**1) *Engel v. Vitale* (1962) see textbook p. 364**

* **BACKGROUND OF THE CASE**

In 1951 the New York State Board of Education, which supervises the state’s public school system, approved a brief prayer which local school districts could adopt to be said in the schools at the start of each day. The prayer read: ***“Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country.”*** In 1958 the New Hyde Park school board adopted the prayer and directed that it be said aloud each day in every class in their district.

Steven Engel, the father of two children in New Hyde Park schools, objected to the idea of having a prayer read aloud by teachers (who are government officials) in public school classrooms. He sued in a state court and asked a judge to order that the prayer be dropped. Engel directed his suit against William J. Vitale, the head of the local school board. Vitale argued that the prayer was permissible because it was “nondenominational” and not representative of any particular religion or church. Furthermore, lawyers for the school board noted that no student was required to either say the prayer, or even to remain in the classroom while it was being said.

The New York state courts agreed with Vitale and denied Engel’s request, so he appealed to the United States Supreme Court.

* **CONSTITUTIONAL ISSUE**

The “Establishment Clause” of the First Amendment prohibits the making of laws respecting the establishment of religion by the government. Does having teachers in public schools read a daily prayer in class violate this part of the First Amendment?

* **THE COURT’S DECISION**

The Court ruled 6 to 1 in Engel’s favor. Justice Hugo Black wrote the majority opinion in which he said: prayer reading by teachers in public schools is “wholly inconsistent with the Establishment Clause. Prayer composed by government officials as part of a government program to further religious beliefs….breeches the [metaphorical] constitutional wall of separation between Church and State.”

Black continued by pointing out, “it is a matter of history that this practice of establishing governmentally composed prayers for religious services was one of the reasons many of our early colonists left England to seek religious freedom in America. The First Amendment was added to the Constitution to stand as a guarantee that the power and prestige of the government would not be used to control, support or influence the kinds of prayers the American people can say.”

Black noted that the Establishment Clause was meant “to prevent the union of government and religion because religion is too personal, too sacred, too holy, to permit its perversion by government officials.” Black concluded, “the New York law officially prescribing a classroom prayer is inconsistent with the purpose of the Establishment Clause.”

**2) *Wallace v. Jaffree* (1985) see textbook p. 364**

* **BACKGROUND OF THE CASE**

During the 1980s twenty-three states passed “moment-of-silence” laws for their public schools. Knowing the Supreme Court had ruled against teacher-led prayer in the classroom, these laws were designed by state legislatures to allow a new type of prayer in school. They permitted school districts to set aside a moment in each public school classroom each day for students to engage in voluntary prayer or quiet meditation. The idea was to give each student the opportunity to pray during this moment of silence.

Ishmael Jaffree, a parent of three school children in Alabama, challenged that state’s moment-of-silence law by filing a law suit against George Wallace, the governor of the state of Alabama. The Alabama law in question authorized a one-minute period of silence in all public schools “for meditation or voluntary prayer.” Jaffree’s elementary school age children had been teased and ridiculed by some of their peers for not praying during the daily moment of silence. Lawyers for Jaffree, a religious agnostic, claimed the state law violated the principle of separation of church and state established in the 1962 decision in the case of *Engel v. Vitale*.

* **CONSTITUTIONAL ISSUE**

Does a state law authorizing a daily period of silence in public schools for the purpose of prayer violate the “Establishment Clause” of the First Amendment?

* **THE COURT’S DECISION**

By a vote of 6 to 3 the Court ruled the Alabama law was an endorsement of religion in public schools and thus violated the Establishment Clause. Justice John Paul Stevens wrote the majority opinion and noted the Alabama law “was motivated by the purpose to characterize prayer as a favored practice during the moment of silence and it is not consistent with the principle that the government must pursue a course of complete neutrality toward religion.”

Justice Sandra Day O’Connor wrote a concurring opinion in which she said “the Alabama state legislature clearly wanted to use the law to encourage students to choose prayer over other alternatives during the moment of silence.” O’Connor stated the message conveyed to students was “prayer was the endorsed activity” during this state-prescribed daily activity. Although she added a moment of silence in and of itself is not necessarily religious because “silence, unlike prayer said out loud or Bible reading, need not be a religious exercise.” O’Connor left open the door that a state law allowing for a daily moment of silence in the classroom but not specifically mentioning prayer might be constitutional. Then students would be free to use this moment for any purpose they choose without feeling coerced into praying.

**3) *Minersville School District v. Gobitis* (1940) see textbook p. 367**

* **BACKGROUND OF THE CASE**

The Jehovah’s Witnesses is a Christian sect which believes, among other things, that the Old Testament biblical prohibition against worshipping false idols forbids them from pledging loyalty to or saluting a leader, a country or a flag. Lillian and William Gobitis, aged 12 and 10 respectively, followed the Witnesses’ teaching and refused to participate in the daily flag salute in their public school classrooms in Minersville, Pennsylvania. As a result, the local board of education expelled the children claiming students were not allowed to pick and choose in which required school activities they would participate.

Since in Pennsylvania, as in most states, school attendance is mandatory, Walter Gobitis was forced to find a private school in which to enroll his children. As this caused a financial burden for his family, he sued the Minersville School District. He asked the lower courts to prevent the school board from being able to require saying the flag salute as a condition for receiving a free public school education.

When the Gobitis family won this case in the lower courts, the Minersville School District filed an appeal with the United States Supreme Court.

* **CONSTITUTIONAL ISSUE**

The “Free Exercise Clause” of the First Amendment prohibits the government from passing laws prohibiting the free exercise of religion. Does it violate this part of the Constitution if a school district requires, under threat of punishment, participation in a ceremony which a child refuses on sincere religious grounds?

* **THE COURT’S DECISION**

By an 8 to 1 majority the Court decided against the Gobitis family. Justice Felix Frankfurter wrote the majority opinion for the Court.

He said that like freedom of speech, religious freedom may sometimes necessarily be limited in order to “maintain that orderly, tranquil and free society without which religious toleration itself is unattainable.” Frankfurter continued, “the ultimate foundation of a free society is the binding tie of cohesive sentiment….the precise issue for us to decide is whether the various states are barred from determining the appropriateness of various means [such as requiring students to participate in a daily flag salute] to evoke that unifying sentiment.”

Frankfurter declared the Supreme Court does not have the competence to overrule the wisdom of the state legislatures on such a detail of educational policy. Furthermore he said, “the courtroom is not the arena for debating issues like this….so to hold would in effect make us the school board for the entire country.” In 1940, the overwhelming majority of the Supreme Court agreed with this hands off approach toward the states and how they run their public schools.

**4) *Tinker v. Des Moines School District* (1969) see textbook p. 372**

* **BACKGROUND OF THE CASE**

John Tinker and his younger sister Mary Beth were high school and junior high school students respectively in Des Moines, Iowa during the 1960s. Along with others they organized a protest in December 1965 against U.S. involvement in the Vietnam War. They decided they and their supporters would wear to school simple black armbands adorned with peace signs to indicate their support for an end to the war.

School authorities learned of their plans in advance and announced a warning that any student wearing such an armband would be asked to remove it and suspended from school if they refused. Despite this directive, several students, including the Tinkers, wore their armbands to school anyway and were suspended. In response, the Tinker family sued the school district and when they lost in the lower courts, they appealed to the United States Supreme Court.

* **CONSTITUTIONAL ISSUE**

Under the “Freedom of Speech Clause” of the First Amendment, is the wearing of a symbol which promotes a political opinion, a form of speech which students have the right to exercise when they are at school?

* **THE COURT’S DECISION**

The Court held 7 to 2 that this form of speech (often referred to as “symbolic speech”) was protected by the First Amendment. Justice Abe Fortas wrote the majority opinion for the Court.

Fortas observed “it can hardly be argued that either students or teachers shed their constitutional right to freedom of speech at the school-house gate.” The Court found there had been no evidence of any interference with the rights of other students or serious disruption of classes, yet the lower courts supported school authorities because they found their fear of a potential disturbance was reasonable. Fortas took note of this possibility, but famously wrote “our Constitution says we must take this risk.”

According to Fortas, students whether in or out of school, are “persons” under the Constitution who have fundamental rights which must be respected. Students “may not be confined to the expression of those sentiments that are officially approved. The wearing of armbands in this case is closely akin to ‘pure speech’ which is entitled to protection under the First Amendment.”

**5) *Dennis v. United States* (1951) see textbook p. 371**

* **BACKGROUND OF THE CASE**

In 1948, early in the period of confrontation between the U.S. and the Soviet Union known as the Cold War, Eugene Dennis and other leaders of the Communist Party of the United States (CPUSA) were arrested and convicted for violating the Smith Act, a law passed by Congress in 1940 which made it illegal to teach or advocate the violent overthrow of the United States government. This law also forbid the publishing of such ideas, as well as organizing or even belonging to a group which believed in such things. Dennis appealed his conviction to the United States Supreme Court claiming the Smith Act denied his rights under the First Amendment. By the time the case reached the Supreme Court, the Korean War had broken out against the communists in North Korea and their Chinese allies. In other words, the Cold War had turned very hot.

* **CONSTITUTIONAL ISSSUE**

The central question in the case was: Did the Smith Act unconstitutionally limit Freedom of Speech, Press and Assembly as guaranteed by the First Amendment?

* **THE COURT’S DECISION**

The Court upheld the conviction of Dennis by a vote of 6 to 2, finding that the Smith Act was constitutional. Chief Justice Fred Vinson wrote the majority opinion in which he supported the power of Congress to protect itself against violent rebellion since “the existing structure of the government provides for peaceful and orderly change” through the process of democratically held elections.

Vinson then went on to discuss the circumstances under which free speech may be limited. He recognized the main precedent case in this area was *Schenck v. United States* (1919), in which Justice Oliver Wendell Holmes had devised the “clear and present danger” test, which holds that the government may limit a person’s ability to exercise their constitutional rights whenever in the course of doing so, they put others in danger. As Holmes wrote in his decision a person can be forbidden from “falsely shouting fire in a [crowded] theater and causing a panic.”

In the *Dennis* case, Vinson chose to update this test since it was not shown that Dennis in exercising his First Amendment rights expressing support for communist ideas had created a present (meaning hear and now) danger for anyone in particular. However, under Vinson’s interpretation, the danger does not have to be present, only probable. In other words, if there is a probability that Dennis and his communist followers might one day attempt to not just talk about the violent overthrow of the government, but instead actually try to do it, they can be stopped while they are just talking about it.

This interpretation is generally abbreviated as having changed the “clear and present danger” test to the “clear and probable danger” test. On this new ground, the Court found it could deal easily with issue of the convictions of Dennis and his communist colleagues. Vinson argued the CPUSA is “a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders felt the time had come for action.” In other words, even though no overt violent action had yet been taken, the danger of rebellion already existed because “it is the existence of the [communist] conspiracy which creates the danger.”

In the final analysis, it was unlikely at the height of the Cold War, while American soldiers were fighting and dying against communist opposition on the battlefield, that leaders of a communist group in the United States were going to win a free speech case in the Supreme Court.

**6) *Brandenburg v. Ohio* (1969)**

* **BACKGROUND OF THE CASE**

Clarence Brandenburg was a Ku Klux Klan leader in rural Ohio. The Klan is of course a white supremacist, anti-Semitic and anti-Catholic organization. Brandenburg invited a local television station to film a Klan rally during which his followers wore hoods, brandished firearms, and made various anti-Black and anti-Semitic remarks. During the rally, Brandenburg made a speech in which he said, “we’re not a revengent [sic] organization, but if our President, our Congress, our Supreme Court, continue to suppress the white, Caucasian race, it’s possible that there might have to be some revengence [sic] taken.” Brandenburg was unhappy that during the Civil Rights Movement of the 1950s and 60s, the federal government had begun taking actions to protect the rights of minorities and even starting cracking down on the actions of white supremacist groups like the KKK.

For the comments he made at the televised rally, Brandenburg was arrested and convicted under a 1919 Ohio criminal syndicalism law which made it a crime to advocate “the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing political reform.” He was fined $1000 and sentenced to between one and ten years in prison. When the Brandenburg’s conviction was upheld by the higher courts in Ohio, he appealed to the United States Supreme Court.

* **CONSTITUTIONAL ISSUE**

Was Brandenburg’s conviction under Ohio’s 1919 criminal syndicalism law a violation of his freedom of speech under the First Amendment?

* **THE COURT’S DECISION**

The Court made a unanimous decision in Brandenburg’s favor, overturning his conviction and declaring the Ohio law unconstitutional. In a similar case earlier in the decade the Court had written that “the mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action.” In other words, simply talking about the possibility of doing something violent is not the same as actually preparing to do it.

Furthermore the Court said, “the constitutional guarantee of free speech does not permit a state to forbid advocacy of the use of force…except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” Since the Ohio law failed to make any distinction between talking to a group about something violent which might need to be done and actually preparing them to do it, “the statute falls within the condemnation of the First Amendment.”

In this decision the Court can be seen as rejecting the “clear and probable danger” test from *Dennis v. United States* (1951). Given the history of the KKK, it could certainly be argued that if a Klan leader talks about the possibility of doing something violent, it creates a strong probability that it may eventually happen. However in the case of Brandenburg, the 1969 Court did not think this future probability was a strong enough reason for the government to take away a person’s right to freedom of speech.