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Conflict of Laws--Babcock Doctrine--Tort Action Between New York Domiciliaries Results in Application of Colorado Guest Statute (Dym v. Gordon, 16 N.Y.2d 120 (1965))

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RECENT DECISIONS

CONFLICT OF LAWS — BABCOCK DOCTRINE — TORT ACTION BETWEEN NEW YORK DOMICILIARIES RESULTS IN APPLICATION OF COLORADO GUEST STATUTE. — Plaintiff, a passenger in defendant's automobile, sustained personal injuries as a consequence of a collision with another vehicle in Colorado. Both plaintiff and defendant were New York domiciliaries, and defendant's automobile was registered and insured in New York. The host-guest relationship, however, had originated and was to terminate in Colorado, where the parties had taken up temporary residence. Relying on the conflict of laws rule enunciated in *Babcock v. Jackson*,[1] the New York Court of Appeals *held* that since Colorado had the most significant contacts with the matter in controversy and a dominant interest in the outcome of the litigation, its guest statute, which would prevent plaintiff's recovery, was applicable. *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

Three predominant theories have evolved in explanation of the various rules operating in the area of conflict of laws; they may be classified as the comity, local law and the vested rights theories.[2] An early advocate of the comity approach was Justice Story, who insisted that a foreign law never applied of its own force, but was permitted by the forum as a means of achieving justice.[3] Similarly, the local law theory asserts that the forum creates rights and obligations by applying its own laws in a manner consistent with those of the foreign state.[4] A more legalistic position is espoused by the supporters of the vested rights doctrine, who do not indulge in the view that the choice of law is dependent upon the option of a court to choose or create as it wishes or as justice demands; they maintain that a set of legal rights and obligations is created at the time of the act and is then applicable in any forum in which the action may be commenced. Thus, it is not the law of the foreign jurisdiction which is enforced, but rather a transitory legal right.[5]

Traditionally, in the tort area, the rule applied in New York has been that of *lex loci delictus*, an expression of the vested rights

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[1] 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

[2] GOODRICH & SCOLES, CONFLICT OF LAWS 6 (4th ed. 1964).

[3] *Id.* at 6, 8. See also Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 363-70 (1945).

[4] GOODRICH & SCOLES, *op. cit. supra* note 2.

[5] 3 BEALE, CONFLICT OF LAWS 1967-69 (1935); Cheatham, *supra* note 3, at 379-85. The enforcement of these rights is limited to the remedies available under the law of the forum. Mertz v. Mertz, 271 N.Y. 466, 3 N.E.2d 597 (1936).

concept.[6] Under this doctrine, the law to be applied is the law of the jurisdiction wherein the injury occurred,[7] and the rights and obligations of the parties are established at the place of the accident and enforceable everywhere. The merits of the *lex loci delictus* rule are numerous. The controlling law is relatively easy to ascertain and is applicable to all parties to a litigation; the attractiveness of "forum shopping" is reduced, since the result is not dependent upon the jurisdiction in which the action is commenced; and the outcome of a particular controversy is reasonably predictable, thereby facilitating settlements.[8] However, the major feature of *lex loci delictus, i.e.*, the simplicity of its application, may also be its major defect. The law of the place of the tort is invariably applied and, as such, the principle ignores the social and policy considerations of the states involved, and the value of a just result.[9]

Despite general adherence to *lex loci,* the principle, historically, was not applied in New York when it would violate the established public policy of the state. Noteworthy in this respect is the case of *Mertz v. Mertz,*[10] wherein the Court of Appeals dismissed a negligence suit brought by a wife against her husband, both New York domiciliaries, for personal injuries which were sustained in Connecticut. Recognizing that there would have been a valid cause of action in Connecticut, where, unlike New York, the common-law disability between husband and wife had been abolished, the Court held that the claim was not actionable in New York since it was violative of the "deep-rooted tradition" of the state.

In a wrongful death action, *Kilberg v. Northeast Airlines, Inc.,*[11] the Court, although employing a distinction between procedural and substantive law, apparently rested its decision upon public policy considerations. Decedent, a New York domiciliary, purchased an airplane ticket in New York and departed on a plane leaving from a New York airport. The plane crashed in Massachusetts. Defendant sought to limit the recovery in accordance with a provision of the Massachusetts wrongful death statute.[12] The New York Court of Appeals rejected the monetary limitation of the Massachusetts statute, reasoning that it pertained to the remedy rather than the right; since the policy of the forum controls on

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[6] Babcock v. Jackson, 12 N.Y.2d 473, 478, 191 N.E.2d 279, 281, 240 N.Y.S. 2d 743, 746 (1963). See *Comments On Babcock v. Jackson, A Recent Development In Conflict Of Laws,* 63 COLUM. L. REV. 1212, 1229 (1963) (Cheatham's view).

[7] Poplar v. Bourjois, Inc., 298 N.Y. 62, 80 N.E.2d 334 (1948); RESTATEMENT, CONFLICT OF LAWS § 378 (1934).

[8] Currie, *Conflict, Crisis and Confusion In New York,* 1963 DUKE L.J. 1, 10-11.

[9] Babcock v. Jackson, *supra* note 6.

[10] *Supra* note 5.

[11] 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

[12] MASS. ANN. LAWS ch. 229, § 2 (1955), as amended.

matters of procedure, New York would not deviate from its policy of unlimited recovery.[13]

A significant innovation in New York's policy was made in the *contract* case of *Auten v. Auten*.[14] There, the Court did not adhere to the traditional conflicts rules governing the interpretation and enforcement of a contract;[15] rather, it applied a "grouping of contacts" theory. The rule, as the Court noted, afforded less certainty and predictability than under the previous rules. However, "grouping of contacts" was considered preferable, since it applied the policy of the place "having the most interest in the problem" and having a predominant concern with the outcome of the specific litigation.[16] The case involved a separation agreement, made in New York, by English citizens. There were no "contacts" with New York other than the agreement. Defendant-husband was in the United States on a temporary visa; plaintiff-wife was present in New York solely to secure the agreement and immediately thereafter returned to England, as had been contemplated by the agreement. The Court, weighing the contacts, held that the law of England was to be applied.

Although *Auten* was decided prior to *Kilberg*, its rationale was not followed therein. Judge Fuld, concurring in *Kilberg*, noted that the "grouping of contacts" approach was foreclosed, since the New York wrongful death statute was available only when a tort was committed in New York. Since the tort had been committed in Massachusetts, the cause of action could be based only on that state's statute.[17]

The "grouping of contacts" theory was not extended into the tort area until the 1963 decision in *Babcock v. Jackson*,[18] which was factually ideal as an illustration of the harsh consequences resulting under *lex loci*. The parties, New York domiciliaries, embarked from New York on a weekend excursion to Ontario, Canada, and, as a result of an accident caused by defendant-driver's negligence, plaintiff-passenger suffered personal injuries. Defendant, relying on the *lex loci* rule, set up Ontario's "guest" statute as a defense.

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[13] *But see* Davenport v. Webb, 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962).

[14] 308 N.Y. 155, 124 N.E.2d 99 (1954).

[15] "All matters bearing upon the execution, interpretation and the validity of contracts . . . are determined by the law of the place where the contract is made, while all matters connected with its performance . . . are regulated by the law of the place where the contract, by its terms, is to be performed." *Id.* at 160, 124 N.E.2d at 101 (quoting the essential text of Union Nat'l Bank v. Chapman, 169 N.Y. 538, 543, 62 N.E. 672, 673 (1902)).

[16] *Id.* at 161, 124 N.E.2d at 102.

[17] Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 45, 172 N.E.2d 526, 531, 211 N.Y.S.2d 133, 140 (1961) (concurring opinion).

[18] Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

The Court, in an opinion written by Judge Fuld, held that the place of the tort did not invariably govern the *availability* of relief and, in resolving the choice of law problem, applied the "grouping of contacts" test . It was, however, carefully pointed out that the standard of conduct to be applied in determining whether defendant had been negligent was that indicated by the law of Ontario.[19] New York's "contacts" were undoubtedly numerically superior. The injuries were suffered by plaintiff as a result of defendant's negligent operation of an automobile garaged, licensed and insured in New York. Furthermore, the journey began and was to end in New York. Yet, none of these factors was held conclusive; the policy served by the enforcement or denial of the remedy was also to be considered.[20] The test, therefore, was qualitative, rather than quantitative. The Court found that the concern of New York was greater and more direct than that of Ontario, the latter being characterized as merely the *fortuitous* site of the accident. In refusing to apply the Ontario "guest" statute, the Court explicitly referred to its standards as "justice, fairness and the 'the best practical result . . . .' "[21]

Several recent cases have involved the concepts discussed in *Babcock*. In *Posner v. Travelers Ins. Co.*,[22] a federal district court viewed the rule of *Babcock* as one of extraterritoriality, and interpreted it to mean that, where all parties are residents of New York, New York law is to be applied even though the accident takes place out of state. New York courts have not been consistent in their interpretation of *Babcock*. The extraterritorial concept was again apparent in *Long v. Pan Am. World Airways, Inc.*,[23] which interpreted *Babcock* to mean that a foreign restrictive statute would not defeat a claim between New York parties, where the site of the accident was incidental to the enterprise. Also indicative of the confusion which exists is *Macey v. Rozbicki*,[24] where, rather than an objective evaluation of the "contacts," an attempt was made to determine if the situation was factually within the scope of *Babcock*. The majority apparently viewed *Babcock* as an exception to the *lex loci* rule, rather than a replacement; since

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[19] *Id.* at 483, 191 N.E.2d at 284, 240 N.Y.S.2d at 750-51.

[20] *Id.* at 482, 191 N.E.2d at 284, 240 N.Y.S.2d at 750. "Where the defendant's exercise of due care in the operation of his automobile is in issue, the jurisdiction in which the allegedly wrongful conduct occurred will usually have a predominant, if not exclusive, concern. In such a case, it is appropriate to look to the law of the place of the tort so as to give effect to that jurisdiction's interest in regulating conduct within its borders, and it would be almost unthinkable to seek the applicable rule in the law of some other place." *Id.* at 483, 191 N.E.2d at 284, 240 N.Y.S.2d at 750-51.

[21] *Id.* at 481, 191 N.E.2d at 283, 240 N.Y.S.2d at 749.

[22] 244 F. Supp. 865 (N.D. Ill. 1965).

[23] 23 App. Div. 2d 386, 260 N.Y.S.2d 750 (1st Dep't 1965).

[24] 23 App. Div. 2d 532, 256 N.Y.S.2d 202 (4th Dep't 1965) (memorandum decision).

the factual situation of *Rozbicki* was distinguishable from that in *Babcock,* the latter decision was considered not controlling.

The Court of Appeals in the instant case distinguished the factual situation of *Babcock,* noting several variations. The first significant difference was that in *Dym* the parties were not in transit, but had taken up residence in Colorado, albeit on a temporary basis. Also important was the fact that the host-guest relationship had been formed and was to terminate in Colorado. Upon these factors, the Court concluded that in no sense could the place of the accident be termed "fortuitous." [25]

The majority further stated that such significant "contacts," combined with Colorado's concern with the fate of all motorists on its highways, warranted the application of Colorado's law and public policy.[26] However, to dispel any possible implication that the place where the relationship was formed was of paramount importance in determining which law was applicable, the Court stressed that this factor was only to be taken in conjunction with the general intention of the parties, inferred from their actions; for example, in *Dym,* the parties had "accepted the benefit of that [Colorado's] law for . . . a prolonged period." [27] The Court refused to consider the facts that the automobile was registered and insured in New York as having independent significance, since they were mere incidents of domicile.[28] Thus, New York's contact was reduced to that of the domicile of the parties. Thereupon, this single factor was summarily rejected since a rule of *lex domicilii* would be just as inflexible and contrary to the spirit and rationale of *Babcock* as was the *lex loci* principle.[29]

Pursuing a course of argument reminiscent of *Kilberg,* the plaintiff suggested that New York's "governmental interest" (public policy) would prohibit the imposition of the restrictive Colorado statute, since it would be New York's duty to care for her if she were to become destitute. The Court dismissed this contention, because its major defect was that it ignored the possibility of the defendant becoming destitute if a judgment rendered against him were to exceed his insurance coverage. Furthermore, the Court considered it well settled that public policy plays no part in choice of law problems, and is not by itself to be considered a contact.[30]

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[25] Dym v. Gordon, 16 N.Y.2d 120, 124-25, 209 N.E.2d 792, 794, 262 N.Y.S.2d 463, 466-67 (1965).

[26] *Id.* at 125, 128, 209 N.E.2d at 795, 797, 262 N.Y.S.2d at 467, 470.

[27] *Id.* at 125, 209 N.E.2d at 794, 262 N.Y.S.2d at 467. The Court distinguished *Babcock* on this ground, since "in Babcock the New Yorkers at all times were in transitu . . . ." *Ibid.*

[28] *Id.* at 126, 209 N.E.2d at 795, 262 N.Y.S.2d at 468. *But see Comments On Babcock v. Jackson, A Recent Development In Conflict Of Laws,* 63 COLUM. L. REV. 1212, 1246 (1963) (Ehrenzweig's view, emphasizing the significance of the state where the automobile was insured).

[29] *Supra* note 25, at 127, 209 N.E.2d at 796, 262 N.Y.S.2d at 468-69.

[30] *Id.* at 127-28, 209 N.E.2d at 796, 262 N.Y.S.2d at 469.

The Court acknowledged that *lex loci delictus* will no longer be invariably applied,[31] and indicated as one reason for its disfavor the extensive mobility of the American people, made possible by modern transportation facilities. As the multi-state contacts of the people increase, the frequency of unjust results, in cases involving competing state interests, becomes correspondingly greater.[32]

The Court discussed the conflicting treatments in New York and Colorado of the ramifications of the host-guest relationship. New York's policy is simply the application of the usual negligence precept of ordinary care, while Colorado has chosen to deviate from this standard where this relationship was involved. The purpose of the Colorado guest statute was the protection of the right of injured parties, other than the negligent driver's guest, to the defendant's assets. To prevent collusive actions, the public policy of the state foreclosed an action by a passenger against the driver.[33]

It is interesting to note that, from a decision which purported to be "no departure from the rule announced in *Babcock*, merely an example of its application," Chief Judge Desmond, who concurred in *Babcock*, and Judge Fuld, the author of both *Auten* and *Babcock*, dissented. Moreover, Judges Van Voorhis and Scileppi, who dissented in *Babcock*, concurred in the majority opinion of *Dym*.

Judge Van Voorhis' dissent in *Babcock* criticized the decision as standing for the application of New York laws and policy, without regard to the interests of other states, whenever New York parties were concerned:

> Attempts to make the law or public policy of New York State prevail over the laws and policies of other States where citizens of New York State are concerned are simply a form of extraterritoriality which can be turned against us wherever actions are brought in the courts of New York which involve citizens of other States.[34]

The conclusion that *Babcock* enunciated an absolute rule, *i.e.*, that New York law is to apply whenever New York parties are the litigants, does not appear to be one validly drawn from that decision. In fact, the *Dym* decision, by refusing to apply New York law, demonstrates that no absolute standard is to be formulated;

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[31] This is not to indicate that the law of the place of the injury is never to be applied, but rather, that it will be applied only when that state surpasses all others in the significance of its contacts and interests. *Id.* at 123, 209 N.E.2d at 794, 262 N.Y.S.2d at 465-66.

[32] *Id.* at 127-28, 209 N.E.2d at 796, 262 N.Y.S.2d at 469.

[33] Two other policies were responsible for Colorado's guest statute: the protection of Colorado drivers and insurers against fraudulent claims, and the prevention of suits by ungrateful guests. *Id.* at 124, 209 N.E.2d at 794, 262 N.Y.S.2d at 466.

[34] Babcock v. Jackson, *supra* note 18, at 486, 191 N.E.2d at 286, 240 N.Y.S.2d at 753 (dissenting opinion).

rather, the determination of each case will be made on the basis of the specific contacts evident in the individual factual situation.

Judge Fuld, dissenting in *Dym*, considered that the balance of the "contacts" involved justified the application of New York law; he particularly noted the fact that New York was the parties' domicile and the place to which they returned after the accident.[35]

In *Auten*, which introduced the "grouping of contacts" theory into New York law, his decision was greatly influenced by the fact that England was the place where the wife and children resided and he concluded that it had the greatest concern in securing to the wife and children essential support and maintenance.[36]

In addition, Judge Fuld attempted to establish a "public policy" contact in *Dym* on the premise that plaintiff could become a public charge of the state of New York.[37] Aside from the majority's answer to this argument, the fact that plaintiff eventually returned to New York does not seem to possess any independent significance as a contact since it is no more than an incident of domicile. It is, after all, expected that a domiciliary will return to his domicile.[38]

The position taken by Chief Judge Desmond in his dissent is that the rule stated and applied in *Babcock* is simply that New York's policy allowing recovery by a guest against a negligent host applies whenever both parties are New York domiciliaries, regardless of the fact that the relationship between the parties arose in a foreign jurisdiction.[39] The Chief Judge's view should not be surprising, since it was clearly indicated by his opinion in *Kilberg*. Recognizing, in that case, the anomalous results often obtained under *lex loci*, the measure and even the right of recovery depending upon the varying laws of the different states, he indicated that New York "courts should if possible provide protection for our own State's people against unfair and anachronistic treatment of lawsuits which result from these disasters."[40] His decision in *Kilberg* was based on New York's public policy, as was his concurrence in *Babcock*.[41] He feels that in tort cases, where New York parties are litigating in a New York court, the law to be applied, as to liability and compensation, is that of New York since, in such

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[35] Dym v. Gordon, *supra* note 25, at 129-30, 209 N.E.2d at 797, 262 N.Y.S. 2d at 471 (dissenting opinion).

[36] Auten v. Auten, 308 N.Y. 155, 162, 124 N.E.2d 99, 103 (1954).

[37] Dym v. Gordon, *supra* note 25, at 132-33, 209 N.E.2d at 799, 262 N.Y.S.2d at 473 (dissenting opinion).

[38] STUMBERG, CONFLICT OF LAWS 26-27 (3d ed. 1963).

[39] Dym v. Gordon, *supra* note 25, at 134, 209 N.E.2d at 800-01, 262 N.Y.S.2d at 474-75 (dissenting opinion).

[40] Kilberg v. Northeast Airlines, Inc., *supra* note 17, at 39, 172 N.E.2d at 527-28, 211 N.Y.S.2d at 135.

[41] Dym v. Gordon, *supra* note 25, at 135, 209 N.E.2d at 801, 262 N.Y.S.2d at 475 (dissenting opinion).

circumstances, no other state can have an interest in the enforcement of its own particular public policies.[42]

The desire for the enunciation of a firm rule which can be easily followed by lower courts and attorneys is at the heart of Chief Judge Desmond's aversion toward the "grouping of contacts" approach. He maintains that the processes of counting "contacts" or weighing respective "interests" can never satisfactorily decide an actual lawsuit.[43]

Concededly, these processes could lead to conflicting decisions by different lower courts of a jurisdiction and result in an increase in the number of appeals taken. However, as *Babcock* is further refined, new guideposts will lessen the likelihood of inconsistency.[44] Even at the present time, the lack of predictability with respect to unintentional torts, is not a major problem. The primary importance of predictability lies in assisting the attorney in the negotiation of settlements.[45]

It is in the context of the different interpretations of *Babcock v. Jackson* that the significance of *Dym v. Gordon* is found. *Dym* clearly indicates that *Babcock's* importance as a precedent is not for the decision reached upon its particular facts, but for the establishment of the "grouping of contacts" approach in the torts area. In fact, *Dym* used the approach to limit the *Babcock* decision by refusing to apply New York law where the place of injury was also the site of the establishment of the host-guest relationship and the temporary residence of the parties.

In applying the *Babcock* approach, the Court is careful to note that no one "contact" is to be considered controlling. This is essential to a just and reasonable result in each particular situation. There is no reason why one invariable standard should be substituted for another or why the new one would not be subject to the same criticism as the original. The *Babcock* approach, in its present state of refinement, would certainly necessitate an *ad hoc* determination of almost every choice of law problem. This is not, however, as alarming as it may at first appear. These decisions

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[42] *Ibid.*

[43] *Ibid.*

[44] *Comments On Babcock v. Jackson, A Recent Development In Conflict Of Laws*, 63 COLUM. L. REV. 1212, 1254 (1963) (Reese's view). The situation is quite different in commercial law where predictability is a factor of great importance. The United States Supreme Court in *Texas v. New Jersey*, a case concerning the escheating of personal property, rejected the significant contacts rule proposed on the basis that it would leave the area in permanent turmoil. 379 U.S. 674, 678 (1965). It is to be noted that when presented with a case in the torts area, the Court saw no reason to deny the implementation of the "grouping of contacts" theory. Richards v. United States, 369 U.S. 1, 12-13 (1961). New York has also refused to extend the theory in commercial law. See Matter of Bauer, 14 N.Y.2d 272, 200 N.E.2d 207, 251 N.Y.S.2d 23 (1964).

[45] Wilcox v. Wilcox, 26 Wis. 2d 617, —, 133 N.W.2d 408, 411 (1965).

demand interpretation and construction, processes which are basic to the very nature of the jurist.

Dym v. Gordon is a "guidepost" case, the first of many whose clarifications are essential to the precise utilization of the approach outlined in *Babcock*. Although, as such, its significance is limited, it performs well in providing a direction to be followed and new impetus for the principle.

CONSTITUTIONAL LAW—POSTAL RESTRICTION OF COMMUNIST PROPAGANDA DEEMED INVALID.—The addressees of unsealed mail, containing "communist political propaganda," originating in a foreign country, attacked the constitutionality of a federal statute[1] which authorized detention of such mail upon its arrival in the United States, until a written request for its delivery was made. On appeal, the United States Supreme Court *held* that the statute was violative of the first amendment, since its requirement of a written request to obtain the mail constituted a restriction on the unfettered exercise of the *addressees'* right to free speech. *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965).

The freedoms of speech and press, at the time they were embodied in the Constitution, consisted primarily of immunity from prior restraints, *i.e.*, censorship.[2] Prevention of censorship, however, was not their exclusive purpose. Any action on the part of the Government which might prevent free discussion of public matters was also prohibited,[3] thus the unconditional phrasing of the first amendment: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

Nevertheless, the first amendment does not protect every utterance; the right to speak is not absolute.[4] The right to express one's views freely, however, has come to enjoy a preferred status.[5]

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[1] Postal Serv. and Fed. Employees Salary Act, 39 U.S.C. § 4008(a) (1964).

[2] Deutsch, *Freedom of the Press and of the Mails*, 36 MICH. L. REV. 703, 714 (1938). See generally CHAFEE, FREEDOM OF SPEECH (1920).

[3] 2 COOLEY, CONSTITUTIONAL LIMITATIONS 886 (8th ed. 1927); Grosjean v. American Press Co., 297 U.S. 233, 245 (1936).

[4] Near v. Minnesota, 283 U.S. 697, 708 (1931). For example, the following types of speech are not protected by the first amendment: obscenity, Roth v. United States, 354 U.S. 476 (1957); "group libel," Beauharnais v. Illinois, 343 U.S. 250 (1952); advocacy of the violent overthrow of the government, Dennis v. United States, 341 U.S. 494 (1951). *But see* the dissenting opinions of Mr. Justice Black in Konigsberg v. State Bar, 366 U.S. 36, 56 (1961); Wilkinson v. United States, 365 U.S. 399, 415 (1961).

[5] See Board of Educ. v. Barnette, 319 U.S. 624 (1943). *But see* the concurring opinion of Mr. Justice Frankfurter in Kovacs v. Cooper, 336 U.S. 77, 89 (1949).