any concept of "ideological" obscenity.[1302] However, this function is not the reason that obscenity is outside the protection of the First Amendment, although the Court has never really been clear about what that reason is.

Adjudication over the constitutional law of obscenity began in *Roth v. United States*,[1303] in which the Court in an opinion by Justice Brennan settled in the negative the "dispositive question" "whether obscenity is utterance within the area of protected speech and press."[1304] The Court then undertook a brief historical survey to demonstrate that "the unconditional phrasing of the First Amendment was not intended to protect every utterance." All or practically all the states that ratified the First Amendment had laws making blasphemy or profanity or both crimes, and provided for prosecutions of libels as well. It was this history that had caused the Court in *Beauharnais* to conclude that "libelous utterances are not within the area of constitutionally protected speech," and this history was deemed to demonstrate that "obscenity, too, was outside the protection intended for speech and press."[1305] "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people . . . . All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they en-

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[1302] Winters v. New York, 333 U.S. 507 (1948); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Commercial Pictures Corp. v. Regents, 346 U.S. 587 (1954); Kingsley Pictures Corp. v. Regents, 360 U.S. 684 (1959). The last case involved the banning of the movie *Lady Chatterley's Lover* on the ground that it dealt too sympathetically with adultery. "It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing." Id. at 688–89.

[1303] 354 U.S. 476 (1957). Heard at the same time and decided in the same opinion was *Alberts v. California*, involving, of course, a state obscenity law. The Court's first opinion in the obscenity field was Butler v. Michigan, 352 U.S. 380 (1957), considered *infra*. Earlier the Court had divided four-to-four and thus affirmed a state court judgment that Edmund Wilson's *Memoirs of Hecate County* was obscene. Doubleday & Co. v. New York, 335 U.S. 848 (1948).

[1304] Roth v. United States, 354 U.S. 476, 481 (1957). Justice Brennan later changed his mind on this score, arguing that, because the Court had failed to develop a workable standard for distinguishing the obscene from the non-obscene, regulation should be confined to the protection of children and non-consenting adults. *See* Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973).

[1305] 354 U.S. at 482–83. The reference is to Beauharnais v. Illinois, 343 U.S. 250 (1952).