations." This means removing or lessening barriers that prevent them from participating in all aspects of society.

Private Employment

Employers with 15 or more workers must make reasonable accommodations to enable disabled persons to do a job. For example, an employer may have to modify an assembly line to allow a worker in a wheelchair to do a job sitting that is usually done standing. However, the employer would not be required to make accommodations that are an undue hardship (too difficult or too costly) for the employer. The ADA also prohibits discrimination against disabled persons in hiring, promotion, firing, pay, and job training.

Government Agencies

The ADA prohibits discrimination against disabled persons in all state and local government agencies, schools, and public transportation. All programs and services must be accessible to those with disabilities. Buses, trains, and airplanes must be made accessible to the disabled by ramps, wheelchair lifts, special seating, and signs. Public restrooms must have stalls equipped for ease of use by disabled persons.

Businesses Serving the Public

ADA requirements for accessibility and against discrimination apply to nearly all private businesses that serve the public. Examples include hotels, restaurants, theaters, stores, hospitals, amusement parks, sports stadiums, private schools, and colleges. The restrictions we saw above regarding undue hardship apply.

Enforcement

The 1990 ADA placed the burden on the individual claiming discrimination to file a lawsuit. Today, however, the U.S. Department of Justice enforces the law by filing lawsuits against those accused of violating the ADA. But other federal agencies like the Equal Employment Opportunity Commission may also become involved. Sometimes lawsuits are filed by private individuals after complaints have been made to a relevant federal agency.

Disabled Persons in the U.S. Today

According to the most recent data from the U.S. Census Bureau (2019), 41.1 million Americans are disabled, or 12.72 percent of the population. Census data also showed that the most common disability is difficulty in mobility or moving around on one's own (6.86 percent). This is followed by cognition or difficulty learning or understanding (5.20 percent). Other major types of disability involve hearing (3.56 percent), the ability to care for oneself (2.64 percent), and vision (2.31 percent).

The Census Bureau reported in 2017 that over nine million workers age 16 and older in the United States had a disability. The Centers for Disease Control and Prevention reported in 2018 that the frequency of disability was higher among women, American Indians/Alaskan Natives, adults below the poverty level, and persons living in the South. In 2018, the National Center for Educational Statistics found that only 22 percent of disabled students who graduated from high school were employed.

WRITING & DISCUSSION

1. With every proposed piece of legislation for disability rights, critics have argued that the changes would be too expensive. How were these concerns addressed in the examples in the article? If you were a lawmaker, how would you address those concerns?
2. Describe what a "reasonable accommodation" might be for a worker in each of the following circumstances (you may need to do a little research):
 - a) A paraplegic person who uses a wheelchair and who works at a public library.
 - b) A person diagnosed with a learning disability who works as a restaurant manager.
 - c) A deaf person who is a courtroom attorney.
 - d) A blind person who is a pharmacist.
3. Review the last section of the article on disabled people in the U.S. today. What do you think should be the top priority of lawmakers in protecting the rights of disabled Americans?

Author: Carlton Martz is a longtime contributor to Bill of Rights in Action (BRIA) and other CRF publications.

ACTIVITY: A Timeline for the Rights of Disabled Persons

1. In a small group or with a partner, review the article create a timeline of what you think are the five most important events, laws, individuals, or landmarks in American history that advanced the cause of disabled persons' rights. On the timeline, explain why each played a part in advancing the rights of people with disabilities.
2. Report the results of your timeline to the class. Have one person in the class keep a tally of the top five selected by all the groups.

SUPREME COURT HIGHLIGHTS

In its 2022-2023 term, the Supreme Court issued 58 opinions. As happened last term, some of the court's decisions are already landmark cases. Landmark cases show major shifts in the law of the land. *Bill of Rights in Action* (BRIA) is proud to bring its readers "Supreme Court Highlights" for classroom use. We hope these highlights will help explain the major decisions and make the law understandable.

For each case, remember these basics:

- There are nine justices on the Supreme Court of the United States. When a majority of those justices agree with each other in a case, the court has reached a decision. One justice is assigned to write the *majority opinion*. A 5-to-4 decision, for example, means five justices agreed and form the majority opinion. The four justices who disagree with the majority are in the minority and have *dissenting opinions*.
- Dissenting justices may write their own dissenting opinions. Often, there is more than one dissenting opinion in a case, as even dissenters may disagree with each other! We do not necessarily include quotations from all the dissenting opinions in each case.
- Sometimes, justices agree with the majority's decision but have a slightly different reason for doing so. These justices may write a *concurring opinion*. They are expressing their overall agreement with the majority but want the record to show their individual reasoning.

Selected cases from the 2022-2023 U.S. Supreme Court term are listed below. (Some ellipses have been omitted.)

Students for Fair Admission v. Harvard; Students for Fair Admission v. University of North Carolina

Harvard University and University of North Carolina ("UNC") used certain student admission policies with the objective of a diverse educational environment. These policies included evaluating qualified applicants for admission by considering various factors, including an applicant's race. This practice, known as race-conscious admissions, is a type of affirmative action. Harvard and UNC were sued by the nonprofit organization Students for Fair Admissions, who argued that their admissions programs, which took race into account, violated the U.S. Constitution. Data showed that Harvard's use of race in admissions resulted in an 11.1 percent decrease in the number of Asian-Americans accepted to Harvard.

In response, Harvard and UNC argued that their race-conscious admissions programs were constitutional. The universities relied on the 2003 Supreme Court case *Grutter v. Bollinger*. In the *Grutter* case, the Supreme Court held 5-to-4 that a university may consider an applicant's race as a "potential 'plus' factor," that may be included among the other factors in the admission determinations. The purpose is to encourage diversity on campus. In prior cases, the court had established that diversity on college campuses is a compelling governmental interest. However, universities cannot set aside spaces for students based on race.



The Supreme Court evaluates race-conscious policies under the equal protection clause of the 14th Amendment. The equal protection clause says that no state in the United States "shall . . . deny to any person within its jurisdiction the equal protection of the laws." The court in *Grutter* decided that using race as a plus factor in admissions is narrowly tailored to meet the compelling interest of diversity. (A policy is "narrowly tailored" when applies to as many people as is reasonably necessary and no more. Courts determine what is reasonably necessary in each case.)

In June 2023, six of the U.S. Supreme Court justices held that Harvard's and UNC's race-conscious admissions policies were unconstitutional. (Justice Ketanji Brown Jackson did not participate in the

decision relating to Harvard because she had served on a governing board of Harvard until 2022.)

In the court's view, the equal protection clause guarantees equality for all citizens. These admissions policies were inherently unequal because they treated applicants differently based on their race. While the court did not explicitly overrule the *Grutter* case, the court ruled that universities cannot make admissions decisions that rely on race.

From the majority opinion by Chief Justice Roberts:

The point of [Harvard and UNC's] admissions programs is that there is an inherent benefit in race *qua* race—in race for race's sake.

[W]hen a university admits students “on the basis of race, it engages in the offensive and demeaning assumption that [students] of a particular race, because of their race, think alike” . . . Such stereotyping can only “cause continued hurt and injury,” contrary [to] the “core purpose” of the Equal Protection Clause. [Citations omitted.]

At the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities

from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.

From the dissenting opinion of Justice Sotomayor:

Today, this Court stands in the way and rolls back decades of precedent and momentous progress. It holds that race can no longer be used in a limited way in college admissions to achieve such critical benefits. In so holding, the Court cements a superficial rule of colorblindness as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter.

WRITING & DISCUSSION

1. What do you think about the Supreme Court's decision in this case?
2. The Supreme Court held that race can no longer be a diversity factor in college admissions. What other parts of students' experiences can you think of that colleges might consider for diversity other than race?
3. Choose one of the diversity factors you thought of in Question 2. Would the majority opinion be different if that factor was challenged? Why or why not?

Jack Daniel's Properties v. VIP Products

VIP Products sold a line of dog toys that mocked popular beverage makers. One VIP toy was shaped like a whiskey bottle made by Jack Daniel's Properties, an alcoholic beverage company. Jack Daniel's “Tennessee Whiskey” product has “Old No. 7” in its logo. VIP's dog toy had the following phrases printed on it in Jack Daniel's iconic font: “Bad Spaniels: The Old No. 2 On Your Tennessee Carpet.”

When a company makes a product, the company has a trademark in that product. A trademark gives the company the exclusive right to the design and unique characteristics of the product. A company can also have a trademark in its company “brand” (its distinguishing symbols, colors, and slogans). If one company makes a product whose design is similar to that of another company's product, then that company might have violated the other company's trademark. Also, if a company copies another company's “brand” too closely, there may be a trademark violation. A federal law called the Lanham Act gives companies the right to bring a lawsuit against anyone who makes a product that is likely to confuse consumers about who made the product.

In deciding trademark violations, some courts use a threshold (first) question about an “expressive element.” They ask whether the challenged product uses a trademark in an artistically expressive way that poses only a “slight risk” of confusing consumers about its source. The First Amendment protects the right to free-speech and can be used as a defense against claims of trademark



Dog toys including the “Bad Spaniel Tennessee Carpet” toy.

violation. For example, in the case of *Mattel, Inc. v. MCA Records, Inc.*, a band's song “Barbie Girl” referred to the Mattel company's trademarked Barbie toy. Mattel claimed infringement of its brand. The court ruled in favor of the music company, finding there was no trademark infringement because the song is a parody and an artistic expression that is very unlikely to cause listeners to think the band represented the Mattel company.

In the case of the dog toy, Jack Daniel's was not pleased with VIP's design. It sued VIP Products, arguing

that the toy so closely resembled Jack Daniel's trademark that it deceptively led consumers to think that Jack Daniel's had created or was responsible for the dog toy. Further, Jack Daniel's argued that the association between dog excrement and Jack Daniel's whiskey diluted the brand value of the whiskey's trademark.

In a unanimous opinion written by Justice Elena Kagan, the U.S. Supreme Court addressed two questions. First, must VIP Products satisfy the "expressive element" test before the court may address likelihood-of-confusion concerns under the Lanham Act? The court said no. The "expressive element" test has only applied to cases of "non-trademark uses." Here, VIP intended its toy to look like a Jack Daniel's bottle in order to make sales and could not claim a First Amendment defense.

Second, was the Bad Spaniels design likely to cause confusion about the toy's source? Here, the court said yes. Justice Kagan explained that, even though the toy was meant to be a parody, VIP used the toy's design in such a way that it identified the design's source: the Jack Daniel's label. Because the toy was so similar to the trademarked design of the whiskey bottle, and because VIP relied upon and marketed using this similarity, the court ruled in favor of Jack Daniel's.

From the court's unanimous opinion by Justice Kagan:

It is not appropriate when the accused infringer has used a trademark to designate the source of its own goods — in other words, has used a trademark as a trademark. That kind of use falls within the heartland of trademark law and does not receive special First Amendment protection. The use of a mark does not count as noncommercial just because it parodies, or otherwise comments on, another's products.

WRITING & DISCUSSION

1. In this case, the court said that a parody must "conjure up" enough of an original trademark to make the parody's humor recognizable. But to be protected by the First Amendment, the parody must also contrast enough with the original trademark "so that its message of ridicule . . . comes clear." Was there any way VIP Products' dog toy could have been re-designed as a proper parody of the Jack Daniel's trademark to be protected as free speech? Why or why not?
2. VIP argued that the Bad Spaniels toy was a form of artistic expression that should be protected under the First Amendment. How should courts balance the rights of companies to protect their trademarks with the rights of other companies or creators to speak and make art?

Groff v. DeJoy

Gerald Groff, an evangelical Christian, took a mail delivery job with the United State Postal Service (USPS). He took the job partly because it did not involve Sunday work. Later, USPS agreed to begin Sunday deliveries for Amazon. Groff did not want to work on Sundays due to his religious beliefs in which Sunday is the *sabbath*, or holy day of rest. USPS could have accommodated Groff's request by asking other workers to pick up the slack, which imposed some burden on them. Instead, the USPS gave Groff progressive discipline, and he eventually resigned.

Title VII of the Civil Rights Act of 1964 requires employers to make "reasonable accommodations" for the religious needs of employees unless to do so would cause "undue hardship on the conduct of the employer's business." Groff sued USPS, claiming that USPS could have accommodated him without undue hardship.

In its decision, the Supreme Court first reviewed a 1974 case which had been interpreted by some lower courts to hold that there was an "undue hardship" if the employer bore "more than *de minimis* cost in order to give [the employee] Saturdays off is an undue hardship." The term "*de minimis* cost" is often used to refer to the smallest or least significant cost. According to this interpretation, employers could avoid making accommodations for



employees' religious beliefs if it only caused a very minor burden. Both sides agreed that this was not the correct standard, and in a unanimous decision, the U.S. Supreme Court agreed.

The court clarified that a higher standard of burden should be required before an employer can avoid making accommodations.

From the majority opinion by Justice Alito:

Showing “more than a *de minimis* cost,” as that phrase is used in common parlance, does not suffice to establish “undue hardship.”

“[U]ndue hardship” is shown when a burden is substantial in the overall context of an employer’s business.

In common parlance, a “hardship” is, at minimum, “something hard to bear” . . . more severe than mere burden . . . and adding the modifier “undue” means that the requisite burden, privation, or adversity must rise to an “excessive” or “unjustifiable” level.

[A] hardship that is attributable to employee animosity to a particular religion . . . cannot be considered “undue.”

From the concurring opinion of Justices Sotomayor and Jackson:

Because the “conduct of [a] business” plainly includes the management and performance of the business’s employees, undue hardship on the conduct of a business may include undue hardship on the business’s employees.

Indeed, for many businesses, labor is more important to the conduct of the business than any other factor.

Having clarified the Title VII undue hardship standard, the Supreme Court left the application of the new substantial standard as to Goff, and whether he would be required to work on Sundays, to the lower courts.

WRITING & DISCUSSION

1. The Supreme Court interpreted Title VII to mean that employers are required to make reasonable accommodations for their employees’ religious needs unless it would cause “undue hardship on the conduct of the employer’s business.” Do you agree with the court that the hardship must be substantial? Why or why not?
2. What examples of religious accommodations for employees that would not involve substantial burden to the employer can you think of?
3. What examples of religious accommodations for employees that would involve a substantial burden to the employer can you think of?

Biden v. Nebraska, Department of Education v. Brown

The HEROES Act of 2003 is a federal law that gives the federal secretary of education the authority to “waive or modify” student loan repayment requirements as the secretary “deems necessary in connection with a [national emergency].” (To *waive* a required action means to not demand that it be done.)

On March 13, 2020, President Donald Trump declared the COVID-19 pandemic a national emergency. One week later, Secretary of Education Betsy DeVos temporarily paused all repayments of federal student loans and set all federal student loans’ interest to zero.

In 2022, under President Joseph Biden, Secretary of Education Miguel Cardona invoked the HEROES Act to cancel certain federal student debt due to the COVID-19 national emergency. The proposed debt cancellation plan would cancel up to \$10,000 per borrower if they had an income below \$125,000 in 2020 or 2021. Borrowers who received Pell Grants could have up to \$20,000 cancelled. The Department of Education estimated that nearly 43 million borrowers would qualify for the debt forgiveness program. In total, the proposal would cancel an estimated \$430 billion in debt principal (the actual debt owed before interest payments are added).

Six states, including Nebraska, challenged the proposed debt-cancellation plan. They argued that the plan exceeded the secretary’s authority under the HEROES



Act. The secretary argued that the HEROES Act gave them the appropriate authority to waive or modify the debt-repayments through cancellation of the debts.

In a 6-to-3 decision, the U.S. Supreme Court held that the provision in the HEROES Act was only for waiver or modification of debt-repayment, but what Secretary Cardona was proposing was, in its view, much more than a waiver or modification. The court stated that the secretary could “make modest adjustments” to debt requirements but not “basic and fundamental changes” to the loan-forgiveness program.

From the majority opinion by Chief Justice John Roberts:

In sum, the Secretary's comprehensive debt cancellation plan is not a waiver because it augments and expands existing provisions dramatically. It is not a modification because it constitutes "effectively the introduction of a whole new regime." And it cannot be some combination of the two, because when the Secretary seeks to *add* to existing law, the fact that he has "waived" certain provisions does not give him a free pass to avoid the limits inherent in the power to "modify."

From the dissenting opinion of Justice Kagan:

The [HEROES Act] . . . gives the Secretary broad authority to relieve a national emergency's effect on borrowers' ability to repay their student loans. The Secretary did no more than use that lawfully delegated authority. So the majority [of justices] applies a rule specially

crafted to kill significant regulatory action, by requiring Congress to delegate not just clearly but also microspecifically. The question, the majority maintains, is "who has the authority" to decide whether such a significant action should go forward. The right answer is the political branches . . . [t]he majority instead says that it is theirs to decide.

WRITING & DISCUSSION

1. Do you agree that the proposed plan was far more than a modification or waiver to the HEROES Act? Why or why not?
2. Today, over 48 million Americans collectively owe about \$1.6 trillion in federal student loans for college. And college costs in the United States remain higher than almost all other wealthy nations. If loan cancellation through the HEROES Act is not permitted, what do you think are other ways to ease the financial burdens of young people paying for their college education?

Counterman v. Colorado

Billy Counterman sent hundreds of Facebook messages to C.W., a local singer whom Counterman had never met. His messages let her know he knew her whereabouts, expressing anger, and envisioning physical harm to C.W. C.W. tried to block Counterman without success. C.W. suffered severe anxiety.

The state of Colorado charged Counterman with the crime of stalking because of his threatening communications. Counterman argued that this violated his First Amendment right to free speech. However, he was convicted of the charges against him.

The right to free speech guaranteed in Constitution's Bill of Rights is foundational to the values of this country. However, it is not absolute. Obscenity, defamation, incitement, and true threats of violence are not protected speech under the First Amendment. True threats are statements that frighten hearers into believing that they will be seriously harmed by the speaker. When judging cases about "true threats," courts do not consider whether the speaker really intends to commit violence. What matters to courts is whether hearers do, in fact, feel threatened by the speaker's statements.

Case law has been conflicting on whether a guilty verdict for a true threat can be based on an *objective* standard (what a hypothetical reasonable person would think was a threat) or a *subjective* standard (what the speaker in a case actually means to convey). Counterman appealed his conviction, arguing that his speech did not include true threats of violence. He said that Colorado wrongly used a subjective standard, and that he was unaware of the threatening nature of his messages.



The singer Coles Whalen pictured in 2009, several years before receiving disturbing messages via Facebook.

In a 7-to-2 opinion, the U.S. Supreme Court overturned Counterman's conviction. The court held that the trial court where he had been convicted violated the First Amendment by relying on the objective standard. The court explained that prohibitions on speech have a potential chilling effect on speech, which means they make people afraid to speak. Therefore, for a threat to be a "true threat," which is a crime not protected by the First Amendment, the speaker of the threat must at least have some criminal intent (*mens rea*).

The justices considered a range of standards that might mean a threat is a true threat. The court settled on recklessness as the minimum subjective standard for true threats. In other words, to be found guilty of a criminal threat, a defendant must at least speak in a

reckless manner. Recklessness means the speaker disregards the substantial risk of harm caused by their speech. In throwing out Counterman's conviction, the Supreme Court remanded his case (or sent it back down) to the trial court where Counterman's actions would be judged under the new recklessness standard.

From the majority opinion by Justice Kagan:

The first dispute here is about whether the First Amendment . . . demands that the State in a true threats case prove that the defendant was aware in some way of the threatening nature of his communications. . . . [We hold] that the State must prove in true-threats cases that the defendant had some understanding of his statements' threatening character. The second issue here concerns what precise *mens rea* standard suffices for the First Amendment purpose at issue. Again guided by our precedent [or previous decisions], we hold that a recklessness standard is enough.

From the concurring opinion of Justices Sotomayor and Gorsuch:

I agree that recklessness is amply sufficient for this case. Yet I would stop there, leaving for another day the question of the specific *mens rea* required to prosecute true threats generally.

Especially in a climate of intense polarization, it is dangerous to allow criminal prosecutions for heated words based solely on an amorphous recklessness standard.

From the dissenting opinion of Justice Barrett:

The Court holds that speakers must recklessly disregard the threatening nature of their speech to lose constitutional protection. Because this unjustifiably grants true threats preferential treatment, I respectfully dissent. . . . We have held that nearly every category of unprotected speech may be regulated using an objective test. In concluding otherwise, the Court neglects certain cases and misreads others. . . .

The bottom line is this: Counterman communicated true threats, which, "everyone agrees, lie outside the bounds of the First Amendment's protection." [Citation omitted.] He knew what the words meant. Those threats caused the victim to fear for her life, and they "upended her daily existence." [Citation omitted.]

WRITING & DISCUSSION

1. Justice Sotomayor mentioned political polarization, which is the division of people into extreme political positions. Do you think polarization creates an environment for increasingly threatening speech to become more normal? Why or why not?
2. What difficulties exist in determining what is threatening speech in social media and what is not?
3. What examples can you think of where speech might be considered threatening but still protected under the court's "reckless" standard?

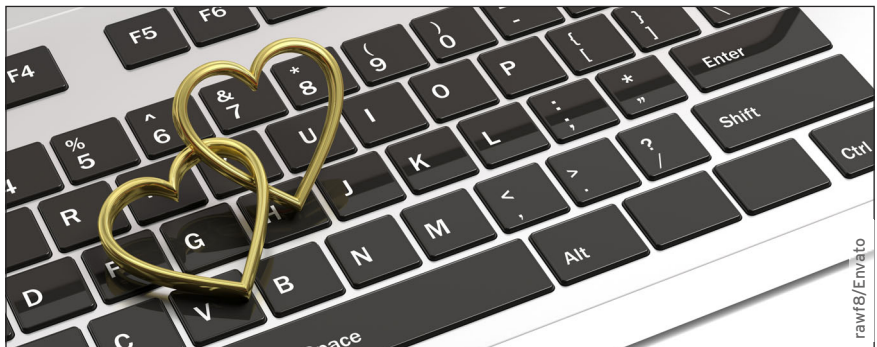
303 Creative LLC v. Elenis

Lorie Smith owns 303 Creative LLC, a Colorado business which provides graphic design services, marketing advice, and social media services. Smith wanted to expand her business to offer wedding websites. Smith stated that she would provide services to anyone who requested them, regardless of customers' sexual orientation. However, Smith also claimed that her Christian faith prevented her from creating a wedding website for same-sex partners.

Colorado has an anti-discrimination law. It makes it illegal for businesses to discriminate when selling goods and services to the public based on a customer's protected characteristics: disability, race, creed, color, sex, sexual orientation, religion, age, national origin, or ancestry.

Although Smith had not yet denied her services to any customers, she challenged Colorado's anti-discrimination law. She argued the law violated her free-speech rights under the First Amendment by compelling her to create websites for same-sex partners.

In a 6-to-3 opinion, the U.S. Supreme Court held that Colorado cannot use its anti-discrimination law to make



Lorie Smith create websites for same-sex weddings. Smith's websites are unique and will express and communicate ideas. Therefore, her websites are protected speech under the First Amendment's free speech clause.

From the majority opinion by Justice Gorsuch:

[A]s this Court has long held, the opportunity to think for ourselves and to express those thoughts freely is among our most cherished liberties and part of what keeps our Republic strong. Of course, abiding the Constitution's commitment to the freedom of speech means all of us will encounter ideas we consider "unattractive," "misguided, or even hurtful." [Citations omitted.] But tolerance, not coercion, ►

is our Nation’s answer. The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands.

From the dissenting opinion of Justice Sotomayor:

The First Amendment does not entitle petitioners [Lorie Smith and her company] to a special exemption from a state law that simply requires them to serve all members of the public on equal terms. Such a law does not directly regulate petitioners’ speech at all, and petitioners may not escape the law by claiming an expressive interest in discrimination.

WRITING & DISCUSSION

1. Both Lorie Smith and the state of Colorado agreed that Ms. Smith’s belief that “marriage is a union between one man and one woman” is a “sincerely held religious conviction.” To what extent should the First Amendment protect people’s actions based on their sincere religious beliefs?
2. The majority opinion discussed the importance of everyone being free to think and speak as they wish. In contrast, the dissenting opinion focused on equal treatment of all members of the public. Do you think the Supreme Court struck the right balance in this case between protecting free speech and preventing discrimination? Why or why not?

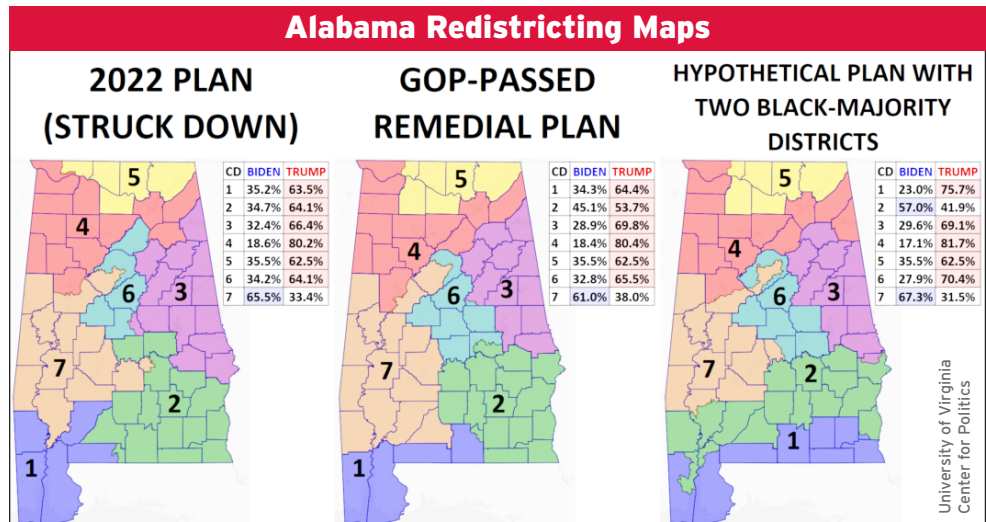
Allen v. Milligan

The Voting Rights Act (VRA) of 1965 provides federal protection against discriminatory voting laws. Section 2 of this law prohibits states from acting with a “racially discriminatory motivation” or an “invidious purpose to discriminate” in creating voting laws. (Invidious means unjust.) It does not, however, prohibit laws that only have a discriminatory effect if states did not intend to exclude anyone from voting.

In 1982, Congress amended the VRA to clarify the prohibited motivations or purposes. Congress said that prohibited motivations or purposes in voting laws are those in which the “totality of circumstances” shows that the processes of nominating and electing candidates were “not equally open to participation by” a minority group.

Since 1982, the court has decided questions arising under Section 2 using a three-part test from a case called *Thornburg v. Gingles* (1986). When a plaintiff challenges a state’s voting restriction under Section 2, the plaintiff must demonstrate the following three conditions:

- 1) the minority group against whom the law is said to be discriminatory is “sufficiently large and [geographically] compact [so as] to constitute a majority in a reasonably configured district;
- 2) the minority group is “politically cohesive,” meaning it would make sense for the group to be represented by the same official on the ballot; and
- 3) the “white majority votes sufficiently as a bloc to enable it . . . to defeat the minority’s preferred candidate.”



If a plaintiff proves all three of these factors, the plaintiff must then show under the “totality of circumstances” that the political process is not “equally open to minority voters.” Only then will the state’s voting restriction not go into effect.

By 2020, the state of Alabama’s population had increased by 5.1 percent. The Alabama legislature hired a consultant to draw new congressional districts to reflect this growth. The new map produced only one district in which Black voters constituted a majority of the voting age population.

Three groups (the petitioners) sued Alabama to prevent an election from being held under this new voting district map. They argued that the map violated Section 2 of the VRA because it discriminated against Black voters. They also argued that the map violated the Fourteenth Amendment’s equal protection clause, which states that all persons within a state are equally protected by that state’s laws.

In a 5-to-4 decision, the U.S. Supreme Court concluded that the petitioners were able to satisfy all three

conditions of the *Gingles* test. First, Black voters in Alabama could be a majority in a second district if that district was “reasonably configured.” Second, Black voters are “politically cohesive.” Finally, the white majority usually votes as a bloc (together) to “defeat Black voters’ preferred candidate.” The Court also found that the petitioners had shown that Alabama had a history of “racial and voting-related discrimination.” Because the Alabama voting map had a discriminatory effect against Black voters, the Supreme Court struck down the state’s use of the new map in future elections.

From the majority opinion by Chief Justice Roberts:

[W]e have reiterated that [section 2 of the VRA] turns on the presence of discriminatory effects, not discriminatory intent. . . . Individuals thus lack an equal opportunity to participate in the political process when a State’s electoral structure operates in a manner that “minimize[s] or cancel[s] out the[ir] voting strength.” . . . A district is not equally open, in other words, when minority voters face — unlike their majority peers — bloc voting along racial lines, arising against the backdrop of substantial racial discrimination within the State, that renders a minority vote unequal to a vote by a nonminority voter. [Citations omitted.]

From the concurring opinion of Justice Kavanaugh:

[T]he upshot of Alabama’s argument is that the court should overrule *Gingles*. The *stare decisis* standard for this Court to overrule a statutory precedent, as distinct from a constitutional precedent, is

comparatively strict. [*Stare decisis* means to rely on decisions in previous cases.] Unlike with constitutional precedents, Congress and the President may enact new legislation to alter statutory precedents such as *Gingles*. In the past 37 years, however, Congress and the President have not disturbed *Gingles*, even as they have made other changes to the Voting Rights Act.

From the dissenting opinion of Justice Thomas:

Under the statutory text, a Section 2 [of the VRA] challenge must target a voting qualification or prerequisite to voting or standard, practice, or procedure. I have long been convinced that those words reach only enactments that regulate citizens’ access to the ballot or the processes for counting a ballot; they do not include a State’s . . . choice of one districting scheme over another. Thus, Section 2 cannot provide a basis for invalidating any district.

WRITING & DISCUSSION

1. Why is it important for states to draw congressional districts that are politically cohesive?
2. Alabama proposed the use of modern computer technology that can generate millions of possible districting maps for a given State and does not consider race at all. The court rejected this plan primarily because the idea that “mapmakers must be entirely blind to race has no footing” in any prior cases about Section 2 of the VRA.” Do you think that letting computers control the districting process would result in more or less discrimination? Why?

Haaland v. Brackeen

In the 19th and 20th centuries, the United States government forced many American Indian (Native American) children out of their families and into the foster-care system and adoptive homes. In 1978, Congress passed the Indian Child Welfare Act (ICWA) “out of concern that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children” into non-Indian households. The ICWA prioritized placing Indian children in Native American families, even if not from the same tribe as the child. The child’s preferences or their parents’ preferences have rarely, if ever, been taken into consideration.

The present case arises from three child custody cases with similar facts. In all the cases, non-tribal families faced considerable obstacles when attempting to adopt a Native American child:

- 1) In one case, a family sought to adopt a child of a Navajo mother and Cherokee father, both of whom approved the adoption. The Navajo and Cherokee Nations, however, objected.



Young people of the Chiricahua band of Apache Native Americans arriving at a boarding school ca. 1887.

- 2) In another case, a family wanted to adopt a child whose biological father is a member of the Ysleta del Sur Pueblo Tribe (“Tribe”). Again, the child’s biological parents approved the adoption, but the Tribe did not.
- 3) In a third case, a child whose grandmother is of the White Earth Band of Ojibwe Tribe was removed from a foster family wanting to adopt. The child was placed with the grandmother even though she had previously lost her foster license.

In the first two cases, the adoptive families were ultimately able to adopt the children. But because of the requirements of the ICWA, they had to go to court to do so. While they want to adopt more Native American children – even a sibling of one of the adopted children – they hesitate because of the challenges posed by the ICWA.

The families and the state of Texas (“petitioners”) challenged the ICWA in court. They claimed that the ICWA is unconstitutional because Congress did not have the power to make the law. Petitioners argued that the ICWA violates Article I of the Constitution (which defines Congress’s powers) because family law is not an area over which Congress has control. Instead, they argued, state governments traditionally have authority to regulate family law, including adoptions and foster care.

The petitioners also argued that several of the ICWA’s requirements violate the 10th Amendment, which reserves powers for state governments. One principle in the 10th Amendment is that the federal government cannot require state governments to enforce federal law. The ICWA, they argued, forced state family law courts to enforce the federal government’s policies about Native American adoptions.

In a 7-to-2 decision written by Justice Amy Coney Barrett, the U.S. Supreme Court upheld the ICWA as

constitutional. The Court found that Congress’s power to make laws that deal with Native American tribes is “well established and broad.” Moreover, because the ICWA’s provisions apply to private parties as well as States, the law was not a command to States and this did not violate the Tenth Amendment.

From the majority opinion by Justice Barrett:

But the Constitution does not erect a firewall around family law In fact, we have specifically recognized Congress’s power to displace the jurisdiction of state courts in adoption proceedings involving Indian children.

From the dissenting opinion of Justice Thomas:

The Constitution confers enumerated powers on the Federal Government. Not one of them supports ICWA. Nor does precedent. To the contrary, this Court has never upheld a federal statute that regulates the noncommercial activities of a U. S. citizen residing on lands under the sole jurisdiction of States merely because he happens to be an Indian. But that is exactly what ICWA does: It regulates child custody proceedings, brought in state courts, for those who need never have set foot on Indian lands.

WRITING & DISCUSSION

1. Do you think that Congress should have the broad authority to regulate the adoption of Native American children when it does not have that authority with other children’s adoptions? Why or why not?
2. In the adoption process, how much importance should courts give to the desires of a child’s Native American biological parents? Should their desires be more important than those of tribal governments (like the Navajo Nation)? Why or why not?

Authors: Pauline Alarcon, Itzelth Gamboa, Damon Huss, Molly McDermott, Amanda Susskind, and Laura Wesley.



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Standards

The ‘Business Plot’ to Overthrow Franklin D. Roosevelt

CA HSS Standard 11.6: Students analyze the different explanations for the Great Depression and how the New Deal fundamentally changed the role of the federal government. (4) Analyze the effects of and the controversies arising from New Deal economic policies and the expanded role of the federal government in society and the economy since the 1930s . . .

CA HSS Framework Ch. 16 p. 397 (Grade Eleven): Expansionary fiscal and monetary policies, job programs, and regulatory agencies are a few of the broad roles for government set in place by the New Deal. This question may frame students’ investigations of the New Deal: How did the New Deal attempt to remedy problems from the Great Depression? Key New Deal innovations included the right to collective bargaining for unions, minimum wage and hours laws and Social Security for the elderly, disabled, unemployed, and dependent women and children. Taken together, these new developments created the principle that the government has a responsibility to provide a safety net to protect the most vulnerable Americans . . .

CA HSS Framework Ch. 17 p. 452 (Grade Twelve): [S]tudents can review what they learned in grade ten about the development of fascist dictatorships in Germany and Italy and how they systematically eliminated civil liberties, subverted the role of the military, and quashed political dissent.

C3 Framework Indicators

D2.Civ.8.9-12. Evaluate social and political systems in different contexts, times, and places, that promote civic virtues and enact democratic principles.

D2.Civ.13.9-12. Evaluate public policies in terms of intended and unintended outcomes, and related consequences.

D2.His.8.9-12. Analyze how current interpretations of the past are limited by the extent to which available historical sources represent perspectives of people at the time.

Common Core State Standards: SL.11-12.1, SL.11-12.3, RH.11-12.1, RH.11-12.2, RH.11-12.10, WHST.11-12.10.

The Struggle for the Rights of Disabled Persons

CA HSS Standard 11.10: Students analyze the development of federal civil rights and voting rights. (6) Analyze the passage and effects of civil rights and voting rights legislation . . .

CA HSS Standard 11.11: Analyze the passage and effects of civil rights and voting rights legislation . . .

CA HSS Framework Ch. 14, p. 309 (Grade Nine – Women in United States History): Themes or issues of significance include the following: Women’s involvement in and contribution to . . . health reform, civil rights movement . . .

CA HSS Framework Ch. 16, p. 419 (Grade Eleven): The advances of the black Civil Rights Movement encouraged other groups— including women, Hispanics and Latinos, American Indians, Asian Americans, Pacific Islanders, LGBT Americans, students, and people with disabilities—to mount their own campaigns for legislative and judicial recognition of their civil equality. Students can use the question How did various movements for equality build upon one another? to identify commonalities in goals, organizational structures, forms of resistance, and members.

C3 Framework Indicators

D2.Civ.10.9-12. Analyze the impact and the appropriate roles of personal interests and perspectives on the application of civic virtues, democratic principles, constitutional rights, and human rights.

D2.Civ.2.9-12. Analyze the role of citizens in the U.S. political system, with attention to various theories of democracy, changes in Americans’ participation over time, and alternative models from other countries, past and present.

D2.Civ.5.9-12. Evaluate citizens’ and institutions’ effectiveness in addressing social and political problems at the local, state, tribal, national, and/or international level.

D2.Civ.12.9-12. Analyze how people use and challenge local, state, national, and international laws to address a variety of public issues.

D2.His.3.9-12. Use questions generated about individuals and groups to assess how the significance of their actions changes over time and is shaped by the historical context.

D2.His.5.9-12. Analyze how historical contexts shaped and continue to shape people’s perspectives.

Common Core State Standards: SL.9-10.1, SL. 9-10.3, RH. 9-10.1, RH. 9-10.2, RH. 9-10.10, WHST. 9-10.10, SL.11-12.1, SL.11-12.3, RH.11-12.1, RH.11-12.2, RH.11-12.10, WHST.11-12.10.

Supreme Court Highlights

California History-Social Science Standard 8.2: Students analyze the political principles underlying the U.S. Constitution and compare the enumerated and implied powers of the federal government. (6) Enumerate the powers of government set forth in the Constitution and the fundamental liberties ensured by the Bill of Rights.

California History-Social Science Standard 12.2: Students evaluate and take and defend positions on the scope and limits of rights and obligations as democratic citizens, the relationships among them, and how they are secured. (5) Describe the reciprocity between rights and obligations; that is, why enjoyment of one’s rights entails respect for the rights of others.

California History-Social Science Standard 12.5: Students summarize landmark U.S. Supreme Court interpretations of the Constitution and its amendments. (1) Understand the changing interpretations of the Bill of Rights over time, including interpretations of the basic freedoms (religion, speech, press, petition, and assembly) articulated in the First Amendment and the due process and equal-protection-of-the-law clauses of the Fourteenth Amendment.

CA HSS Framework Ch. 17, p. 443 (Grade Twelve): What makes a law or an action unconstitutional, and does that determination ever change? . . . Whenever possible, students should learn through illustrations of the kinds of controversies that have arisen because of challenges or differing interpretations of the Bill of Rights. For example, the unit can be organized around case studies of specific issues, such as the First Amendment’s cases on free speech, free press, religious liberty, separation of church and state, academic freedom, and the right of assembly or the Fourth Amendment’s warrant requirements and protections against unreasonable search and seizure.

C3 Framework Indicators

D2.Civ.9.9-12. Use appropriate deliberative processes in multiple settings.

D2.Civ.12.9-12. Analyze how people use and challenge local, state, national, and international laws to address a variety of public issues.

D2.Civ.14.9-12. Analyze historical, contemporary, and emerging means of changing societies, promoting the common good, and protecting rights.

Common Core State Standards: RH.6-8.4, RH.6-8.10; RL.8.10; WHST.6-8.10, SL.11-12.1, SL.11-12.3, RH.11-12.1, RH.11-12.2, RH.11-12.10, WHST.11-12.10.

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All cases of the Supreme Court of the United States in this section can be found at www.supremecourt.gov/opinions/slipopinion/22.

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