The Power of Judicial Dissent

- Supreme Court is an appellate court
- Justices deliver opinions on the cases they review
- Majority opinions carry the ruling on the case
- Minority, or "dissenting," opinions don't have legal force but can effect change at a later time
  - Congress may pass a law limiting the court's ruling
  - Dissenting opinions may influence later court decisions

The Supreme Court room in the Capitol

12

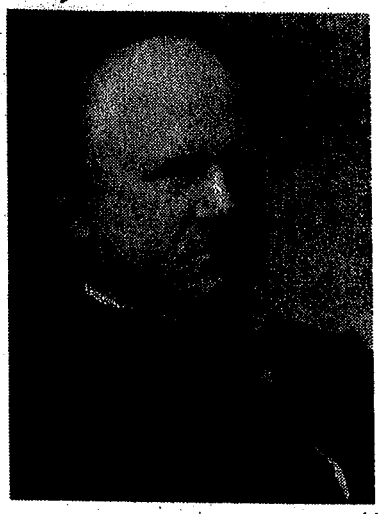
The Supreme Court hears cases already tried in lower courts, which makes it an appellate court. When the court reviews a case, it hears both sides to determine if the lower court ruled correctly. The justices individually go over the case, with each expressing an opinion on its legal merits. Five or more justices in agreement form a majority, and from this group one is assigned to write the majority opinion. Justices who disagree with the majority file their own opinion, called the minority, or "dissenting," opinion.

Though dissenting opinions have no legal force, they can over time have a greater impact. For instance, Congress may decide to limit a Supreme Court ruling through legislation because it agrees with a dissenting opinion. Dissenting opinions may also influence the court's later decisions. While the court will typically follow its own precedents when deciding cases, it has on occasion overturned or significantly modified its own earlier decisions based on those cases' dissenting opinions.

The Power of Judicial Dissent (continued)

Plessy v. *Ferguson* (1896):

- Louisiana law allowed for "separate but equal" accommodations
- Justice Harlan believed the Constitution was "color-blind"
- His dissent influenced the 1954 *Brown* v. *Board of Education* decision



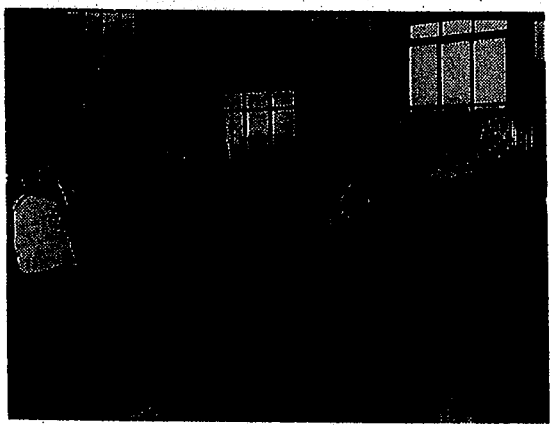
Justice John Marshall Harlan [14]

As a result of the ruling that the 14th Amendment's due process protections only pertained to government, any company that did business with the public (railroads, theaters, and restaurants, for example) could legally provide separate accommodations for blacks and whites. In 1892, Homer Plessy decided to test these regulations by buying a first-class ticket on a Louisiana train. Plessy, who was one-eighth African American, boarded a train car marked "whites only." After refusing to go to the "colored only" car, he was arrested for violating Louisiana's Separate Car Act. He sued, and the case made its way to the Supreme Court in 1896 as *Plessy* v. *Ferguson.* Plessy's attorney argued that Louisiana's segregation law violated both the 13th and 14th Amendments. In a 7–1 ruling, the court determined that the 14th Amendment's equal protection clause allowed for "separate but equal" accommodations for African Americans. Justice John Marshall Harlan wrote the lone dissent. Harlan, a former slave owner who did not believe in inherent racial equality, nevertheless argued that legally imposed segregation denied minorities their political equality and that the Civil War Amendments (13, 14, and 15) were intended to guarantee that equality. In his dissenting opinion, he stated, "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." While strong, Harlan's dissent did not prove influential for some time. The United States continued its policy of "separate but equal" for nearly 60 years in facilities such as parks, public restrooms, and schools until the landmark *Brown* v. *Board of Education* decision in 1954.

First Amendment Cases: Religion

On the free exercise clause:

- *Minersville School District* v. *Gobitis* (1940): Ruled that political responsibility supersedes religious freedom
- *West Virginia Board of Education* v. *Barnette* (1943): Reversed the *Gobitis* decision; religious freedom trumps patriotism



28

The passage of time has allowed the Supreme Court to revisit and sometimes reverse its past rulings. At other times, the justices have clarified previous rulings in order to further define the extent of the rights protected by the Constitution.

In 1940, the United States witnessed totalitarian regimes dominate national governments in Europe and Asia. Wanting to instill a sense of national pride and patriotism in its students, Pennsylvania (like many states) required its students to salute the flag and recite the Pledge of Allegiance. In Minersville, Pennsylvania, seventh grader Lillian Gobitis and her younger brother William refused to participate in the pledge; as Jehovah's Witnesses, their religious beliefs forbade swearing loyalty to political institutions or symbols. They were subsequently expelled. Their father contested their expulsion in court, charging that the school had violated his children's First Amendment right of religious freedom. In the case of *Minersville School District* v. *Gobitis* (1940), the Supreme Court upheld the Pennsylvania law, concluding that religious liberty does not relieve citizens from political responsibility.

As the United States became embroiled in World War II, it became clear that a major motivation for fighting was to defend the nation against tyranny and injustice. Three Supreme Court justices privately began to have a change of heart (acknowledged publicly in the dissent of a 1942 case concerning religious freedom), and when another case involving Jehovah's Witnesses and the Pledge of Allegiance came before them, they eagerly accepted. In *West Virginia Board of Education* v. *Barnette* (1943), the court reversed its *Gobitis* decision and ruled that the First Amendment forbids the government from compelling people to participate in the Pledge of Allegiance when it conflicts with their religious beliefs.

First Amendment Cases: Religion (continued)

On the establishment clause:

- *Engle* v. *Vitale* (1962): Any state-sponsored prayer session in public schools violates the establishment clause
- *Lemon* v. *Kurtzman* (1971): Stated that government support to religious schools:
  1. Must have a legitimate secular purpose,
  2. Must not advance or inhibit religion, and
  3. Must not create an "excessive entanglement" of government and religion

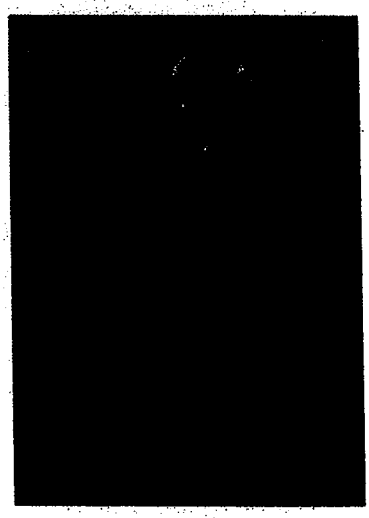
29

In the atmosphere of the Cold War, certain institutions in the United States sought to clearly distinguish democracy from communism. Many states mandated prayer in their public schools in order to impress upon students that America was a nation that believed in God, and therefore differed from atheistic communist countries such as the Soviet Union. The New York State Board of Regents had prepared a "nondenominational" prayer for use in the public schools, trying to avoid offending any particular religious group. Students who chose not to participate in the prayer could be excused. In *Engle* v. *Vitale* (1962), the Supreme Court held that the entire idea of a state-mandated or state-sponsored prayer—even a nondenominational and voluntary one—was unconstitutional.

In the 1960s and 1970s, states attempted to ensure that students in both public and private schools received the best education possible. In 1968, the Pennsylvania state legislature passed the Nonpublic Elementary Act, which allowed the state Superintendent of Public Instruction to reimburse nonpublic schools for teachers' salaries, and for textbooks and instructional materials that presented non-religious topics. In *Lemon* v. *Kurtzman* (1971), the Supreme Court ruled that such support by a government body to a private religious institution also violated the establishment clause of the First Amendment, even though the funding did not directly support any religious instruction. Anticipating that similar cases would arise, the court established a three-part test to determine whether any government action violated the establishment clause. For government support to be constitutional it (1) must have a legitimate secular purpose, (2) must not advance or inhibit religion, and (3) must not result in an "excessive entanglement" of government and religion.

First Amendment Cases: Speech

- The Framers originally viewed the First Amendment as only protecting political speech
- *Schenck* v. *United States* (1919): Speech that presents a "clear and present danger" cannot be protected



Justice Oliver Wendell Holmes

30

The Constitution's Framers viewed freedom of speech primarily as a protection for political speech, which at best advances thought and discourse on matters of government. But what about speech that criticizes the government and calls for people to take action against it?

In 1917, the United States was at war in Europe, and a national draft was in force. In protest, Charles Schenck distributed a pamphlet that both decried the law and encouraged new draftees not to serve. He was arrested and convicted under the recently passed Espionage Act. In *Schenck* v. *United States* (1919), Justice Oliver Wendell Holmes wrote the majority opinion, stating that the First Amendment does not absolutely guarantee protection and that speech could be constrained if the words used presented a "clear and present danger" to society. The court's majority felt that Schenck's call for resistance adversely affected the war effort and thus was not protected speech. To illustrate, Holmes wrote that the First Amendment cannot protect a man from falsely shouting "fire" in a crowded theater and causing a panic.

First Amendment Cases: Speech (continued)

Expression as protected speech:

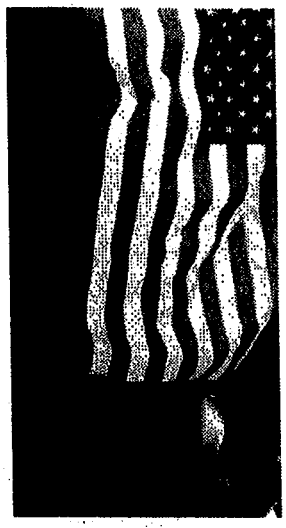
- *Tinker* v. *Des Moines* (1969): Symbolic speech that does not disrupt or invade the rights of others is protected in a school environment

32

In 1964, Congress passed the Gulf of Tonkin Resolution, which granted President Lyndon Johnson the authority to increase troop levels and widen the war into North Vietnam. The following year in Des Moines, Iowa, 13-year-old Mary Beth Tinker, her older brother John, and their friend Christopher Eckhardt decided to wear black armbands to school in protest of the war and its escalation. Their actions contravened a school board policy banning the wearing of such armbands, and all three were suspended. In 1969, the Supreme Court heard the case of *Tinker* v. *Des Moines School District.*

The court ruled that First Amendment protections cover acts of symbolic speech. This ruling set a precedent that student expression is constitutionally protected and may not be censored, unless school officials can show that the expression (1) would result in a material and substantial disruption of normal school activities or (2) invades the rights of others. Under the *Tinker* ruling, schools may not censor student expression simply because school officials dislike the message or find it controversial, or because the expression criticizes the school's administration or policies. As long as the expression is lawful (i.e., not libelous or obscene), it cannot be censored for its content unless it violates the two standards set by *Tinker.*

First Amendment Cases: Speech (continued)



Expression as protected speech:

- *Texas* v. *Johnson* (1989): Burning the American flag in protest constitutes free expression
- *United States* v. *Eichman* (1990): Only with a constitutional amendment can Congress reverse a Supreme Court decision

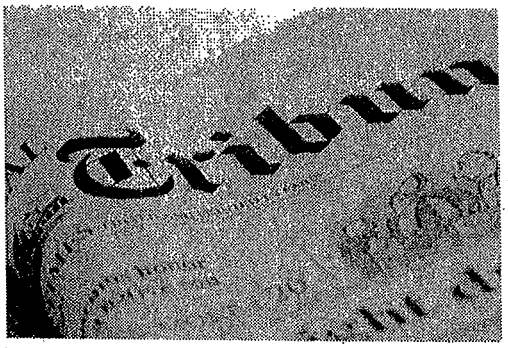
33

During the 1984 Republican National Convention in Dallas, Texas, Gregory Johnson burned an American flag in protest of the Reagan Administration's policies. Texas authorities arrested Johnson and convicted him of desecrating the flag in violation of Texas state law. The case made its way through the appeals process and in 1989 to the Supreme Court. In *Texas* v. *Johnson*, the court narrowly struck down the Texas law prohibiting flag desecration, stating that Johnson's action was protected speech. The 5–4 decision held that government may not prohibit the expression of an idea simply because it offends society. Though the Constitution originally intended to protect only the spoken or written word, previous decisions like the *Tinker* case recognized that speech protections did not stop there. The ruling in *Texas* v. *Johnson* was hotly contested and met with public outcry and eventual congressional action.

In response to the *Texas* v. *Johnson* decision, Congress passed the Flag Protection Act of 1989, which prohibited any desecration of the flag. In 1990, the court reaffirmed its *Texas* v. *Johnson* ruling in *United States* v. *Eichman,* stating that the Flag Protection Act violated the First Amendment because its language outlawed disrespect for the flag, not its actual burning (which is actually the proper way to dispose of an old or damaged flag). The First Amendment protects people's disrespect for the flag as much as it protects their respect for it. The ruling also reminded Congress that it could not reverse a Supreme Court decision merely by passing a law: since the court interprets the meaning of the Constitution, only a constitutional amendment can overturn a decision.

First Amendment Cases: The Press

- *Near* v. *Minnesota* (1931): Declared prior restraint unconstitutional in nearly all cases
- *Hazelwood School District* v. *Kuhlmeier* (1988): School-sponsored newspapers not protected in the same way as standard press



34

The court has taken a more evolutionary approach in defining the parameters of press freedom. Originally, the Constitution's Framers believed that Congress's powers didn't extend far enough to restrict freedom of the press and that state constitutions would protect this freedom anyway. The authors of the Bill of Rights held a narrow view as to extent of freedom of the press, limiting the protections to political discourse.

Press protections eventually came into question when publishers no longer confined the printed word to political discussion. In the late 1920s, Jay Near published a "scandal sheet" known as *The Saturday Press* that criticized local officials for failing to act against organized crime. One of the local officials, Floyd Olson, filed a complaint against Near under the so-called Minnesota Gag Law, which issued a permanent injunction against printing any future editions of a paper suspected of libel. Near claimed his right to freedom of the press under the First Amendment. In 1931, the Supreme Court struck down the Minnesota Gag Law in *Near* v. *Minnesota*, stating that only in rare cases could the government exercise prior restraint (i.e., censor the press before publication).

In 1987, the journalism class at Hazelwood High School in St. Louis, Missouri, published a student newspaper called *The Spectrum.* The school's principal usually reviewed the paper before publication and in this case deleted two articles. The more relevant one covered teen pregnancy and featured interviews with three pregnant students. Though their real names had been replaced by pseudonyms, the principal censored the article, claiming that it insufficiently protected the students' anonymity and that any discussion of birth control was inappropriate for younger students. The student publishers took the issue to court: a trial court sided with the school, but an appellate court agreed with the students. In 1988, the Supreme Court heard *Hazelwood School District* v. *Kuhlmeier* and ruled that the principal's actions had not violated the students' First Amendment rights because a school-sponsored paper does not count as a public forum. The court went on to say that a school may censor a student publication when the prior restraint is reasonably related to legitimate educational concerns.

Fourth Amendment Cases

Protections against "unreasonable searches and seizures":

- *Weeks* v. *United States* (1914): Established the "exclusionary rule"
- *Mapp* v. *Ohio* (1963): Extended the exclusionary rule to the states

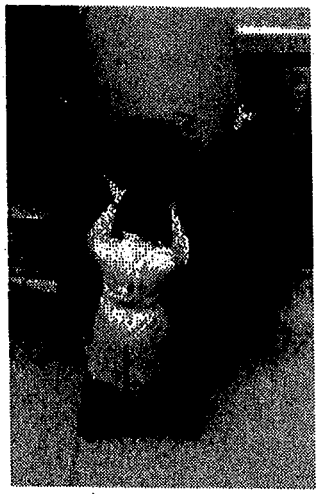
38

The Supreme Court has defined the boundaries of an unreasonable search or seizure in several cases over the past century. Various rulings have established and clarified the "exclusionary rule," which (in most cases) renders evidence gathered in an illegal search inadmissible in court.

In the case of Weeks v. *United* States (1914), police arrested Fremont Weeks at his place of business and searched the premises without a warrant; officers also repeatedly performed warrantless searches on Weeks's home. The search of his business turned up evidence that Weeks had sent lottery tickets through the mail—a violation of federal law for which Weeks was later tried and convicted. The Supreme Court overturned the lower court's conviction, ruling that the warrantless searches had infringed upon Weeks's Fourth Amendment rights against unlawful search and seizure. This set the precedent that evidence obtained unlawfully could not be legally presented in a court of law.

The court extended the exclusionary rule to the states through the 14th Amendment in *Mapp* v. *Ohio* (1963). In this case, the police entered Dollree Mapp's home looking for a suspect they believed she was harboring. When the police didn't produce a search warrant, she refused to let them in. The police forcibly entered the house and a brief confrontation ensued, resulting in Mapp's handcuffing. The police, claiming they had a warrant (though none was produced) searched the premises and found pornographic materials; Mapp was later tried and convicted for possession of obscenity. The judge knew of the search's illegality but nonetheless admitted the evidence. Mapp appealed to the Supreme Court, whose justices ruled that the due process cause of the 14th Amendment requires that all illegally obtained evidence be excluded from state as well as federal court proceedings.

Fourth Amendment Cases (continued)



Protections against "unreasonable searches and seizures":

- *United States* v. *Leon* (1984): Clarified the exclusionary rule
- Exclusionary rule not intended to protect a suspect's constitutional rights, but to deter and penalize police misconduct

39

Controversy surrounds the exclusionary rule, as many suspected criminals have gone free because evidence illegally seized could not be used in the courtroom. In recent years, the courts have further clarified the exclusionary rule and have come up with several exceptions by which evidence acquired without a search warrant can be used in court. One of these early exceptions was the "good faith doctrine," which the Supreme Court established in *United States* v. *Leon* and which states that evidence can be admitted in court if police were truly unaware that by collecting it they were violating a suspect 's Fourth Amendment rights.

It is important to point out that the exclusionary rule is not intended to specifically protect the constitutional rights of suspects, but to deter police misconduct and penalize its occurrence. When a court invokes the exclusionary rule, it does so not to excuse a criminal act but to emphasize that police will have to find other evidence to try and convict a suspect.

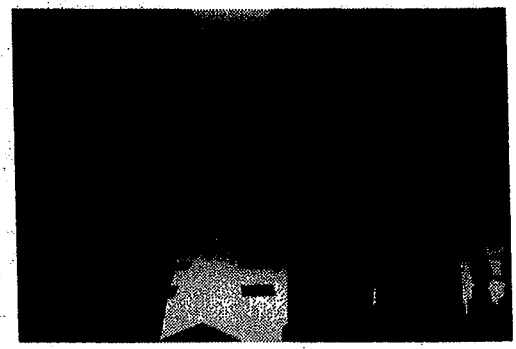
Other Bill of Rights Cases

Fifth Amendment:

- *Miranda* v. *Arizona* (1966): Protection against self-incrimination

Sixth Amendment:

- *Gideon* v. *Wainwright* (1963): Guaranteed a suspect's right to counsel



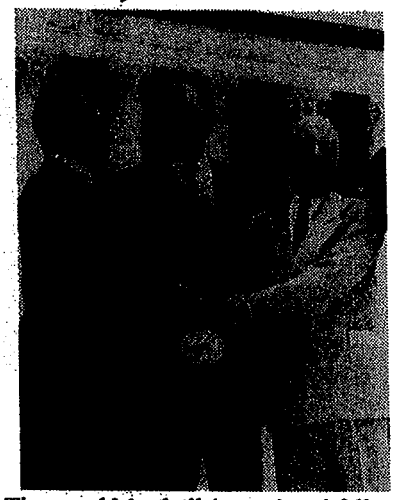
40

The 1960s saw a movement to reform police interrogation practices, which in some instances deprived suspects of their legal rights, including the presumption of innocence until convicted. In 1963, Arizona police arrested Ernesto Miranda for robbery, kidnapping, and rape. He confessed to the charges after hours of interrogation during which he was not aware of his constitutional protection against self-incrimination; his subsequent conviction rested entirely upon his confession. After both state and federal appeals, the Supreme Court heard the case and broadened its earlier ruling in *Escobedo* v. *Illinois* (1964), which required that an attorney be present during a suspect's interrogation. In *Miranda* v. *Arizona* (1966), the court ruled that Miranda's Fifth Amendment rights had been violated. The decision stated that "the modern practice of in-custody interrogation is psychologically rather than physically oriented" and that "the blood of the accused is not the only hallmark of an unconstitutional inquisition." The court outlined the necessary warnings police must give to suspects, including the rights to remain silent and to have counsel present during interrogations.

In 1961, Clarence Gideon was charged with burglarizing a Florida pool hall and with stealing money from its vending machines. He was too poor to afford his own lawyer, and at the time Florida only paid for counsel in cases involving capital crimes. He defended himself, maintaining his innocence. However, the jury found him guilty and sentenced him to five years in prison. While in the penitentiary, Gideon spent considerable time in the prison's library, where he discovered that he was denied due process by not having been provided with an attorney. In 1963, he appealed his case to the U.S. Supreme Court. The court's unanimous decision found that the right to counsel was fundamental, essential to a fair trial, and applicable to the states through the 14th Amendment. Gideon's case was remanded back to the Florida court, where he was provided an attorney and acquitted of all charges.

Key Civil Rights Decisions (continued)

- *Brown* v. *Board of Education* (1954): Determined "separate but equal" to be inherently unequal



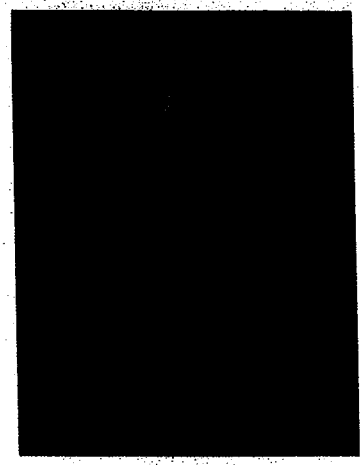
Thurgood Marshall (center) and fellow NAACP lawyers in the *Brown* case 48

In 1954, civil rights leaders squarely took on the issue of "separate but equal" by directly challenging the practice of segregation in public schools. They argued that the "separate but equal" doctrine resulted in the poor treatment of African Americans because their separate facilities and services were never truly equal and fostered an impression of inferiority—even to African Americans themselves. Since 1879, Kansas state law had allowed school districts to segregate their facilities. The NAACP-sponsored suit called for the board of education of Topeka, Kansas, to discontinue its policy of racial segregation. After the district court ruled for the school board, the Supreme Court heard the case in 1952 and again in 1953. On May 17, 1954, the court handed down a unanimous ruling stating emphatically that "separate education facilities were inherently unequal," tearing down the "separate but equal" doctrine once and for all.

Though a landmark case, *Brown* did not result in the immediate desegregation of public schools, nor did it address segregation in public accommodations such as privately owned restaurants or theaters. A Supreme Court decision the following year ordered state compliance with the *Brown* ruling "with all deliberate speed." It would take Congress's passage of the Civil Rights Act of 1964, more Supreme Court rulings, and several more years of protest to bring about the total desegregation of public and private facilities throughout the country.

Key Civil Rights Decisions (continued)

- *University of California Regents* v. *Bakke* (1978): Racial considerations may be one—but not the only—factor in college admissions

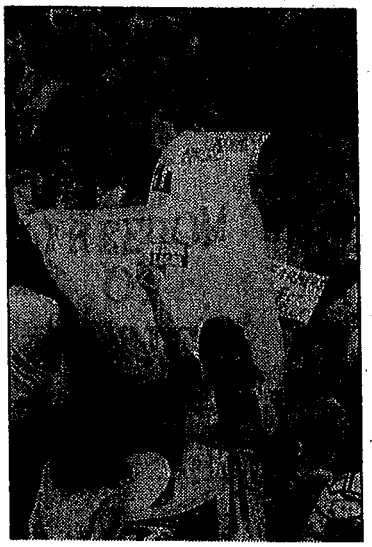


Justice Lewis Powell

50

In the early 1960s, many public institutions created policies to make up for years of discrimination. Public universities in particular established quota systems and affirmative-action policies to boost minority enrollment. Allan Bakke, a white man, had applied to the University of California–Davis Medical School twice and was rejected both times. The school had reserved 16 places (out of 100) in each entering class for qualified minority students. Since his college GPA and test scores far exceeded those of the minority students whom the school admitted, Bakke sued, contending that he had been denied admission based solely on his race. In *University of California Regents* v. *Bakke* (1978), the Supreme Court ordered the school to admit Bakke but was split in its decision with no majority opinion. Four justices stated that the use of a racial quota system by a government agency contravened the Civil Rights Act of 1964, while four others contended that selection based on race was permissible as long as other criteria were also considered. The ninth justice, Lewis Powell, agreed that race could be one (but never the only) factor in admissions and ruled in favor of Bakke, asserting that the university had denied him equal protection under the 14th Amendment.

Contemporary Constitutional Issues



Cases that defined the rights of individuals:

- *Roe* v. *Wade* (1973): Upheld a woman's right to an abortion on privacy grounds
- *Cruzan* v. *Director, Missouri Department of Health* (1990): Prohibited removing a patient from life support without "clear and convincing evidence" of the patient's wishes

59

The Supreme Court has at times examined issues that the Constitution's Framers in all likelihood did not foresee, including the often divisive issues of abortion and assisted suicide. In 1973, the court heard the case of a Texas woman (whom her attorneys dubbed "Jane Roe" to preserve her anonymity) who sought to terminate her pregnancy. Texas state law prohibited abortion except in order to save the woman's life. The central question before the court concerned whether the Constitution protects a woman's right to terminate a pregnancy via an abortion. In a 7–2 decision, the court ruled in favor of Ms. Roe, affirming that a woman's right to an abortion fell within her Fourth Amendment right to privacy (a right which case law precedent supported and which the Ninth Amendment did not expressly deny to the people), which the due process clause of the 14th Amendment extended to the states. The court elaborated on its ruling, stating that during the first trimester of pregnancy, the decision fell exclusively to the woman (with advice from her doctor). During the second and third trimesters, a state could regulate abortion if it chose to, for reasons related to the health of the woman.

Severe injuries sustained in a 1983 automobile accident left Nancy Cruzan in a coma, her life artificially sustained by a feeding tube. After several years of efforts to rehabilitate her failed, physicians determined that she lay in a persistent vegetative state and kept her on life support. With virtually no chance of recovery, her parents attempted to terminate her treatment, but state hospital officials refused to do so without court approval. After years of legal wrangling, the Supreme Court ruled in *Cruzan* v. *Director, Missouri Department of Health* (1990) that although individuals could refuse medical treatment under the due process clauses of the Fifth and 14th Amendments, incompetent persons could not. Without "clear and convincing evidence" that the patient wanted to end treatment, the state hospital's efforts to keep the patient alive were constitutional.

Contemporary Constitutional Issues (continued)

Cases that defined the rights of individuals:

- *Gonzales* v. *Oregon* (2006): barred the U.S. Attorney General from punishing doctors who participate in physician-assisted suicide

60

The case of *Gonzales* v. *Oregon* (2006) involved issues of both federalism and privacy. In 1994, voters in Oregon approved a law that legalized physician-assisted suicide and reaffirmed the law in 1997 by a wide majority. The law allowed doctors to prescribe a lethal dose of medication to a patient suffering from an incurable, fatal condition (i.e., one who is within six months of death). Two doctors must agree on the patient's condition as well as to the prescription. In 2001, U.S. Attorney General John Ashcroft declared that physician-assisted suicide violated the Controlled Substances Act of 1970 and threatened to revoke the medical license of any participating physician. The case brought up several legal questions, including the legitimacy of federal intrusion into state medical matters, federal officers overruling the will of the people of a state, and a patient's right to die. However, the court concentrated on whether the Controlled Substances Act permitted the Attorney General (Alberto Gonzales held the position in 2006) to ban the use of controlled substances for physician-assisted suicide. In a 6–3 ruling, the court held that the Controlled Substance Act did not give the Attorney General the right to deny physicians their licenses for prescribing medicines that were not themselves illegal. The decision avoided questions about the constitutionality of physician-assisted suicide and the power of the federal government over state decisions. These matters would have to be settled at a later time.