
Media and Society Seminars

A PROGRAM OF
THE GRADUATE SCHOOL OF JOURNALISM
COLUMBIA UNIVERSITY

Transcripts: 204 Journalism, Columbia University, New York, N.Y. 10027

THE
CONSTITUTION
THAT DELICATE BALANCE

**School Prayer, Gun Control,
and the Right to Assemble**

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The Constitution: That Delicate Balance is a production of *Media and Society Seminars*, a program of the Columbia University Graduate School of Journalism, produced in association with WNET/Thirteen (New York) and WTTW (Chicago). Major funding was provided by The Annenberg/CPB Project, a project of the Corporation for Public Broadcasting and The Annenberg School of Communications to provide opportunities for higher education, with additional support from the Times Mirror Company.

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CASE STUDY

Marathon is a racially mixed Sunbelt city. Recently, 22 black Marathon youths have been sexually molested and murdered. While the crimes appear to be linked, they remain unsolved. The mood is tense and rumors with racial overtones are widespread. There have been sporadic acts of racial violence in the schools.

The Mayor and the Marathon City Council meet and pass a temporary ordinance banning permits for demonstrations and marches if "there is a reasonable likelihood of violence." They formally request the Marathon School Board to authorize voluntary daily prayer for peace in schools throughout the city. The City Council also passes a comprehensive gun control ordinance that effectively bans the sale of guns in Marathon.

Responding to petitions from some Marathon residents and community groups, a federal court upholds the constitutionality of the gun control ordinance. At a subsequent hearing, the court declares the school prayer unconstitutional. The court also enjoins the Marathon high school championship football game until racial tensions subside.

MEDIA AND SOCIETY SEMINARS

Air Date: November 13, 1983

School Prayer, Gun Control, and the Right to Assemble

FRED W. FRIENDLY, *Columbia School of Journalism*: From the birthplace of the Constitution . . . School prayer, gun control, and the right of extremist groups to assemble. Who decides?

Prof. ARTHUR MILLER, *Harvard Law School*: The eternal cry of the lawyer: "We can bring a lawsuit."

ORRIN HATCH, *U.S. Senator, Utah*: I have never been afraid of prayer, anywhere, any place, any time.

SHIRLEY M. HUFSTEDLER, *Former Secretary of Education*: Still the place to pray is in the church and not in the school.

Prof. MILLER: Hiding behind your First Amendment.

Sec. HUFSTEDLER: Absolutely enwrapped in it.

Hon. POTTER STEWART, *Justice (retired), U.S. Supreme Court*: If that Constitution is to be worth anything more than the paper it's written on, there has to be an umpire to apply those restrictions and limitations. And while the Constitution is not explicit as to who that umpire shall be, I think since the days of Chief Justice Marshall it's been accepted by the American people that the umpire shall be the Supreme Court of the United States.

Judge HARRY T. EDWARDS, *U.S. Court of Appeals, D.C. Circuit*: The legislators and the executive branches are writing solutions that are either so ambiguous or so useless that it's inevitable that the courts are going to get the questions because the combatants are at loggerheads and they don't know where else to go — and then we get blamed.

* * *

Mr. FRIENDLY: I suppose to many Americans today, the First Amendment means freedom of speech and of the press. We hear a lot about that. Yet in that amendment the framers of the Bill of Rights wrote first about the dangers of the establishment by Congress of an official religion. They feared it. They prohibited it. But they also wanted to promote the free exercise of religion according to the conscience of the individual. Justice Potter Stewart participated in the seminar we're about to view and is here with us to provide additional analysis.

As prologue, Justice Stewart, the establishment clause was ratified in 1791. Yet for a hundred and seventy years children said prayers or read the Bible in the school. Why did it take so long for the Supreme Court to declare that practice unconstitutional?

Justice STEWART: Well, I think it's important to remember, Mr. Friendly, that until the 1920's the establishment clause of the First Amendment was not understood to impose any restrictions at all upon the individual states but only upon the federal government, which had no part in running the public schools.

Mr. FRIENDLY: You mean when they said, "Congress shall make no law," they—

Justice STEWART: That's what they meant.

Mr. FRIENDLY: They meant the federal government.

Justice STEWART: Correct.

Mr. FRIENDLY: "Shall make no law."

Justice STEWART: And that was just a self-evident historic fact, that the original Bill of Rights contained restrictions upon the newly-created federal government, not any restrictions at all upon the states, which were, so far as the Bill of Rights was concerned, free to go their own way. But the First Amendment was one of the early provisions of the Bill of Rights, one of the early Bill of Rights to be incorporated as a restriction upon state power, and that occurred in the 1920's.

Mr. FRIENDLY: Now let's adjourn to Congress Hall, where participants consider a hypothetical case on school prayer, gun control, and the right to assemble — even for extremists. Our moderator is Harvard Law Professor Arthur Miller.

* * *

Prof. MILLER: Ladies and gentlemen, welcome to Marathon. Marathon is a racially mixed city. Unfortunately, things have not been very good in Marathon because, during the last year, twenty-two black teenagers have been murdered after being sexually molested. The murders are clearly linked. They remain unsolved. The city is tense. There have been sporadic acts of violence in the schools. Pastor Brown is a black minister, apparently the father of the twenty-second teenager to be murdered. He is about to petition the Marathon school board to allow him to come to the school to hold just a little remembrance prayer for his son Jamie Brown. Judge Edwards, let me take away your robes. It's your son's high school. Pastor Brown is a good friend of yours, as a matter of fact. As a parent, how do you react?

Judge EDWARDS: If he's a good friend of mine, I'd call him and ask him to revise his request. To make it an occasion for remembering his child and not a prayer service or service of any sort. I would be most disturbed to have any kind of religious service in the school. I think an occasion to remember the child would probably be very settling and would probably be very— would be a good occasion to have.

Prof. MILLER: Why? What's wrong with having a man who's a pastor, a man of religion, come in for a moment?

Judge EDWARDS: Because I think that what he does with respect to his religion can be done in his church and that those of us who are inclined to pray with him can go to his church and he should—he should not use a public forum—a public institution as a place for prayer, religious service, because there are some who would not subscribe to his, his views.

Prof. MILLER: Judge Hufstедler, you are on the school board of Marathon. Pastor Brown has appeared and has suggested that this moment of prayer be held in his son's former classroom. How do you feel as a member of the school board?

Sec. HUFSTEDLER: I would vote no because the appropriate forum for prayer is the church.

Prof. MILLER: This is a very religious community, Marathon. It's very homogenous.

Sec. HUFSTEDLER: That doesn't change my view at all. Still the place to pray is in the church and not in the school.

Prof. MILLER: Why is the school not a place to pray?

Sec. HUFSTEDLER: Well, you have taken away perhaps my law degree too but you haven't erased the First Amendment of the—

Prof. MILLER: First Amendment—

Sec. HUFSTEDLER: The federal Constitution.

Prof. MILLER: What does that say that's relevant here?

Sec. HUFSTEDLER: Well, what we are talking about is the appropriate separation of church and state and obviously I have to read that language, brief though it is, with the gloss upon it placed there by the Supreme Court of the United States.

Prof. MILLER: Well, let's read it.

Sec. HUFSTEDLER: Um-hmm.

Prof. MILLER: I always carry my favorite document with me. It says: "Congress—Congress shall make no law respecting an establishment of religion." Congress—are you the Congress?

Sec. HUFSTEDLER: Oh no, indeed.

Prof. MILLER: You're the Marathon school board.

Sec. HUFSTEDLER: I'm the Marathon school board, but as a part of my oath in becoming

a member of the school board, I promised to support and defend the Constitution of the United States and in making that determination negative to prayer in the public schools, I'm upholding that oath.

Prof. MILLER: Do you really think this moment of prayer for Jamie Brown is that significant that it has Constitutional dimensions?

Sec. HUFSTEDLER: Yes, I do. Moreover, I think that the prayer for the young lad who is gone is so important that it should be in the church, whose adherents believe in the thought and in the religious views of the pastor who has lost his son.

Prof. MILLER: Yet the acts of violence thus far have been in the schools. Some of our parents in the community, deeply religious, believe it's time to bring some religion or some religious beliefs to the school to pacify the situation.

Sec. HUFSTEDLER: I flatly disagree with them.

Prof. MILLER: Um-hmm. Hiding behind your First Amendment.

Sec. HUFSTEDLER: Absolutely unwrapped in it.

Prof. MILLER: Mr. Nelson, you're on that school board.

AVI NELSON, Commentator, WCVB-TV (Boston): I think for me it would be more a sense of community at a time of trial and stress if it were my sense that the overwhelming majority of the community was in favor of some kind of memorial service even if it had religious involvement in the school that I would go along with it. I guess I don't share the judge's concern that the Constitution of the United States will be torn asunder because there's a memorial service for a dead youth.

Prof. MILLER: Pastor Brown suggests the following: "Almighty God, we acknowledge our dependence on thee and earnestly beseech you to bless the soul of our dear departed Jamie Brown. In the name of Jesus Christ, our Lord, Amen."

Mr. NELSON: Well, it seems to me that a memorial service in a school, even if held in the school, could be made voluntary and I think many of us have attended a religious service where we stood in silence, not necessarily believing or agreeing with all the content. But again, if the overwhelming sentiment here is in favor of having this memorial service, I'd go along with it.

Prof. MILLER: Mr. Neal, you're on that school board too.

JAMES F. NEAL, Attorney, Neal and Harwell: I think in this case I would recognize that the Constitution is really not so fragile, that under these circumstances they could withstand a little prayer in the schools and I would—

Prof. MILLER: Just a little prayer.

Mr. NEAL: Well, not too much more than you said, but a little prayer.

Prof. MILLER: How about that little prayer every day until the murderer is apprehended?

Mr. NEAL: Well, it's all a matter of degree and I know that the theory is that you don't allow the camel to put his nose under the tent for pretty soon then the whole body will be in there, but I think you—I think you can tolerate a little nose in this case. But we can't do this every day because then we would be getting—might then be ripping a little bit the Constitution.

Prof. MILLER: What if Jamie Brown's class had twenty-five Baptists, five Hindus, three Jews, two Moonies, six Ethical Culturists, and eight yahoos—and I'll throw in an agnostic and two atheists.

Mr. NEAL: What would I say about that?

Prof. MILLER: Yeah.

Mr. NEAL: I'd still say we'd had enough of the nose under the—under the flap of the tent: no more.

Prof. MILLER: But you'd still allow that prayer in that classroom.

Mr. NEAL: Under the circumstances I mentioned, I think I would.

Prof. MILLER: Ms. Kiernan, if you're on that school board, how would you vote?

LAURA A. KIERNAN, Reporter, The Washington Post: I think that Mr. Neal is

making a big mistake to think that he can let the camel get its nose in a little bit. In a deeply religious town there'll be no stopping — and the same purpose could be accomplished with a memorial service.

Prof. MILLER: Today a one-minute prayer, tomorrow a catechism, hmmm?

Ms. KIERNAN: Precisely. Making visits and daily mass, right.

Prof. MILLER: Well, how do you respond to Mr. Nelson, who says this is a deeply religious community? This was one of their classmates. They loved him.

Ms. KIERNAN: I don't think you can single out the town as an exception to the principle that you don't have religion in your public schools.

Prof. MILLER: So you say nothing — not even my single line?

Ms. KIERNAN: No. I'd say a memorial service.

Prof. MILLER: Could we play a Bach cantata?

Ms. KIERNAN: Could.

Prof. MILLER: I mean, with — with words as well as music — all that religious stuff that they say about —

Ms. KIERNAN: Now you're going to trap me, that's right. We'd screen the music for the service.

Prof. MILLER: Oh. I see. So a Bach cantata is suspect.

Ms. KIERNAN: We'd be very careful. We got a lot of problems in this town and we don't want to complicate it with — religion.

Prof. MILLER: Why? What's — what's bothering you? What's wrong with that camel's nose?

Ms. KIERNAN: I think you're imposing it on the children.

Prof. MILLER: No, no, we decided that any child who did not wish to recite the prayer with Pastor Brown did not have to. And if he or she brings a note from a parent can leave the room.

Ms. KIERNAN: I think you're putting — forcing a child into an untenable position. Sifting outside the room while his other classmates are inside saying prayers and they come out and confront him and say, "Why weren't you in there for?"

Prof. MILLER: Well, it's only a minute.

Ms. KIERNAN: Nevertheless.

Prof. MILLER: Senator Hatch, if you're on that school board, suppose I say that this is really a very homogenous community, there really is no other religion —

Sen. HATCH: Then I would have no problem because I've never been afraid of prayer, anywhere, any place, any time, and even though somebody might try to enjoin that prayer they would have their right in court to do so.

Prof. MILLER: Miss Kiernan. You're a wordsmith. Maybe we can negotiate. What's wrong with my prayer? "Almighty God, we acknowledge our dependence on thee."

Ms. KIERNAN: That, for starters.

Prof. MILLER: Which?

Ms. KIERNAN: The first two sentences.

Prof. MILLER: "Almighty?"

Ms. KIERNAN: "We acknowledge our dependence on thee."

Prof. MILLER: Um-hmm.

Ms. KIERNAN: And as you proceed, it would get to be more objectionable. I don't think the state through its schools should be making that acknowledgement on behalf of its students.

Prof. MILLER: So you would also ban the singing of "God Bless America."

Ms. KIERNAN: No.

Prof. MILLER: No. I feel Neal's camel's nose is in the tent. If you can sing "God Bless America."

Ms. KIERNAN: I think there's a difference between that and a prayer.

Prof. MILLER: Explain it to me.

Ms. KIERNAN: The difference is. I think that the prayer connotes a statement of some kind of dependence or belief that some of the children and their parents might not ascribe to and the song is more of a patriotic expression.

Prof. MILLER: So religion —

Ms. KIERNAN: Weak. I'm trying —

Prof. MILLER: Can come in through patriotism. It can't —

Ms. KIERNAN: Through the side door.

Prof. MILLER: It can't come through humanity —

Ms. KIERNAN: I don't think you're really bringing —

Prof. MILLER: And love of a dead child or any of those normal human emotions.

Ms. KIERNAN: I don't think you're injecting religion by singing "God Bless America."

Prof. MILLER: And you are when you pray for the soul of Jamie Brown.

Ms. KIERNAN: When you gather the children together in the school auditorium and conduct a prayer session, yes.

Prof. MILLER: Let us assume that our Marathon school board, unlike the one here, is not split. An unhappy parent comes to you, Ms. Baker, says, "I've nothing against religion. We're deeply religious ourselves — doesn't happen to be Jamie Brown's religion, that's not the point. I've read my Constitution — the annotated version that Judge Hufstедler has. What can you do for me?"

JEANNE BAKER, Former General Counsel, Massachusetts Civil Liberties Union: I say, "Well, we can bring a lawsuit." First I —

Prof. MILLER: The eternal cry of the lawyer: "We can bring a lawsuit."

Ms. BAKER: And I then say, "If you can finance it, we can most likely win the lawsuit."

Prof. MILLER: And if I can't finance it, we will lose the lawsuit?

Ms. BAKER: No. If you can't finance it, we'll go to the local Civil Liberties Union and make sure that somebody finances the lawsuit.

Prof. MILLER: Now, what's your lawsuit? Who are you suing?

Ms. BAKER: Well, I would bring a complaint in federal court against the school board on behalf of the parent, and we would say in the lawsuit there is a proposal, and indeed it's been agreed upon, that there's going to be a religious ceremony in the school and that's a violation of the First Amendment applied to the states through the Fourteenth Amendment and we ask for an injunction. We would prepare legal memorandum and have present arguments to the court to the effect that any prayer, even if it is brief, even if it receives community support, you know, in terms of various religious groups joining together and wishing this prayer to happen, that even in those circumstances it does violate the Constitution which does require strict separation of church and state and requires strict adherence to the principle that a public institution like a school cannot lend its weight, lend its imprimatur to the — to the advancing of religion. There's no way you can interpret the prayer as anything other than a statement of a religious belief and in fact a particular religious belief, reflecting a particular religious angle.

Prof. MILLER: You wanted a federal judge. There's a federal judge over there, Judge Merhige. Judge, do you have any questions of counsel?

Judge ROBERT R. MERHIGE, Jr., U.S. District Court, Eastern District of Virginia: Would you cite the Constitution of the United States?

Ms. BAKER: I would cite the Constitution, the First Amendment, the Fourteenth Amendment and I might even cite a state constitution.

Prof. MILLER: You trying to run away from this case?

Judge MERHIGE: You asked me the — you asked me what I would ask her and I —

Prof. MILLER: Oh, I see — and you felt obliged to —

Judge MERHIGE: I'm ready to—I'm ready to rule.

Prof. MILLER: Oh, well, always a six-gun at the ready, eh?

Ms. BAKER: See, what you don't—

Prof. MILLER: Would you like to hear opposing counsel?

Judge MERHIGE: Due process requires it, but it does take time. I thought I'd been listening to opposing counsel.

Prof. MILLER: You have a ruling, I take it.

Judge MERHIGE: Yeah, I'm ready to rule.

Prof. MILLER: Rule.

Judge MERHIGE: Well, I'm real sorry, but she's entitled to the injunction. Now I'd be delighted to meet with Reverend Brown, to pray with him because I believe in it, too, but not in my schools, not under the sponsorship of the school board.

Prof. MILLER: Yet the Constitution doesn't say anything about—

Judge MERHIGE: No.

Prof. MILLER:—prayer, it says "establishing a religion." How does this establish a religious—a religion, this—this one little fleeting prayer in an emergency situation—

Judge MERHIGE: Well—

Prof. MILLER: In a particular community?

Judge MERHIGE: It— it fosters excessive involvement, entanglement, between the state in religion and the Supreme Court says that that's inappropriate.

Prof. MILLER: What are the arguments the other way, Justice Stewart?

Justice STEWART: I think you've asked the appropriate question. How can the saying of a nondenominational prayer in the public tax-supported schools be an establishment of religion? Even assuming that there are people there of various religious beliefs and of no religious beliefs and of antireligious beliefs. And therefore how can the saying of— of a nondenominational prayer possibly constitute an establishment of religion which historically simply reflected the decision of the— those who drafted our Constitution that we wanted no Church of England in this country? Fact is, there was an established church in the state of Massachusetts until well into the nineteenth century.

Prof. MILLER: Ms. Baker, having won this battle, you next discover that the school board, having learned this first lesson, amends the procedure and it says, "We are going to have a moment of silent prayer. Either for Jamie Brown or for our community or for the apprehension of this heinous criminal who has killed twenty-two people."

Ms. BAKER: The problem with what the school board has now enacted in its modified, you know, proposal or its modified plan is still, I think, a little bit of that camel's nose. Just recently—

Prof. MILLER: God is not mentioned. "Almighty one" is not mentioned.

Ms. BAKER: No, but the words—

Prof. MILLER: "Dependence" is not mentioned.

Ms. BAKER: But the word "prayer" does, I think, in the common parlance connote, you know, ascription to religion. Moreover, there are cases, there are precedents where judges have held just that, where they've looked at the words "prayer" and "meditation" and they've said, "Well, if it said 'meditation service' that would be fine or even if it said 'prayer and meditation' or 'prayer or meditation,'" but where the service is specifically for prayer I could find precedent and I could show it to the school board and I would do that. I would—I would show some cases that I'm aware of to the school board and I would say, "Look, if we go back into court, you saw how quickly I got relief from Judge Merhige, it'll happen again."

Prof. MILLER: How do you rule this time, Judge?

Judge MERHIGE: Well, violative of the Constitution of the United States, so the Supreme Court of the United States says in my opinion.

Prof. MILLER: Suppose we use the word—

Judge MERHIGE: 'Cause that's where the false—

Prof. MILLER:—"meditation." If—if a teacher says, "Children, I'm sure you miss Jamie Brown as much as I do. We were all deeply fond of him and loved him and I would like each of you to spend a quiet moment, thinking about Jamie Brown and wishing him well in the Great Beyond and expressing in your inner soul"—or is that an offensive word, "soul" is? Can I use "soul"?

Judge MERHIGE: "Soul" is and "the Great Beyond."

Prof. MILLER: Oh, sorry. How about: "Wherever he is?" Suppose she says, "I want you to spend a minute thinking about Jamie Brown, thinking about his loss to our community, thinking about our community, thinking about the future, and expressing— however you choose— your hope that this murderer is apprehended."

Judge MERHIGE: Now you're making it tougher. I'd like to hear from counsel on that.

Ms. BAKER: I was afraid of that. I—

Prof. MILLER: Have I sanitized enough? Is this the name of the game, sanitization?

Ms. BAKER: I think—

Judge MERHIGE: Well, I want to interrupt now. If your purpose is to sanitize—

Ms. BAKER: Judges do it all the time.

Judge MERHIGE: You—you're violating the spirit and I'm not going to put up with that. You can move out of court right now.

Prof. MILLER: Suppose we take it up to, say, Court of Appeals. How much play, Judge Edwards, is there in this First Amendment? How— how clear—

Judge EDWARDS: I think—

Prof. MILLER:—is the separation of church and state—

Judge EDWARDS: I think if all we have is a school board saying, "We'd like to have kids think about these tragedies at the beginning of each day," it seems to me that's a long hike from—to get to the establishment clause and to worry much about it. I really don't see a lot of trouble with that one at all.

Prof. MILLER: Would you have trouble with thinking about Jamie Brown's soul?

Judge EDWARDS: Yeah. Because suggesting to people who are easily proselytized something about belief and what you should and should not believe—

Prof. MILLER: Ninety-eight point nine percent—

Judge EDWARDS: That's not the point.

Prof. MILLER:—of the people in that community believe in—

Judge EDWARDS: Not under existing—

Prof. MILLER: Jamie Brown's soul.

Judge EDWARDS: Not under existing law, that's not the point—that's clearly not the point.

Prof. MILLER: Who made that law?

Judge EDWARDS: Well, the—the Supreme Court interpreted our Constitution.

Prof. MILLER: Um-hmm.

Judge EDWARDS: I think that would—

Prof. MILLER: The courts, in other words, not the people.

Judge EDWARDS: Well, who construes the Constitution but the courts?

Prof. MILLER: Well, we're going to be working on that, Judge. Judge Adams?

Judge ARLIN M. ADAMS, U.S. Court of Appeals, Third Circuit: I—I take a different point of view. Here, as I understand the facts that you have been giving, there are other important purposes such as maintaining a certain ambience in the community and I think when you add up those factors, the fact that this might be a one-shot affair, if you use one of

the nondenominational invocations that you mentioned. I think that gets much closer to what we find at high school commencements and the courts have approved those. They have not turned those down.

Prof. MILLER: Now what would be a nondenominational invocation of a Supreme Being?

Judge ADAMS: Yeah, even that I think I would go along with, although I don't think it's necessary in the memorial-type service that you've been talking about. I think I'd even go that far, if it's a one-shot affair, it's a voluntary attendance, and the purpose is to maintain harmony in a community that's badly divided.

Prof. MILLER: Let's suppose that the congressman from Marathon is outraged. So the congressman from Marathon proposes a statute in the United States Congress which basically says no court — no federal court — has jurisdiction over any case involving a voluntary prayer promulgated by a legally constituted school board. Going to vote for that, Congressman Rangel?

CHARLES B. RANGEL, U.S. Representative, New York: Is it an election year?

Prof. MILLER: It's very close. And they have just redistricted in your area.

Rep. RANGEL: I— I think I would have enough confidence in my constituents that they would allow me to vote against it.

Prof. MILLER: Why would you vote against it?

Rep. RANGEL: Well, it would be an unconstitutional statute. It would be just a demagogue. The courts will strike it down anyway and we could not restrict the jurisdiction of the court just because we legislate it. We—a number of members of Congress do that quite often and—and it flies back home, but —

Prof. MILLER: You—you've been in the Congress a long time. You were there when Norris-LaGuardia was passed.

Rep. RANGEL: Umm.

Prof. MILLER: That's how old you are, and it says the federal courts can't issue labor injunctions. What—that do you mean, you don't have the power?

Rep. RANGEL: Well, I—I would not believe in it that—that they could not review a case where school board—or—where the lo—or where the courts have knocked down the school board's right or the teacher's right to have a memorial service. I would not then believe that the Congress should step in and restrict the courts. I think their role would be to interpret what we're doing and interpret the Constitution. Of course, back in the district I'd be supporting the service and I don't see any conflict between the two views.

Prof. MILLER: Senator Hatch, how would you go on this one?

Sen. HATCH: Well, I've always been interested in that issue because Article III does provide the means whereby the court's jurisdiction can be restricted. The question is whether that jurisdiction should be restricted under given circumstances. You cited the Norris-LaGuardia Act: a perfect illustration where Congress of the United States restricted the jurisdiction of the federal courts. Now, I think it depends on who's making the argument but there's no question under the Constitution that the jurisdiction of the courts can be restricted and that whether — like Congressman Rangel — whether we would do that in this case or not, it seems to me is the real question. I doubt that I would do that in this case.

Prof. MILLER: But you feel as a member of the United States Senate you do have the power to limit the jurisdiction of the federal courts to interpret the Constitution?

Sen. HATCH: I think we have the power to limit the jurisdiction of the courts within certain parameters. If it comes to the constitutional rights that must be preserved, I'm not sure Congress can extend its power that far. It may try, and it may succeed, because the court itself as you know is not immune to political thought and theory.

Prof. MILLER: Oh, all they want to do through this bill is get back to the old-fashioned notion of what establishing a religion is.

Sen. HATCH: Well, there are two conflicting problems: the establishment-of-religion problem, plus the — plus the problem of free expression, or the right to have free expression of religion. And it seems to me where we break down is always emphasizing the establishment

clause as though there is a wall of separation between the church and the state, when in fact in the early days of this country every state had laws that protected religion. And the issue is, are we going to establish a state religion? Are we going to establish a preferred religion? Or are we going to be a religious nation? I think those two competing and conflicting clauses are very important.

Prof. MILLER: Judge Bell, does it bother you in a structural sense that the Congress should be able to restrict the jurisdiction of the federal courts?

GRIFFIN B. BELL, Former U.S. Attorney General: It bothers me a great deal for the Congress to ever even attempt to overrule a decision of the Supreme Court. My position is that the Congress ought to leave the Supreme Court alone, even if it's a statutory ruling. I would let the system work. We have a separation of powers, we have checks and balances, and in my lifetime I see things come back in balance. Sometimes they get out of balance, but they always come back in because we have such a marvelous system of government.

Prof. MILLER: But why is it that your assumption is that the system — the checks and balances — leave the ultimate determination to the court?

Judge BELL: Well, it's been that way since John Marshall's time.

Prof. MILLER: Maybe he was wrong.

Judge BELL: Well, I've—I've never thought so. I'm a court man. I believe in the court.

Prof. MILLER: That's a good category. "A court man."

Judge BELL: Or court woman as the case may be. But I believe the courts occupy a very good role in the system and I've never seen anything really go terribly wrong with the government maybe since the Dred Scott decision.

Prof. MILLER: As Leo Durocher used to say, "Never change a winning lineup."

Judge BELL: Right.

Prof. MILLER: Senator Hatch, you are not a court man.

Sen. HATCH: Well, I don't—I don't disagree with Judge Bell, but—but I don't think there's any question that if we had the Supreme Court today that came down with the Dred Scott decision determining that a black human being is not a human being, then I have no doubt in my mind we could overturn that decision tomorrow, and that everybody in this country—or at least everybody who thinks in this country—would want us to overturn that decision and right that wrong. I think the Congress has that right. Where you get into the difficulty is where the Congress tries to overrule the Constitution itself.

Prof. MILLER: Now, Mr. Lewis, you've heard the lawyers talk about your Constitution. What do you think—

ANTHONY LEWIS, Columnist, The New York Times: Well, I—

Prof. MILLER:—your Constitution should deal or do with this confrontation between the Congress and the court?

Mr. LEWIS: I agree with what's been said. I'm a court man and I think that was really implicit in our system. We didn't adopt a system in the beginning—in the beginning that gave way to the overwhelming sentiment of the community all the time. To the contrary, we explicitly and deliberately — the framers of the Constitution and of our country did — adopted a system in which the minority would be protected — even an eccentric small minority would be protected against the overwhelming sentiment of the community, and I prefer it that way.

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Mr. FRIENDLY: Justice Stewart, Tom Paine was an agnostic, but most of the Founding Fathers were deeply religious. Doesn't the ban on school prayers put the thumb of the court in weighing the First Amendment on the side of agnostics and atheists?

Justice STEWART: Well, that's what the critics of that decision say, and I was one of the critics of that decision.

Mr. FRIENDLY: You were a dissenter?

Justice STEWART: I was indeed. But the court thought and held that the establishment clause of the Constitution of the United States, found in the First Amendment and applicable to the states through the Fourteenth, was so important in its requirement of neutrality that the result was not to favor agnostics and atheists but was to carry out the guarantees of the establishment clause of the Constitution.

Mr. FRIENDLY: Now, Justice Stewart, let's return to the hypothetical.

* * *

Prof. MILLER: While this debate has been going on about the memorial service or moment of meditation about Jamie Brown, the city council has been active. It seems that one day the mayor of Marathon walked into the city council and said, "Boy, we've got a problem on our hands. The racial tension in this community is growing. I understand that gun sales are up in the last few weeks. It's time for a gun control ordinance." You with me, Mr. Reynolds, on the city council?

WILLIAM B. REYNOLDS, Asst. Attorney General, Civil Rights Division, Justice Department: I think that the—I would vote for a ban on the sale of all guns.

Prof. MILLER: How about you, Congressman Rangel? Will you go with me on this gun control ordinance?

RANGEL: I'd—I'd be with Councilman Reynolds.

Prof. MILLER: Um-hmm. Judge Bell, you with me?

Judge BELL: I would go with you.

Prof. MILLER: Councilman Bauer, you with me?

Judge WILLIAM J. BAUER, U.S. Court of Appeals, Seventh Circuit: Absolutely, no question about it.

Prof. MILLER: Councilman Kiernan, you with me?

Ms. KIERNAN: Absolutely.

Prof. MILLER: Good. Five-oh, we're banning the sale of guns. Suppose, however, somebody said, "We should go a little further. I think we better take back the guns that are already out there." So let's modify the ordinance a little bit and ban the sale and possession of firearms other than in the hands of a duly constituted law officer. You with me?

Judge BELL: Not with you.

Prof. MILLER: I lost your vote.

Judge BELL: No. You lost me.

Prof. MILLER: Why?

Judge BELL: Well, I just don't believe in making everyone turn their guns in. You didn't say—you didn't say—

Prof. MILLER: You got yours stashed away, hey Councilman?

Judge BELL: Well, I—I own some shotguns, yeah. I don't plan to turn 'em in. I have mine registered.

Prof. MILLER: Why? Why—

Judge BELL: You—you jumped all the way from sale to banishing.

Prof. MILLER: Yes. Well, what's wrong with that? It's the only way to get them out of the community.

Judge BELL: Well, some people would argue that the Second Amendment might block you, but even on philosophical grounds I would not vote for it.

Prof. MILLER: Why?

Judge BELL: Because I think people have a right to own guns. And I think the—under police power you have a right to regulate what you do with guns, but certainly have a right to own a gun in our country.

Prof. MILLER: Mr. Reynolds, how about my modified ordinance, sale or possession?

Mr. REYNOLDS: How long are you going to keep the guns? Just take 'em forever, or are you taking them for a temporary period while we're in the middle of a—

Prof. MILLER: That's a good point. We'll only take them until the conviction of the murderer.

Mr. REYNOLDS: I wouldn't have any constitutional problem with that. I think I probably would—I think if the community tension was high enough that that would be something that I would stay with you on.

Prof. MILLER: Um-hmm. Congressman.

Rep. RANGEL: I would support that without a problem.

Prof. MILLER: We can take Judge Bell's shotguns away from him.

Rep. RANGEL: Well, I suppose if we were talking about—

Prof. MILLER: You wouldn't want to see a grown man cry in hunt season, would you?

Rep. RANGEL: No, for—for hunting, no, for hunting, but handguns definitely.

Prof. MILLER: Mr. Neal, you were arguing for the city council's ordinance.

Mr. NEAL: I don't think I'd have any problem with it. I don't think the Second Amendment has anything to do with the possession of a—of a gun in your bedroom drawer. I think that's been decided.

Prof. MILLER: You have no Second Amendment problem?

Mr. NEAL: No.

Prof. MILLER: The word according to the Second Amendment: "A well-regulated militia being necessary to the security of a free state, comma, the right of the people to keep and bear arms, shall not be infringed." You don't have any problem with that?

Mr. NEAL: I think I would find the precedent that the right to the people to—to bear arms has nothing to do with the citizen keeping a firearm. I think that has—

Prof. MILLER: That's very strange, because the word "Congress" in the First Amendment has nothing to do with school boards and the words "establishment of a religion" seem to me equally to have nothing to do with a little memorial service for Jamie Brown.

Mr. NEAL: Right.

Prof. MILLER: But that argument didn't work in the First Amendment. You mean, not all amendments were created equal?

Mr. NEAL: Well, where there's a lot of—there's a lot of political philosophy grafted on to the words of the Constitution, of course.

Prof. MILLER: Sounds to me as if this Marathon ordinance puts the whole camel in the Second Amendment tent.

Mr. NEAL: Well, I don't think that. I think this is the place for, as far as this ordinance is concerned, the prohibition of possession of firearms. I think the camel should be in the tent. I think—

Prof. MILLER: Oh, you like that. I see. Well, Judge Bauer, what are you going to do with this Second Amendment argument?

Judge BAUER: I don't have as big a problem with the Second Amendment as you and Mr. Neal may contemplate, 'cause you've already upheld the fact that various armaments are perfectly—it's perfectly all right to proscribe 'em. For instance, bazookas; you can't have hand grenades in your basement and can't own a Thompson submarine gun and a sawed-off shotgun. A lot of those are arms and what we're really talking about is how far you can go and I think that you can separate the bearing of arms from the militia situation. So, I'm perfectly willing to do this and see your ordinance and add to it, "Anybody in the militia can keep and bear arms whenever he is in the militia and on duty."

Prof. MILLER: Um-hmm. So you would read the Second Amendment so that it only applied to the keeping and bearing of arms by members of the militia?

Judge BAUER: I would.

Prof. MILLER: At which point everybody in Marathon declares themselves to be minute-persons.

Judge BAUER: Guess Marathon has now a new problem but I— at the moment I've solved mine. I've a firm— I've upheld their ordinance.

Prof. MILLER: You uphold their ordinance. Judge Adams?

Judge ADAMS: I think that the framers were making a distinction between possessing and acquiring. I think the language is pretty clear in that regard. Therefore I agree with Judge Bell. I think the much more troublesome question is whether the Second Amendment in this context is applicable to the states. It's never been decided so it's a question of policy.

Prof. MILLER: And you find nothing a little strange about coming to one conclusion about the First Amendment applying to the states, and the Second possibly not applying to the states?

Judge ADAMS: Well, there's some judges who believe that all the amendments in the Bill of Rights should be applied. There are other perhaps more discriminating judges who think you should look [at] each one or aspects of each one and I suspect that the latter view is the view that currently prevails.

Prof. MILLER: Mr. Rather, you are a citizen of Marathon. You are also its leading journalist. What are you writing in your newspaper or saying on the evening news about this entanglement?

DAN RATHER, Managing Editor, CBS Evening News: I think if you were running a newspaper in this town or doing the local station broadcasts that on the gun control audience — or ordinance — particularly when it came to possession, sales, I suspect that an alert reporter, wouldn't even take an editorial writer, would be making the following points: First of all, whether it's right or wrong there's very likely going to be a new city council in this town the next election round. Second, I think you'd certainly want to be raising the possibility that what you have here is diminution of the Constitution as most people have been raised to believe it exists, and I'd try to call that attention to my readers. But when you get dealing with taking people's guns away, like there is a great deal of difference between saying, "We're not going to sell any more guns. If you want a gun you're going to have to go into the next county and get it." There's a great deal of difference between that and saying, "We're not going to allow anybody in town to have guns, handguns or long guns and if you've got them, you're going to have to turn them in." That's a big difference, and responsible journalism should be pointing that out rather regularly. I think.

Prof. MILLER: Senator Hatch?

Sen. HATCH: You know these are very difficult— difficult problems, but I do not believe that either the state or the federal government has— should have the right to take away people's right to bear arms. My personal belief is that people should have the right to bear arms and they should have the right to be able to purchase arms as well, and even if you take that right away from them that will not protect Marathon because those who want to commit crimes will have access to them one way or the other, anyway.

Prof. MILLER: Justice Stewart, without necessarily voicing an opinion as to the Second Amendment, is there anything wrong structurally with a system that gives so much power to the court to apply these portions of the Bill of Rights selectively to the states so that it literally has the power to decide what is prayer in the school, what is meditation in the school, what is the establishment of a religion, what is a militia, what does the right to bear and keep arms mean, what applies to the state, what doesn't apply to the state?

Justice STEWART: Well, historically— of course as everybody knows the Bill of Rights applied only to the federal government and then after the Civil War, known in some quarters as the War Between the States, there was adopted a change in the Constitution — i.e., the Fourteenth Amendment, which put restrictions upon the power of the individual states. Seems to me that when you begin with a written Constitution that contains limitations and restrictions upon what the federal government can do and upon what the state government can do — governments can do — and even our original Constitution before any amendments did contain restrictions, then unless that Constitution is to be worth anything — if that Constitution is to be worth anything more than the paper it's written on, there has to be an umpire to apply those restrictions and limitations. And while the Constitution is not explicit

as to who that umpire should— shall be, I think that since the days of Chief Justice Marshall it's been accepted by the American people that the umpire shall be the Supreme Court of the United States and the other courts, state and federal of— of the United States of America.

Prof. MILLER: While the Marathon city council has been debating this gun control ordinance, there's been a new development in town. Two groups seemed to have squared off against each other. One group is called the National People's Alliance — to put no fine point on it, it's a left-wing radical group — that seems to have appeared in town with the mounting number of deaths. The other group is a recently reorganized chapter of the Ku Klux Klan. These two groups have each announced that they are going to hold public demonstrations the same day at the same place. Ninety-nine point nine percent of the community does not want the Klan to march, does not want the People's Alliance to counter-march. Ms. Baker, somebody comes to you and says, "Is there any way we can stop this mess?"

Ms. BAKER: I'm not aware of any ordinances on the books in this town, at the moment, which could stop these groups in advance.

Prof. MILLER: Well, suppose the town council, equally concerned about this problem, this morning passes an ordinance saying "permits for assemblies and demonstrations shall be denied when there is a reasonable likelihood of violence."

Ms. BAKER: It's unconstitutional.

Prof. MILLER: You won't take my case?

Ms. BAKER: Well, I couldn't support in a court of law, under the Constitution of the United States, that ordinance.

Prof. MILLER: You don't think the community which is in a lockstep, unanimous, in wanting these people out— you don't think the community can stop this death march?

Ms. BAKER: We have—

Prof. MILLER: With visions of Greensboro and Skokie dancing in their heads, the community is powerless?

Ms. BAKER: The problem is that we have a situation where majority rule is squarely in conflict with the Constitution and we have a constitutional set of rights that protects a minority group and allows that minority group to make political statements in public. Now, if there were a set of facts which could be developed and documented in advance and presented to a judge, a set of facts making out a case of clear and present danger, it's possible that a judge could be persuaded.

Prof. MILLER: A total of twelve fights at the press conferences. A cross burning at the head of the— head of the—

Ms. BAKER: I think—

Prof. MILLER: —NAACP, a gun cache—

Ms. BAKER: You need more than that.

Prof. MILLER: The presence in town of somebody on the ten wanted— most wanted list of the FBI.

Ms. BAKER: You need more than that. You need— and it might happen in a particular case—

Prof. MILLER: Do I have to bring in an A-bomb?

Ms. BAKER: I don't think bringing in an A-bomb would change it — if all you did was bring in the A-bomb. What you have to do is show facts that if these permits—

Prof. MILLER: Have we allowed doctrine to run riot here?

Ms. BAKER: No, no, you haven't tied any of the facts that you've presented into an imminence of danger at the location of the marches at the time of the marches.

Prof. MILLER: Well, Judge Bauer, you — you sitting as district judge — would issue an injunction.

Judge BAUER: Absolutely. Under the facts you outline, I'm sure.

Ms. BAKER: Without tying those facts into some advance information that the weaponry, et cetera, would be used for that occasion. You would just assume it would—

Judge BAUER: I'm not going to wait around until this thing blows up before I make up my mind. You know, I—

Ms. BAKER: You're going to stop—

Judge BAUER: You can afford to be an ostrich, I can't. When they come in and say, "These are the facts. We have two violent groups opposing each other. They're marching. They've got a history of violence. You've got one of the ten most wanted persons leading them on in the march. Some of them are in robes of the Ku Klux Klan and the others are wearing green fatigues and carrying guns." Madam, that's all I need. I mean there's—

Ms. BAKER: But there are—

Judge BAUER: There comes a time when I've run out. I don't need anymore.

Ms. BAKER: But there are many less restrictive alternatives that the court could apply.

Judge BAUER: I— listen. At that stage of the game there may be, but I'll enter the temporary injunction, then sit around and figure out what the least restrictive ones are going to be later.

Ms. BAKER: And in the meantime, the First Amendment has— has been—

Judge BAUER: In the meantime the First Amendment has—

Ms. BAKER: Has been—

Judge BAUER: Hasn't blown up. The city is still all right, and God's in his heaven and all's right with the world. The city's still there and nobody's dead and who's been hurt?

Ms. BAKER: But it is a prior restraint of speech. I think the law's very clear that—that—

Judge BAUER: With your definition.

Ms. BAKER: That marches and uniforms are symbolic speech.

Judge BAUER: All right. I'd take that risk. I restrain them. They've been, you know, mea culpa. I've done my bit to bring America to its knees, but I've also saved the community from a terrible battle.

Prof. MILLER: You don't understand. The camel's nose is in the tent again.

Ms. BAKER: Exactly.

Judge BAUER: Yes, indeed it is. But one way or another, you know the responsibility is not to just stand idly by thinking, you know, this is an abstraction that we have to worry about: prior restraint and things like this. I'm concerned about right now. Somebody's going to get killed.

Judge EDWARDS: You know, one of the problems we're ignoring is that you started with the ordinance. The ordinance is plainly unconstitutional and it raises a point that judges are most aggravated by, time and time again. The people who ought to make the policy do a lousy job with it. There were a number of ways that the police and the city council could have—a number of means that they could have used—to deal with the problem effectively well short of that ordinance and it's because you have that ordinance that you have the debate that is now going on. And the judge is pushed to the wall—up against the constitutional proscription and a civil liberties attorney is arguing very legitimately about First Amendment concerns. Whereas the other way to handle this kind of an issue is for the policymakers to do what they ought to do correctly in the first place, and then they wouldn't accuse us of always being so activist. The legislators and the executive branches are writing solutions that are either so ambiguous or so useless that it's inevitable that the courts are going to get the question because the combatants are at loggerheads, and they don't know where else to go, and then we get blamed.

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Mr. FRIENDLY: Justice Stewart, that debate over the delicate balance between the Congress, the executive branch, and the courts has been going on since John Marshall and Thomas Jefferson squared off against each other on the issue of judicial review in *Marbury vs. Madison*. No two Americans in history ever contributed more to constitutional government or differed more on how it should work. Yet the clash—the clash over judicial review

rages on. What about what Judge Edwards just said? Is this a problem of legislative abdication or judicial activism?

Judge STEWART: Well, let me emphasize this, Mr. Friendly, that the people who wrote our Constitution realized that they were writing a constitution for an unknowable future, and therefore they put many of the most important constitutional provisions in general language. They were not writing a traffic code for today and tomorrow only and they knew it. They were writing a constitution to endure for centuries as it has endured, for almost two centuries now.

Mr. FRIENDLY: I heard you say once that the Constitution was not a self-executing document.

Judge STEWART: It is not.

Mr. FRIENDLY: Who executes it?

Judge STEWART: The judiciary.

Mr. FRIENDLY: Not the Congress, not the President.

Judge STEWART: Well, the Congress and the President are both obligated to operate within the confines of the Constitution, but its ultimate interpretation is left to the judiciary generally and to the Supreme Court of the United States in particular.

Mr. FRIENDLY: Put the shoe on the other foot for a minute. If there were a runaway Supreme Court in the 1980's, what could the Congress or a President do about it?

Judge STEWART: Well, there—three times in our history, Supreme Court decisions have been reversed by specific constitutional amendments; that's been the traditional historic way to correct the—what were perceived to be the wrong decisions of the Supreme Court of the United States. There are now proposals in Congress, as you know, to limit the jurisdiction of the federal courts generally and of the Supreme Court of the United States specifically. I think it's important to remember that the Constitution of the United States is superior to any transient majority, and that the Supreme Court of the United States is entrusted with the obligation and the responsibility and the function of construing and interpreting that Constitution, and it was not intended ever that Congress or the President should supercede the Constitution of the United States.

Mr. FRIENDLY: Thank you, Justice Stewart. This debate will continue, and perhaps that's the greatest strength of the Constitution and the Bill of Rights: that the dialogue goes on.

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