Appendix D:
Three Examples of the ACLU/U.S. Supreme Court Cases from the Four-volume Set of ___ Cases

Cases #1, #268 and #771 from the four-volume set:

#1. Gitlow v. New York

(Decided June 8, 1925; 268 U.S. 652)

I. ISSUE

A. **Issues Discussed:** First Amendment, Fourteenth Amendment, freedom of speech and of the press

B. **Legal Question Presented:** Does a state statute regulating speech by prohibiting advocacy of criminal anarchy deprive the defendant of freedom of speech or of the press in violation of the due process clause of the Fourteenth Amendment?

C. **Supreme Court's Answer:** The state statute is constitutional. However, fundamental rights federally protected under the First Amendment, such as freedom of speech and press, are protected from state impairment by the due process clause of the Fourteenth Amendment.

II. CASE SUMMARY

A. Background

"The defendant [was] a member of the Left Wing Section of the Socialist Party [which] was organized nationally at a conference in New York City in June, 1919 . . . . The conference elected a National Council, of which the defendant was member, and left to it the

adoption of a 'Manifesto.' This was published in The Revolutionary Age, the official organ of the Left Wing. . . . Sixteen thousand copies were printed [and] paid for by the defendant, as business manager of the paper . . . . [D]efendant signed a card subscribing to the Manifesto and Program of the Left Wing [and] went to different parts of the State to speak to branches of the Socialist Party about the principles of the Left Wing and advocated their adoption.

[The Manifesto] advocated, in plain and unequivocal language, the necessity of accomplishing the 'Communist Revolution' by a militant and 'revolutionary Socialism,' based on 'the class struggle' and mobilizing the 'power of the proletariat in action,' through mass industrial revolts developing into mass political strikes and 'revolutionary mass action,' for the purpose of conquering and destroying the parliamentary state and establishing in its place, through a 'revolutionary dictatorship of the proletariat,' the system of Communist Socialism."

Defendant was "convicted and sentenced to imprisonment" by the trial court. "The Court of Appeals held that the Manifesto 'advocated the overthrow of [the] government by violence, or by unlawful means.' . . . And both the Appellate Division and the Court of Appeals held the statute constitutional."

The Supreme Court granted certiorari to review the case and affirmed the judgment of the Court of Appeals.

B. Counsel of Record / ACLU Attorney:

ACLU Side (Petitioner/Appellant):	Opposing Side (Respondent/Appellee):
Walter H. Pollak and Walter Nelles argued the cause for appellant.	John Caldwell Myers and W. J. Wetherbee argued the cause for appellee.

III. AMICI CURIAE

ACLU Side (Petitioner/Appellant):	Opposing Side (Respondent/Appellee):
No briefs of amici curiae were filed in support of appellant.	No briefs of amici curiae were filed in support of appellee.

IV. THE SUPREME COURT'S DECISION

A. In upholding the statute and affirming the Court of Appeals decision, the Court determined "[t]he statute does not penalize the utterance or publication of abstract 'doctrine' or academic discussion having no quality of incitement to any concrete action. . . . What it prohibits is language advocating, advising or teaching the overthrow of organized government by unlawful means. [The Manifesto] advocates and urges in fervent language mass action which shall progressively foment industrial disturbances and through political mass strikes and revolutionary mass action overthrow and destroy organized parliamentary government."

The Court "assume[d] that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." However, "[i]t is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility. . . ."

State "'statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise authority vested in the State in the public interest.' That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear. Such utterances, by their very

nature, involve danger to the public peace and to the security of the State."

The Court ultimately found "that the statute is not in itself unconstitutional, and that it has not been applied in the present case in derogation of any constitutional right . . . ."

B. Justice Vote: 2 Pro ACLU Side vs. 7 Con Opposing Side

ACLU Side (Petitioner/Appellant):	Opposing Side (Respondent/Appellee):
1. Holmes, O. – Wrote dissenting opinion	1. Sanford, E. – Wrote majority opinion
2. Brandeis, L. – Joined dissenting opinion	2. Taft, W. – Joined majority opinion
	3. Van Devanter, W. – Joined majority opinion
	4. McReynolds, J. – Joined majority opinion
	5. Sutherland, G. – Joined majority opinion
	6. Butler, P. – Joined majority opinion
	7. Stone, H. – Joined majority opinion

V. A WIN OR LOSS FOR THE ACLU?

The ACLU, as attorney of record, urged reversal of the judgment of the Court of Appeals; the Supreme Court affirmed in a 7-2 vote, giving the ACLU an apparent **loss**.

(Some believe that this case should be viewed as a win overall because the Court established in *Gitlow* that fundamental rights, such as freedom of speech and press, must not be impaired by the states, incorporating these rights under the due process clause of the Fourteenth Amendment.)

#268. Miami Herald Publishing Co. v. Tornillo

(Decided June 25, 1974; 418 U.S. 241)

I. ISSUE

A. Issues Discussed: First Amendment, freedom of the press

B. Legal Question Presented: "[W]hether a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper violates the guarantees of a free press."

C. Supreme Court's Answer: The state statute violates the First Amendment freedom of the press.

II. CASE SUMMARY

A. Background:

"In the fall of 1972, appellee, Executive Director of the Classroom Teachers Association, . . . was a candidate for the Florida House of Representatives. On September 20, 1972, and again on September 29, 1972, appellant printed editorials critical of appellee's candidacy. In response to these editorials appellee demanded that appellant print verbatim his replies, defending the role of the Classroom Teachers Association and the organization's accomplishments for the citizens of Dade County. Appellant declined to print the appellee's replies and appellee brought suit in Circuit Court, Dade County, seeking declaratory and injunctive relief and actual and punitive damages in excess of $5,000. The action was premised on Florida Statute §104.38 (1973), a 'right of reply' statute which provides that if a candidate for nomination or election is assailed regarding his personal character or official record by any newspaper, the candidate has the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper's charges. The reply must appear in as conspicuous a place, and in the same size of type, as the charges which prompted the reply, provided it does not take up more space than the

charges. Failure to comply with the statute constitutes a first-degree misdemeanor.

Appellee sought a declaration that §104.38 was unconstitutional. After an emergency hearing requested by appellee, the circuit court denied injunctive relief and held that §104.38 was unconstitutional as an infringement on the freedom of the press under the First and Fourteenth Amendments to the Constitution. The Circuit Court concluded that dictating what a newspaper must print was no different from dictating what it must not print. The Circuit Judge viewed the statute's vagueness as serving 'to restrict and stifle protected expression.' Appellee's cause was dismissed with prejudice.

On direct appeal, the Florida Supreme Court reversed, holding that § 104.38 did not violate constitutional guarantees. It held that free speech was enhanced and not abridged by the Florida right-of-reply statute, which in that court's view, furthered the 'broad societal interest in the free flow of information to the public.' It also held that the statute is not impermissibly vague; the statute informs 'those who are subject to it as to what conduct on their part will render them liable to its penalties.' Civil remedies, including damages, were held to be available under this statute and the case was remanded to the trial court for further proceedings not inconsistent with the Florida Supreme Court's opinion."

The Supreme Court granted certiorari to review the case and reversed.

B. Counsel of Record:

ACLU Side (Petitioner/Appellant):	Opposing Side (Respondent/Appellee):
Daniel P. S. Paul argued the cause for appellant.	Jerome A. Barron argued the cause for appellee.

III. AMICI CURIAE

ACLU Side (Petitioner/Appellant):	Opposing Side (Respondent/Appellee):
Brief of amici curiae filed on behalf of the ACLU of Florida by Jonathan L. Alpert, Irma Robbins Feder, and Richard Yale Feder. Additional briefs of amici curiae were filed on behalf of the Washington Post Co., the Times Mirror Co., New York News Inc., the Chicago Tribune Co., et al., the Florida Publishing Co., the Times Publishing Co., the Gannett Florida Corporation, et al., the American Newspaper Publishers Association, the National Newspaper Association, the American Society of Newspaper Editors, et al., the Reporters Committee for Freedom of the Press Legal Defense and Research Fund, et al., the National Association of Broadcasters, the Radio Television News Directors Association, the National Broadcasting Co., Inc., and Dow Jones & Co., Inc., et al.	Briefs of amici curiae were filed on behalf of the National Citizens Committee for Broadcasting by Albert H. Kramer and Thomas R. Asher; and by Donald U. Sessions, pro se.

IV. THE SUPREME COURT'S DECISION:

A. "The challenged statute creates a right to reply to press criticism of a candidate for nomination or election. The statute was enacted in 1913, and this is only the second recorded case decided under its provisions. . . .

Appellee's argument that the Florida statute does not amount to a restriction of appellant's right to speak because 'the statute in question here has not prevented the *Miami Herald* from saying anything it wished' begs the core question. Compelling editors or publishers to publish that which 'reason' tells them should not be published is what is at issue in this case. The Florida statute operates as a command in the same sense as a statue or regulation forbidding appellant to publish specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers. The Florida statute exacts a penalty on the basis of the content of a newspaper. The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print. [A] newspaper is not subject to the finite technological limitations of time that confront a broadcaster but it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available.

Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.' . . .

'[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates . . . .'

Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to

go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials whether fair or unfair - constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. Accordingly, the judgment of the Supreme Court of Florida is reversed."

B. Justice Vote: 9 Pro ACLU Side vs. 0 Con Opposing Side

ACLU Side (Petitioner/Appellant):	Opposing Side (Respondent/Appellee):
1. Burger, W. – Wrote majority opinion	
2. Blackmun, H. – Joined majority opinion	
3. Powell, L. – Joined majority opinion	
4. Douglas, W. – Joined majority opinion	
5. Brennan, W. – Wrote concurring opinion	
6. Rehnquist, W. – Joined Brennan's concurrence	
7. White, B. – Wrote concurring opinion	
8. Marshall, T. – Joined majority opinion	
9. Stewart, P. – Joined majority opinion	

V. A WIN OR LOSS FOR THE ACLU?

The ACLU filed as amicus curiae urging reversal of the judgment of the Supreme Court of Florida; the U.S. Supreme Court reversed in a 9-0 vote, giving the ACLU an apparent **win**.

#771. Bush v. Palm Beach County Canvassing Board

(Decided December 1, 2000; 531 U.S. 70)

I. ISSUE

A. Issues Discussed: Voting

B. Legal Question Presented: "[W]hether the decision of the Florida Supreme Court, by effectively changing the State's elector appointment procedures after election day, violated the Due Process Clause or 3 U. S. C. § 5, and whether the decision of that court changed the manner in which the State's electors are to be selected, in violation of the legislature's power to designate the manner for selection under Art. II, § 1, cl. 2, of the United States Constitution."

C. Supreme Court's Answer: "After reviewing the opinion of the Florida Supreme Court, we find 'that there is considerable uncertainty as to the precise grounds for the decision.' This is sufficient reason for us to decline at this time to review the federal questions asserted to be present."

II. CASE SUMMARY

A. Background:

"On November 8, 2000, the day following the Presidential election, the Florida Division of Elections reported that Governor Bush had received 2,909,135 votes, and respondent Democrat Vice President Albert Gore, Jr., had received 2,907,351, a margin of 1,784 in Governor Bush's favor. Under Fla. Stat. §102.141(4) (2000), because the margin of victory was equal to or less than one-half of one percent of the votes cast, an automatic machine recount occurred. The recount resulted in a much smaller margin of victory for Governor Bush. Vice President Gore then exercised his statutory right to submit written requests for manual recounts to the canvassing

board of any county. He requested recounts in four counties: Volusia, Palm Beach, Broward, and Miami-Dade.

The parties urged conflicting interpretations of the Florida Election Code respecting the authority of the canvassing boards, the Secretary of State (hereinafter Secretary), and the Elections Canvassing Commission. On November 14, in an action brought by Volusia County, and joined by the Palm Beach County Canvassing Board, Vice President Gore, and the Florida Democratic Party, the Florida Circuit Court ruled that the statutory 7-day deadline was mandatory, but that the Volusia board could amend its returns at a later date. The court further ruled that the Secretary, after 'considering all attendant facts and circumstances,' could exercise her discretion in deciding whether to include the late amended returns in the statewide certification.

The Secretary responded by issuing a set of criteria by which she would decide whether to allow a late filing. The Secretary ordered that, by 2 p.m. the following day, November 15, any county desiring to forward late returns submit a written statement of the facts and circumstances justifying a later filing. Four counties submitted statements, and, after reviewing the submissions, the Secretary determined that none justified an extension of the filing deadline. On November 16, the Florida Democratic Party and Vice President Gore filed an emergency motion in the state court, arguing that the Secretary had acted arbitrarily and in contempt of the court's earlier ruling. The following day, the court denied the motion, ruling that the Secretary had not acted arbitrarily and had exercised her discretion in a reasonable manner consistent with the court's earlier ruling. The Democratic Party and Vice President Gore appealed to the First District Court of Appeal, which certified the matter to the Florida Supreme Court. That court accepted jurisdiction and *sua sponte* entered an order enjoining the Secretary and the Elections Canvassing Commission from finally certifying the results of the election and declaring a winner until further order of that court.

The Supreme Court, with the expedition requisite for the controversy, issued its decision on November 21. As the court saw the matter, there were two principal questions: whether a discrepancy

between an original machine return and a sample manual recount resulting from the way a ballot has been marked or punched is an 'error in vote tabulation' justifying a full manual recount; and how to reconcile what it spoke of as two conflicts in Florida's election laws: (a) between the timeframe for conducting a manual recount under Fla. Stat. §102.166 (2000) and the timeframe for submitting county returns under §§102.111 and 102.112, and (b) between §102.111, which provides that the Secretary 'shall . . . ignor[e]' late election returns, and §102.112, which provides that she 'may . . . ignor[e]' such returns.

With regard to the first issue, the court held that, under the plain text of the statute, a discrepancy between a sample manual recount and machine returns due to the way in which a ballot was punched or marked did constitute an 'error in vote tabulation' sufficient to trigger the statutory provisions for a full manual recount.

With regard to the second issue, the court held that the 'shall . . . ignor[e]' provision of §102.111 conflicts with the 'may . . . ignor[e]' provision of §102.112, and that the 'may . . . ignor[e]' provision controlled. The court turned to the questions whether and when the Secretary may ignore late manual recounts. The court relied in part upon the right to vote set forth in the Declaration of Rights of the Florida Constitution in concluding that late manual recounts could be rejected only under limited circumstances. The court then stated: '[B]ecause of our reluctance to rewrite the Florida Election Code, we conclude that we must invoke the equitable powers of this Court to fashion a remedy . . . .' The court thus imposed a deadline of November 26, at 5 p.m., for a return of ballot counts. The 7-day deadline of §102.111, assuming it would have applied, was effectively extended by 12 days. The court further directed the Secretary to accept manual counts submitted prior to that deadline."

The Supreme Court granted certiorari to review the case, vacated the decision below, and remanded the case.

B. Counsel of Record:

ACLU Side (Respondent/Appellee):	Opposing Side (Petitioner/Appellant):
Paul F. Hancock, Deputy Attorney General of Florida, argued the cause for appellee Butterworth, Attorney General of Florida. Laurence H. Tribe argued the cause for appellees Gore, et al.	Theodore B. Olson argued the cause for appellant. Joseph P. Klock, Jr., argued the cause for Katherine Harris, et al., appellees under Supreme Court Rule 12.6, in support of appellant.

III. AMICI CURIAE

ACLU Side (Respondent/Appellee):	Opposing Side (Petitioner/Appellant):
Brief of amici curiae filed on behalf of the ACLU by Steven R. Shapiro, Laughlin McDonald, and James K. Green. Brief of amici curiae filed on behalf of the State of Iowa, et al., by Thomas J. Miller, Attorney General of Iowa, Dennis W. Johnson, Solicitor General, and Tam B. Ormiston, Deputy Attorney General, and by the Attorneys General for their respective States as follows: Bill Lockyer of California, Richard Blumenthal of Connecticut, Earl I. Anzai of Hawaii, Karen M. Freeman-Wilson of Indiana, Andrew Ketterer of	Brief of amici curiae filed on behalf of the State of Alabama, et al., by Bill Pryor, Attorney General of Alabama, and Margaret L. Fleming, John J. Park, Jr., Charles B. Campbell, Scott L. Rouse, A. Vernon Barnett IV, and Richard E. Trewhella, Jr., Assistant Attorneys General. Brief of amici curiae filed on behalf of the Commonwealth of Virginia, et al., by Mark L. Earley, Attorney General of Virginia, Randolph A. Beales, Chief Deputy Attorney General, William Henry Hurd, Solicitor General, Judith Williams Jagdmann, Deputy

Maine, J. Joseph Curran, Jr., of Maryland, Thomas F. Reilly of Massachusetts, Joseph P. Mazurek of Montana, Frankie Sue Del Papa of Nevada, Patricia A. Madrid of New Mexico, Drew Edmondson of Oklahoma, Hardy Myers of Oregon, and Sheldon Whitehouse of Rhode Island. Brief of amici curiae filed on behalf of the Coalition for Local Sovereignty by Kenneth B. Clark, in support of neither party. Brief of amici curiae filed on behalf of the Florida Senate, et al., by Charles Fried, Einer Elhauge, and Roger J. Magnuson, in support of neither party. Brief of amici curiae filed on behalf of the Disenfranchised Voters in the USA, et al., by Ilise Levy Feitshans, in support of neither party.	Attorney General, Siran S. Faulders and Maureen Riley Matsen, Senior Assistant Attorneys General, Eleanor Anne Chesney, Anthony P. Meredith, and Valerie L. Myers, Assistant Attorneys General, Charlie Condon, Attorney General of South Carolina, and Don Stenberg, Attorney General of Nebraska. Brief of amici curiae filed on behalf of William H. Haynes, et al., by Jay Alan Sekulow, Thomas P. Monaghan, Stuart J. Roth, Colby M. May, James M. Henderson, Sr., David A. Cortman, Griffin B. Bell, Paul D. Clement, and Jeffrey S. Bucholtz. Brief of amici curiae filed on behalf of the American Civil Rights Union by John C. Armor and Peter Ferrara.

IV. THE SUPREME COURT'S DECISION:

A. "As a general rule, this Court defers to a state court's interpretation of a state statute. But in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, §1, cl. 2, of the United States Constitution. That provision reads:

'Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . .'

Although we did not address the same question petitioner raises here, in *McPherson* v. *Blacker,* 146 U. S. 1, 25 (1892), we said:

'[Art. II, §1, cl. 2,] does not read that the people or the citizens shall appoint, but that 'each State shall'; and if the words 'in such manner as the legislature thereof may direct,' had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence the insertion of those words, while operating as a limitation upon the State in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself.'

There are expressions in the opinion of the Supreme Court of Florida that may be read to indicate that it construed the Florida Election Code without regard to the extent to which the Florida Constitution could, consistent with Art. II, §1, cl. 2, 'circumscribe the legislative power.' The opinion states, for example, that '[t]o the extent that the Legislature may enact laws regulating the electoral process, those laws are valid only if they impose no 'unreasonable or unnecessary' restraints on the right of suffrage' guaranteed by the State Constitution. The opinion also states that '[b]ecause election laws are intended to facilitate the right of suffrage, such laws must be liberally construed in favor of the citizens' right to vote . . . .'

In addition, 3 U. S. C. § 5 provides in pertinent part:

'If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days

prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.'

The parties before us agree that whatever else may be the effect of this section, it creates a 'safe harbor' for a State insofar as congressional consideration of its electoral votes is concerned. If the state legislature has provided for final determination of contests or controversies by a law made prior to election day, that determination shall be conclusive if made at least six days prior to said time of meeting of the electors. The Florida Supreme Court cited 3 U. S. C. §§ 1–10 in a footnote of its opinion, but did not discuss § 5. Since § 5 contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state law in effect before the election, a legislative wish to take advantage of the 'safe harbor' would counsel against any construction of the Election Code that Congress might deem to be a change in the law.

After reviewing the opinion of the Florida Supreme Court, we find 'that there is considerable uncertainty as to the precise grounds for the decision.' This is sufficient reason for us to decline at this time to review the federal questions asserted to be present.

'It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases.'

Specifically, we are unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority under Art. II, §1, cl. 2. We are also unclear as to the consideration the Florida Supreme Court accorded to 3 U. S. C. § 5. The judgment of the Supreme Court of Florida is therefore vacated, and the case is remanded for further proceedings not inconsistent with this opinion."

B. Justice Vote: 0 Pro ACLU Side vs. 9 Con Opposing Side

ACLU Side (Respondent/Appellee):	Opposing Side (Petitioner/Appellant):
	1. Stevens, J. – Per curiam decision 2. Souter, D. – Per curiam decision 3. Ginsburg, R. – Per curiam decision 4. Breyer, S. – Per curiam decision 5. Rehnquist, W. – Per curiam decision 6. O'Connor, S. – Per curiam decision 7. Scalia, A. – Per curiam decision 8. Kennedy, A. – Per curiam decision 9. Thomas, C. – Per curiam decision

V. A WIN OR LOSS FOR THE ACLU?

The ACLU, as amicus curiae, urged affirmance of the judgment of the Florida Supreme Court; the U.S. Supreme Court vacated the judgment and remanded the case in a per curiam decision, giving the ACLU an apparent **loss**.