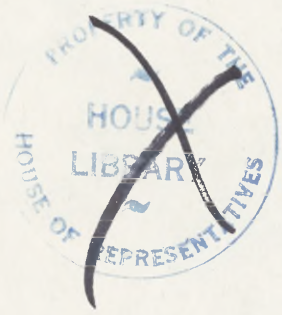
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UNITED STATES REPORTS

VOLUME 403

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1970

JUNE 7 THROUGH JUNE 30, 1971

END OF TERM

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

UNITED STATES
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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
HUGO L. BLACK, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
JOHN M. HARLAN, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.

RETIRED

EARL WARREN, Chief Justice.
STANLEY REED, Associate Justice.
TOM C. CLARK, Associate Justice.

OFFICERS OF THE COURT

JOHN N. MITCHELL, Attorney General.
ERWIN N. GRISWOLD, Solicitor General.
E. ROBERT SEAVER, Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
T. PERRY LIPPITT, Marshal.
HENRY CHARLES HALLAM, Jr., Librarian.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, Warren E. Burger, Chief Justice.

For the First Circuit, William J. Brennan, Jr., Associate Justice.

For the Second Circuit, John M. Harlan, Associate Justice.

For the Third Circuit, William J. Brennan, Jr., Associate Justice.

For the Fourth Circuit, Warren E. Burger, Chief Justice.

For the Fifth Circuit, Hugo L. Black, Associate Justice.

For the Sixth Circuit, Potter Stewart, Associate Justice.

For the Seventh Circuit, Thurgood Marshall, Associate Justice.

For the Eighth Circuit, Harry A. Blackmun, Associate Justice.

For the Ninth Circuit, William O. Douglas, Associate Justice.

For the Tenth Circuit, Byron R. White, Associate Justice.

It is further ordered that when the Circuit Justice is unavailable to act on an application in a case arising in his circuit, the Clerk shall present such application to the Acting Circuit Justice.

The Acting Circuit Justice, for this purpose, is that Justice, then available, who is next junior to the Circuit Justice; except that the turn of the Chief Justice in this cycle shall follow that of the Justice most recently appointed.

June 28, 1971.

(For next previous allotment, see 398 U. S., p. v.)

RETIREMENT OF CHIEF DEPUTY CLERK

SUPREME COURT OF THE UNITED STATES

MONDAY, JUNE 14, 1971

Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN.

THE CHIEF JUSTICE said:

Today we wish to take note of the retirement of Edmund P. Cullinan, Chief Deputy Clerk of this Court, after 41 years of dedicated service to the Court. Mr. Cullinan entered the service of the Court in 1930, the same year that Charles Evans Hughes became Chief Justice. He has thus served with five of its 15 Chief Justices. Through those years his conscientious and able performance of duty has contributed immeasurably to the efficient operation of the Supreme Court.

Thousands of litigants and countless members of the Bar of the Court are indebted to him for his skillful and expeditious attention to their problems, great and small. They are indebted to him, too, for his unfailing courtesy and his capacity for sensitive understanding of their individual needs and problems.

These days we speak often of the importance of efficient court administration. Edmund Cullinan labored more than four decades in that cause, and he did it with unobtrusive loyalty and high professional skill. No detail was ever too small to escape his thoughtful attention, and no task ever too large to deter his conscientious ef-

forts, and few have ever equalled his grasp of procedure and practice before the Supreme Court.

His 41 years of honorable service with the Court have been uniformly characterized by the qualities of integrity and unswerving devotion to duty that are indispensable to the efficient and fair administration of justice. His retirement is a loss to the Court and to all who come here.

I know I speak for all the members of the Court, and for our predecessors with whom he served, when I express our heartfelt thanks to Edmund P. Cullinan as he leaves the institution he loved so well and served so loyally, and he leaves with our best wishes for the future.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1970

GORDON ET AL. *v.* LANCE ET AL.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 96. Argued January 18, 1971—Decided June 7, 1971

West Virginia's constitutional and statutory requirement that political subdivisions may not incur bonded indebtedness or increase tax rates beyond those established by the State Constitution without the approval of 60% of the voters in a referendum election does not discriminate against or authorize discrimination against any identifiable class and does not violate the Equal Protection Clause or any other provision of the United States Constitution. *Gray* v. *Sanders,* 372 U. S. 368, and *Cipriano* v. *City of Houma,* 395 U. S. 701, distinguished. Pp. 4–8.

153 W. Va. 559, 170 S. E. 2d 783, reversed.

BURGER, C. J., delivered the opinion of the Court, in which BLACK, DOUGLAS, STEWART, WHITE, and BLACKMUN, JJ., joined. HARLAN, J., filed a statement concurring in the result, *post,* p. 8. BRENNAN and MARSHALL, JJ., filed a dissenting statement, *post,* p. 8.

George M. Scott argued the cause and filed briefs for petitioners.

Charles C. Wise, Jr., argued the cause for respondents. With him on the brief was *J. Henry Francis, Jr.*

Briefs of *amici curiae* urging reversal were filed by *Slade Gorton,* Attorney General of Washington, and *Philip H. Austin,* Assistant Attorney General, for the State of Washington et al.; by *Thomas M. O'Connor* for the City and County of San Francisco; by *Francis R. Kirkham* and *Francis N. Marshall* for the California Taxpayers' Association; and by *George E. Svoboda* for Hayes Smith.

Briefs of *amici curiae* urging affirmance were filed by *James R. Ellis* for Seattle School District No. 1; by *Stephen J. Pollak, William H. Dempsey, Jr., Ralph J. Moore, Jr.,* and *Robert H. Chanin* for the National Education Association et al.; by *August W. Steinhilber* and *Robert G. Dixon, Jr.,* for the National School Boards Association; by *David R. Hardy* and *Robert E. Northrup* for the Missouri State Teachers Association; by *William B. Beebe, Hershel Shanks,* and *Allan I. Mendelsohn* for the American Association of School Administrators et al.; by *Melvin L. Wulf* for the American Civil Liberties Union et al.; and by *Paul W. Preisler* for the Committee for the Equal Weighting of Votes.

Briefs of *amici curiae* were filed by *John W. Witt* and *Joseph Kase, Jr.,* for the City of San Diego et al., and by *Chas. Claflin Allen, pro se.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to review a challenge to a 60% vote requirement to incur public debt as violative of the Fourteenth Amendment.

The Constitution of West Virginia and certain West Virginia statutes provide that political subdivisions of the State may not incur bonded indebtedness or increase tax rates beyond those established by the Constitution without the approval of 60% of the voters in a referendum election.

On April 29, 1968, the Board of Education of Roane County, West Virginia, submitted to the voters of Roane County a proposal calling for the issuance of general obligation bonds in the amount of $1,830,000 for the purpose of constructing new school buildings and improving existing educational facilities. At the same election, by separate ballot, the voters were asked to authorize the Board of Education to levy additional taxes to support current expenditures and capital improvements. Of the total votes cast, 51.55% favored the bond issues and 51.51% favored the tax levy. Having failed to obtain the requisite 60% affirmative vote, the proposals were declared defeated.

Following the election, respondents appeared before the Board of Education on behalf of themselves and other persons who had voted in favor of the proposals and demanded that the Board authorize the bonds and the additional taxes. The Board refused.

Respondents then brought this action, seeking a declaratory judgment that the 60% requirements were unconstitutional as violative of the Fourteenth Amendment. In their complaint they alleged that the Roane County schools had been basically unimproved since 1946 and fell far below the state average, both in classroom size and facilities. They further alleged that four similar proposals had been previously defeated, although each had received majorities of affirmative votes ranging from 52.51% to 55.84%. The West Virginia trial court dismissed the complaint. On appeal, the West Virginia Supreme Court of Appeals reversed, holding that the state constitutional and statutory 60% requirements violated the Equal Protection Clause of the Fourteenth Amendment. 153 W. Va. 559, 170 S. E. 2d 783 (1969). We granted certiorari, 397 U. S. 1020 (1970), and for the reasons set forth below, we reverse.

The court below relied heavily on two of our holdings dealing with limitations on the right to vote and dilution of voting power. The first was *Gray* v. *Sanders,* 372 U. S. 368 (1963), which held that Georgia's county-unit system violated the Equal Protection Clause, because the votes of primary electors in one county were accorded less weight than the votes of electors in other counties. The second was *Cipriano* v. *City of Houma,* 395 U. S. 701 (1969), in which we held impermissible the limitation to "property taxpayers" of the right to vote in a revenue bond referendum. From these cases the state court concluded that West Virginia's requirement was constitutionally defective, because the votes of those who favored the issuance of the bonds had a proportionately smaller impact on the outcome of the election than the votes of those who opposed issuance of the bonds.

We conclude that the West Virginia court's reliance on the *Gray* and *Cipriano* cases was misplaced. The defect this Court found in those cases lay in the denial or dilution of voting power because of group characteristics—geographic location and property ownership—that bore no valid relation to the interest of those groups in the subject matter of the election; moreover, the dilution or denial was imposed irrespective of how members of those groups actually voted.[1]

Thus in *Gray, supra,* at 381 n. 12, we held that the county-unit system would have been defective even if unit votes were allocated strictly in proportion to population. We noted that if a candidate received 60% of the votes cast in a particular county he would receive that county's entire unit vote, the 40% cast for the other

[1] While *Cipriano* involved a denial of the vote, a percentage reduction of an individual's voting power in proportion to the amount of property he owned would be similarly defective. See *Stewart* v. *Parish School Board,* 310 F. Supp. 1172 (ED La.), aff'd, 400 U. S. 884 (1970).

candidates being discarded. The defect, however, continued to be geographic discrimination. Votes for the losing candidates were discarded solely because of the county where the votes were cast. Indeed, votes for the winning candidate in a county were likewise devalued, because all marginal votes for him would be discarded and would have no impact on the statewide total.

Cipriano was no more than a reassertion of the principle, consistently recognized, that an individual may not be denied access to the ballot because of some extraneous condition, such as race, *e. g., Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960); wealth, *e. g., Harper* v. *Virginia Board of Elections,* 383 U. S. 663 (1966); tax status, *e. g., Kramer* v. *Union Free School Dist.,* 395 U. S. 621 (1969); or military status, *e. g., Carrington* v. *Rash,* 380 U. S. 89 (1965).

Unlike the restrictions in our previous cases, the West Virginia Constitution singles out no "discrete and insular minority" for special treatment. The three-fifths requirement applies equally to all bond issues for any purpose, whether for schools, sewers, or highways. We are not, therefore, presented with a case like *Hunter* v. *Erickson,* 393 U. S. 385 (1969), in which fair housing legislation alone was subject to an automatic referendum requirement.

The class singled out in *Hunter* was clear—"those who would benefit from laws barring racial, religious, or ancestral discriminations," *supra,* at 391. In contrast we can discern no independently identifiable group or category that favors bonded indebtedness over other forms of financing. Consequently no sector of the population may be said to be "fenced out" from the franchise because of the way they will vote. Cf. *Carrington* v. *Rash, supra,* at 94.

Although West Virginia has not denied any group access to the ballot, it has indeed made it more difficult

for some kinds of governmental actions to be taken. Certainly any departure from strict majority rule gives disproportionate power to the minority. But there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue. On the contrary, while we have recognized that state officials are normally chosen by a vote of the majority of the electorate, we have found no constitutional barrier to the selection of a Governor by a state legislature, after no candidate received a majority of the popular vote. *Fortson* v. *Morris,* 385 U. S. 231 (1966).

The Federal Constitution itself provides that a simple majority vote is insufficient on some issues; the provisions on impeachment and ratification of treaties are but two examples. Moreover, the Bill of Rights removes entire areas of legislation from the concept of majoritarian supremacy. The constitutions of many States prohibit or severely limit the power of the legislature to levy new taxes or to create or increase bonded indebtedness,[2] thereby insulating entire areas from majority control. Whether these matters of finance and taxation are to be considered as less "important" than matters of treaties, foreign policy, or impeachment of public officers is more properly left to the determination by the States and the people than to the courts operating under the broad mandate of the Fourteenth Amendment. It must be remembered that in voting to issue bonds voters are committing, in part, the credit of infants and of generations yet unborn, and some restriction on such commitment is not an unreasonable demand. That the bond issue may have the desirable objective of providing better education for future generations goes to the wisdom of

[2] *E. g.,* Indiana Constitution, Art. 10, § 5; Ohio Constitution, Art. 8, § 3; Texas Constitution, Art. 3, § 49; Wisconsin Constitution, Art. 8, § 4.

an indebtedness limitation: it does not alter the basic fact that the balancing of interests is one for the State to resolve.

Wisely or not, the people of the State of West Virginia have long since resolved to remove from a simple majority vote the choice on certain decisions as to what indebtedness may be incurred and what taxes their children will bear.

We conclude that so long as such provisions do not discriminate against or authorize discrimination against any identifiable class they do not violate the Equal Protection Clause.[3] We see no meaningful distinction between such absolute provisions on debt, changeable only by constitutional amendment, and provisions that legislative decisions on the same issues require more than a majority vote in the legislature. On the contrary, these latter provisions may, in practice, be less burdensome than the amendment process.[4] Moreover, the same considerations apply when the ultimate power, rather than being delegated to the legislature, remains with the people, by way of a referendum. Indeed, we see no constitutional distinction between the 60% requirement in the present case and a state requirement that a given issue be approved by a majority of all registered voters.[5] Cf. *Clay* v. *Thornton,* 253 S. C. 209, 169 S. E.

[3] Compare *Reitman* v. *Mulkey,* 387 U. S. 369 (1967).

[4] Some 14 States require an amendment to be approved by two sessions of the legislature, before submission to the people. West Virginia's Constitution, Art. 14, § 2, provides for approval by two-thirds of a single legislature and a majority of the voters.

[5] In practice, the latter requirement would be far more burdensome than a 60% requirement. There were 8,913 registered voters in Roane County in 1968, of whom 5,600 voted in the referendum at issue. If a majority of all eligible voters had been required, approval would have required the affirmative votes of over 79% of those voting. See State of West Virginia, Official Returns of 1970 Primary Election (including the 1968 registration figures).

2d 617 (1969), appeal dismissed *sub nom. Turner* v. *Clay,* 397 U. S. 39 (1970).

That West Virginia has adopted a rule of decision, applicable to all bond referenda, by which the strong consensus of three-fifths is required before indebtedness is authorized, does not violate the Equal Protection Clause or any other provision of the Constitution.[6]

Reversed.

MR. JUSTICE HARLAN concurs in the result for the reasons stated in his separate opinion in *Whitcomb* v. *Chavis, post,* p. 165.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would affirm for the reasons expressed in the opinion of the West Virginia Supreme Court of Appeals, 153 W. Va. 559, 170 S. E. 2d 783 (1969).

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[6] We intimate no view on the constitutionality of a provision requiring unanimity or giving a veto power to a very small group. Nor do we decide whether a State may, consistently with the Constitution, require extraordinary majorities for the election of public officers.

UTAH *v.* UNITED STATES

ON BILL OF COMPLAINT

No. 31, Orig. Argued April 26, 1971—Decided June 7, 1971

In this suit involving conflicting claims between Utah and the United States to the shorelands around the Great Salt Lake the Special Master's report, finding that at the date of Utah's admission to the Union the Lake was navigable and that the lake bed passed to Utah at that time, is supported by adequate evidence and is approved by the Court. The parties are invited to address themselves to the decree submitted with the report with a view to agreeing, if possible, upon the issues that have now been settled. Pp. 9–13.

DOUGLAS, J., delivered the opinion of the Court, in which all members joined except MARSHALL, J., who took no part in the consideration or decision of the case.

Dallin W. Jensen, Assistant Attorney General of Utah, argued for plaintiff in support of the Report of the Special Master. With him on the briefs were *Vernon B. Romney,* Attorney General, *Robert B. Hansen,* Deputy Attorney General, *Paul E. Reimann,* Assistant Attorney General, and *Clifford L. Ashton* and *Edward W. Clyde,* Special Assistant Attorneys General.

Peter L. Strauss argued for the United States on exceptions to the Report of the Special Master. On the brief were *Solicitor General Griswold, Assistant Attorney General Kashiwa, Louis F. Claiborne,* and *Martin Green.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This suit was initiated by Utah to resolve a dispute between it and the United States as to shorelands around the Great Salt Lake. Utah's claim to the lands is premised on the navigability of the lake at the date of

statehood, *viz.*, January 4, 1896. If indeed the lake were navigable at that time, the claim of Utah would override any claim of the United States, with the possible exception of a claim based on the doctrine of reliction, not now before us.

The operation of the "equal footing" principle has accorded newly admitted States the same property interests in submerged lands as was enjoyed by the Thirteen Original States as successors to the British Crown. *Pollard's Lessee* v. *Hagan,* 3 How. 212, 222–223, 228–230. That means that Utah's claim to the original bed of the Great Salt Lake—whether now submerged or exposed—ultimately rests on whether the lake was navigable (*Martin* v. *Waddell,* 16 Pet. 367, 410, 416–417) at the time of Utah's admission. *Shively* v. *Bowlby,* 152 U. S. 1, 26–28. It was to that issue that we directed the Special Master, Hon. J. Cullen Ganey, to address himself. See *Utah* v. *United States,* 394 U. S. 89. In the present report the Special Master found that at the time in question the Great Salt Lake was navigable. We approve that finding.

The question of navigability is a federal question. *The Daniel Ball,* 10 Wall. 557, 563. Moreover, the fact that the Great Salt Lake is not part of a navigable interstate or international commercial highway in no way interferes with the principle of public ownership of its bed. *United States* v. *Utah,* 283 U. S. 64, 75; *United States* v. *Oregon,* 295 U. S. 1, 14. The test of navigability of waters was stated in *The Daniel Ball, supra,* at 563:

> "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. . . ."

While that statement was addressed to the navigability of "rivers" it applies to all water courses. *United States* v. *Oregon, supra,* at 14.

The United States strongly contests the finding of the Special Master that the Great Salt Lake was navigable. Although the evidence is not extensive, we think it is sufficient to sustain the findings. There were, for example, nine boats used from time to time to haul cattle and sheep from the mainland to one of the islands or from one of the islands to the mainland. The hauling apparently was done by the owners of the livestock, not by a carrier for the purpose of making money. Hence it is suggested that this was not the use of the lake as a navigable highway in the customary sense of the word. That is to say, the business of the boats was ranching and not carrying water-borne freight. We think that is an irrelevant detail. The lake was used as a highway and that is the gist of the federal test.

It is suggested that the carriage was also limited in the sense of serving only the few people who performed ranching operations along the shores of the lake. But that again does not detract from the basic finding that the lake served as a highway and it is that feature that distinguishes between navigability and non-navigability.

There was, in addition to the boats used by ranchers, one boat used by an outsider who carried sheep to an island for the owners of the sheep. It is said that one sheep boat for hire does not make an artery for commerce; but one sheep boat for hire is in keeping with the theme of actual navigability of the waters of the lake in earlier years.

There was, in addition, a boat known as the *City of Corinne* which was launched in May 1871 for the purpose of carrying passengers and freight; but its life in that capacity apparently lasted less than a year. In 1872 it

was converted into an excursion boat which apparently plied the waters of the lake until 1881. There are other boats that hauled sheep to and from an island in the lake and also hauled ore, and salt, and cedar posts. Still another boat was used to carry salt from various salt works around the lake to a railroad connection.

The United States says the trade conducted by these various vessels was sporadic and their careers were short. It is true that most of the traffic which we have mentioned took place in the 1880's, while Utah became a State in 1896. Moreover, it is said that the level of the lake had so changed by 1896 that navigation was not practical. The Master's Report effectively refutes that contention. It says that on January 4, 1896, the lake was 30.2 feet deep. He finds that on that date "the Lake was physically capable of being used in its ordinary condition as a highway for floating and affording passage to water craft in the manner over which trade and travel was or might be conducted in the customary modes of travel on water at that time." He found that the lake on January 4, 1896, "could have floated and afforded passage to large boats, barges and similar craft currently in general use on inland navigable bodies of water in the United States." He found that the areas of the lake that had a depth sufficient for navigation "were several miles wide, extending substantially through the length and width of the Lake."

Most of the history of actual water transportation, to be sure, took place on the lake in the 1880's, yet the findings of the Master are that the water conditions which obtained on January 4, 1896, still permitted navigation at that time.

In sum, it is clear that Utah is entitled to the decree for which it asks. The Special Master has submitted with his report a proposed decree which we attach as an Appendix to this opinion. We invite the parties to

address themselves to that decree with the view of agreeing, if possible, upon the issues which have now been settled by this litigation.

So ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

APPENDIX TO OPINION OF THE COURT

IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. The United States of America, its departments and agencies, are enjoined, subject to any regulations which the Congress may impose in the interest of navigation or pollution control, from asserting against the State of Utah any claim of right, title and interest:

(a) to the bed of the Great Salt Lake lying below the meander line of Great Salt Lake as duly surveyed heretofore or in accordance with Section 1 of the Act of June 3, 1966, 80 Stat. 192, with the exception of any lands within the Bear River Migratory Bird Refuge and the Weber Basin federal reclamation project,

(b) to the natural resources and living organisms in or beneath the bed of the Great Salt Lake as delineated in (a) above, and

(c) to the natural resources and living organisms either within the waters of the Great Salt Lake, or extracted therefrom, lying below the meander line of the Great Salt Lake, as delineated in (a) above, except brine and minerals in solution in the brine or precipitated or extracted therefrom in whatever federal lands there may be below said meander line, together with the right to prospect for, mine, and remove the same, as set forth in Section 3 of the Act of June 3, 1966, 80 Stat. 192.

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2. The State of Utah is not required to pay the United States, through the Secretary of the Interior, for the lands, including any minerals, lying below the meander line of the Great Salt Lake, as delineated in 1 (a), above, of this decree.

3. The prayer of the United States of America in its Answer to the State of Utah's Complaint that this Court "confirm, declare and establish that the United States is the owner of all right, title and interest in all the lands described in Section 2 of the Act of June 3, 1966, 80 Stat. 192, as amended by the Act of August 23, 1966, 80 Stat. 349, and that the State of Utah is without any right, title or interest in such lands, save for the right to have these lands conveyed to it by the United States, and to pay for them, in accordance with the provisions of the Act of June 3, 1966, as amended," is denied.

Respectfully submitted,

J. Cullen Ganey,
Senior Circuit Judge,
Special Master.

COHEN *v.* CALIFORNIA

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

No. 299. Argued February 22, 1971—Decided June 7, 1971

Appellant was convicted of violating that part of Cal. Penal Code § 415 which prohibits "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct," for wearing a jacket bearing the words "Fuck the Draft" in a corridor of the Los Angeles Courthouse. The Court of Appeal held that "offensive conduct" means "behavior which has a tendency to provoke *others* to acts of violence or to in turn disturb the peace," and affirmed the conviction. *Held:* Absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display of this single four-letter expletive a criminal offense. Pp. 22–26.

1 Cal. App. 3d 94, 81 Cal. Rptr. 503, reversed.

HARLAN, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, and MARSHALL, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BURGER, C. J., and BLACK, J., joined, and in which WHITE, J., joined in part, *post,* p. 27.

Melville B. Nimmer argued the cause for appellant. With him on the brief was *Laurence R. Sperber.*

Michael T. Sauer argued the cause for appellee. With him on the brief was *Roger Arnebergh.*

Anthony G. Amsterdam filed a brief for the American Civil Liberties Union of Northern California as *amicus curiae* urging reversal.

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance.

Appellant Paul Robert Cohen was convicted in the Los Angeles Municipal Court of violating that part of California Penal Code § 415 which prohibits "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct . . . ." [1] He was given 30 days' imprisonment. The facts upon which his conviction rests are detailed in the opinion of the Court of Appeal of California, Second Appellate District, as follows:

> "On April 26, 1968, the defendant was observed in the Los Angeles County Courthouse in the corridor outside of division 20 of the municipal court wearing a jacket bearing the words 'Fuck the Draft' which were plainly visible. There were women and children present in the corridor. The defendant was arrested. The defendant testified that he wore the jacket knowing that the words were on the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft.
>
> "The defendant did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct

[1] The statute provides in full:

"Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, or threatening, traducing, quarreling, challenging to fight, or fighting, or who, on the public streets of any unincorporated town, or upon the public highways in such unincorporated town, run any horse race, either for a wager or for amusement, or fire any gun or pistol in such unincorporated town, or use any vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner, is guilty of a misdemeanor, and upon conviction by any Court of competent jurisdiction shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the County Jail for not more than ninety days, or by both fine and imprisonment, or either, at the discretion of the Court."

> in fact commit or threaten to commit any act of violence. The defendant did not make any loud or unusual noise, nor was there any evidence that he uttered any sound prior to his arrest." 1 Cal. App. 3d 94, 97–98, 81 Cal. Rptr. 503, 505 (1969).

In affirming the conviction the Court of Appeal held that "offensive conduct" means "behavior which has a tendency to provoke *others* to acts of violence or to in turn disturb the peace," and that the State had proved this element because, on the facts of this case, "[i]t was certainly reasonably foreseeable that such conduct might cause others to rise up to commit a violent act against the person of the defendant or attempt to forceably remove his jacket." 1 Cal. App. 3d, at 99–100, 81 Cal. Rptr., at 506. The California Supreme Court declined review by a divided vote.[2] We brought the case here, postponing the consideration of the question of our jurisdiction over this appeal to a hearing of the case on the merits. 399 U. S. 904. We now reverse.

The question of our jurisdiction need not detain us long. Throughout the proceedings below, Cohen con-

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[2] The suggestion has been made that, in light of the supervening opinion of the California Supreme Court in *In re Bushman,* 1 Cal. 3d 767, 463 P. 2d 727 (1970), it is "not at all certain that the California Court of Appeal's construction of § 415 is now the authoritative California construction." *Post,* at 27 (BLACKMUN, J., dissenting). In the course of the *Bushman* opinion, Chief Justice Traynor stated:

"[One] may . . . be guilty of disturbing the peace through 'offensive' conduct [within the meaning of § 415] if by his actions he wilfully and maliciously incites others to violence or engages in conduct likely to incite others to violence. (*People* v. *Cohen* (1969) 1 Cal. App. 3d 94, 101, [81 Cal. Rptr. 503].)" 1 Cal. 3d, at 773, 463 P. 2d, at 730.

We perceive no difference of substance between the *Bushman* construction and that of the Court of Appeal, particularly in light of the *Bushman* court's approving citation of *Cohen.*

sistently claimed that, as construed to apply to the facts of this case, the statute infringed his rights to freedom of expression guaranteed by the First and Fourteenth Amendments of the Federal Constitution. That contention has been rejected by the highest California state court in which review could be had. Accordingly, we are fully satisfied that Cohen has properly invoked our jurisdiction by this appeal. 28 U. S. C. § 1257 (2); *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282 (1921).

I

In order to lay hands on the precise issue which this case involves, it is useful first to canvass various matters which this record does *not* present.

The conviction quite clearly rests upon the asserted offensiveness of the *words* Cohen used to convey his message to the public. The only "conduct" which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon "speech," cf. *Stromberg* v. *California,* 283 U. S. 359 (1931), not upon any separately identifiable conduct which allegedly was intended by Cohen to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message and hence arguably could be regulated without effectively repressing Cohen's ability to express himself. Cf. *United States* v. *O'Brien,* 391 U. S. 367 (1968). Further, the State certainly lacks power to punish Cohen for the underlying content of the message the inscription conveyed. At least so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected. *Yates* v. *United States,* 354 U. S. 298 (1957).

Appellant's conviction, then, rests squarely upon his exercise of the "freedom of speech" protected from arbitrary governmental interference by the Constitution and can be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom, not as a permissible prohibition on the substantive message it conveys. This does not end the inquiry, of course, for the First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses. In this vein, too, however, we think it important to note that several issues typically associated with such problems are not presented here.

In the first place, Cohen was tried under a statute applicable throughout the entire State. Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested must fail in the absence of any language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places. See *Edwards* v. *South Carolina,* 372 U. S. 229, 236–237, and n. 11 (1963). Cf. *Adderley* v. *Florida,* 385 U. S. 39 (1966). No fair reading of the phrase "offensive conduct" can be said sufficiently to inform the ordinary person that distinctions between certain locations are thereby created.[3]

In the second place, as it comes to us, this case cannot be said to fall within those relatively few categories of

[3] It is illuminating to note what transpired when Cohen entered a courtroom in the building. He removed his jacket and stood with it folded over his arm. Meanwhile, a policeman sent the presiding judge a note suggesting that Cohen be held in contempt of court. The judge declined to do so and Cohen was arrested by the officer only after he emerged from the courtroom. App. 18–19.

instances where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression simply upon a showing that such a form was employed. This is not, for example, an obscenity case. Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic. *Roth* v. *United States,* 354 U. S. 476 (1957). It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket.

This Court has also held that the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called "fighting words," those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction. *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942). While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not "directed to the person of the hearer." *Cantwell* v. *Connecticut,* 310 U. S. 296, 309 (1940). No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult. Nor do we have here an instance of the exercise of the State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction. Cf. *Feiner* v. *New York,* 340 U. S. 315 (1951); *Terminiello* v. *Chicago,* 337 U. S. 1 (1949). There is, as noted above, no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result.

Finally, in arguments before this Court much has been made of the claim that Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to appellant's crude form of protest. Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. See, *e. g., Organization for a Better Austin* v. *Keefe,* 402 U. S. 415 (1971). While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, *e. g., Rowan* v. *Post Office Dept.,* 397 U. S. 728 (1970), we have at the same time consistently stressed that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech." *Id.,* at 738. The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

In this regard, persons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes. And, while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in

being free from unwanted expression in the confines of one's own home. Cf. *Keefe, supra.* Given the subtlety and complexity of the factors involved, if Cohen's "speech" was otherwise entitled to constitutional protection, we do not think the fact that some unwilling "listeners" in a public building may have been briefly exposed to it can serve to justify this breach of the peace conviction where, as here, there was no evidence that persons powerless to avoid appellant's conduct did in fact object to it, and where that portion of the statute upon which Cohen's conviction rests evinces no concern, either on its face or as construed by the California courts, with the special plight of the captive auditor, but, instead, indiscriminately sweeps within its prohibitions all "offensive conduct" that disturbs "any neighborhood or person." Cf. *Edwards* v. *South Carolina, supra.*[4]

II

Against this background, the issue flushed by this case stands out in bold relief. It is whether California can excise, as "offensive conduct," one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality,

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[4] In fact, other portions of the same statute do make some such distinctions. For example, the statute also prohibits disturbing "the peace or quiet . . . by loud or unusual noise" and using "vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner." See n. 1, *supra.* This second-quoted provision in particular serves to put the actor on much fairer notice as to what is prohibited. It also buttresses our view that the "offensive conduct" portion, as construed and applied in this case, cannot legitimately be justified in this Court as designed or intended to make fine distinctions between differently situated recipients.

may properly remove this offensive word from the public vocabulary.

The rationale of the California court is plainly untenable. At most it reflects an "undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression." *Tinker* v. *Des Moines Indep. Community School Dist.*, 393 U. S. 503, 508 (1969). We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen. There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression. The argument amounts to little more than the self-defeating proposition that to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves. Cf. *Ashton* v. *Kentucky*, 384 U. S. 195, 200 (1966); *Cox* v. *Louisiana*, 379 U. S. 536, 550–551 (1965).

Admittedly, it is not so obvious that the First and Fourteenth Amendments must be taken to disable the States from punishing public utterance of this unseemly expletive in order to maintain what they regard as a suitable level of discourse within the body politic.[5] We

[5] The *amicus* urges, with some force, that this issue is not properly before us since the statute, as construed, punishes only conduct that might cause others to react violently. However, because the opinion below appears to erect a virtually irrebuttable presumption that use of this word will produce such results, the statute as thus construed appears to impose, in effect, a flat ban on the public utterance of this word. With the case in this posture, it does not seem inappro-

think, however, that examination and reflection will reveal the shortcomings of a contrary viewpoint.

At the outset, we cannot overemphasize that, in our judgment, most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions, discussed above but not applicable here, to the usual rule that governmental bodies may not prescribe the form or content of individual expression. Equally important to our conclusion is the constitutional backdrop against which our decision must be made. The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. See *Whitney* v. *California,* 274 U. S. 357, 375–377 (1927) (Brandeis, J., concurring).

To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and

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priate to inquire whether any other rationale might properly support this result. While we think it clear, for the reasons expressed above, that no statute which merely proscribes "offensive conduct" and has been construed as broadly as this one was below can subsequently be justified in this Court as discriminating between conduct that occurs in different places or that offends only certain persons, it is not so unreasonable to seek to justify its full broad sweep on an alternate rationale such as this. Because it is not so patently clear that acceptance of the justification presently under consideration would render the statute overbroad or unconstitutionally vague, and because the answer to appellee's argument seems quite clear, we do not pass on the contention that this claim is not presented on this record.

even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. That is why "[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons," *Winters* v. *New York,* 333 U. S. 507, 528 (1948) (Frankfurter, J., dissenting), and why "so long as the means are peaceful, the communication need not meet standards of acceptability," *Organization for a Better Austin* v. *Keefe,* 402 U. S. 415, 419 (1971).

Against this perception of the constitutional policies involved, we discern certain more particularized considerations that peculiarly call for reversal of this conviction. First, the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

Additionally, we cannot overlook the fact, because it

is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated. Indeed, as Mr. Justice Frankfurter has said, "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation." *Baumgartner* v. *United States,* 322 U. S. 665, 673–674 (1944).

Finally, and in the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results.

It is, in sum, our judgment that, absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense. Because that is the only arguably sustainable rationale for the conviction here at issue, the judgment below must be

Reversed.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACK join.

I dissent, and I do so for two reasons:

1. Cohen's absurd and immature antic, in my view, was mainly conduct and little speech. See *Street* v. *New York,* 394 U. S. 576 (1969); *Cox* v. *Louisiana,* 379 U. S. 536, 555 (1965); *Giboney* v. *Empire Storage Co.,* 336 U. S. 490, 502 (1949). The California Court of Appeal appears so to have described it, 1 Cal. App. 3d 94, 100, 81 Cal. Rptr. 503, 507, and I cannot characterize it otherwise. Further, the case appears to me to be well within the sphere of *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942), where Mr. Justice Murphy, a known champion of First Amendment freedoms, wrote for a unanimous bench. As a consequence, this Court's agonizing over First Amendment values seems misplaced and unnecessary.

2. I am not at all certain that the California Court of Appeal's construction of § 415 is now the authoritative California construction. The Court of Appeal filed its opinion on October 22, 1969. The Supreme Court of California declined review by a four-to-three vote on December 17. See 1 Cal. App. 3d, at 104. A month later, on January 27, 1970, the State Supreme Court in another case construed § 415, evidently for the first time. *In re Bushman,* 1 Cal. 3d 767, 463 P. 2d 727. Chief Justice Traynor, who was among the dissenters to his court's refusal to take Cohen's case, wrote the majority opinion. He held that § 415 "is not unconstitutionally vague and overbroad" and further said:

> "[T]hat part of Penal Code section 415 in question here makes punishable only wilful and malicious conduct that is violent and endangers public safety and order or that creates a clear and present danger that others will engage in violence of that nature.

> ". . . [It] does not make criminal any nonviolent act unless the act incites or threatens to incite others to violence . . . ." 1 Cal. 3d, at 773–774, 463 P. 2d, at 731.

Cohen was cited in *Bushman*, 1 Cal. 3d, at 773, 463 P. 2d, at 730, but I am not convinced that its description there and *Cohen* itself are completely consistent with the "clear and present danger" standard enunciated in *Bushman*. Inasmuch as this Court does not dismiss this case, it ought to be remanded to the California Court of Appeal for reconsideration in the light of the subsequently rendered decision by the State's highest tribunal in *Bushman*.

MR. JUSTICE WHITE concurs in Paragraph 2 of MR. JUSTICE BLACKMUN'S dissenting opinion.

Syllabus

ROSENBLOOM *v.* METROMEDIA, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 66. Argued December 7–8, 1970—Decided June 7, 1971

Respondent's radio station, which broadcast news reports every half hour, broadcast news stories of petitioner's arrest for possession of obscene literature and the police seizure of "obscene books," and stories concerning petitioner's lawsuit against certain officials alleging that the magazines he distributed were not obscene and seeking injunctive relief from police interference with his business. These latter stories did not mention petitioner's name, but used the terms "smut literature racket" and "girlie-book peddlers." Following petitioner's acquittal of criminal obscenity charges, he filed this diversity action in District Court seeking damages under Pennsylvania's libel law. The jury found for petitioner and awarded $25,000 in general damages; and $725,000 in punitive damages, which was reduced by the court on remittitur to $250,000. The Court of Appeals reversed, holding that the *New York Times Co.* v. *Sullivan,* 376 U. S. 254, standard applied, and "the fact that plaintiff was not a public figure cannot be accorded decisive significance." *Held:* The judgment is affirmed. Pp. 40–62.

415 F. 2d 892, affirmed.

MR. JUSTICE BRENNAN, joined by THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN, concluded that the *New York Times* standard of knowing or reckless falsity applies in a state civil libel action brought by a private individual for a defamatory falsehood uttered in a radio news broadcast about the individual's involvement in an event of public or general interest. Pp. 40–57.

MR. JUSTICE BLACK concluded that the First Amendment protects the news media from libel judgments even when statements are made with knowledge that they are false. P. 57.

MR. JUSTICE WHITE concluded that, in the absence of actual malice as defined in *New York Times, supra,* the First Amendment gives the news media a privilege to report and comment upon the official actions of public servants in full detail, without sparing from public view the reputation or privacy of an individual involved in or affected by any official action. Pp. 59–62.

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BRENNAN, J., announced the Court's judgment and delivered an opinion in which BURGER, C. J., and BLACKMUN, J., joined. BLACK, J., *post*, p. 57, and WHITE, J., *post*, p. 57, filed opinions concurring in the judgment. HARLAN, J., filed a dissenting opinion, *post*, p. 62. MARSHALL, J., filed a dissenting opinion in which STEWART, J., joined, *post*, p. 78. DOUGLAS, J., took no part in the consideration or decision of this case.

Ramsey Clark argued the cause for petitioner. With him on the brief was *Benjamin Paul.*

Bernard G. Segal argued the cause for respondent. With him on the brief were *Irving R. Segal, Samuel D. Slade,* and *Carleton G. Eldridge, Jr.*

MR. JUSTICE BRENNAN announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join.

In a series of cases beginning with *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964), the Court has considered the limitations upon state libel laws imposed by the constitutional guarantees of freedom of speech and of the press. *New York Times* held that in a civil libel action by a public official against a newspaper those guarantees required clear and convincing proof that a defamatory falsehood alleged as libel was uttered with "knowledge that it was false or with reckless disregard of whether it was false or not." *Id.,* at 280. The same requirement was later held to apply to "public figures" who sued in libel on the basis of alleged defamatory falsehoods. The several cases considered since *New York Times* involved actions of "public officials" or "public figures," usually, but not always, against newspapers or magazines.[1] Common to all the cases was a

[1] See, *e. g., Associated Press* v. *Walker,* 388 U. S. 130 (1967) (retired Army general against a wire service); *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130 (1967) (former football coach against pub-

defamatory falsehood in the report of an event of "public or general interest." [2] The instant case presents the question whether the *New York Times'* knowing-or-reckless-falsity standard applies in a state civil libel action brought not by a "public official" or a "public figure" but by a private individual for a defamatory falsehood uttered in a news broadcast by a radio station about the individual's involvement in an event of public or general

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lisher of magazine); *Beckley Newspapers Corp.* v. *Hanks,* 389 U. S. 81 (1967) (court clerk against newspaper); *Greenbelt Publishing Assn.* v. *Bresler,* 398 U. S. 6 (1970) (state representative and real estate developer against publisher of newspaper); *Ocala Star-Banner Co.* v. *Damron,* 401 U. S. 295 (1971) (defeated candidate for tax assessor against publisher of newspaper); *Monitor Patriot Co.* v. *Roy,* 401 U. S. 265 (1971) (candidate for United States Senate against publisher of newspaper); *Time, Inc.* v. *Pape,* 401 U. S. 279 (1971) (police official against publisher of magazine). However, *Rosenblatt* v. *Baer,* 383 U. S. 75 (1966), involved an action against a newspaper columnist by a former county recreation area supervisor; *St. Amant* v. *Thompson,* 390 U. S. 727 (1968), involved an action of a deputy sheriff against a defeated candidate for the United States Senate; and *Linn* v. *Plant Guard Workers,* 383 U. S. 53 (1966), involved an action by an official of an employer against a labor union.

Garrison v. *Louisiana,* 379 U. S. 64 (1964), held that the *New York Times* standard measured also the constitutional restriction upon state power to impose criminal sanctions for criticism of the official conduct of public officials. The *Times* standard of proof has also been required to support the dismissal of a public school teacher based on false statements made by the teacher in discussing issues of public importance. *Pickering* v. *Board of Education,* 391 U. S. 563 (1968). The same test was applied to suits for invasion of privacy based on false statements where, again, a matter of public interest was involved. *Time, Inc.* v. *Hill,* 385 U. S. 374 (1967). The opinion in that case expressly reserved the question presented here whether the test applied in a libel action brought by a private individual. *Id.,* at 391.

[2] This term is from Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 214 (1890). Our discussion of matters of "public or general interest" appears in Part IV, *infra,* of this opinion.

interest.[3] The District Court for the Eastern District of Pennsylvania held that the *New York Times* standard did not apply and that Pennsylvania law determined respondent's liability in this diversity case, 289 F. Supp. 737 (1968). The Court of Appeals for the Third Circuit held that the *New York Times* standard did apply and reversed the judgment for damages awarded to petitioner by the jury. 415 F. 2d 892 (1969). We granted certiorari, 397 U. S. 904 (1970). We agree with the Court of Appeals and affirm that court's judgment.

I

In 1963, petitioner was a distributor of nudist magazines in the Philadelphia metropolitan area. During the fall of that year, in response to citizen complaints, the Special Investigations Squad of the Philadelphia Police Department initiated a series of enforcement actions under the city's obscenity laws. The police, under the command of Captain Ferguson, purchased various magazines from more than 20 newsstands throughout the city. Based upon Captain Ferguson's determination that the magazines were obscene,[4] police on October 1, 1963, arrested most of the newsstand operators [5] on charges of selling obscene material. While the police were making an arrest at one newsstand, petitioner arrived to deliver some of his nudist magazines and was immediately ar-

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[3] Petitioner does not question that the First Amendment guarantees of freedom of speech and freedom of the press apply to respondent's newscasts.

[4] At trial, Captain Ferguson testified that his definition of obscenity was "anytime the private parts is showing of the female or the private parts is shown of males."

[5] Several more newsstand operators were arrested between October 1 and October 4.

rested along with the newsboy.[6] Three days later, on October 4, the police obtained a warrant to search petitioner's home and the rented barn he used as a warehouse, and seized the inventory of magazines and books found at these locations. Upon learning of the seizures, petitioner, who had been released on bail after his first arrest, surrendered to the police and was arrested for a second time.

Following the second arrest, Captain Ferguson telephoned respondent's radio station WIP and another local radio station, a wire service, and a local newspaper to inform them of the raid on petitioner's home and of his arrest. WIP broadcast news reports every half hour to the Philadelphia metropolitan area. These news programs ran either five or ten minutes and generally contained from six to twenty different items that averaged about thirty seconds each. WIP's 6 p. m. broadcast on October 4, 1963, included the following item:

> "City Cracks Down on Smut Merchants
>
> "The Special Investigations Squad raided the home of George Rosenbloom in the 1800 block of Vesta Street this afternoon. Police confiscated 1,000 allegedly obscene books at Rosenbloom's home and arrested him on charges of possession of obscene literature. The Special Investigations Squad also raided a barn in the 20 Hundred block of Welsh Road near Bustleton Avenue and confiscated 3,000 obscene books. Capt. Ferguson says he believes they have hit the supply of a main distributor of obscene material in Philadelphia."

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[6] The record neither confirms nor refutes petitioner's contention that his arrest was fortuitous. Nor does the record reflect whether or not petitioner's magazines were the subject either of the original citizens' complaints or of the initial police purchases.

This report was rebroadcast in substantially the same form at 6:30 p. m., but at 8 p. m. when the item was broadcast for the third time, WIP corrected the third sentence to read "reportedly obscene." News of petitioner's arrest was broadcast five more times in the following twelve hours, but each report described the seized books as "allegedly" or "reportedly" obscene. From October 5 to October 21, WIP broadcast no further reports relating to petitioner.

On October 16 petitioner brought an action in Federal District Court against various city and police officials and against several local news media.[7] The suit alleged that the magazines petitioner distributed were not obscene and sought injunctive relief prohibiting further police interference with his business as well as further publicity of the earlier arrests. The second series of allegedly defamatory broadcasts related to WIP's news reports of the lawsuit. There were ten broadcasts on October 21, two on October 25, and one on November 1. None mentioned petitioner by name. The first at 6:30 a. m. on October 21 was pretty much like those that followed:

> "Federal District Judge Lord, will hear arguments today from two publishers and a distributor all seeking an injunction against Philadelphia Police Commissioner Howard Leary . . . District Attorney James C. Crumlish . . . a local television station and a newspaper . . . ordering them to lay off the smut literature racket.
>
> "The girlie-book peddlers say the police crack-

[7] The complaint named as defendants the publishers of two newspapers, a television station, the city of Philadelphia, and the district attorney, but not respondent WIP. The plaintiffs were petitioner, the partnership of himself and his wife which carried on the business, and the publisher of the nudist magazines that he distributed.

> down and continued reference to their borderline literature as smut or filth is hurting their business. Judge Lord refused to issue a temporary injunction when he was first approached. Today he'll decide the issue. It will set a precedent . . . and if the injunction is not granted . . . it could signal an even more intense effort to rid the city of pornography."

On October 27, petitioner went to WIP's studios after hearing from a friend that the station had broadcast news about his lawsuit. Using a lobby telephone to talk with a part-time newscaster, petitioner inquired what stories WIP had broadcast about him. The newscaster asked him to be more specific about dates and times. Petitioner then asked for the noon news broadcast on October 21, 1963, which the newscaster read to him over the phone; it was similar to the above 6:30 a. m. broadcast. According to petitioner, the ensuing interchange was brief. Petitioner told the newscaster that his magazines were "found to be completely legal and legitimate by the United States Supreme Court." When the newscaster replied the district attorney had said the magazines were obscene, petitioner countered that he had a public statement of the district attorney declaring the magazines legal. At that point, petitioner testified, "the telephone conversation was terminated . . . He just hung up." Petitioner apparently made no request for a retraction or correction, and none was forthcoming. WIP's final report on petitioner's lawsuit—the only one after petitioner's unsatisfactory conversation at the station—occurred on November 1 after the station had checked the story with the judge involved.[8]

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[8] The text of the final broadcast read as follows:

"U. S. District Judge John Lord told WIP News just before airtime that it may be another week before he will be able to render a

II

In May 1964 a jury acquitted petitioner in state court of the criminal obscenity charges under instructions of the trial judge that, as a matter of law, the nudist magazines distributed by petitioner were not obscene. Following his acquittal, petitioner filed this diversity action in District Court seeking damages under Pennsylvania's libel law. Petitioner alleged that WIP's unqualified characterization of the books seized as "obscene" in the 6 and 6:30 p. m. broadcasts of October 4, describing his arrest, constituted libel *per se* and was proved false by petitioner's subsequent acquittal. In addition, he alleged that the broadcasts in the second series describing his court suit for injunctive relief were also false and defamatory in that WIP characterized petitioner and his business associates as "smut distributors" and "girlie-book peddlers" and, further, falsely characterized the suit as an attempt to force the defendants "to lay off the smut literature racket."

At the trial WIP's defenses were truth and privilege. WIP's news director testified that his eight-man staff of reporters prepared their own newscasts and broadcast their material themselves, and that material for the news programs usually came either from the wire services or from telephone tips. None of the writers or broadcasters involved in preparing the broadcasts in this case testified. The news director's recollection was that the primary source of information for the first series of broadcasts

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decision as to whether he has jurisdiction in the case of two publishers and a distributor who wish to restrain the D. A.'s office, the police chief, a TV station and the Bulletin for either making alleged raids of their publications, considered smut and immoral literature by the defendants named, or publicizing that they are in that category. Judge Lord then will be in a position to rule on injunction proceedings asked by the publishers and distributor claiming the loss of business in their operations."

about petitioner's arrest was Captain Ferguson, but that, to the director's knowledge, the station did not have any further verification. Captain Ferguson testified that he had informed WIP and other media of the police action and that WIP had accurately broadcast what he told the station. The evidence regarding WIP's investigation of petitioner's lawsuit in the second series of broadcasts was even more sparse. The news director testified that he was "sure we would check with the District Attorney's office also and with the Police Department," but "it would be difficult for me to specifically state what additional corroboration we had." In general, he testified that WIP's half-hour deadlines required it to rely on wire-service copy and oral reports from previously reliable sources subject to the general policy that "we will contact as many sources as we possibly can on any kind of a story."

III

Pennsylvania's libel law tracks almost precisely the Restatement (First) of Torts provisions on the subject. Pennsylvania holds actionable any unprivileged "malicious" [9] publication of matter which tends to harm a person's reputation and expose him to public hatred, contempt, or ridicule. *Schnabel* v. *Meredith,* 378 Pa. 609, 107 A. 2d 860 (1954); Restatement of Torts §§ 558, 559 (1938). Pennsylvania law recognizes truth as a complete defense to a libel action. *Schonek* v. *WJAC, Inc.,* 436 Pa. 78, 84, 258 A. 2d 504, 507 (1969); Restatement of Torts § 582. It recognizes an absolute immunity for defamatory statements made by high state officials, even if published with an improper motive, actual malice, or knowing falsity. *Montgomery* v. *Philadelphia,* 392 Pa. 178, 140 A. 2d 100 (1958); Restatement of Torts § 591,

[9] The reference here, of course, is to common-law "malice," not to the constitutional standard of *New York Times Co.* v. *Sullivan, supra.* See n. 18, *infra.*

and it recognizes a conditional privilege for news media to report judicial, administrative, or legislative proceedings if the account is fair and accurate, and not published solely for the purpose of causing harm to the person defamed, even though the official information is false or inaccurate. *Sciandra* v. *Lynett,* 409 Pa. 595, 600–601, 187 A. 2d 586, 588–589 (1963); Restatement of Torts § 611. The conditional privilege of the news media may be defeated, however, by " 'want of reasonable care and diligence to ascertain the truth, before giving currency to an untrue communication.' The failure to employ such 'reasonable care and diligence' can destroy a privilege which otherwise would protect the utterer of the communication." *Purcell* v. *Westinghouse Broadcasting Co.,* 411 Pa. 167, 179, 191 A. 2d 662, 668 (1963). Pennsylvania has also enacted verbatim the Restatement's provisions on burden of proof, which place the burden of proof for the affirmative defenses of truth and privilege upon the defendant.[10]

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[10] Pa. Stat. Ann., Tit. 12, § 1584a (Supp. 1971) provides:

"(1) In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised:

"(a) The defamatory character of the communication;

"(b) Its publication by the defendant;

"(c) Its application to the plaintiff;

"(d) The recipient's understanding of its defamatory meaning;

"(e) The recipient's understanding of it as intended to be applied to the plaintiff;

"(f) Special harm resulting to the plaintiff from its publication;

"(g) Abuse of a conditionally privileged occasion.

"(2) In an action for defamation, the defendant has the burden of proving, when the issue is properly raised:

"(a) The truth of the defamatory communication;

"(b) The privileged character of the occasion on which it was published;

"(c) The character of the subject matter of defamatory comment as of public concern."

See Restatement of Torts § 613.

At the close of the evidence, the District Court denied respondent's motion for a directed verdict and charged the jury, in conformity with Pennsylvania law, that four findings were necessary to return a verdict for petitioner: (1) that one or more of the broadcasts were defamatory; (2) that a reasonable listener would conclude that the defamatory statement referred to petitioner; (3) that WIP had forfeited its privilege to report official proceedings fairly and accurately, either because it intended to injure the plaintiff personally or because it exercised the privilege unreasonably and without reasonable care; and (4) that the reporting was false. The jury was instructed that petitioner had the burden of proof on the first three issues, but that respondent had the burden of proving that the reporting was true. The jury was further instructed that "as a matter of law" petitioner was not entitled to actual damages claimed for loss of business "not because it wouldn't ordinarily be but because there has been evidence that this same subject matter was the subject" of broadcasts over other television and radio stations and of newspaper reports, "so if there was any business lost . . . we have no proof . . . that [it] resulted directly from the broadcasts by WIP . . . ." App. 331a. On the question of punitive damages, the judge gave the following instruction:

> "[I]f you find that this publication arose from a bad motive or malice toward the plaintiff, or if you find that it was published with reckless indifference to the truth, if you find that it was not true, you would be entitled to award punitive damages, and punitive damages are awarded as a deterrent from future conduct of the same sort.
>
> "They really are awarded only for outrageous conduct, as I have said, with a bad motive or with reckless disregard of the interests of others, and before

> you would award punitive damages you must find that these broadcasts were published with a bad motive or with reckless disregard of the rights of others, or reckless indifference to the rights of others . . . ."

The jury returned a verdict for petitioner and awarded $25,000 in general damages, and $725,000 in punitive damages. The District Court reduced the punitive damages award to $250,000 on remittitur, but denied respondent's motion for judgment *n. o. v.* In reversing, the Court of Appeals emphasized that the broadcasts concerned matters of public interest and that they involved "hot news" prepared under deadline pressure. The Court of Appeals concluded that "the fact that plaintiff was not a public figure cannot be accorded decisive importance if the recognized important guarantees of the First Amendment are to be adequately implemented." 415 F. 2d, at 896. For that reason, the court held that the *New York Times* standard applied and, further, directed that judgment be entered for respondent, holding that, as a matter of law, petitioner's evidence did not meet that standard.

IV

Petitioner concedes that the police campaign to enforce the obscenity laws was an issue of public interest, and, therefore, that the constitutional guarantees for freedom of speech and press imposed limits upon Pennsylvania's power to apply its libel laws to compel respondent to compensate him in damages for the alleged defamatory falsehoods broadcast about his involvement. As noted, the narrow question he raises is whether, because he is not a "public official" or a "public figure" but a private individual, those limits required that he prove that the falsehoods resulted from a failure of respondent to exercise reasonable care, or required that he prove that

the falsehoods were broadcast with knowledge of their falsity or with reckless disregard of whether they were false or not. That question must be answered against the background of the functions of the constitutional guarantees for freedom of expression. *Rosenblatt* v. *Baer,* 383 U. S. 75, at 84–85, n. 10 (1966).

Self-governance in the United States presupposes far more than knowledge and debate about the strictly official activities of various levels of government. The commitment of the country to the institution of private property, protected by the Due Process and Just Compensation Clauses in the Constitution, places in private hands vast areas of economic and social power that vitally affect the nature and quality of life in the Nation. Our efforts to live and work together in a free society not completely dominated by governmental regulation necessarily encompass far more than politics in a narrow sense. "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs." *Time, Inc.* v. *Hill,* 385 U. S. 374, 388 (1967). "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama,* 310 U. S. 88, 102 (1940).

Although the limitations upon civil libel actions, first held in *New York Times* to be required by the First Amendment, were applied in that case in the context of defamatory falsehoods about the official conduct of a public official, later decisions have disclosed the artificiality, in terms of the public's interest, of a simple distinction between "public" and "private" individuals or institutions:

> "Increasingly in this country, the distinctions between governmental and private sectors are blurred. . . . In many situations, policy determina-

> tions which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions . . . .
>
> ". . . Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.'" *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130, 163–164 (1967) (Warren, C. J., concurring in result).

Moreover, the constitutional protection was not intended to be limited to matters bearing broadly on issues of responsible government. "[T]he Founders . . . felt that a free press would advance 'truth, science, morality, and arts in general' as well as responsible government." *Id.,* at 147 (opinion of HARLAN, J.). Comments in other cases reiterate this judgment that the First Amendment extends to myriad matters of public interest. In *Time, Inc.* v. *Hill, supra,* we had "no doubt that the . . . opening of a new play linked to an actual incident, is a matter of public interest," 385 U. S., at 388, which was entitled to constitutional protection. *Butts* held that an alleged "fix" of a college football game was a public issue. *Associated Press* v. *Walker,* 388 U. S. 130 (1967), a companion case to *Butts,* established that the public had a similar interest in the events and personalities involved in federal efforts to enforce a court decree ordering the enrollment of a Negro student in the University of Mississippi. Thus, these cases underscore the vitality, as

well as the scope, of the "profound national commitment to the principle that debate on *public issues* should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan,* 376 U. S., at 270–271 (emphasis added).

If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not "voluntarily" choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety.[11] The present case illustrates the point. The community has a vital interest in the proper enforcement of its criminal laws, particularly in an area such as obscenity where a number of highly important values are potentially in conflict: the public has an interest both in seeing that the criminal law is adequately enforced and in assuring that the law is not used unconstitutionally to suppress free expression. Whether the person involved is a famous large-scale magazine distributor or a "private" businessman running a corner newsstand has no relevance in ascertaining whether the public has an interest in the issue. We honor the commitment to robust debate on public issues, which is embodied in the First Amend-

[11] For example, the public's interest in the provocative speech that was made during the tense episode on the campus of the University of Mississippi would certainly have been the same in *Associated Press* v. *Walker,* n. 1, *supra,* if the speaker had been an anonymous student and not a well-known retired Army general. *Walker* also illustrates another anomaly of focusing analysis on the public "figure" or public "official" status of the individual involved. General Walker's fame stemmed from events completely unconnected with the episode in Mississippi. It seems particularly unsatisfactory to determine the extent of First Amendment protection on the basis of factors completely unrelated to the newsworthy events being reported. See also *Greenbelt Publishing Assn.* v. *Bresler,* 398 U. S. 6 (1970).

ment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.[12]

Our Brother WHITE agrees that the protection afforded by the First Amendment depends upon whether the issue involved in the publication is an issue of public or general concern. He would, however, confine our holding to the situation raised by the facts in this case, that is, limit it to issues involving "official actions of public servants." In our view that might be misleading. It is clear that there has emerged from our cases decided since *New York Times* the concept that the First Amendment's impact upon state libel laws derives not so much from whether the plaintiff is a "public official," "public figure," or "private individual," as it derives from the question whether the allegedly defamatory publication concerns a matter of public or general interest. See T. Emerson, The System of Freedom of Expression 531–532, 540 (1970). In that circumstance we think the time has come forthrightly to announce that the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern, albeit leaving the

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[12] We are not to be understood as implying that no area of a person's activities falls outside the area of public or general interest. We expressly leave open the question of what constitutional standard of proof, if any, controls the enforcement of state libel laws for defamatory falsehoods published or broadcast by news media about a person's activities not within the area of public or general interest.

We also intimate no view on the extent of constitutional protection, if any, for purely commercial communications made in the course of business. See *Valentine* v. *Chrestensen,* 316 U. S. 52 (1942). Compare *Breard* v. *Alexandria,* 341 U. S. 622 (1951), with *Martin* v. *Struthers,* 319 U. S. 141 (1943). But see *New York Times Co.* v. *Sullivan,* 376 U. S., at 265–266; *Linn* v. *Plant Guard Workers,* 383 U. S. 53 (1966).

delineation of the reach of that term to future cases. As our Brother WHITE observes, that is not a problem in this case, since police arrest of a person for distributing allegedly obscene magazines clearly constitutes an issue of public or general interest.[13]

V

We turn then to the question to be decided. Petitioner's argument that the Constitution should be held to require that the private individual prove only that the publisher failed to exercise "reasonable care" in publishing defamatory falsehoods proceeds along two lines. First, he argues that the private individual, unlike the public figure, does not have access to the media to counter the defamatory material and that the private individual, unlike the public figure, has not assumed the risk of defamation by thrusting himself into the public arena. Second, petitioner focuses on the important values served by the law of defamation in preventing and redressing attacks upon reputation.

We have recognized the force of petitioner's arguments, *Time, Inc.* v. *Hill, supra,* at 391, and we adhere to the caution expressed in that case against "blind application" of the *New York Times* standard. *Id.,* at 390. Analysis of the particular factors involved, however, convinces us that petitioner's arguments cannot be reconciled with the purposes of the First Amendment, with our cases, and with the traditional doctrines of libel law itself. Drawing a distinction between "public"

[13] Our Brother WHITE states in his opinion: "[T]he First Amendment gives . . . a privilege to report . . . the official actions of public servants in full detail, with no requirement that . . . the privacy of an individual involved in . . . the official action be spared from public view." *Post,* at 62. This seems very broad. It implies a privilege to report, for example, such confidential records as those of juvenile court proceedings.

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and "private" figures makes no sense in terms of the First Amendment guarantees.[14] The *New York Times* standard was applied to libel of a public official or public figure to give effect to the Amendment's function to encourage ventilation of public issues, not because the public official has any less interest in protecting his reputation than an individual in private life. While the argument that public figures need less protection because they can command media attention to counter criticism may be true for some very prominent people, even then it is the rare case where the denial overtakes the original charge. Denials, retractions, and corrections are not "hot" news, and rarely receive the prominence of the original story. When the public official or public figure is a minor functionary, or has left the position that put him in the public eye, see *Rosenblatt* v. *Baer, supra,* the argument loses all of its force. In the vast majority of libels involving public officials or public figures, the ability to respond through the media will depend on the same complex factor on which the ability of a private individual depends: the unpredictable event of the media's continuing interest in the story. Thus the unproved, and highly improbable, generalization that an as yet undefined class of "public figures" involved in matters of public concern will be better able to respond

[14] See *United Medical Laboratories, Inc.* v. *Columbia Broadcasting System, Inc.,* 404 F. 2d 706 (CA9 1968), cert. denied, 394 U. S. 921 (1969); *Time, Inc.* v. *McLaney,* 406 F. 2d 565 (CA5), cert. denied, 395 U. S. 922 (1969); *Bon Air Hotel, Inc.* v. *Time, Inc.,* 426 F. 2d 858, 861 n. 4, and cases cited therein (CA5 1970). See generally Cohen, A New Niche for the Fault Principle: A Forthcoming Newsworthiness Privilege in Libel Cases?, 18 U. C. L. A. L. Rev. 371 (1970); Kalven, The Reasonable Man and the First Amendment: Hill, Butts, and Walker, 1967 Sup. Ct. Rev. 267; Note, Public Official and Actual Malice Standards: The Evolution of *New York Times Co.* v. *Sullivan,* 56 Iowa L. Rev. 393, 398–400 (1970); Note, The Scope of First Amendment Protection for Good-Faith Defamatory Error, 75 Yale L. J. 642 (1966).

through the media than private individuals also involved in such matters seems too insubstantial a reed on which to rest a constitutional distinction. Furthermore, in First Amendment terms, the cure seems far worse than the disease. If the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern.[15]

Further reflection over the years since *New York Times* was decided persuades us that the view of the "public official" or "public figure" as assuming the risk of defamation by voluntarily thrusting himself into the public eye bears little relationship either to the values protected by the First Amendment or to the nature of our society. We have recognized that "[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community." *Time, Inc.* v. *Hill,*

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[15] Some States have adopted retraction statutes or right-of-reply statutes. See Donnelly, The Right of Reply: An Alternative to an Action for Libel, 34 Va. L. Rev. 867 (1948); Note, Vindication of the Reputation of a Public Official, 80 Harv. L. Rev. 1730 (1967). Cf. *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367 (1969).

One writer, in arguing that the First Amendment itself should be read to guarantee a right of access to the media not limited to a right to respond to defamatory falsehoods, has suggested several ways the law might encourage public discussion. Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641, 1666–1678 (1967). It is important to recognize that the private individual often desires press exposure either for himself, his ideas, or his causes. Constitutional adjudication must take into account the individual's interest in access to the press as well as the individual's interest in preserving his reputation, even though libel actions by their nature encourage a narrow view of the individual's interest since they focus only on situations where the individual has been harmed by undesired press attention. A constitutional rule that deters the press from covering the ideas or activities of the private individual thus conceives the individual's interest too narrowly.

supra, at 388. Voluntarily or not, we are all "public" men to some degree. Conversely, some aspects of the lives of even the most public men fall outside the area of matters of public or general concern. See n. 12, *supra; Griswold* v. *Connecticut,* 381 U. S. 479 (1965).[16] Thus, the idea that certain "public" figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view is, at best, a legal fiction. In any event, such a distinction could easily produce the paradoxical result of dampening discussion of issues of public or general concern because they happen to involve private citizens while extending constitutional encouragement to discussion of aspects of the lives of "public figures" that are not in the area of public or general concern.

General references to the values protected by the law of libel conceal important distinctions. Traditional arguments suggest that libel law protects two separate interests of the individual: first, his desire to preserve a certain privacy around his personality from unwarranted intrusion, and, second, a desire to preserve his public good name and reputation. See *Rosenblatt* v. *Baer,* 383 U. S., at 92 (STEWART, J., concurring). The individual's interest in privacy—in preventing unwarranted intrusion upon the private aspects of his life—is not involved in this case, or even in the class of cases under consideration, since, by hypothesis, the individual is involved in matters of public or general concern.[17] In

[16] This is not the less true because the area of public concern in the cases of candidates for public office and of elected public officials is broad. See *Monitor Patriot Co.* v. *Roy,* 401 U. S. 265 (1971).

[17] Our Brothers HARLAN and MARSHALL would not limit the application of the First Amendment to private libels involving issues of general or public interest. They would hold that the Amendment covers all private libels at least where state law permits the defense

the present case, however, petitioner's business reputation is involved, and thus the relevant interests protected by state libel law are petitioner's public reputation and good name.

These are important interests. Consonant with the libel laws of most of the States, however, Pennsylvania's libel law subordinates these interests of the individual in a number of circumstances. Thus, high government officials are immune from liability—absolutely privileged—even if they publish defamatory material from an improper motive, with actual malice, and with knowledge of its falsity. *Montgomery* v. *Philadelphia,* 392 Pa. 178, 140 A. 2d 100 (1958). This absolute privilege attaches to judges, attorneys at law in connection with a judicial proceeding, parties and witnesses to judicial proceedings, Congressmen and state legislators, and high national and state executive officials. Restatement of Torts §§ 585–592. Moreover, a conditional privilege allows newspapers to report the false defamatory material originally published under the absolute privileges listed above, if done accurately. *Sciandra* v. *Lynett,* 409 Pa. 595, 187 A. 2d 586 (1963).

Even without the presence of a specific constitutional command, therefore, Pennsylvania libel law recognizes that society's interest in protecting individual reputation

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of truth. The Court has not yet had occasion to consider the impact of the First Amendment on the application of state libel laws to libels where no issue of general or public interest is involved. See n. 1, *supra.* However, *Griswold* v. *Connecticut,* 381 U. S. 479 (1965), recognized a constitutional right to privacy and at least one commentator has discussed the relation of that right to the First Amendment. Emerson, *supra,* at 544–562. Since all agree that this case involves an issue of public or general interest, we have no occasion to discuss that relationship. See n. 12, *supra.* We do not, however, share the doubts of our Brothers HARLAN and MARSHALL that courts would be unable to identify interests in privacy and dignity. The task may be difficult but not more so than other tasks in this field.

often yields to other important social goals. In this case, the vital needs of freedom of the press and freedom of speech persuade us that allowing private citizens to obtain damage judgments on the basis of a jury determination that a publisher probably failed to use reasonable care would not provide adequate "breathing space" for these great freedoms. Reasonable care is an "elusive standard" that "would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait." *Time, Inc.* v. *Hill,* 385 U. S., at 389. Fear of guessing wrong must inevitably cause self-censorship and thus create the danger that the legitimate utterance will be deterred. Cf. *Speiser* v. *Randall,* 357 U. S. 513, 526 (1958).

Moreover, we ordinarily decide civil litigation by the preponderance of the evidence. Indeed, the judge instructed the jury to decide the present case by that standard. In the normal civil suit where this standard is employed, "we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor." *In re Winship,* 397 U. S. 358, 371 (1970) (HARLAN, J., concurring). In libel cases, however, we view an erroneous verdict for the plaintiff as most serious. Not only does it mulct the defendant for an innocent misstatement—the three-quarter-million-dollar jury verdict in this case could rest on such an error—but the possibility of such error, even beyond the vagueness of the negligence standard itself, would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate. These dangers for freedom of speech and press led us to reject the reasonable-man standard of liability as "simply inconsistent" with our national commitment under the First Amendment when sought to be applied to the

conduct of a political campaign. *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265, 276 (1971). The same considerations lead us to reject that standard here.

We are aware that the press has, on occasion, grossly abused the freedom it is given by the Constitution. All must deplore such excesses. In an ideal world, the responsibility of the press would match the freedom and public trust given it. But from the earliest days of our history, this free society, dependent as it is for its survival upon a vigorous free press, has tolerated some abuse. In 1799, James Madison made the point in quoting (and adopting) John Marshall's answer to Talleyrand's complaints about American newspapers, American State Papers, 2 Foreign Relations 196 (U. S. Cong. 1832):

> "'Among those principles deemed sacred in America, among those sacred rights considered as forming the bulwark of their liberty, which the Government contemplates with awful reverence and would approach only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press. That this *liberty* is often carried to excess; that it has sometimes degenerated into *licentiousness,* is seen and lamented, *but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is allied; perhaps it is a shoot which cannot be stripped from the stalk without wounding vitally the plant from which it is torn. However desirable those measures might be which might correct without enslaving the press, they have never yet been devised in America.*'" 6 Writings of James Madison, 1790–1802, p. 336 (G. Hunt ed. 1906) (emphasis in original).

This Court has recognized this imperative: "[T]o insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment

protect some erroneous publications as well as true ones." *St. Amant* v. *Thompson,* 390 U. S. 727, 732 (1968). We thus hold that a libel action, as here, by a private individual against a licensed radio station for a defamatory falsehood in a newscast relating to his involvement in an event of public or general concern may be sustained only upon clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not.[18] Calculated falsehood, of course, falls outside "the fruitful exercise of the right of free speech." *Garrison* v. *Louisiana,* 379 U. S. 64, 75 (1964).

Our Brothers HARLAN and MARSHALL reject the knowing-or-reckless-falsehood standard in favor of a test that would require, at least, that the person defamed establish that the publisher negligently failed to ascertain the truth of his story; they would also limit any recovery to "actual" damages. For the reasons we have stated, the negligence standard gives insufficient breathing space to First Amendment values. Limiting recovery to actual damages has the same defects. In the first instance, that standard, too, leaves the First Amendment insufficient elbow room within which to function. It is not simply the possibility of a judgment for damages that results in self-censorship. The very possibility of having to engage in litigation, an expensive and protracted process,

[18] At oral argument petitioner argued that "the little man can't show actual malice. How can George Rosenbloom show that there was actual malice in Metromedia? They never heard of him before." Tr. of Oral Arg., Dec. 8, 1970, p. 39. But ill will toward the plaintiff, or bad motives, are not elements of the *New York Times* standard. That standard requires only that the plaintiff prove knowing or reckless falsity. That burden, and no more, is the plaintiff's whether "public official," "public figure," or "little man." It may be that jury instructions that are couched only in terms of knowing or reckless falsity, and omit reference to "actual malice," would further a proper application of the *New York Times* standard to the evidence.

is threat enough to cause discussion and debate to "steer far wider of the unlawful zone" thereby keeping protected discussion from public cognizance. *Speiser* v. *Randall,* 357 U. S., at 526. Cf. *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U. S. 313, 334–339 (1971). Too, a small newspaper suffers equally from a substantial damage award, whether the label of the award be "actual" or "punitive."

The real thrust of Brothers HARLAN's and MARSHALL's position, however, is their assertion that their proposal will not "constitutionalize" the factfinding process. But this clearly is not the way their test would work in practice. Their approach means only that factfinding will shift from an inquiry into whether the defamatory statements were knowingly or recklessly uttered to the inquiry whether they were negligently uttered, and if so, to an inquiry whether plaintiff suffered "actual" damages. This latter inquiry will involve judges even more deeply in factfinding. Would the mere announcement by a state legislature that embarrassment and pain and suffering are measurable actual losses mean that such damages may be awarded in libel actions? No matter how the problem is approached, this Court would ultimately have to fashion constitutional definitions of "negligence" and of "actual damages."

Aside from these particularized considerations, we have repeatedly recognized that courts may not avoid an excursion into factfinding in this area simply because it is time consuming or difficult. We stated in *Pennekamp* v. *Florida,* 328 U. S. 331, 335 (1946), that:

> "The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circum-

> stances under which they were made to see whether or not they . . . are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." (Footnote omitted.)

Clearly, then, this Court has an "obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments," and in doing so "this Court cannot avoid making an independent constitutional judgment on the facts of the case." *Jacobellis* v. *Ohio,* 378 U. S. 184, 190 (1964). The simple fact is that First Amendment questions of "constitutional fact" compel this Court's *de novo* review. See *Edwards* v. *South Carolina,* 372 U. S. 229, 235 (1963); *Blackburn* v. *Alabama,* 361 U. S. 199, 205 n. 5 (1960).

VI

Petitioner argues that the instructions on punitive damages either cured or rendered harmless the instructions permitting an award of general damages based on a finding of failure of WIP to exercise reasonable care. We have doubts of the merits of the premise,[19] but even

[19] The instructions authorized an award of punitive damages upon a finding that a falsehood "arose from a bad motive or . . . that it was published with reckless indifference to the truth . . . punitive damages are awarded as a deterrent from future conduct of the same sort." App. 333a. The summation of petitioner's counsel conceded that respondent harbored no ill-will toward petitioner, but, following the suggestion of the instructions that punitive damages are " 'smart' money," App. 313a, argued that they should be assessed because "[respondent] must be careful the way they impart news information and you can punish them if they weren't because you could say that was malicious." *Ibid.* This was an obvious invitation based on the instructions to award punitive damages for carelessness. Thus the jury was allowed, and even encouraged, to find malice and award punitive damages merely on the basis of negligence and bad motive.

assuming that instructions were given satisfying the standard of knowing or reckless falsity, the evidence was insufficient to sustain an award for the petitioner under that standard. In these cases our "duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied." *New York Times Co.* v. *Sullivan,* 376 U. S., at 285. Our independent analysis of the record leads us to agree with the Court of Appeals that none of the proofs, considered either singly or cumulatively, satisfies the constitutional standard with the convincing clarity necessary to raise a jury question whether the defamatory falsehoods were broadcast with knowledge that they were false or with reckless disregard of whether they were false or not.

The evidence most strongly supporting petitioner is that concerning his visit to WIP's studio where a part-time newscaster hung up the telephone when petitioner disputed the newscaster's statement that the District Attorney had characterized petitioner's magazines as obscene. This contact occurred, however, after all but one of the second series of broadcasts had been aired. The incident has no probative value insofar as it bears on petitioner's case as to the first series of broadcasts. That portion of petitioner's case was based upon the omission from the first two broadcasts at 6 and 6:30 p. m. on October 4 of the word "alleged" preceding a characterization of the magazines distributed by petitioner. But that omission was corrected with the 8 p. m. broadcast and was not repeated in the five broadcasts that followed. And we agree with the analysis of the Court of Appeals that led that court, and leads us, to conclude that the episode failed to provide evidence satisfying the *New York Times* standard insofar as it bore on peti-

tioner's case based upon the broadcasts on and after October 21 concerning petitioner's lawsuit:

> "Only one broadcast took place after this conversation. It is attacked on the ground that it contains an inaccurate statement concerning plaintiff's injunction action in that it stated that the district attorney considered plaintiff's publications to be smut and immoral literature. The transcript of the testimony shows that plaintiff's own attorney, when questioning defendant's representative concerning the allegedly defamatory portion of the last broadcast, said that he was not questioning its 'accuracy'. Furthermore, his examination of the same witness brought out that defendant's representative confirmed the story with the judge involved before the broadcast was made. We think that the episode described failed to provide evidence of actual malice with the requisite convincing clarity to create a jury issue under federal standards." 415 F. 2d, at 897.

Petitioner argues finally that WIP's failure to communicate with him to learn his side of the case and to obtain a copy of the magazine for examination, sufficed to support a verdict under the *New York Times* standard. But our "cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant* v. *Thompson,* 390 U. S., at 731. Respondent here relied on information supplied by police officials. Following petitioner's complaint about the accuracy of the broadcasts, WIP checked its last report with the judge who presided in the case. While we may assume that the District Court correctly held to be defamatory

respondent's characterizations of petitioner's business as "the smut literature racket," and of those engaged in it as "girlie-book peddlers," there is no evidence in the record to support a conclusion that respondent "in fact entertained serious doubts as to the truth" of its reports.

Affirmed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE BLACK, concurring in the judgment.

I concur in the judgment of the Court for the reasons stated in my concurring opinion in *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 293 (1964), in my concurring and dissenting opinion in *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130, 170 (1967), and in MR. JUSTICE DOUGLAS' concurring opinion in *Garrison* v. *Louisiana,* 379 U. S. 64, 80 (1964). I agree of course that First Amendment protection extends to "all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous." *Ante,* at 44. However, in my view, the First Amendment does not permit the recovery of libel judgments against the news media even when statements are broadcast with knowledge they are false. As I stated in *Curtis Publishing Co.* v. *Butts, supra,* "[I]t is time for this Court to abandon *New York Times Co.* v. *Sullivan* and adopt the rule to the effect that the First Amendment was intended to leave the press free from the harassment of libel judgments." *Id.,* at 172.

MR. JUSTICE WHITE, concurring in the judgment.

I

Under existing law the First Amendment is deemed to permit recoveries for damaging falsehoods published

about public officials or public figures only if the defamation is knowingly or recklessly false. But until today the First Amendment has not been thought to prevent citizens who are neither public officials nor public figures from recovering damages for defamation upon proving publication of a false statement injurious to their reputation. There has been no necessity to show deliberate falsehood, recklessness, or even negligence.

The Court has now decided that the First Amendment requires further restrictions on state defamation laws. MR. JUSTICE BRENNAN and two other members of the Court would require proof of knowing or reckless misrepresentation of the facts whenever the publication concerns a subject of legitimate public interest, even though the target is a "private" citizen. Only residual areas would remain in which a lower degree of proof would obtain.

Three other members of the Court also agree that private reputation has enjoyed too much protection and the media too little. But in the interest of protecting reputation, they would not roll back state laws so far. They would interpret the First Amendment as proscribing liability without fault and would equate non-negligent falsehood with faultless conduct. The burden of the damaging lie would be shifted from the media to the private citizen unless the latter could prove negligence or some higher degree of fault. They would also drastically limit the authority of the States to award compensatory and punitive damages for injury to reputation.

MR. JUSTICE BLACK, consistently with the views that he and MR. JUSTICE DOUGLAS have long held, finds no room in the First Amendment for any defamation recovery whatsoever.

Given this spectrum of proposed restrictions on state defamation laws and assuming that MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS will continue in future cases

to support the severest of the restrictions, it would seem that at least five members of the Court would support each of the following rules:

For public officers and public figures to recover for damage to their reputations for libelous falsehoods, they must prove either knowing or reckless disregard of the truth. All other plaintiffs must prove at least negligent falsehood, but if the publication about them was in an area of legitimate public interest, then they too must prove deliberate or reckless error. In all actions for libel or slander, actual damages must be proved, and awards of punitive damages will be strictly limited.

II

For myself, I cannot join any of the opinions filed in this case. Each of them decides broader constitutional issues and displaces more state libel law than is necessary for the decision in this case. As I have said, MR. JUSTICE BRENNAN would extend the privilege enunciated in *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964), to publications upon any "subject of public or general interest." See *ante,* at 43. He would thereby extend the constitutional protection to false and damaging, but nonmalicious, publications about such matters as the health and environmental hazards of widely used manufactured products, the mental and emotional stability of executives of business establishments, and the racial and religious prejudices of many groups and individuals. All of these are, of course, subjects of real concern, and arguments for placing them within the scope of *New York Times* are by no means frivolous.

For MR. JUSTICE MARSHALL and MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN's opinion is both too severe and too limited. They would make more sweeping incursions into state tort law but purportedly with less destructive weapons. They would permit suit by some plaintiffs

barred under MR. JUSTICE BRENNAN's opinion, but would require all plaintiffs to prove at least negligence before any recovery would be allowed.

I prefer at this juncture not to proceed on such a broad front. I am quite sure that *New York Times Co.* v. *Sullivan* was the wiser course, but I am unaware that state libel laws with respect to private citizens have proved a hazard to the existence or operations of the communications industry in this country. Some members of the Court seem haunted by fears of self-censorship by the press and of damage judgments that will threaten its financial health. But technology has immeasurably increased the power of the press to do both good and evil. Vast communication combines have been built into profitable ventures. My interest is not in protecting the treasuries of communicators but in implementing the First Amendment by insuring that effective communication which is essential to the continued functioning of our free society. I am not aware that self-censorship has caused the press to tread too gingerly in reporting "news" concerning private citizens and private affairs or that the reputation of private citizens has received inordinate protection from falsehood. I am not convinced that we must fashion a constitutional rule protecting a whole range of damaging falsehoods and so shift the burden from those who publish to those who are injured.

I say this with considerable deference since all my Brethren have contrary views. But I would not nullify a major part of state libel law until we have given the matter the most thorough consideration and can articulate some solid First Amendment grounds based on experience and our present condition. As it is, today's experiment rests almost entirely on theoretical grounds and represents a purely intellectual derivation from what are thought to be important principles of tort

law as viewed in the light of the primacy of the written and spoken word.

This case lends itself to more limited adjudication. *New York Times Co.* v. *Sullivan* itself made clear that discussion of the official actions of public servants such as the police is constitutionally privileged. "The right of free public discussion of the stewardship of public officials" is, in the language of that case, "a fundamental principle of the American form of government." 376 U. S., at 275. Discussion of the conduct of public officials cannot, however, be subjected to artificial limitations designed to protect others involved in an episode with officials from unfavorable publicity. Such limitations would deprive the public of full information about the official action that took place. In the present case, for example, the public would learn nothing if publication only of the fact that the police made an arrest were permitted; it is also necessary that the grounds for the arrest and, in many circumstances, the identity of the person arrested be stated. In short, it is rarely informative for a newspaper or broadcaster to state merely that officials acted unless he also states the reasons for their action and the persons whom their action affected.

Nor can *New York Times* be read as permitting publications that invade the privacy or injure the reputations of officials, but forbidding those that invade the privacy or injure the reputations of private citizens against whom official action is directed. *New York Times* gives the broadcasting media and the press the right not only to censure and criticize officials but also to praise them and the concomitant right to censure and criticize their adversaries. To extend constitutional protection to criticism only of officials would be to authorize precisely that sort of thought control that the First Amendment forbids government to exercise.

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I would accordingly hold that in defamation actions, absent actual malice as defined in *New York Times Co.* v. *Sullivan,* the First Amendment gives the press and the broadcast media a privilege to report and comment upon the official actions of public servants in full detail, with no requirement that the reputation or the privacy of an individual involved in or affected by the official action be spared from public view. Since respondent Metromedia did nothing more in the instant case, I join in holding its broadcasts privileged. I would not, however, adjudicate cases not now before the Court.

MR. JUSTICE HARLAN, dissenting.

The very facts of this case demonstrate that uncritical acceptance of the Pennsylvania libel law here involved would be inconsistent with those important First and Fourteenth Amendment values we first treated with in an analogous context in *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964). However, as the plurality opinion implicitly recognizes, only an undiscriminating assessment of those values would lead us to extend the *New York Times* rule in full force to all purely private libels. My Brother BRENNAN's opinion would resolve the dilemma by distinguishing those private libels that arise out of events found to be of "public or general concern" from those that do not, and subjecting the former to full-scale application of the *New York Times* rule.

For the reasons set forth in Part I of my Brother MARSHALL's dissent, I cannot agree to such a solution. As he so well demonstrates, the principal failing of the plurality opinion is its inadequate appreciation of the limitations imposed by the legal process in accommodating the tension between state libel laws and the federal constitutional protection given to freedom of speech and press.

Once the evident need to balance the values underlying each is perceived, it might seem, purely as an abstract matter, that the most utilitarian approach would be to scrutinize carefully every jury verdict in every libel case, in order to ascertain whether the final judgment leaves fully protected whatever First Amendment values [1] transcend the legitimate state interest in protecting the particular plaintiff who prevailed. This seems to be what is done in the plurality opinion. But we did not embrace this technique in *New York Times, supra.* Instead, as my Brother MARSHALL observes, we there announced a rule of general application, not ordinarily dependent for its implementation upon a case-by-case examination of trial court verdicts. See also my dissent in *Time, Inc.* v. *Pape,* 401 U. S. 279, 293 (1971). Nor do I perceive any developments in the seven years since we decided *New York Times, supra,* that suggest our original method should now be abandoned. At least where we can discern generally applicable rules that should balance with fair precision the competing interests at stake, such rules should be preferred to the plurality's approach both in order to preserve a measure of order and predictability in the law that must govern the daily conduct of affairs and to avoid subjecting the press to judicial second-guessing of the newsworthiness of each item they print. Consequently, I fully concur in Part I of MR. JUSTICE MARSHALL'S dissent.

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[1] Of course, for me, this case presents a Fourteenth, not a purely First, Amendment issue, for the question is one of the constitutionality of the applicable Pennsylvania libel laws. However, I have found it convenient, in the course of this opinion, occasionally to speak directly of the First Amendment as a shorthand phrase for identifying those constitutional values of freedom of expression guaranteed to individuals by the Due Process Clause of the Fourteenth Amendment.

Further, I largely agree with the alternative proposals of that dissent. I, too, think that, when dealing with private libel, the States should be free to define for themselves the applicable standard of care so long as they do not impose liability without fault; that a showing of actual damage should be a requisite to recovery for libel; and that it is impermissible, given the substantial constitutional values involved, to fail to confine the amount of jury verdicts in such cases within any ascertainable limits. However, my reasons for so concluding are somewhat different than his, and I therefore reach a different result than he does with respect to the tolerable limits of punitive damages.

I

I think we all agree on certain core propositions. First, as a general matter, the States have a perfectly legitimate interest, exercised in a variety of ways, in redressing and preventing careless conduct, no matter who is responsible for it, that inflicts actual, measurable injury upon individual citizens. Secondly, there is no identifiable value worthy of constitutional protection in the publication of falsehoods. Third, although libel law provides that truth is a complete defense, that principle, standing alone, is insufficient to satisfy the constitutional interest in freedom of speech and press. For we have recognized that it is inevitable that there will be "some error in the situation presented in free debate," *Time, Inc.* v. *Hill,* 385 U. S. 374, 406 (1967) (opinion of this writer), a process that needs "breathing space," *NAACP* v. *Button,* 371 U. S. 415, 433 (1963), to flourish, and that "putting to the pre-existing prejudices of a jury the determination of what is 'true' may effectively institute a system of censorship." *Time, Inc.* v. *Hill, supra,* at 406.

Moreover, any system that punishes certain speech is likely to induce self-censorship by those who would other-

wise exercise their constitutional freedom. Given the constitutionally protected interest in unfettered speech, it requires an identifiable, countervailing state interest, consistent with First Amendment values, to justify a regulatory scheme that produces such results. And, because the presence of such values dictates closer scrutiny of this aspect of state tort law than the Fourteenth Amendment would otherwise command, it may well be that certain rules, impervious to constitutional attack when applied to ordinary human conduct, may have to be altered or abandoned where used to regulate speech. Finally, as determined in *New York Times,* the constitutional interest in tolerance of falsehood as well as the need to adjust competing societal interests, prohibits, at a minimum, the imposition of liability without fault.

The precise standard of care necessary to achieve these goals is, however, a matter of dispute as is the range of penalties a State may prescribe for a breach of that standard. In analyzing these problems it is necessary to begin with a general analytical framework that defines those competing interests that must be reconciled. My Brother MARSHALL's opinion, I think, dwells too lightly upon the nature of the legitimate countervailing interests promoted by the State's libel law and, as a result, overstates the case against punitive damages. Because we deal with a set of legal rules that treat truth as a complete defense it strikes, I think, somewhat wide of the mark to treat the State's interest as one of protecting reputations from "unjustified invasion." *Post,* at 78. By hypothesis, the respondent here was free to reveal any true facts about petitioner's "obscure private life." [2]

[2] I would expressly reserve, for a case properly presenting it, the issue whether the *New York Times* rule should have any effect on "privacy" litigation. The problem is briefly touched upon in *Time, Inc.* v. *Hill,* 385 U. S. 374, 404–405 (1967) (HARLAN, J., concurring and dissenting).

Given the defense of truth, it is my judgment that, in order to assure that it promotes purposes consistent with First Amendment values, the legitimate function of libel law must be understood as that of compensating individuals for actual, measurable harm caused by the conduct of others. This can best be demonstrated by postulating a law that subjects publishers to jury verdicts for falsehoods that have done the plaintiff no harm. In my view, such a rule can only serve a purpose antithetical to those of the First Amendment. It penalizes speech, not to redress or avoid the infliction of harm, but only to deter the press from publishing material regarding private behavior that turns out to be false simply because of its falsity. This the First Amendment will not tolerate. Where the State cannot point to any tangible danger, even knowingly erroneous publication is entitled to constitutional protection because of the interest in avoiding an inquiry into the mere truth or falsity of speech. Moreover, such a scheme would impose a burden on speaking not generally placed upon constitutionally unprotected conduct—the payment of private fines for conduct which, although not conformed to established limits of care, causes no harm in fact.

Conversely, I think that where the purpose and effect of the law are to redress actual and measurable injury to private individuals that was reasonably foreseeable as a result of the publication, there is no necessary conflict with the values of freedom of speech. Just as an automobile negligently driven can cost a person his physical and mental well-being and the fruits of his labor, so can a printing press negligently set. While the First Amendment protects the press from the imposition of special liabilities upon it, "[t]o exempt a publisher, because of the nature of his calling, from an imposition generally exacted from other members of the community, would be to extend a protection not required by the constitutional

guarantee." *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130, 160 (1967) (opinion of this writer). A business "is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." *Associated Press* v. *NLRB,* 301 U. S. 103, 132–133 (1937). That the damage has been inflicted by words rather than other instrumentalities cannot insulate it from liability. States may legitimately be required to use finer regulatory tools where dealing with "speech," but they are not wholly disabled from exacting compensation for its measurable adverse consequences. If this is not so, it is difficult to understand why governments may, for example, proscribe "misleading" advertising practices or specify what is "true" in the dissemination of consumer credit advertisements.

Nor does this interest in compensating victims of harmful conduct somehow disappear when the damages inflicted are great. So long as the effect of the law of libel is simply to make publishers pay for the harm they cause, and the standard of care required is appropriately adjusted to take account of the special countervailing interests in an open exchange of ideas, the fact that this may involve the payment of substantial sums cannot plausibly be said to raise serious First Amendment problems. If a newspaper refused to pay its bills because to do so would put it out of business, would the First Amendment dictate that this be treated as a partial or complete defense? If an automobile carrying a newsman to the scene of a history-making event ran over a pedestrian, would the size of the verdict, if based upon generally applicable tort law principles, have to be assessed against the probability that it would deter broadcasters from news gathering before it could pass muster under the First Amendment?

However, without foreclosing the possibility that other limiting principles may be surfaced by subsequent experience, I do think that since we are dealing, by hypothesis, with infliction of harm through the exercise of freedom of speech and the press to which the Constitution gives explicit protection, recoverable damages must be limited to those consequences of the publication which are reasonably foreseeable. The usual tort rule seems to be that once some foreseeable injury has been inflicted, the negligent defendant must compensate for all damages he proximately caused in fact, no matter how peculiar were the circumstances of the particular plaintiff involved. W. Prosser, The Law of Torts § 50 (3d ed. 1964). However, our cases establish, I think, that, unless he has knowledge to the contrary, a speaker is entitled to presume that he is addressing an audience that is not especially susceptible to distress at the specter of open, uninhibited, robust speech. *Cohen* v. *California, ante,* p. 15. See also *Brandenburg* v. *Ohio,* 395 U. S. 444 (1969); *Butler* v. *Michigan,* 352 U. S. 380 (1957). Thus, I think the speaker should be free from a duty to compensate for actual harm inflicted by his falsehoods where the defamation would not have caused such harm to a person of average sensibilities unless, of course, the speaker knew that his statements were made concerning an unusually sensitive person. In short, I think the First Amendment does protect generally against the possibility of self-censorship in order to avoid unwitting affronts to the frail and the queasy.

II

Of course, it does not follow that so long as libel law performs the same compensatory function as civil law generally it is necessarily legitimate in all its various applications. The presence of First Amendment values means that the State can be compelled to utilize finer,

more discriminating instruments of regulation where necessary to give more careful protection to these countervailing interests. *New York Times, supra,* and *Curtis Publishing Co., supra,* established that where the injured party is a "public figure" or a "public official," the interest in freedom of speech dictates that the States forgo their interest in compensating for actual harm, even upon a basis generally applicable to all members of society, unless the plaintiff can show that the injurious publication was false and was made "with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times, supra,* at 280. Tacitly recognizing that it would unduly sacrifice the operative legitimate state interests to extend this rule to all cases where the injured party is simply a private individual, the plurality opinion would nevertheless apply it where the publication concerned such a person's "involvement in an event of public or general concern." *Ante,* at 52. I would not overrule *New York Times* or *Curtis Publishing Co.* and I do agree, as indicated above, that making liability turn on simple falsity in the purely private libel area is not constitutionally permissible. But I would not construe the Federal Constitution to require that the States adhere to a standard other than that of reasonable care where the plaintiff is an ordinary citizen.

My principal concern with the plurality's view, of course, is that voiced by my Brother MARSHALL. However, even if this objection were not tenable, unlike the plurality, I do think there is a difference, relevant to the interests here involved, between the public and the private plaintiff, as our cases have defined these categories, and that maintaining a constitutional distinction between them is at least as likely to protect true First Amendment concerns as one that eradicates such a line and substitutes for it a distinction between matters we think are of true social significance and those we think are not.

To begin, it does no violence, in my judgment, to the value of freedom of speech and press to impose a duty of reasonable care upon those who would exercise these freedoms. I do not think it can be gainsaid that the States have a substantial interest in encouraging speakers to carefully seek the truth before they communicate, as well as in compensating persons actually harmed by false descriptions of their personal behavior. Additionally, the burden of acting reasonably in taking action that may produce adverse consequences for others is one generally placed upon all in our society. Thus, history itself belies the argument that a speaker must somehow be freed of the ordinary constraints of acting with reasonable care in order to contribute to the public good while, for example, doctors, accountants, and architects have constantly performed within such bounds.

This does not mean that I do not agree with the rule of *New York Times, supra,* but only that I deem it inapplicable here. That rule was not, I think, born solely of a desire to free speech that would otherwise have been stifled by overly restrictive rules, but also rested upon a determination that the countervailing state interests, described above, were not fully applicable where the subject of the falsehood was a public official or a public figure. For me, it does seem quite clear that the public person has a greater likelihood of securing access to channels of communication sufficient to rebut falsehoods concerning him than do private individuals in this country who do not toil in the public spotlight. Similarly, our willingness to assume that public personalities are more impervious to criticism, and may be held to have run the risk of publicly circulated falsehoods concerning them, does not rest solely upon an empirical assertion of fact, but also upon a belief that, in our political system, the individual speaker is entitled to act upon such an assumption if our institutions are to be held

up, as they should be, to constant scrutiny. And, at least as to the "public official," it seems to be universally the case that he is entitled to an absolute immunity for what he may utter in response to the charges of others. Where such factors are present the need to provide monetary compensation for defamation appears a good deal more attenuated. Finally, in light of the plurality opinion's somewhat extravagant delineation of the public interest involved in the dissemination of information about nonpublic persons, it bears emphasizing that a primary rationale for extending the *New York Times* rule to public figures was the desire to reflect, in the constitutional balance, the fact that "in this country, the distinctions between governmental and private sectors are blurred," *Curtis Publishing Co., supra,* at 163 (opinion of Warren, C. J.), and to treat constitutional values as specially implicated where important, albeit nonofficial, policy and behavior were the subjects of discussion. At the very least, this tends to diminish the force of any contention that libelous depictions of nonpublic persons are often likely to involve matters of abiding public significance.

I cannot agree that the First Amendment gives special protection to the press from "[t]he very possibility of having to engage in litigation," *ante,* at 52 (opinion of BRENNAN, J.). Were this assertion tenable, I do not see why the States could ever enforce their libel laws. Cf. my Brother BLACK's opinion, *ante,* at 57. Further, it would certainly cast very grave doubts upon the constitutionality of so-called "right-of-reply statutes" advocated by the plurality, *ante,* at 47 n. 15, and ultimately treat the application of any general law to a publisher or broadcaster as an important First Amendment issue. The notion that such an interest, in the context of a purely private libel, is a significant independent constitutional value is an unfortunate consequence of the plurality's

single-minded devotion to the task of preventing self-censorship, regardless of the purposes for which such restraint is induced or the evils its exercise tends to avoid.

It is, then, my judgment that the reasonable care standard adequately serves those First Amendment values that must inform the definition of actionable libel and that those special considerations that made even this standard an insufficiently precise technique when applied to plaintiffs who are "public officials" or "public figures" do not obtain where the litigant is a purely private individual.

III

There remains the problem of punitive damages.[3] No doubt my Brother MARSHALL is correct in asserting that the specter of being forced to pay out substantial punitive damage awards is likely to induce self-censorship. This would probably also be the case where the harm actually caused is likely to be great. But, as I indicated above, this fact in itself would not justify construing the First Amendment to impose an arbitrary limitation on the amount of actual damages recoverable. Thus, as my Brother MARSHALL would apparently agree—since he, too, proposes no limitation on actual damages—one cannot jump from the proposition that fear of substantial punitive damage awards may be an important factor in

[3] The conclusions I reach in Part III of this opinion are somewhat different from those I embraced four Terms ago in *Curtis Publishing Co., supra,* at 159–161. Where matters are in flux, however, it is more important to re-think past conclusions than to adhere to them without question and the problem under consideration remains in a state of evolution, as is attested to by all the opinions filed today. Reflection has convinced me that my earlier opinion painted with somewhat too broad a brush and that a more precise balancing of the conflicting interests involved is called for in this delicate area.

inducing self-censorship directly to the result that punitive damages cannot be assessed in all private libel cases. A more particularized inquiry into the nature of the competing interests involved is necessary in order to ascertain whether awarding punitive damages must inevitably, in private libel cases, serve only interests that are incompatible with the First Amendment.

At a minimum, even in the purely private libel area, I think the First Amendment should be construed to limit the imposition of punitive damages to those situations where actual malice is proved. This is the typical standard employed in assessing anyone's liability for punitive damages where the underlying aim of the law is to compensate for harm actually caused, see, *e. g.*, 3 L. Frumer et al., Personal Injury § 2.02 (1965); H. Oleck, Damages to Persons and Property § 30 (1955), and no conceivable state interest could justify imposing a harsher standard on the exercise of those freedoms that are given explicit protection by the First Amendment.

The question then arises whether further limitations on this general state power must be imposed in order to serve the particularized goals of the First Amendment. The most compelling rationale for providing punitive damages where actual malice is shown is that such damages assure that deterrent force is added to the jury's verdict. If the speaker's conduct was quite likely to produce substantial harm, but fortuitously did not, simple assessment of actual damages will not fully reflect the social interest in deterring that conduct generally. Further, even if the harm done was great the defendant may have unusually substantial resources that make the award of actual damages a trivial inconvenience of no actual deterrent value. And even where neither of these factors obtains, the State always retains an interest in punishing more severely conduct that, although it causes the same effect, is more morally blameworthy. For example, con-

sider the distinction between manslaughter and first-degree murder.

I find it impossible to say, at least without further judicial experience in this area, that the First Amendment interest in avoiding self-censorship will always outweigh the state interest in vindicating these policies. It seems that a legislative choice is permissible which, for example, seeks to induce, through a reasonable monetary assessment, repression of false material, published with actual malice, that was demonstrably harmful and reasonably thought capable of causing substantial harm, but, in fact, was not so fully injurious to the individual attacked. Similarly, the State surely has a legitimate interest in seeking to assure that its system of compensating victims of negligent behavior also operates upon all as an inducement to avoidance of such conduct. And, these are burdens that are placed on all members of society, thus permitting the press to escape them only if its interest is somehow different in this regard.

However, from the standpoint of the individual plaintiff such damage awards are windfalls. They are, in essence, private fines levied for purposes that may be wholly unrelated to the circumstances of the actual litigant. That fact alone is not, I think, enough to condemn them. The State may, as it often does, use the vehicle of a private lawsuit to serve broader public purposes. It is noteworthy that my Brother MARSHALL does not rest his objection to punitive damages upon these grounds. He fears, instead, the self-censorship that may flow from the unbridled discretion of juries to set the amount of such damages. I agree that where these amounts bear no relationship to the actual harm caused, they then serve essentially as springboards to jury assessment, without reference to the primary legitimating compensatory function of the system, of an infinitely wide range of penalties wholly unpredictable in amount at the time of the pub-

lication and that this must be a substantial factor in inducing self-censorship. Further, I find it difficult to fathom why it may be necessary, in order to achieve its justifiable deterrence goals, for the States to permit punitive damages that bear no discernible relationship to the actual harm caused by the publication at issue. A rational determination of the injury a publication might potentially have inflicted should typically proceed from the harm done in fact. And where the compensatory scheme seeks to achieve deterrence as a subsidiary by-product, the desired deterrence, if not precisely measured by actual damages, should be informed by that touchstone if deterrence of falsehood is not to replace compensation for harm as the paramount goal. Finally, while our legal system does often mete out harsher punishment for more culpable acts, it typically begins with a gradation of offenses defined in terms of effects. Compare, for example, larceny with murder. It is not surprising, then, that most States apparently require that punitive damages in most private civil actions bear some reasonable relation to the actual damages awarded, Oleck, at § 275, Pennsylvania included, *Weider* v. *Hoffman,* 238 F. Supp. 437, 444–447 (MD Pa. 1965).

However, where the amount of punitive damages awarded bears a reasonable and purposeful relationship to the actual harm done, I cannot agree that the Constitution must be read to prohibit such an award. Indeed, as I understand it, my Brother MARSHALL's objection to my position [4] is not that the interest in freedom of speech dictates eliminating such judgments, but that this result

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[4] Of course, I do not envision that, consistently with my views, the States could only exact some predetermined multiple of the actual damages found. I should think a jury could simply be instructed, along the lines set out in my opinion, on the legitimate uses of the punitive damage award and the necessity for relating any such judgment to the harm actually done.

is compelled by the need to avoid involving courts in an "ad hoc balancing" of "the content of the speech and the surrounding circumstances," *post,* at 86, 85, much like that undertaken today in Part VI of the plurality opinion, the same technique criticized in my dissent in *Time, Inc.* v. *Pape, supra.* I find this argument unpersuasive. First, I do not see why my proposed rule would necessarily require frequent judicial reweighing of the facts underlying each jury verdict. A carefully and properly instructed jury should ordinarily be able to arrive at damage awards that are self-validating. It is others, not I, who have placed upon the federal courts the general duty of reweighing jury verdicts regarding the degree of fault demonstrated in libel actions. Further, to the extent that supervision of jury verdicts would be required it would entail a different process from that undertaken where judges redetermine the degree of fault. The defendant's resources, the actual harm suffered by the plaintiff, and the publication's potential for actual harm are all susceptible of more or less objective measurement. And the overriding principle that deterrence is not to be made a substitute for compensation should serve as a useful mechanism for adjusting the equation. Finally, even if some marginal "ad hoc balancing" becomes necessary, I should think it the duty of this Court at least to attempt to implement such a process before pre-empting, for itself, all state power in this regard.[5]

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[5] The plurality opinion states that the "real thrust" of my position is that it "will not 'constitutionalize' the factfinding process." *Ante,* at 53. In fact, I have attempted to demonstrate throughout this opinion that I believe the positions of my Brothers BRENNAN, BLACK, and MARSHALL all, in varying degrees, overstate the extent to which libel law is incompatible with the constitutional guarantee of freedom of expression, and have pointed out that I think my views

In sum, given the fact that it seems to reflect the majority rule, that most of our jurisprudence proceeds upon the premise that legislative purposes can be achieved by fitting the punishment to the crime, and since we deal here with a precise constitutional interest that may legitimately require the States to resort to more discriminating regulation within a more circumscribed area of permissible concern, I would hold unconstitutional, in a private libel case, jury authority to award punitive damages which is unconfined by the requirement that these awards bear a reasonable and purposeful relationship to the actual harm done. Conversely, where the jury authority has been exercised within such constraints, and the plaintiff has proved that the speaker acted out of express malice, given the present state of judicial experience, I think it would be an unwarranted intrusion into the legitimate legislative processes of the States and an impermissibly broad construction of the First Amendment to nullify that state action.

Because the Court of Appeals adjudicated this case upon principles wholly unlike those suggested here, I

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have merit "even if [the objection noted in my Brother MARSHALL's opinion] were not tenable." *Supra,* at 69. Moreover, the assertion that an inquiry into whether actual damages were suffered "will involve judges even more deeply in factfinding," *ante,* at 53, than ascertaining whether "the defendant in fact entertained serious doubts as to the truth of his publication," *ante,* at 56, or whether the publication involved "an event of public or general concern," *ante,* at 52, seems to me to carry its own refutation. The former focuses on measurable, objective fact; the latter upon subjective, personal belief. Finally, I cannot see why juries may not typically be entrusted responsibly to determine whether a publisher was negligent, a function they perform in judging the harmful conduct of most other members of society; or why it should be materially more difficult for judges to oversee such decisions where a speaker, rather than any other actor, is a defendant.

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would vacate the judgment below and remand the case for further proceedings consistent with the views expressed herein.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE STEWART joins, dissenting.

Here, unlike the other cases involving the *New York Times* [1] doctrine, we are dealing with an individual who held no public office, who had not taken part in any public controversy, and who lived an obscure private life.[2] George Rosenbloom, before the events and reports of the events involved here, was just one of the millions of Americans who live their lives in obscurity.

The protection of the reputation of such anonymous persons "from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (STEWART, J., concurring). But the concept of a citizenry informed by a free and unfettered press is also basic to our system of ordered liberty. Here these two essential and fundamental values conflict.

I

The plurality has attempted to resolve the conflict by creating a conditional constitutional privilege for defamation published in connection with an event that is found to be of "public or general concern." The condition for the privilege is that the defamation must not be published "with knowledge that it was false or with reckless

[1] *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964).

[2] See, *e. g.*, *Associated Press* v. *Walker*, 388 U. S. 130 (1967); *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967); *Beckley Newspapers Corp.* v. *Hanks*, 389 U. S. 81 (1967); *Greenbelt Publishing Assn.* v. *Bresler*, 398 U. S. 6 (1970); *Rosenblatt* v. *Baer*, 383 U. S. 75 (1966).

disregard of whether it was false or not." I believe that this approach offers inadequate protection for both of the basic values that are at stake.

In order for particular defamation to come within the privilege there must be a determination that the event was of legitimate public interest. That determination will have to be made by courts generally and, in the last analysis, by this Court in particular. Courts, including this one, are not anointed with any extraordinary prescience. But, assuming that under the rule announced by MR. JUSTICE BRENNAN for the plurality, courts are not simply to take a poll to determine whether a substantial portion of the population is interested or concerned in a subject, courts will be required to somehow pass on the legitimacy of interest in a particular event or subject; what information is relevant to self-government. See *Whitney* v. *California,* 274 U. S. 357, 375 (1927) (Brandeis, J., concurring). The danger such a doctrine portends for freedom of the press seems apparent.

The plurality's doctrine also threatens society's interest in protecting private individuals from being thrust into the public eye by the distorting light of defamation. This danger exists since all human events are arguably within the area of "public or general concern." My Brother BRENNAN does not try to provide guidelines or standards by which courts are to decide the scope of public concern. He does, however, indicate that areas exist that are not the proper focus of public concern, and cites *Griswold* v. *Connecticut,* 381 U. S. 479 (1965). But it is apparent that in an era of a dramatic threat of overpopulation and one in which previously accepted standards of conduct are widely heralded as outdated, even the intimate and personal concerns with which the Court dealt in that case cannot be said to be outside the area of "public or general concern."

The threats and inadequacies of using the plurality's conditional privilege to resolve the conflict between the two basic values involved here have been illustrated by the experience courts have had in trying to deal with the right of privacy. See Cohen, A New Niche for the Fault Principle: A Forthcoming Newsworthiness Privilege in Libel Cases?, 18 U. C. L. A. L. Rev. 371, 379–381 (1970); Kalven, Privacy in Tort Law—Were Warren and Brandeis Wrong?, 31 Law & Contemp. Prob. 326, 336 (1966). The authors of the most famous of all law review articles recommended that no protection be given to privacy interests when the publication dealt with a "matter which is of public or general interest." Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 214 (1890). Yet cases dealing with this caveat raise serious questions whether it has substantially destroyed the right of privacy as Warren and Brandeis envisioned it.[3] For example, the publication of a picture of the body of plaintiff's daughter immediately after her death in an automobile accident was held to be protected. *Kelley* v. *Post Publishing Co.*, 327 Mass. 275, 98 N. E. 2d 286 (1951). And the publication of the details of the somewhat peculiar behavior of a former child prodigy, who had a passion for obscurity, was found to involve a matter of public concern. *Sidis* v. *F-R Pub. Corp.*, 113 F. 2d 806 (CA2 1940).

In *New York Times* the Court chose to balance the competing interests by seeming to announce a generally applicable rule. Here it is apparent that the general rule announced cannot have general applicability. The plurality's conditional privilege approach, when coupled

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[3] For cases in which the courts have protected the privacy of persons involved in dramatic public events see *Mau* v. *Rio Grande Oil, Inc.*, 28 F. Supp. 845 (ND Cal. 1939), and *Melvin* v. *Reid*, 112 Cal. App. 285, 297 P. 91 (1931).

with constitutionalizing of the factfinding process,[4] see Part VI of MR. JUSTICE BRENNAN's opinion, results in the adoption of an ad hoc balancing of the two interests involved. The Court is required to weigh the nuances of each particular circumstance on its scale of values regarding the relative importance of society's interest in protecting individuals from defamation against the importance of a free press. This scale may arguably be a more finely tuned instrument in a particular case. But whatever precision the ad hoc method supplies is achieved at a substantial cost in predictability and certainty. Moreover, such an approach will require this Court to engage in a constant and continuing supervision of defamation litigation throughout the country. See *Time, Inc.* v. *Pape,* 401 U. S. 279, 293 (1971) (HARLAN, J., dissenting); *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130, 171 (1967) (opinion of BLACK, J.).

Undoubtedly, ad hoc balancing may be appropriate in some circumstances that involve First Amendment problems. See, *e. g., Bates* v. *Little Rock,* 361 U. S. 516 (1960); *Tinker* v. *Des Moines Independent Community School Dist.,* 393 U. S. 503 (1969). But in view of the shortcomings of my Brother BRENNAN's test, defamation of a private individual by the mass media is not one of the occasions for unfettered ad hoc balancing. A generally applicable resolution is available that promises to provide an adequate balance between the interest in protecting individuals from defamation and the equally basic interest in protecting freedom of the press.

II

As the plurality recognizes here and as was recognized as the basic premise of the *New York Times* principle, the threat that defamation law presents for the values

[4] See *Time, Inc.* v. *Pape,* 401 U. S. 279 (1971).

encompassed in the concept of freedom of the press is that of self-censorship.[5] Our notions of liberty require a free and vigorous press that presents what it believes to be information of interest or importance; not timorous, afraid of an error that leaves it open to liability for hundreds of thousands of dollars. The size of the potential judgment that may be rendered against the press must be the most significant factor in producing self-censorship—a judgment like the one rendered against Metromedia would be fatal to many smaller publishers.[6]

The judgments that may be entered in defamation cases are unlike those that may be entered in most litigation since the bulk of the award is given to punish the defendant or to compensate for presumed damages. Here the jury awarded Mr. Rosenbloom $725,000 in punitive damages.[7] This huge sum was given not to compensate him for any injury but to punish Metromedia. The concept of punitive or exemplary damages was first articulated in *Huckle* v. *Money,* 2 Wils. 205, 95 Eng. Rep. 768 (K. B. 1763)—one of the general warrant cases. There Lord Camden found that the power to award such damages was inherent in the jury's exercise of uncontrolled discretion in the awarding of damages. See 1 T. Sedgwick, Damages §§ 347–350 (9th ed. 1912). Today these damages are rationalized as a way to punish the wrongdoer and to admonish others not to err. See Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1172 (1931). Thus they serve the same function as criminal penalties and are in effect private fines. Unlike criminal penalties, however, punitive damages are not awarded within discernible limits but can be awarded

[5] *New York Times Co.* v. *Sullivan,* 376 U. S., at 279.

[6] The jury awarded Mr. Rosenbloom $25,000 in general damages and $725,000 in punitive damages. The District Court reduced the punitive damages to $250,000 on remittitur.

[7] See n. 6, *supra.*

in almost any amount. Since there is not even an attempt to offset any palpable loss and since these damages are the direct product of the ancient theory of unlimited jury discretion, the only limit placed on the jury in awarding punitive damages is that the damages not be "excessive," and in some jurisdictions, that they bear some relationship to the amount of compensatory damages awarded.[8] See H. Oleck, Damages to Persons and Property § 275, pp. 557–560 (1955). The manner in which unlimited discretion may be exercised is plainly unpredictable. And fear of the extensive awards that may be given under the doctrine must necessarily produce the impingement on freedom of the press recognized in *New York Times.*

In addition to the huge awards that may be given under the label of punitive or exemplary damages, other doctrines in the law of defamation allow substantial damages without even an offer of evidence that there was actually injury. See *Montgomery* v. *Dennison,* 363 Pa. 255, 69 A. 2d 520 (1949); Restatement of Torts § 621 (1938). These doctrines create a legal presumption that substantial injuries "normally flow" from defamation. There is no requirement that there be even an offer of proof that there was in fact financial loss, physical or emotional suffering, or that the plaintiff's standing in the community was diminished. The effect is to give the jury essentially unlimited discretion and thus to give it much the same power it exercises under the labels of punitive or exemplary damages. The impingement upon free speech is the same no matter what label is attached.

[8] Most jurisdictions in this country recognize the concept of punitive or exemplary damages. Four States—Illinois, Massachusetts, Nebraska, and Washington—apparently do not recognize the doctrine. In Louisiana and Indiana the doctrine has limited applicability. See H. Oleck, Damages to Persons and Property § 269, p. 541 (1955).

The unlimited discretion exercised by juries in awarding punitive and presumed damages compounds the problem of self-censorship that necessarily results from the awarding of huge judgments. This discretion allows juries to penalize heavily the unorthodox and the unpopular and exact little from others. Such free wheeling discretion presents obvious and basic threats to society's interest in freedom of the press. And the utility of the discretion in fostering society's interest in protecting individuals from defamation is at best vague and uncertain. These awards are not to compensate victims; they are only windfalls. Certainly, the large judgments that can be awarded admonish the particular defendant affected as well as other potential transgressors not to publish defamation. The degree of admonition—the amount of the judgment in relation to the defamer's means—is not, however, tied to any concept of what is necessary to deter future conduct nor is there even any way to determine that the jury has considered the culpability of the conduct involved in the particular case. Thus the essence of the discretion is unpredictability and uncertainty.

The threats to society's interest in freedom of the press that are involved in punitive and presumed damages can largely be eliminated by restricting the award of damages to proved, actual injuries. The jury's wide-ranging discretion will largely be eliminated since the award will be based on essentially objective, discernible factors. And the self-censorship that results from the uncertainty created by the discretion as well as the self-censorship resulting from the fear of large judgments themselves would be reduced. At the same time, society's interest in protecting individuals from defamation will still be fostered. The victims of the defamation will be compensated for their real injuries. They will not be, however, assuaged far beyond their wounds. And, there

will be a substantial although imprecise and imperfect admonition to avoid future defamation by imposing the requirement that there be compensation for actual damages.

My Brother HARLAN argues that it is unnecessary to go so far. Although he recognizes the dangers involved in failing "to confine the amount of jury verdicts . . . within any ascertainable limits," MR. JUSTICE HARLAN suggests that on a finding of actual malice punitive damages may be awarded if they "bear a reasonable and purposeful relationship to the actual harm done." My Brother HARLAN envisions jurors being instructed [9] to consider the deterrent function of punitive damages and to try to gear the punitive damages awarded in some undetermined way to actual injury. Apparently, the jury under the supervision of the court would weigh the content of the speech and the surrounding circumstances—*inter alia,* the position of the plaintiff, the wealth of the defendant, and the nature of the instrument of publication—on the scale of their values and determine what amount is necessary in light of the various interests involved. Since there would be no objective standard by which to measure the jury's decision there would be no predetermined limit of jury discretion and all of the threats to freedom of the press involved in such discretion would remain. The chant of some new incantation will, of course, provide clear authority for a court to substitute its values for the jury's and remake the decision. If this is what my Brother

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[9] "[A] jury instruction is not abracadabra. It is not a magical incantation, the slightest deviation from which will break the spell. Only its poorer examples are formalistic codes recited by a trial judge to please appellate masters. At its best, it is simple, rugged communication from a trial judge to a jury of ordinary people, entitled to be appraised in terms of its net effect." *Time, Inc.* v. *Hill,* 385 U. S. 374, 418 (1967) (Fortas, J., dissenting).

HARLAN envisions, he is merely moving the ad hoc balancing from the question of fault to the question of damages.

I believe that the appropriate resolution of the clash of societal values here is to restrict damages to actual losses. See Hill, The Bill of Rights and the Supervisory Power, 69 Col. L. Rev. 181, 191 n. 62 (1969). Of course, damages can be awarded for more than direct pecuniary loss but they must be related to some proved harm. See Wright, Defamation, Privacy, and the Public's Right to Know: A National Problem and a New Approach, 46 Tex. L. Rev. 630, 648 (1968). If awards are so limited in cases involving private individuals—persons first brought to public attention by the defamation that is the subject of the lawsuit—it will be unnecessary to rely, as both the plurality and to some extent MR. JUSTICE HARLAN do, on somewhat elusive concepts [10] of the degree of fault, and unnecessary, for constitutional purposes, to engage in ad hoc balancing of the competing interests involved.[11] States would be essentially free to continue the evolution of the common law of defamation and to articulate whatever fault standard best suits the State's need.[12]

The only constitutional caveat should be that absolute or strict liability, like uncontrolled damages and private

[10] See n. 9, *supra*.

[11] Of course, reliance on limiting awards to compensation for actual loss will require some review of the facts of particular cases. But that review will be limited to essentially objectively determinable issues; the contents of the publication will not have to be considered.

[12] Leaving States free to impose liability when defamation is found to be the result of negligent conduct, should make it somewhat more likely that a private person will have a meaningful forum in which to vindicate his reputation. If the standard of care is higher, it would seem that publishers will be more likely to assert the defense of truth than simply contend that they did not breach the standard.

fines, cannot be used.[13] The effect of imposing liability without fault is to place "the printed, written or spoken word in the same class with the use of explosives or the keeping of dangerous animals." W. Prosser, The Law of Torts § 108, p. 792 (3d ed. 1964). Clearly, this is inconsistent with the concepts of freedom of the press.

Thus in this case I would reverse the judgment of the Court of Appeals for the Third Circuit and remand the case for a determination of whether Mr. Rosenbloom can show any actual loss.

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[13] Strict liability for defamation was first clearly established in *Jones* v. *E. Hulton & Co.*, [1909] 2 K. B. 444, aff'd, [1910] A. C. 20. See Smith, Jones v. Hulton: Three Conflicting Judicial Views As to a Question of Defamation, 60 U. Pa. L. Rev. 365 and 461 (1912). The standard has been applied in many jurisdictions in this country. See, *e. g.*, *Upton* v. *Times-Democrat Publishing Co.*, 104 La. 141, 28 So. 970 (1900); *Laudati* v. *Stea*, 44 R. I. 303, 117 A. 422 (1922); *Taylor* v. *Hearst*, 107 Cal. 262, 40 P. 392 (1895). See also Restatement of Torts § 582, comment *g* (1938). Liability without fault has not been applied, however, in Pennsylvania. See *Summit Hotel Co.* v. *National Broadcasting Co.*, 336 Pa. 182, 8 A. 2d 302 (1939), Pa. Stat. Ann., Tit. 12, § 1583 (1953).

GRIFFIN ET AL. *v.* BRECKENRIDGE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 144. Argued January 13–14, 1971—Decided June 7, 1971

Petitioners, Negro citizens of Mississippi, filed a damages action under 42 U. S. C. § 1985 (3), charging that respondents, white citizens of Mississippi, conspired to assault petitioners, who were passengers "travelling upon the federal, state, and local highways" in an automobile driven by one Grady, a citizen of Tennessee, for the purpose of preventing them "and other Negro-Americans, through . . . force, violence and intimidation, from seeking the equal protection of the laws and from enjoying the equal rights, privileges and immunities of citizens under the laws of the United States and the State of Mississippi," including rights to free speech, assembly, association, and movement, and the right not to be enslaved. The complaint alleged that pursuant to the conspiracy respondents, mistakenly believing Grady to be a civil rights worker, blocked the travellers' passage on the public highways, forced them from the car, held them at bay with firearms, and amidst threats of murder clubbed them, inflicting serious physical injury. Section 1985 (3) provides: "If two or more persons . . . conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws [and] in any case of conspiracy set forth in this section, if one or more persons engaged therein do . . . any act in furtherance of the object of such conspiracy, whereby another is injured . . . or deprived of . . . any right or privilege of a citizen of the United States, the party so injured or deprived" may have a cause of action for damages against the conspirators. The District Court dismissed the complaint for failure to state a cause of action, relying on *Collins* v. *Hardyman,* 341 U. S. 651, where the Court in order to avoid difficult constitutional questions, in effect construed § 1985 (3) to reach only conspiracies under color of state law. The Court of Appeals affirmed. *Held:*

1. Section 1985 (3) does not require state action but reaches private conspiracies, such as the one alleged in the complaint here, that are aimed at invidiously discriminatory deprivation of the

equal enjoyment of rights secured to all by law, as is clearly manifested by the wording and legislative history of the statute and companion statutory provisions, and the constitutional impediments that influenced the Court's construction of the statute in *Collins, supra,* as is clear from more recent decisions, simply do not exist. Pp. 95–103.

2. Congress had the constitutional authority to reach a private conspiracy of the sort alleged in the complaint in this case both under § 2 of the Thirteenth Amendment and under its power to protect the right of interstate travel. Pp. 104–106.

410 F. 2d 817, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, DOUGLAS, HARLAN (except for Part V-B), BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. HARLAN, J., filed a concurring statement, *post,* p. 107.

Stephen J. Pollak argued the cause for petitioners. With him on the brief were *Gary J. Greenberg* and *John A. Bleveans.*

W. D. Moore, by appointment of the Court, 400 U. S. 1006, argued the cause for respondents. With him on the brief was *Helen J. McDade.*

Lawrence G. Wallace argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Griswold* and *Louis F. Claiborne.*

MR. JUSTICE STEWART delivered the opinion of the Court.

This litigation began when the petitioners filed a complaint in the United States District Court for the Southern District of Mississippi, seeking compensatory and punitive damages and alleging, in substantial part, as follows:

> "2. The plaintiffs are Negro citizens of the United States and residents of Kemper County, Mississippi. . . .

"3. The defendants, Lavon Breckenridge and James Calvin Breckenridge, are white adult citizens of the United States residing in DeKalb, Kemper County, Mississippi.

"4. On July 2, 1966, the . . . plaintiffs . . . were passengers in an automobile belonging to and operated by R. G. Grady of Memphis, Tennessee. They were travelling upon the federal, state and local highways in and about DeKalb, Mississippi, performing various errands and visiting friends.

"5. On July 2, 1966 defendants, acting under a mistaken belief that R. G. Grady was a worker for Civil Rights for Negroes, wilfully and maliciously conspired, planned, and agreed to block the passage of said plaintiffs in said automobile upon the public highways, to stop and detain them and to assault, beat and injure them with deadly weapons. Their purpose was to prevent said plaintiffs and other Negro-Americans, through such force, violence and intimidation, from seeking the equal protection of the laws and from enjoying the equal rights, privileges and immunities of citizens under the laws of the United States and the State of Mississippi, including but not limited to their rights to freedom of speech, movement, association and assembly; their right to petition their government for redress of their grievances; their rights to be secure in their persons and their homes; and their rights not to be enslaved nor deprived of life and liberty other than by due process of law.

"6. Pursuant to their conspiracy, defendants drove their truck into the path of Grady's automobile and blocked its passage over the public road. Both defendants then forced Grady and said plaintiffs to get out of Grady's automobile and prevented said plaintiffs from escaping while defendant James

Calvin Breckenridge clubbed Grady with a blackjack, pipe or other kind of club by pointing firearms at said plaintiffs and uttering threats to kill and injure them if defendants' orders were not obeyed, thereby terrorizing them to the utmost degree and depriving them of their liberty.

"7. Pursuant to their conspiracy, defendants wilfully, intentionally, and maliciously menaced and assaulted each of the said plaintiffs by pointing firearms and wielding deadly blackjacks, pipes or other kind of clubs, while uttering threats to kill and injure said plaintiffs, causing them to become stricken with fear of immediate injury and death and to suffer extreme terror, mental anguish and emotional and physical distress.

"8. Pursuant to defendants' conspiracy, defendant James Calvin Breckenridge then wilfully, intentionally and maliciously clubbed each of said plaintiffs on and about the head, severely injuring all of them, while both defendants continued to assault said plaintiffs and prevent their escape by pointing their firearms at them.

. . . . .

"12. By their conspiracy and acts pursuant thereto, the defendants have wilfully and maliciously, directly and indirectly, intimidated and prevented the . . . plaintiffs . . . and other Negro-Americans from enjoying and exercising their rights, privileges and immunities as citizens of the United States and the State of Mississippi, including but not limited to, their rights to freedom of speech, movement, association and assembly; the right to petition their government for redress of grievances; their right to be secure in their person; their right not to be enslaved nor deprived of life, liberty or property other than by due process of law, and their

rights to travel the public highways without restraint in the same terms as white citizens in Kemper County, Mississippi . . . ."

The jurisdiction of the federal court was invoked under the language of Rev. Stat. § 1980, 42 U. S. C. § 1985 (3), which provides:

> "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws [and] in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

The District Court dismissed the complaint for failure to state a cause of action, relying on the authority of this Court's opinion in *Collins* v. *Hardyman,* 341 U. S. 651, which in effect construed the above language of § 1985 (3) as reaching only conspiracies under color of state law. The Court of Appeals for the Fifth Circuit affirmed the judgment of dismissal. 410 F. 2d 817. Judge Goldberg's thorough opinion for that court expressed "serious doubts" as to the "continued vitality" of *Collins* v. *Hardyman, id.,* at 823, and stated that "it would not surprise us if Collins v. Hardyman were disapproved and if § 1985 (3) were held to embrace private conspiracies to interfere with rights of national citizenship," *id.,* at 825–826 (footnote omitted), but concluded that "[s]ince we

may not adopt what the Supreme Court has expressly rejected, we obediently abide the mandate in *Collins," id.,* at 826–827. We granted certiorari, 397 U. S. 1074, to consider questions going to the scope and constitutionality of 42 U. S. C. § 1985 (3).

I

Collins v. *Hardyman* was decided 20 years ago. The complaint in that case alleged that the plaintiffs were members of a political club that had scheduled a meeting to adopt a resolution opposing the Marshall Plan, and to send copies of the resolution to appropriate federal officials; that the defendants conspired to deprive the plaintiffs of their rights as citizens of the United States peaceably to assemble and to equal privileges and immunities under the laws of the United States; that, in furtherance of the conspiracy, the defendants proceeded to the meeting site and, by threats and violence, broke up the meeting, thus interfering with the right of the plaintiffs to petition the Government for the redress of grievances; and that the defendants did not interfere or conspire to interfere with the meetings of other political groups with whose opinions the defendants agreed. The Court held that this complaint did not state a cause of action under § 1985 (3): [1]

> "The complaint makes no claim that the conspiracy or the overt acts involved any action by state officials, or that defendants even pretended to act under color of state law. It is not shown that defendants had or claimed any protection or immunity from the law of the State, or that they in fact enjoyed such because of any act or omission by state authorities." 341 U. S., at 655.
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> "What we have here is not a conspiracy to affect in any way these plaintiffs' equality of protection by

[1] The statute was then 8 U. S. C. § 47 (3) (1946 ed.).

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> the law, or their equality of privileges and immunities under the law. There is not the slightest allegation that defendants were conscious of or trying to influence the law, or were endeavoring to obstruct or interfere with it. . . . Such private discrimination is not inequality before the law unless there is some manipulation of the law or its agencies to give sanction or sanctuary for doing so." *Id.*, at 661.

The Court was careful to make clear that it was deciding no constitutional question, but simply construing the language of the statute, or more precisely, determining the applicability of the statute to the facts alleged in the complaint: [2]

> "We say nothing of the power of Congress to authorize such civil actions as respondents have commenced or otherwise to redress such grievances as they assert. We think that Congress has not, in the narrow class of conspiracies defined by this statute, included the conspiracy charged here. We therefore reach no constitutional questions." *Id.*, at 662.

Nonetheless, the Court made equally clear that the construction it gave to the statute was influenced by the constitutional problems that it thought would have otherwise been engendered:

> "It is apparent that, if this complaint meets the requirements of this Act, it raises constitutional problems of the first magnitude that, in the light of history, are not without difficulty. These would

[2] "We do not say that no conspiracy by private individuals could be of such magnitude and effect as to work a deprivation of equal protection of the laws, or of equal privileges and immunities under laws. . . . But here nothing of that sort appears. We have a case of a lawless political brawl, precipitated by a handful of white citizens against other white citizens." 341 U. S., at 662.

include issues as to congressional power under and apart from the Fourteenth Amendment, the reserved power of the States, the content of rights derived from national as distinguished from state citizenship, and the question of separability of the Act in its application to those two classes of rights." *Id.*, at 659.

Mr. Justice Burton filed a dissenting opinion, joined by MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS. The dissenters thought that "[t]he language of the statute refutes the suggestion that action under color of state law is a necessary ingredient of the cause of action which it recognizes." *Id.*, at 663. Further, the dissenters found no constitutional difficulty in according to the statutory words their apparent meaning:

> "Congress certainly has the power to create a federal cause of action in favor of persons injured by private individuals through the abridgment of federally created constitutional rights. It seems to me that Congress has done just this in [§ 1985 (3)]. This is not inconsistent with the principle underlying the Fourteenth Amendment. That amendment prohibits the respective states from making laws abridging the privileges or immunities of citizens of the United States or denying to any person within the jurisdiction of a state the equal protection of the laws. Cases holding that those clauses are directed only at state action are not authority for the contention that Congress may not pass laws supporting rights which exist apart from the Fourteenth Amendment." *Id.*, at 664.

II

Whether or not *Collins* v. *Hardyman* was correctly decided on its own facts is a question with which we need not here be concerned. But it is clear, in the light of

the evolution of decisional law in the years that have passed since that case was decided, that many of the constitutional problems there perceived simply do not exist. Little reason remains, therefore, not to accord to the words of the statute their apparent meaning. That meaning is confirmed by judicial construction of related laws, by the structural setting of § 1985 (3) itself, and by its legislative history. And a fair reading of the allegations of the complaint in this case clearly brings them within this meaning of the statutory language. As so construed, and as applied to this complaint, we have no doubt that the statute was within the constitutional power of Congress to enact.

III

We turn, then, to an examination of the meaning of § 1985 (3). On their face, the words of the statute fully encompass the conduct of private persons. The provision speaks simply of "two or more persons in any State or Territory" who "conspire or go in disguise on the highway or on the premises of another." Going in disguise, in particular, is in this context an activity so little associated with official action and so commonly connected with private marauders that this clause could almost never be applicable under the artificially restrictive construction of *Collins*. And since the "going in disguise" aspect must include private action, it is hard to see how the conspiracy aspect, joined by a disjunctive, could be read to require the involvement of state officers.

The provision continues, specifying the motivation required "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." This language is, of course, similar to that of § 1 of the Fourteenth Amend-

ment, which in terms speaks only to the States,[3] and judicial thinking about what can constitute an equal protection deprivation has, because of the Amendment's wording, focused almost entirely upon identifying the requisite "state action" and defining the offending forms of state law and official conduct. A century of Fourteenth Amendment adjudication has, in other words, made it understandably difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons. Yet there is nothing inherent in the phrase that requires the action working the deprivation to come from the State. See, *e. g., United States* v. *Harris,* 106 U. S. 629, 643. Indeed, the failure to mention any such requisite can be viewed as an important indication of congressional intent to speak in § 1985 (3) of *all* deprivations of "equal protection of the laws" and "equal privileges and immunities under the laws," whatever their source.

The approach of this Court to other Reconstruction civil rights statutes in the years since *Collins* has been to "accord [them] a sweep as broad as [their] language." *United States* v. *Price,* 383 U. S. 787, 801; *Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409, 437. Moreover, very similar language in closely related statutes has early and late received an interpretation quite inconsistent with that given to § 1985 (3) in *Collins.* In construing the exact criminal counterpart of § 1985 (3), the Court in *United States* v. *Harris, supra,* observed that the statute was "not limited to take effect only in case [of state action]," *id.,* at 639, but "was framed to protect from invasion by private persons, the equal privileges

[3] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

and immunities under the laws, of all persons and classes of persons," *id.*, at 637. In *United States* v. *Williams*, 341 U. S. 70, the Court considered the closest remaining criminal analogue to § 1985 (3), 18 U. S. C. § 241.[4] Mr. Justice Frankfurter's plurality opinion, without contravention from the concurrence or dissent, concluded that "if language is to carry any meaning at all it must be clear that the principal purpose of [§ 241], unlike [18 U. S. C. § 242], was to reach private action rather than officers of a State acting under its authority. Men who 'go in disguise upon the public highway, or upon the premises of another' are not likely to be acting in official capacities." 341 U. S., at 76. "Nothing in [the] terms [of § 241] indicates that color of State law was to be relevant to prosecution under it." *Id.*, at 78 (footnote omitted).

A like construction of § 1985 (3) is reinforced when examination is broadened to take in its companion statutory provisions. There appear to be three possible forms for a state action limitation on § 1985 (3)—that there must be action under color of state law, that there must be interference with or influence upon state authorities, or that there must be a private conspiracy so massive and effective that it supplants those authorities and thus satisfies the state action requirement.[5] The Congress

[4] "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

"If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

"They shall be fined not more than $5,000 or imprisoned not more than ten years, or both."

The penalty section was amended in 1968. See 18 U. S. C. § 241 (1964 ed., Supp. V).

[5] This last was suggested in *Collins* v. *Hardyman*. See n. 2, *supra*.

that passed the Civil Rights Act of 1871, 17 Stat. 13, § 2 of which is the parent of § 1985 (3), dealt with each of these three situations in explicit terms in other parts of the same Act. An element of the cause of action established by the first section, now 42 U. S. C. § 1983, is that the deprivation complained of must have been inflicted under color of state law.[6] To read any such requirement into § 1985 (3) would thus deprive that section of all independent effect. As for interference with state officials, § 1985 (3) itself contains another clause dealing explicitly with that situation.[7] And § 3 of the 1871 Act provided for military action at the command of the President should massive private lawlessness render state authorities powerless to protect the federal rights of classes of citizens, such a situation being defined by the Act as constituting a state denial of equal protection. 17 Stat. 14. Given the existence of these three provisions, it is almost impossible to believe that Congress intended, in the dissimilar language of the portion of § 1985 (3) now before us, simply to duplicate the coverage of one or more of them.

The final area of inquiry into the meaning of § 1985 (3) lies in its legislative history. As originally introduced in the 42d Congress, the section was solely a criminal provision outlawing certain conspiratorial acts done with

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[6] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[7] "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another . . . for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . . ."

intent "to do any act in violation of the rights, privileges, or immunities of another person . . . ." Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871). Introducing the bill, the House sponsor, Representative Shellabarger, stressed that "the United States always has assumed to enforce, as against the States, *and also persons,* every one of the provisions of the Constitution." *Id.,* at App. 69 (emphasis supplied). The enormous sweep of the original language led to pressures for amendment, in the course of which the present civil remedy was added. The explanations of the added language centered entirely on the animus or motivation that would be required, and there was no suggestion whatever that liability would not be imposed for purely private conspiracies. Representative Willard, draftsman of the limiting amendment, said that his version "provid[ed] that the essence of the crime should consist in the intent to deprive a person of the equal protection of the laws and of equal privileges and immunities under the laws; in other words, that the Constitution secured, and was only intended to secure, equality of rights and immunities, and that we could only punish by United States laws a denial of that equality." *Id.,* at App. 188. Representative Shellabarger's explanation of the amendment was very similar: "The object of the amendment is . . . to confine the authority of this law to the prevention of deprivations which shall attack the equality of rights of American citizens; that any violation of the right, the *animus* and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of the remedies of this section." *Id.,* at 478.[8]

[8] The conspiracy and disguise language of what finally became § 1985 (3) appears to have been borrowed from the parent of 18 U. S. C. § 241. See Cong. Globe, 41st Cong., 2d Sess., 3611–3613 (1870).

Other supporters of the bill were even more explicit in their insistence upon coverage of private action. Shortly before the amendment was introduced, Representative Shanks urged, "I do not want to see [this measure] so amended that there shall be taken out of it the frank assertion of the power of the national Government to protect life, liberty, and property, irrespective of the act of the State." *Id.*, at App. 141. At about the same time, Representative Coburn asked: "Shall we deal with individuals, or with the State as a State? If we can deal with individuals, that is a less radical course, and works less interference with local governments. . . . It would seem more accordant with reason that the easier, more direct, and more certain method of dealing with individual criminals was preferable, and that the more thorough method of superseding State authority should only be resorted to when the deprivation of rights and the condition of outlawry was so general as to prevail in all quarters in defiance of or by permission of the local government." *Id.*, at 459. After the amendment had been proposed in the House, Senator Pool insisted in support of the bill during Senate debate that "Congress must deal with individuals, not States. It must punish the offender against the rights of the citizen . . . ." *Id.*, at 608.

It is thus evident that all indicators—text, companion provisions, and legislative history—point unwaveringly to § 1985 (3)'s coverage of private conspiracies. That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others. For, though the supporters of the legislation insisted on coverage of private conspiracies, they were equally emphatic that they did not believe, in the words of Representative Cook, "that Congress has a right to punish an assault and battery when committed by two or more per-

sons within a State." *Id.*, at 485. The constitutional shoals that would lie in the path of interpreting § 1985 (3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. See the remarks of Representatives Willard and Shellabarger, quoted *supra,* at 100. The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.[9] The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.[10]

IV

We return to the petitioners' complaint to determine whether it states a cause of action under § 1985 (3) as so construed. To come within the legislation a complaint must allege that the defendants did (1) "conspire or go in disguise on the highway or on the premises of another" (2) "for the purpose of depriving, either directly

[9] We need not decide, given the facts of this case, whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of § 1985 (3) before us. Cf. Cong. Globe, 42d Cong., 1st Sess., 567 (1871) (remarks of Sen. Edmunds).

[10] The motivation requirement introduced by the word "equal" into the portion of § 1985 (3) before us must not be confused with the test of "specific intent to deprive a person of a federal right made definite by decision or other rule of law" articulated by the plurality opinion in *Screws* v. *United States,* 325 U. S. 91, 103, for prosecutions under 18 U. S. C. § 242. Section 1985 (3), unlike § 242, contains no specific requirement of "wilfulness." Cf. *Monroe* v. *Pape,* 365 U. S. 167, 187. The motivation aspect of § 1985 (3) focuses not on scienter in relation to deprivation of rights but on invidiously discriminatory animus.

or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." It must then assert that one or more of the conspirators (3) did, or caused to be done, "any act in furtherance of the object of [the] conspiracy," whereby another was (4a) "injured in his person or property" or (4b) "deprived of having and exercising any right or privilege of a citizen of the United States."

The complaint fully alleges, with particulars, that the respondents conspired to carry out the assault. It further asserts that "[t]heir purpose was to prevent [the] plaintiffs and other Negro-Americans, through . . . force, violence and intimidation, from seeking the equal protection of the laws and from enjoying the equal rights, privileges and immunities of citizens under the laws of the United States and the State of Mississippi," including a long list of enumerated rights such as free speech, assembly, association, and movement. The complaint further alleges that the respondents were "acting under a mistaken belief that R. G. Grady was a worker for Civil Rights for Negroes." These allegations clearly support the requisite animus to deprive the petitioners of the equal enjoyment of legal rights because of their race. The claims of detention, threats, and battery amply satisfy the requirement of acts done in furtherance of the conspiracy. Finally, the petitioners—whether or not the nonparty Grady was the main or only target of the conspiracy—allege personal injury resulting from those acts. The complaint, then, states a cause of action under § 1985 (3). Indeed, the conduct here alleged lies so close to the core of the coverage intended by Congress that it is hard to conceive of wholly private conduct that would come within the statute if this does not. We must, accordingly, consider whether Congress had constitutional power to enact a statute that imposes liability under federal law for the conduct alleged in this complaint.

V

The constitutionality of § 1985 (3) might once have appeared to have been settled adversely by *United States* v. *Harris,* 106 U. S. 629, and *Baldwin* v. *Franks,* 120 U. S. 678, which held unconstitutional its criminal counterpart, then § 5519 of the Revised Statutes.[11] The Court in those cases, however, followed a severability rule that required invalidation of an entire statute if any part of it was unconstitutionally overbroad, unless its different parts could be read as wholly independent provisions. *E. g., Baldwin* v. *Franks, supra,* at 685. This Court has long since firmly rejected that rule in such cases as *United States* v. *Raines,* 362 U. S. 17, 20–24. Consequently, we need not find the language of § 1985 (3) now before us constitutional in all its possible applications in order to uphold its facial constitutionality and its application to the complaint in this case.

That § 1985 (3) reaches private conspiracies to deprive others of legal rights can, of itself, cause no doubts of its constitutionality. It has long been settled that 18 U. S. C. § 241, a criminal statute of far broader phrasing (see n. 4, *supra*), reaches wholly private conspiracies and is constitutional. *E. g., In re Quarles,* 158 U. S. 532; *Logan* v. *United States,* 144 U. S. 263, 293–295; *United States* v. *Waddell,* 112 U. S. 76, 77–81; *Ex parte Yarbrough,* 110 U. S. 651. See generally *Twining* v. *New Jersey,* 211 U. S. 78, 97–98. Our inquiry, therefore, need go only to identifying a source of congressional power to reach the private conspiracy alleged by the complaint in this case.

A

Even as it struck down Rev. Stat. § 5519 in *United States* v. *Harris,* the Court indicated that parts of its coverage would, if severable, be constitutional under the

[11] Rev. Stat. § 5519 was repealed in 1909. 35 Stat. 1154.

Thirteenth Amendment. 106 U. S., at 640–641. And surely there has never been any doubt of the power of Congress to impose liability on private persons under § 2 of that amendment, "for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." *Civil Rights Cases,* 109 U. S. 3, 20. See also *id.,* at 23; *Clyatt* v. *United States,* 197 U. S. 207, 216, 218; *Jones* v. *Alfred H. Mayer Co.,* 392 U. S., at 437–440. Not only may Congress impose such liability, but the varieties of private conduct that it may make criminally punishable or civilly remediable extend far beyond the actual imposition of slavery or involuntary servitude. By the Thirteenth Amendment, we committed ourselves as a Nation to the proposition that the former slaves and their descendants should be forever free. To keep that promise, "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." *Jones* v. *Alfred H. Mayer Co., supra,* at 440. We can only conclude that Congress was wholly within its powers under § 2 of the Thirteenth Amendment in creating a statutory cause of action for Negro citizens who have been the victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men.

B

Our cases have firmly established that the right of interstate travel is constitutionally protected, does not necessarily rest on the Fourteenth Amendment, and is assertable against private as well as governmental interference. *Shapiro* v. *Thompson,* 394 U. S. 618, 629–631; *id.,* at 642–644 (concurring opinion); *United States*

v. *Guest,* 383 U. S. 745, 757–760 and n. 17; *Twining* v. *New Jersey,* 211 U. S. 78, 97; *Slaughter-House Cases,* 16 Wall. 36, 79–80; *Crandall* v. *Nevada,* 6 Wall. 35, 44, 48–49; *Passenger Cases,* 7 How. 283, 492 (Taney, C. J., dissenting). The "right to pass freely from State to State" has been explicitly recognized as "among the rights and privileges of National citizenship." *Twining* v. *New Jersey, supra,* at 97. That right, like other rights of national citizenship, is within the power of Congress to protect by appropriate legislation. *E. g., United States* v. *Guest, supra,* at 759; *United States* v. *Classic,* 313 U. S. 299, 314–315; *Ex parte Yarbrough,* 110 U. S. 651; *Oregon* v. *Mitchell,* 400 U. S. 112, 285–287 (concurring and dissenting opinion).

The complaint in this case alleged that the petitioners "were travelling upon the federal, state and local highways in and about" DeKalb, Kemper County, Mississippi. Kemper County is on the Mississippi-Alabama border. One of the results of the conspiracy, according to the complaint, was to prevent the petitioners and other Negroes from exercising their "rights to travel the public highways without restraint in the same terms as white citizens in Kemper County, Mississippi." Finally, the conspiracy was alleged to have been inspired by the respondents' erroneous belief that Grady, a Tennessean, was a worker for Negro civil rights. Under these allegations it is open to the petitioners to prove at trial that they had been engaging in interstate travel or intended to do so, that their federal right to travel interstate was one of the rights meant to be discriminatorily impaired by the conspiracy, that the conspirators intended to drive out-of-state civil rights workers from the State, or that they meant to deter the petitioners from associating with such persons. This and other evidence could make it clear that the petitioners had suffered from conduct that Congress may reach under its power to protect the right of interstate travel.

C

In identifying these two constitutional sources of congressional power, we do not imply the absence of any other. More specifically, the allegations of the complaint in this case have not required consideration of the scope of the power of Congress under § 5 of the Fourteenth Amendment.[12] By the same token, since the allegations of the complaint bring this cause of action so close to the constitutionally authorized core of the statute, there has been no occasion here to trace out its constitutionally permissible periphery.

The judgment is reversed, and the case is remanded to the United States District Court for the Southern District of Mississippi for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE HARLAN, concurring.

I agree with the Court's opinion, except that I find it unnecessary to rely on the "right of interstate travel" as a premise for justifying federal jurisdiction under § 1985 (3). With that reservation, I join the opinion and judgment of the Court.

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[12] See *Katzenbach* v. *Morgan*, 384 U. S. 641; *Oregon* v. *Mitchell*, 400 U. S. 112, 135 (opinion of DOUGLAS, J.), 229 (opinion of BRENNAN, WHITE, and MARSHALL, JJ.); *United States* v. *Guest*, 383 U. S. 745, 761 (Clark, J., concurring), 774 (BRENNAN, J., concurring and dissenting).

ELY *v.* KLAHR ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. 548. Argued March 23, 1971—Decided June 7, 1971

Appellant, in this suit filed in 1964 challenging the constitutionality of Arizona's state legislative districting laws, attacked the State's third attempt to enact a valid apportionment plan. The District Court found the plan constitutionally deficient in several respects but because of the proximity of the 1970 elections (which would be the last held before the 1970 census data became available for new plans) and because the court concluded that the main difficulty was the State's large population increase since the last census, upheld the legislature's plan as the least unsatisfactory alternative (including appellant's plan). In its order the court "assume[d] that the Arizona Legislature will by November 1, 1971, enact a valid plan of reapportionment," but that "[u]pon failure of the Legislature so to do, any party to this action may apply to the court for appropriate relief." Though the 1970 general election was held on the basis of the state law as thus upheld, appellant contends that the District Court should now adopt an apportionment plan which would be displaced only if the legislature adopts a valid plan. *Held:* The District Court did not err in affording the legislature a reasonable time to enact a constitutionally adequate apportionment plan for the 1972 elections, on the basis of the 1970 census figures which will presumably be available, that court being in the best position to know if the November 1 deadline will be adequate to facilitate its consideration of the legislative plan and to enable it to prepare its own plan if the official version is not constitutional. Pp. 114–115.

313 F. Supp. 148, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a concurring opinion, in which BLACK, J., joined, *post*, p. 116. HARLAN, J., filed a statement concurring in the result, *post*, p. 123.

Philip J. Shea argued the cause and filed a brief for appellant.

John M. McGowan II, Special Assistant Attorney General of Arizona, argued the cause for appellees. With him on the brief was *Gary K. Nelson,* Attorney General.

MR. JUSTICE WHITE delivered the opinion of the Court.

This appeal is the latest step in the long and fitful attempt to devise a constitutionally valid reapportionment scheme for the State of Arizona. For the reasons given, we affirm the judgment of the District Court.

In April 1964, shortly before this Court's decision in *Reynolds* v. *Sims,* 377 U. S. 533 (1964), and in its companion cases, suit was filed in the District Court for the District of Arizona attacking the then-existing state districting laws as unconstitutional.[1] Following those decisions, the three-judge District Court ordered all proceedings stayed "until the expiration of a period of 30 days next following adjournment of the next session" of the Arizona Legislature. (App. 2–3, unreported.) Nearly a year later, on May 18, 1965, after the legislature had failed to act, the court again deferred trial pending a special legislative session called by the Governor to deal with the necessity of reapportionment. The special session enacted Senate Bill 11, which among other things provided one senator for a county of 7,700 and another for a county of 55,000. The session did not undertake to reapportion the House. Trial was had in November 1965 and on February 2, 1966, the court enjoined enforcement of Senate Bill 11, which, it held, "bears evidence of having been thrown together as a result of considerations wholly apart from those laid down as compulsory by the

[1] Throughout this litigation, congressional districting has been at issue as well and has suffered the same fate as reapportionment of the legislature. However, appeal has been taken here only with respect to the lower court's decree concerning legislative reapportionment.

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decisions of the Supreme Court." *Klahr* v. *Goddard,* 250 F. Supp. 537, 541 (Ariz. 1966). The plan, said the court, was "shot through with invidious discrimination." *Id.,* at 546. The court also held that the existing House plan produced disparities of nearly four to one, which was clearly impermissible under our decisions.

Noting that the legislature "has had ample opportunity" to produce a valid reapportionment plan, the court formulated its own plan as a "temporary and provisional reapportionment," designed to govern the impending preparation for the 1966 elections. The plan was to be in effect "for the 1966 primary and general elections and for such further elections as may follow until such time as the Legislature itself may adopt different and valid plans for districting and reapportionment." [2] *Id.,* at 543. It retained jurisdiction, as it has done since.

Some 16 months later, in June 1967, the Arizona Legislature enacted "Chapter 1, 28th Legislature," which again attempted reapportionment of the State. Within the month, suit was filed charging that this Act also was unconstitutional, but the court deferred action pending the outcome of a referendum [3] scheduled with the November 1968 election for the legislature and Congress. It ordered those elections to be held in accordance with its own 1966 plan, as supplemented. *Klahr* v. *Williams,* 289 F. Supp. 829 (Ariz. 1967). The legislative plan was approved by the voters in the referendum and signed into law by the Governor on January 17, 1969. A hearing on the plan was commenced the same day. The court concluded on July 22, 1969, that the plan, which

[2] The court issued two supplemental decrees in 1966 which modified and clarified the original order. 254 F. Supp. 997, 289 F. Supp. 827.

[3] Apparently under Arizona law, a referendum is required before a bill can become law where, as here, sufficient signatures against the bill are filed with the Secretary of State. See *Klahr* v. *Williams,* 289 F. Supp. 829 (Ariz. 1967).

set up "election districts" based on population and "legislative" subdistricts based on voter registration, would allow deviations among the legislative subdistricts of up to 40% from *ideal* until 1971, and up to 16% thereafter. The court properly concluded that this plan was invalid under *Kirkpatrick* v. *Preisler,* 394 U. S. 526 (1969), and *Wells* v. *Rockefeller,* 394 U. S. 542 (1969), since the legislature had operated on the notion that a 16% deviation was *de minimis* and consequently made no effort to achieve greater equality. The court ordered its 1966 plan continued once again "until the Legislature shall have adopted different, valid, and effective plans for redistricting and reapportionment . . . ." (App. 85, unreported.) It refused to order the 1970 elections to be held at large, since there was "ample time" for the legislature "to meet its obligation" before the machinery for conducting the 1970 elections would be engaged.

The legislature attempted a third time to enact a valid plan. It passed "Chapter 1, House Bill No. 1, 29th Legislature," which was signed into law by the Governor on January 22, 1970, and which is the plan involved in the decision from which this appeal is taken. Appellant challenged the bill, alleging that it "substantially disenfranchises, unreasonably and unnecessarily, a large number of the citizens of the state," App. 106, and "creates legislative districts that are grossly unequal." App. 108. Appellant at that time submitted his own plan for the court's consideration. Appellant's primary dispute with the new plan was that it substantially misconceived the current population distribution in Arizona. The court agreed that appellant's plan, which utilized 1968 projections of 1960 and 1965 Arizona censuses, could "very likely [result in] a valid reapportionment plan" but it declined to implement the plan, since it was based on census tracts, rather than the existing precinct boundaries, and "the necessary reconstruction of the election

precincts could not be accomplished in time" to serve the 1970 election, whose preliminary preparations were to begin in a few weeks. *Klahr* v. *Williams,* 313 F. Supp. 148, 150 (Ariz. 1970). At the same time, the court observed that its 1966 plan had fallen behind contemporary constitutional requirements, due to more recent voter registration data (which increased the deviation between high and low districts to 47.09%) and the intervening decisions of this Court in *Kirkpatrick* and *Wells, supra,* and *Burns* v. *Richardson,* 384 U. S. 73 (1966).

Turning to the legislature's plan, the court found it wanting in several respects. First, though the result indicated population deviation between high and low districts of only 1.8%, the population formula used [4] did not "truly represent the population within [the] precincts in either 1960 or 1968," and thus "the figures produced . . . are not truly population figures." 313 F. Supp., at 152. Second, the computer that devised the plan had been programmed to assure that the plan would not require any incumbent legislator to face any other incumbent for re-election. Third, the programming gave priority to one-party districts over districts drawn without regard to party strength. The court held that "the incumbency factor has no place in any reapportionment or redistricting" [5] and found "inapposite" the

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[4] "The population factor in each of the election precincts comprising part of a legislative district was obtained by instructing the computer to take the 1968 voter registration for the precinct and divide it by the 1968 voter registration for the county in which the precinct was located, thereby obtaining the percentage of registered voters of the county residing within the precinct. The computer was then directed to multiply that percentage figure by the 1960 census for the county in which the precinct was located, thereby obtaining the population factor for the precinct." 313 F. Supp., at 151–152.

[5] Though we noted in *Burns* v. *Richardson,* 384 U. S. 73, 89 n. 16, that "[t]he fact that district boundaries may have been

"consideration of party strength as a factor . . . ." *Ibid.*

The court was thus faced with a situation where both its 1966 plan and the legislature's latest attempt fell short of the constitutional standard. At that time, however, the 1970 elections were "close at hand." The court concluded that another legislative effort was "out of the question" due to the time and felt that it could not itself devise a new plan without delaying primary elections, "a course which would involve serious risk of confusion and chaos." *Ibid.* It considered at-large elections, but the prospect of electing 90 legislators at large was deemed so repugnant as to be justified only if the legislature's actions had been "deliberate and inexcusable"; the court instead believed that the large population increase in Arizona since the last reliable census in 1960 was more to blame. Concluding that the 1970 elections would be the last to be held before the 1970 census data became available for new plans, the court chose what it considered the lesser of two evils and ordered the elections to be conducted under the legislature's plan. In its order to this effect, the court noted that it "assumes that the Arizona Legislature will by November 1, 1971, enact a valid plan of reapportionment," but that "[u]pon failure of the Legislature so to do, any party to this action may apply to the court for appropriate relief." *Id.*, at 154.

The state officials did not seek review of the District Court's judgment declaring Chapter 1 unconstitutional. Appellant, however, appealed to this Court. His notice of appeal was filed on June 18, 1970, his jurisdictional statement on August 17, 1970. The latter presented the single question whether it was error for the United States

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drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness," it is sufficient to note here that the District Court did not base its decision solely on this factor.

District Court to refuse to enjoin the enforcement of the Arizona Legislature's most recent effort to reapportion the State. Appellees' motion to dismiss or affirm was filed on November 24. We noted probable jurisdiction on December 21, 400 U. S. 963.

Meanwhile, the 1970 elections were held in accordance with the District Court's decree. Appellees suggest that the issue presented is moot and appellant concedes "the 1970 general election has already been held so that that aspect of the wrong cannot be remedied." Brief 8. But appellant now argues that however that may be, the District Court should now proceed to adopt a plan of reapportionment which would be displaced only upon the adoption of a valid plan by the legislature. Appellant doubts that postponing judicial action until after November 1 will give the District Court sufficient time, prior to June 1972, when the election process must begin in Arizona, to consider the legislative plan and to prepare its own plan if the legislative effort does not comply with the Constitution. The feared result is that another election under an unconstitutional plan would be held in Arizona.

Reapportionment history in the State lends some substance to these fears, but as we have often noted, districting and apportionment are legislative tasks in the first instance,[6] and the court did not err in giving the legislature a reasonable time to act based on the 1970 census figures which the court thought would be available in the summer of 1971. We agree with appellant that the District Court should make very sure that the 1972 elec-

[6] *E. g., Reynolds* v. *Sims,* 377 U. S. 533, 586 (1964):

"[L]egislative reapportionment is primarily a matter for legislative consideration and determination, and . . . judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so."

tions are held under a constitutionally adequate apportionment plan. But the District Court knows better than we whether the November 1 deadline will afford it ample opportunity to assess the legality of a new apportionment statute if one is forthcoming and to prepare its own plan by June 1, 1972, if the official version proves insufficient. The 1970 census figures, if not now available, will be forthcoming soon; and appellant, if he is so inclined, can begin to assemble the necessary information and witnesses and himself prepare and have ready for submission what he deems to be an adequate apportionment plan. Surely, had a satisfactory substitute for Chapter 1, held unconstitutional by the District Court, been prepared and ready the court would have ordered the 1970 elections held under that plan rather than the invalid legislative scheme. And surely if appellant has ready for court use on November 1, 1971, a suitable alternative for an unacceptable legislative effort, or at least makes sure that the essential information is on hand, there is no justifiable ground for thinking the District Court could not, prior to June 1, 1972, complete its hearings and consideration of a new apportionment statute and, if that is rejected, adopt a plan of its own for use in the 1972 elections. Nor do we read the District Court decree as forbidding appellant from petitioning for reopening of the case prior to November 1, 1971, and presenting to the District Court the problem which it has now raised here but which we prefer at this juncture to leave in the hands of the District Court.[7] The judgment is affirmed.

It is so ordered.

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[7] Appellant has contended here that the use of voter registration figures, rather than actual population, to determine district size operates to the detriment of the poor, blacks, Mexican-Americans, and American Indians. In light of our disposition of this case, we need only advert to our admonition in *Burns* v. *Richardson, supra,*

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK joins, concurring.

The complaint in this case was filed on April 27, 1964. The District Court stayed all proceedings on June 25, 1964, until after the next regular session of the legislature and, when nothing was achieved, stayed them again until after a special session. A reapportionment plan produced by that legislature was held unconstitutional. 250 F. Supp. 537.

Thereupon the District Court drew a "temporary and provisional" plan for the general elections of 1966 and 1968. See 254 F. Supp. 997; 289 F. Supp. 827; 303 F. Supp. 224. In 1967 the legislature produced another plan which was approved by the voters and became effective January 17, 1969. This plan was also declared unconstitutional by the District Court on July 22, 1969. The legislature then adopted a new plan effective January 22, 1970. The District Court allowed this plan to be used for the 1970 general election, although it considered the plan to be unconstitutional. The District Court in its decree provided:

> "The court, having been advised that detailed population figures for the State of Arizona will be available from the official 1970 census by the summer of 1971, assumes that the Arizona Legislature will by November 1, 1971, enact a valid plan of reapportionment for both houses of the Arizona Legislature and a valid plan of redistricting the con-

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that use of voter registration as a basis may "perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process," 384 U. S., at 92, and is allowable only if it produces "a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis." *Id.*, at 93. We presume, of course, that any plan submitted, and certainly any plan approved by the District Court, will be faithful to this requirement.

gressional districts of Arizona. Upon failure of the Legislature so to do, any party to this action may apply to the court for appropriate relief."

The District Court also retained jurisdiction of the cause. 313 F. Supp. 148.

Since *Reynolds* v. *Sims,* 377 U. S. 533, Arizona has not had a constitutionally valid apportionment plan. Members of the Arizona Legislature who were elected in the 1970 election were elected under a plan the District Court held unconstitutional. Under that plan a computer was instructed to redistrict the State and to accomplish, in order, the following objectives: (1) to make the districts as equal in population as possible; (2) to circumscribe the districts in such a way that each included one incumbent senator and two incumbent representatives; (3) to make the districts compact; and (4) to make districts politically homogeneous.

Even assuming the legislative districts were of equal population the plan would have several practical deficiencies as far as minority representation goes. The 1970 plan insured that no incumbent would be running against another incumbent, as often may happen under a reapportionment plan. Thus the opportunity for preserving the status quo was assisted.

An effort to make each district politically homogeneous compounded this problem. The record provides a new definition of gerrymandering. A gerrymandered district in Arizona is not one where a "natural" majority finds its power erased by either moving lines to increase the numbers of the opposition in the district or by moving the lines so that a majority is dispersed. In Arizona a gerrymandered district came to be one that is overwhelmingly either Republican or Democratic. Thus when the second and fourth factors are combined an incumbent had not only the natural benefits of incum-

bency, but also the benefits (where possible) of a one-party district, his own fiefdom.

The record reveals that the 1970 plan heavily favored incumbents even if we assumed equal population districts. Such an assumption, of course, is contrary to the facts; deviations in Arizona ranged from about 24% above the median to about 52% below the median.

The basic unit for a district was the local political precinct. Unfortunately, there were no population figures for the basic unit, thus making it difficult to build the districts. Such figures were created by programming the computer to assume that a precinct population was that part of the 1960 county population which the number of registered voters in the precinct in 1968 bore to the number of registered voters in the county in 1968.

If all segments of society were equally likely to register to vote, then the Arizona method of computing population would be unobjectionable. But all members of a community are not equally likely to register. For example, only two counties out of eight with Spanish surname populations in excess of 15% showed a voter registration equal to the statewide average.[1] Not only are the poor, the blacks, the Chicanos, and the Indians less likely to register in the first place, they are also likely to have a higher rate of illiteracy among their members. Arizona law at the time of the decision below required a literacy test for voter registration. Ariz. Rev. Stat. Ann. §§ 16–101 (A)(4), 16–101 (A)(5). Naturally this compounded the problem of underregistration of minority groups.[2]

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[1] Hearings on S. 818, S. 2456, S. 2507, and Title IV of S. 2029 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st and 2d Sess., 406 (1969–1970).

[2] Because of the Voting Rights Act Amendments of 1970, literacy tests will not be a factor in future elections. Section 201, 84 Stat. 315, bars a State from denying the right to vote in any federal,

While the present record lacks some basic statistics, we do know that in 1965 the Bureau of the Census determined that less than 50% of the residents of voting age were registered or voted in the 1964 presidential election in Apache County, Navajo County, and Coconino County. 30 Fed. Reg. 9897, 14505. Under § 4 (a) of the Voting Rights Act of 1965, 79 Stat. 438, the application of the literacy tests was suspended by the publication of the statistics in the Federal Register, but the suspension was lifted a year later on the showing that the literacy tests had not been used in a discriminatory manner. *Apache County* v. *United States,* 256 F. Supp. 903. As of last fall Yuma County was subject to the literacy test ban of the Voting Rights Act of 1965. See *Oregon* v. *Mitchell,* 400 U. S. 112, 131 n. 12.

The 1970 plan adversely affected minorities. Because of the registration statistics used, one district in the Phoenix ghetto had approximately 70,000 residents while an affluent all-white district in another area of Phoenix had only 27,000 residents. The Indian reservation area in northeastern Arizona fared little better. While it had sufficient numbers of Indians to justify a separate district which could undoubtedly elect Indian representatives in the state legislature, the Indians were done in. At the time of this suit there were no Indians elected to either the State House or Senate. But just to the south of the area two state senators lived 10 miles apart. Hence, the incumbency rule was invoked to split the Indian area so as to accommodate the two white senators.

The Arizona Legislature has yet to develop a reapportionment plan which can pass constitutional muster. The incumbents who now have the opportunity to draft

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state, or local election because of "any test or device" which is defined, *inter alia,* to include literacy. This part of the Act was upheld in *Oregon* v. *Mitchell,* 400 U. S. 112.

the plan come from districts which are malapportioned and overrepresent the white vote. A valid apportionment plan will seemingly mean the defeat of several incumbents. The new efforts to gerrymander the State for the members of the current legislature will doubtless be prodigious. Members of the 1970 legislature had the twin advantages of running as single incumbents and in politically homogeneous districts. Members of minority groups had the disadvantage of underrepresentation. That invidious discrimination still exists.

On oral argument it was said that there is no point in initiating the design of a reapportionment plan now because the 1970 census figures are not available. That argument is difficult to comprehend, for it appears [3] that in March 1971 New Jersey completed a comprehensive reapportionment plan based on the 1970 census. The District Court has shown great patience and has been persevering. It probably is the first to realize that the Gordian knot must be cut if there is to be a plan that satisfies constitutional requirements.

It has indicated it will wait until November 1, 1971, before it initiates a constitutional plan. The hearings on such a plan will doubtless be long drawn out and extensive. The prize is great, for if the present incumbents can prolong matters, the 1972 election may come and go with the existing invalid 1970 plan in effect. It is not difficult to imagine how easy that strategy might be. The 1972 primaries in Arizona are in September.[4]

Primaries apart, there is always the problem of review by this Court. We are plagued with election cases coming here on the eve of elections, with the remaining

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[3] N. Y. Times, March 24, 1971, p. 47.

[4] The primary election in Arizona in 1972 will be held on Sept. 13. See Ariz. Rev. Stat. Ann. § 16–702.

time so short we do not have the days needed for oral argument and for reflection on the serious problems that are usually presented. If an election case is filed in our summer recess, we will not consider it until the first week in October; and our effort to note the appeal, hear the case, and decide it before November without disrupting the state election machinery is virtually impossible. The time needed is lacking.[5]

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[5] *Williams* v. *Rhodes,* 393 U. S. 23, was an exceptional case. There MR. JUSTICE STEWART acting as Circuit Justice and in consultation with available members of this Court granted injunctive relief ordering the election ballots printed in such a way as to include the American Independent Party, the losing party in the District Court. This was to insure that, if it prevailed here, relief would be available. 21 L. Ed. 2d 69, 89 S. Ct. 1. An expedited briefing schedule was authorized and we heard oral argument as soon as the Term commenced. Eight days later our opinion was handed down modifying the judgment of the District Court. Had not MR. JUSTICE STEWART granted the injunction in September the appellants' victory would have been a hollow one.

A challenge to Colorado's durational residency requirement prior to the 1968 election did not fare as well. The District Court upheld the requirement and we heard oral argument after the election was over. The case was dismissed as moot. *Hall* v. *Beals,* 396 U. S. 45.

Durational residency requirements have come before the Court several times this Term. In *Hayes* v. *Lieutenant Governor of Hawaii,* there was a challenge to the Hawaii durational residency requirement for candidates. The Hawaii Supreme Court upheld the law in late August. An application for an injunction was denied. When the appeal finally came up for consideration on the merits, again after the election, it was dismissed as moot, 401 U. S. 968. In *Sirak* v. *Brown* a state durational residency requirement for voters was upheld and, when this Court denied an injunction, 400 U. S. 809, the plaintiff chose not to docket his appeal, probably on the basis of *Hall* v. *Beals, supra.* A similar issue was present in *Fitzpatrick* v. *Board of Election Comm'rs of Chicago,* where we denied a motion to expedite the appeal, 401 U. S. 905. Had all the lower courts followed *Drueding* v. *Devlin,* 234 F. Supp. 721 (Md. 1964), aff'd, 380 U. S. 125, then mootness might have prevented any plenary review of the issue. But several district courts have con-

If a case is to be heard and decided on these important issues it must be here by February so that we can work it into our spring calendar of argued cases and decide it before July. If the District Court waits until November to hold hearings and put a reapportionment plan in operation, it is unlikely that any such schedule can be met.

It is, therefore, essential that the judicial machinery be put into motion soon, so that a resolution of a matter

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cluded that subsequent decisions have undermined *Drueding* and thus have invalidated durational residency requirements. This avoids the mootness issue and we have noted probable jurisdiction in one such case, *Ellington* v. *Blumstein,* 401 U. S. 934.

In *Beller* v. *Kirk* there was a challenge to the Florida requirement demanding an independent candidate obtain 5% of the registered voters to sign a petition so that he could get on the ballot. Injunctive relief was denied by individual Justices early in October, but the case has subsequently been docketed *sub nom. Beller* v. *Askew,* No. 1360. We have heard oral argument on the same issue in *Jenness* v. *Fortson,* No. 5714.

The Ohio laws are involved in several cases pending this Term. In one, the District Court handed down its decision late in July 1970. By that decision several sections of the Ohio laws were invalidated and we noted probable jurisdiction. *Gilligan* v. *Sweetenham,* 401 U. S. 991. A loyalty oath was upheld and we noted probable jurisdiction in that case. *Socialist Labor Party* v. *Gilligan,* 401 U. S. 991. The court also upheld a provision requiring independent candidates to file at the same time as major party candidates. *Sweetenham* v. *Gilligan,* No. 790. A similar issue is also presented in *Pratt* v. *Begley,* No. 1044, where the District Court for the Eastern District of Kentucky made its ruling in early October.

The then-forthcoming Chicago election in April 1971 also presented cases where one of the parties needed immediate action. In *Jackson* v. *Ogilvie,* the issue was the requirement that an independent obtain 5% of the registered voters on a nominating petition. We denied a stay on February 22, 1971, 401 U. S. 904, and there was no way the case could be heard prior to the election.

Through all these cases *Williams* v. *Rhodes* stands out as exceptional, because both the necessary preargument injunctive relief and expedited oral argument were obtained.

that has defied solution for seven years be no longer delayed. I write these words not in criticism of the District Court but in support of its steadfast efforts to bring this stubborn litigation to an early end.

MR. JUSTICE HARLAN concurs in the result upon the premises set forth in his separate opinions in *Whitcomb* v. *Chavis, post,* p. 165; *Oregon* v. *Mitchell,* 400 U. S. 112, 152 (1970); and *Reynolds* v. *Sims,* 377 U. S. 533, 589 (1964).

WHITCOMB, GOVERNOR OF INDIANA *v.* CHAVIS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

No. 92. Argued December 8, 1970—Decided June 7, 1971

This suit was brought by residents of Marion and Lake Counties, Indiana, challenging state statutes establishing Marion County as a multi-member district for the election of state senators and representatives. It was alleged, first, that the laws invidiously diluted the votes of Negroes and poor persons living in the "ghetto area" of Marion County, and, second, that voters in multi-member districts were overrepresented since the true test of voting power is the ability to cast a tie-breaking vote, and the voters in multi-member districts had a greater theoretical opportunity to cast such votes than voters in single-member districts. The tendency of multi-member district legislators to vote as a bloc was alleged to compound this discrimination. The three-judge court, though not ruling squarely on the second claim, determined that a racial minority group with specific legislative interests inhabited a ghetto area in Indianapolis, in Marion County; that the statutes operated to minimize and cancel out the voting strength of this minority group; and that redistricting Marion County alone would leave impermissible variations between Marion districts and others in the State, thus requiring statewide redistricting, which could not await 1970 census figures. The court held the statutes unconstitutional, and gave the State until October 1, 1969, to enact reapportionment legislation. No such legislation ensued, and the court drafted a plan using single-member districts throughout the State. The 1970 elections were ordered to be held in accordance with the new plan. This Court granted a stay of judgment pending final action on the appeal, thus permitting the 1970 elections to be held under the condemned statutes. Under those statutes, based on the 1960 census, there was a maximum variance in population of senate districts of 28.20%, with a ratio between the largest and smallest districts of 1.327 to 1, and a maximum variance in house districts of 24.78%, with a ratio of 1.279 to 1. *Held:* The judgment is reversed and the case remanded. Pp. 140–170; 179–180.

305 F. Supp. 1364, reversed and remanded.

MR. JUSTICE WHITE delivered the opinion of the Court with respect to Parts I–VI, finding that:

1. Although, as the Court was advised on June 1, 1971, the Indiana legislature enacted new apportionment legislation providing for statewide single-member house and senate districts, the case is not moot. Pp. 140–141.

2. The validity of multi-member districts is justiciable, but a challenger has the burden of proving that such districts unconstitutionally operate to dilute or cancel the voting strength of racial or political groups. Pp. 141–144.

3. The actual, as distinguished from theoretical, impact of multi-member districts on individual voting power has not been sufficiently demonstrated on this record to warrant departure from prior cases involving multi-member districts, and neither the findings below nor the record sustains the view that multi-member districts overrepresent their voters as compared with voters in single-member districts, even if the multi-member legislative delegation tends to bloc voting. Pp. 144–148.

4. Appellees' claim that the fact that the number of ghetto residents who were legislators was not proportionate to ghetto population proves invidious discrimination, notwithstanding the absence of evidence that ghetto residents had less opportunity to participate in the political process, is not valid, and on this record the malproportion was due to the ghetto voters' choices losing the election contests. Pp. 148–155.

5. The trial court's conclusion that, with respect to their unique interests, ghetto residents were invidiously underrepresented due to lack of their own legislative voice, was not supported by the findings. Moreover, even assuming bloc voting by the county delegation contrary to the ghetto majority's wishes, there is no constitutional violation, since that situation inheres in the political process, whether the district be single- or multi-member. P. 155.

6. Multi-member districts have not been proved inherently invidious or violative of equal protection, but, even assuming their unconstitutionality, it is not clear that the remedy is a single-member system with lines drawn to ensure representation to all sizable racial, ethnic, economic, or religious groups. Pp. 156–160.

7. The District Court erred in brushing aside the entire state apportionment policy without solid constitutional and equitable

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grounds for doing so, and without considering more limited alternatives. Pp. 160–161.

MR. JUSTICE WHITE, joined by THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE BLACKMUN, concluded, in Part VII, that it was not improper for the District Court to order statewide redistricting on the basis of the excessive population variances between the legislative districts shown by this record. That court ordered reapportionment not because of population shifts since its 1965 decision upholding the statutory plan but because the disparities had been shown to be excessive by intervening decisions of this Court. Pp. 161–163.

MR. JUSTICE DOUGLAS, joined by MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, concluded, with respect to redistricting the entire State, that there were impermissible population variances between districts under the current apportionment plan, and that the new Marion County districts would also have impermissible variances, thus requiring statewide redistricting. Pp. 179–180.

WHITE, J., announced the Court's judgment and delivered an opinion, of the Court with respect to Parts I–VI, in which BURGER, C. J., and BLACK, STEWART, and BLACKMUN, JJ., joined, and in which, as to Part VII, BURGER, C. J., and BLACK and BLACKMUN, JJ., joined. STEWART, J., filed a statement joining in Parts I–VI and dissenting from Part VII, *post,* p. 163. HARLAN, J., filed a separate opinion, *post,* p. 165. DOUGLAS, J., filed an opinion dissenting in part and concurring in the result in part, in which BRENNAN and MARSHALL, JJ., joined, *post,* p. 171.

William F. Thompson, Assistant Attorney General of Indiana, argued the cause for appellant. With him on the briefs were *Theodore L. Sendak,* Attorney General, and *Richard C. Johnson,* Chief Deputy Attorney General.

James Manahan argued the cause for appellees. With him on the brief were *James Beatty* and *John Banzhaf III.*

William J. Scott, Attorney General, and *Francis C. Crowe* and *Herman Tavins,* Assistant Attorneys General, filed a brief for the State of Illinois as *amicus curiae*

urging reversal, joined by the following Attorneys General: *MacDonald Gallion* of Alabama, *G. Kent Edwards* of Alaska, *Gary K. Nelson* of Arizona, *Duke W. Dunbar* of Colorado, *Richard C. Turner* of Iowa, *A. F. Summer* of Mississippi, *Robert L. Woodahl* of Montana, *Gordon Mydland* of South Dakota, *Crawford C. Martin* of Texas, *Vernon B. Romney* of Utah, and *Chauncey H. Browning* of West Virginia.

Charles Morgan, Jr., Reber F. Boult, Jr., David J. Vann, and *Melvin L. Wulf* filed a brief for the ACLU Foundation, Inc., et al. as *amici curiae* urging affirmance.

MR. JUSTICE WHITE delivered the opinion of the Court with respect to the validity of the multi-member election district in Marion County, Indiana (Parts I–VI), together with an opinion (Part VII), in which THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE BLACKMUN joined, on the propriety of ordering redistricting of the entire State of Indiana, and announced the judgment of the Court.

We have before us in this case the validity under the Equal Protection Clause of the statutes districting and apportioning the State of Indiana for its general assembly elections. The principal issue centers on those provisions constituting Marion County, which includes the city of Indianapolis, a multi-member district for electing state senators and representatives.

I

Indiana has a bicameral general assembly consisting of a house of representatives of 100 members and a senate of 50 members. Eight of the 31 senatorial districts and 25 of the 39 house districts are multi-member districts, that is, districts that are represented by two or more

legislators elected at large by the voters of the district.[1] Under the statutes here challenged, Marion County is a multi-member district electing eight senators and 15 members of the house.

On January 9, 1969, six residents of Indiana, five of whom were residents of Marion County, filed a suit described by them as "attacking the constitutionality of two statutes of the State of Indiana which provide for multi-member districting at large of General Assembly seats in Marion County, Indiana . . . ."[2] Plaintiffs[3] Chavis, Ramsey, and Bryant alleged that the two statutes invidiously diluted the force and effect of the vote of

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[1] As later indicated, shortly before announcement of this opinion, the Court was informed that the statutes at issue here will soon be superseded by new apportionment legislation recently adopted by the Indiana Legislature and signed by the Governor. That legislation provides for single-member districts throughout the State including Marion County. For the reasons stated below the controversy is not moot, and, as will be evident, this opinion proceeds as though the state statutes before us remain undisturbed by new legislation.

[2] The provisions attacked, contained in Acts 1965 (2d Spec. Sess.), c. 5, § 3, and c. 4, § 3, and appearing in Ind. Ann. Stat. §§ 34–102 and 34–104 (1969) were as follows:

"34–102. *Apportionment of representatives.*—Representatives shall be elected from districts comprised of one [1] or more counties and having one [1] or more representatives, as follows: . . . Twenty-sixth District Marion County: fifteen [15] representatives . . . ."

"34–104. *Apportionment of senators.*—Senators shall be elected from districts, comprised of one or more counties and having one or more senators, as follows: . . . Nineteenth District—Marion County: eight [8] senators, two [2] to be elected in 1966."

The District Court denied plaintiffs' motion to have the suit declared a class action under Fed. Rule Civ. Proc. 23 (b). 305 F. Supp. 1359, 1363 (SD Ind. 1969). See n. 17, *infra.*

[3] Plaintiffs in the trial court are appellees here and defendant Whitcomb is the appellant. We shall refer to the parties in this opinion as they stood in the trial court.

Negroes and poor persons living within certain Marion County census tracts constituting what was termed "the ghetto area." Residents of the area were alleged to have particular demographic characteristics rendering them cognizable as a minority interest group with distinctive interests in specific areas of the substantive law. With single-member districting, it was said, the ghetto area would elect three members of the house and one senator, whereas under the present districting voters in the area "have almost no political force or control over legislators because the effect of their vote is cancelled out by other contrary interest groups" in Marion County. The mechanism of political party organization and the influence of party chairmen in nominating candidates were additional factors alleged to frustrate the exercise of power by residents of the ghetto area.

Plaintiff Walker, a Negro resident of Lake County, also a multi-member district but a smaller one, alleged an invidious discrimination against Lake County Negroes because Marion County Negroes, although no greater in number than Lake County Negroes, had the opportunity to influence the election of more legislators than Lake County Negroes.[4] The claim was that Marion County was one-third larger in population and thus had approximately one-third more assembly seats than Lake County, but that voter influence does not vary inversely with population and that permitting Marion County voters to elect 23 assemblymen at large gave them a disproportionate advantage over voters in Lake County.[5] The

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[4] Walker also alleged that "in both Lake and Marion County, Indiana there are a sufficient number of negro [*sic*] voters and inhabitants for a bloc vote by the said inhabitants to change the result of any election recently held."

[5] The mathematical basis for the assertion was set out in detail in the complaint. See also n. 23, *infra*. It was also alleged that "[b]oth Marion County . . . and Lake County . . . are the sole matter

two remaining plaintiffs presented claims not at issue here.[6]

A three-judge court convened and tried the case on June 17 and 18, 1969. Both documentary evidence and oral testimony were taken concerning the composition and characteristics of the alleged ghetto area, the manner in which legislative candidates were chosen and their residence and tenure, and the performance of Marion County's delegation in the Indiana general assembly.[7]

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for consideration before two separate state legislative committees, one directed to the affairs of each county. The laws enacted . . . which directly effect [*sic*] Marion or Lake County typically apply to only one county or the other." App. 15.

[6] Plaintiff Marilyn Hotz, a Republican and a resident of what she described as the white suburban belt of Marion County lying outside the city of Indianapolis, alleged that malapportionment of precincts in party organization together with multi-member districting invidiously diluted her vote.

Plaintiff Rowland Allan (spelled "Allen" in the District Court's opinion), an independent voter, alleged that multi-member districting deprived him of any chance to make meaningful judgments on the merits of individual candidates because he was confronted with a list of 23 candidates of each party.

[7] In their final arguments and proposed findings of fact and conclusions of law plaintiffs urged that the Center Township ghetto was largely inhabited by Negroes who had distinctive interests and whose bloc voting potential was canceled out by opposing interest groups in the at-large elections held in Marion County's multi-member district, that the few Negro legislators, including the three then serving the general assembly from Marion County, were chosen by white voters and were unrepresentative of ghetto Negroes, and that Negroes should be given the power and opportunity to choose their own assemblymen. It was also urged that the power of political as well as racial elements was canceled out in that in every assembly election since 1922, one party or the other had won all the seats with two minor exceptions; hence many voters, in numbers large enough and geographically so located as to command control over one or more general assembly seats if Marion County were

The three-judge court filed its opinion containing its findings and conclusions on July 28, 1969, holding for plaintiffs. *Chavis* v. *Whitcomb*, 305 F. Supp. 1364 (SD Ind. 1969). See also 305 F. Supp. 1359 (1969) (pre-trial orders) and 307 F. Supp. 1362 (1969) (statewide reapportionment plan and implementing order). In sum, it concluded that Marion County's multi-member district must be disestablished and, because of population disparities not directly related to the phenomena alleged in the complaint, the entire State must be redistricted. More particularly, it first determined that a racial minority group inhabited an identifiable ghetto area in Indianapolis.[8] That area, located in the northern half of Center Township and termed the "Center Township ghetto," comprised 28 contiguous census tracts and parts of four others.[9] The area contained a 1967 population

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subdistricted, were wholly without representation whichever way an assembly election turned out.

The defendants argued that Marion County's problems were countywide and that its delegation could better represent the various interests in the county if elected at large and responsible to the county as a whole rather than being elected in single-member districts and thus fragmented by parochial interests and jealousies. They also urged that the 1960 census figures were an unreliable basis for redistricting Marion County and opposed the court's suggestion that the apportionment of the whole State was an issue properly before the court on the pleadings and the evidence.

[8] A ghetto was defined as a residential area with a higher density of population and greater proportion of substandard housing than in the overall metropolitan area and inhabited primarily by racial or other minority groups with lower than average socioeconomic status and whose residence in the area is often the result of a social, legal, or economic restriction or custom. 305 F. Supp., at 1373.

[9] The court's ghetto area was not congruent with that alleged in the complaint. It included five census tracts and parts of four others not within the ghetto area alleged in the complaint, but it omitted census tract 220 which the complaint had included. 305 F. Supp., at 1379–1381. That district, which was contiguous to both

of 97,000 nonwhites, over 99% of whom were Negro, and 35,000 whites. The court proceeded to compare six of these tracts, representative of the area, with tract 211, a predominantly white, relatively wealthy suburban census tract in Washington Township contiguous to the northwest corner of the court's ghetto area and with tract 220, also in Washington Township, a contiguous tract inhabited by middle class Negroes. Strong differences were found in terms of housing conditions, income and educational levels, rates of unemployment, juvenile crime, and welfare assistance. The contrasting characteristics between the court's ghetto area and its inhabitants on the one hand and tracts 211 and 220 on the other indicated the ghetto's "compelling interests in such legislative areas as urban renewal and rehabilitation, health care, employment training and opportunities, welfare, and relief of the poor, law enforcement, quality of education, and anti-discrimination measures." 305 F. Supp., at 1380. These interests were in addition to those the ghetto shared with the rest of the county, such as metropolitan transportation, flood control, sewage disposal, and education.

The court then turned to evidence showing the residences of Marion County's representatives and senators

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tract 211 and the ghetto area, was inhabited primarily by Negroes but was found to be a middle class district differing substantially in critical elements from the remainder of the ghetto. The court also made it unmistakably clear that its ghetto area "does not represent the entire ghettoized portion of Center Township but only the portion which is predominantly inhabited by Negroes and which was alleged in the complaint." 305 F. Supp., at 1380–1381. Although census tract 563, a tract "randomly selected to typify tracts . . . within the predominantly white ghetto portion of Center Township," *id.*, at 1374, was shown to have characteristics very similar to the tracts in the court's ghetto area except for the race of its inhabitants, the size and configuration of the white ghetto area were not revealed by the findings.

in each of the five general assemblies elected during the period 1960 through 1968.[10] Excluding tract 220, the middle class Negro district, Washington Township, the relatively wealthy suburban area in which tract 211 was located, with an average of 13.98% of Marion County's population, was the residence of 47.52% of its senators and 34.33% of its representatives. The court's Center Township ghetto area, with 17.8% of the population, had 4.75% of the senators and 5.97% of the representatives. The nonghetto area of Center Township, with 23.32% of the population, had done little better. Also, tract 220 alone, the middle class Negro district, had only 0.66% of the county's population but had been the residence of more representatives than had the ghetto area. The ghetto area had been represented in the senate only once—in 1964 by one senator—and the house three times—with one representative in 1962 and 1964 and by two representatives in the 1968 general assembly. The court found the "Negro Center Township Ghetto population" to be sufficiently large to elect two representatives and one senator if the ghetto tracts "were specific single-member legislative districts" in Marion County. 305 F. Supp., at 1385. From these data the court found gross inequity of representation, as determined by residence of legislators, between Washington Township and tract 220 on the one hand and Center Township and the Center Township ghetto area on the other.

The court also characterized Marion County's general assembly delegation as tending to coalesce and take common positions on proposed legislation. This was "largely the result of election at large from a common constituency, and obviates representation of a substantial, though minority, interest group within that common

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[10] See Appendix to opinion, *post*, p. 164.

constituency." *Ibid.* Related findings were that, as a rule, a candidate could not be elected in Marion County unless his party carried the election;[11] county political organizations had substantial influence on the selection and election of assembly candidates (an influence that would be diminished by single-member districting), as well as upon the actions of the county's delegation in the assembly; and that at-large elections made it difficult for the conscientious voter to make a rational selection.

The court's conclusions of law on the merits may be summarized as follows:

1. There exists within Marion County an identifiable racial element, "the Negro residents of the Center Township Ghetto," with special interests in various areas of

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[11] A striking but typical example of the importance of party affiliation and the "winner take all" effect is shown by the 1964 House of Representatives election.

Democrats	*Votes*	*Republicans*	*Votes*
Neff	151,822	Cox	144,336
Bridwell	151,756	Hadley	144,235
Murphy	151,746	Baker	144,032
Dean	151,702	Burke	143,989
Creedon	151,573	Borst	143,972
Jones	151,481	Madinger	143,918
DeWitt	151,449	Clark	143,853
Logan	151,360	Bosma	143,810
Roland	151,343	Brown	143,744
Walton	151,282	Durnil	143,588
Huber	151,268	Gallagher	143,553
Costello	151,153	Cope	143,475
Fruits	151,079	Elder	143,436
Lloyd	150,862	Zerfas	143,413
Ricketts	150,797	Allen	143,369

Though nearly 300,000 Marion County voters cast nearly 4½ million votes for the House, the high and low candidates within each party varied by only about a thousand votes. And, as these figures show, the Republicans lost every seat though they received 48.69% of the vote. Plaintiffs' Exhibit 10.

substantive law, diverging significantly from interests of nonresidents of the ghetto.[12]

2. The voting strength of this racial group has been minimized by Marion County's multi-member senate and house district because of the strong control exercised by political parties over the selection of candidates, the inability of the Negro voters to assure themselves the opportunity to vote for prospective legislators of their choice and the absence of any particular legislators who were accountable for their legislative record to Negro voters.

3. Party control of nominations, the inability of voters to know the candidate and the responsibility of legislators to their party and the county at large make it difficult for any legislator to diverge from the majority of his delegation and to be an effective representative of minority ghetto interests.

4. Although each legislator in Marion County is arguably responsible to all the voters, including those in the ghetto, "[p]artial responsiveness of all legislators is [not] . . . equal [to] total responsiveness and the informed concern of a few specific legislators." [13]

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[12] "The first requirement implicit in Fortson v. Dorsey and Burns v. Richardson, that of an identifiable racial or political element within the multi-member district, is met by the Negro residents of the Center Township Ghetto. These Negro residents have interests in areas of substantive law such as housing regulations, sanitation, welfare programs (aid to families with dependent children, medical care, etc.), garnishment statutes, and unemployment compensation, among others, which diverge significantly from the interests of nonresidents of the Ghetto." 305 F. Supp., at 1386.

[13] *Ibid.* The District Court implicitly, if not expressly, rejected the testimony of defendants' witnesses, including a professor of political science, to the effect that Marion County's problems and all its voters would be better served by a delegation sitting and voting as a team and responsible to the district at large, than by a delegation elected from single-member districts and split into groups representing special interests.

5. The apportionment statutes of Indiana as they relate to Marion County operate to minimize and cancel out the voting strength of a minority racial group, namely Negroes residing in the Center Township ghetto, and to deprive them of the equal protection of the laws.

6. As a legislative district, Marion County is large as compared with the total number of legislators, it is not subdistricted to insure distribution of the legislators over the county and comprises a multi-member district for both the house and the senate. (See *Burns* v. *Richardson,* 384 U. S. 73, 88 (1966).)

7. To redistrict Marion County alone would leave impermissible variations between Marion County districts and other districts in the State. Statewide redistricting was required, and it could not await the 1970 census figures estimated to be available within a year.

8. It may not be possible for the Indiana general assembly to comply with the state constitutional requirement prohibiting crossing or dividing counties for senatorial apportionment [14] and still meet the requirements of the Equal Protection Clause adumbrated in recent cases.[15]

9. Plaintiff Walker's claim as a Negro voter resident of Lake County that he was discriminated against because Lake County Negroes could vote for only 16 assemblymen while Marion County Negroes could vote for 23 was deemed untenable. In his second capacity, as a general voter in Lake County, Walker "probably has received less effective representation" than Marion County voters because "he votes for fewer legislators and, therefore, has fewer legislators to speak for him," and, since

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[14] Article 4, § 6, of the Indiana Constitution provides:

"A Senatorial or Representative district, where more than one county shall constitute a district, shall be composed of contiguous counties; *and no county, for Senatorial apportionment, shall ever be divided.*" (Emphasis added.)

[15] See part VII, *infra.*

in theory voting power in multi-member districts does not vary inversely to the number of voters, Marion County voters had greater opportunity to cast tie-breaking or "critical" votes. But the court declined to hold that the latter ground had been proved, absent more evidence concerning Lake County.[16] In this respect consideration of Walker's claim was limited to that to be given the uniform districting principle in reapportioning the Indiana general assembly.[17]

Turning to the proper remedy, the court found redistricting of Marion County essential. Also, although recognizing the complaint was directed only to Marion County, the court thought it must act on the evidence indicating that the entire State required reapportionment.[18] Judgment was withheld in all respects, however, to give the State until October 1, 1969, to enact legisla-

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[16] "In his second status, we find that plaintiff Walker is a voter of Indiana who resides outside Marion County. Applying the uniform district principle, discussed *infra* in the remedy section, we find that he probably has received less effective representation than Marion County voters. It has been shown that he votes for fewer legislators and, therefore, has fewer legislators to speak for him. He also, theoretically, casts fewer critical votes than Marion County voters, but we decline to so hold in the absence of sufficient evidence as to other factors such as bloc and party voting in Lake County. We hold that, in the absence of stronger evidence of dilution, his remedy is limited to the consideration which should be given to the uniform district principle in any subsequent reapportionment of the Indiana General Assembly." 305 F. Supp., at 1390.

[17] The court found a failure of proof on behalf of plaintiff Hotz, a resident of the white suburban belt, and on behalf of plaintiff Allan, an independent voter. Two other plaintiffs were entitled to no relief, plaintiff Chavis because he resided outside the Center Township ghetto and plaintiff Ramsey because he failed to show that he was a resident of that area. Only plaintiff Bryant, in addition to the qualified recognition given Walker, was found to have standing to sue and to be entitled to the relief prayed for.

[18] See part VII, *infra*.

tion remedying the improper districting and malapportionment found to exist by the court.[19] In so doing the court thought the State "might wish to give consideration to certain principles of legislative apportionment brought out at the trial in these proceedings." *Id.*, at 1391. First, the court eschewed any indication that Negroes living in the ghetto were entitled to any certain number of legislators—districts should be drawn with an eye that is color blind, and sophisticated gerrymandering would not be countenanced. Second, the legislature was advised to keep in mind the theoretical advantage inhering in voters in multi-member districts, that is, their theoretical opportunity to cast more deciding votes in any legislative election. Referring to the testimony that bloc-voting, multi-member delegations have disproportionately more power than single-member districts, the court thought that "the testimony has application here." Also, "as each member of the bloc delegation is responsible to the voter majority who elected the whole, each Marion County voter has a greater voice in the legislature, having more legislators to speak for him than does a comparable voter" in a single-member district. Single-member districts, the court thought, would equalize voting power among the districts as well as avoiding diluting political or racial groups located in multi-member districts. The court therefore recommended that the general assembly give consideration to the uniform district principle in making its apportionment.[20]

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[19] The Governor appealed here following this opinion. Since at that time no judgment had been entered and no injunction had been granted or denied, we do not have jurisdiction of that appeal and it is therefore dismissed. *Gunn* v. *University Committee,* 399 U. S. 383 (1970).

[20] The trial court's discussion of this subject may be found in 305 F. Supp., at 1391–1392.

On October 15, the court judicially noticed that the Indiana general assembly had not been called to redistrict and reapportion the State. Following further hearings and examination of various plans submitted by the parties, the court drafted and adopted a plan based on the 1960 census figures. With respect to Marion County, the court followed plaintiffs' suggested scheme, which was said to protect "the legally cognizable racial minority group against dilution of its voting strength." 307 F. Supp. 1362, 1365 (SD Ind. 1969). Single-member districts were employed throughout the State, county lines were crossed where necessary, judicial notice was taken of the location of the nonwhite population in establishing district lines in metropolitan areas of the State and the court's plan expressly aimed at giving "recognition to the cognizable racial minority group whose grievance lead [*sic*] to this litigation." *Id.*, at 1366.

The court enjoined state officials from conducting any elections under the existing apportionment statutes and ordered that the 1970 elections be held in accordance with the plan prepared by the court. Jurisdiction was retained to pass upon any future claims of unconstitutionality with respect to any future legislative apportionments adopted by the State.[21]

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[21] The court also provided for the possibility that the legislature would fail to redistrict in time for the 1972 elections:

"The Indiana constitutional provision for staggering the terms of senators, so that one-half of the Senate terms expire every two years, is entirely proper and valid and would be mandatory in a legislatively devised redistricting plan.

"However, the plan adopted herein is provisional in nature and probably will be applicable for only the 1970 election and the subsequent 2-year period. This is true since the 1970 census will have been completed in the interim, and the legislature can very well redistrict itself prior to the 1972 election. On the other hand, it is conceivable that the legislature may fail to redistrict before

Appeal was taken following the final judgment by the three-judge court, we noted probable jurisdiction, 397 U. S. 984 (1970), and the State's motion for stay of judgment was granted pending our final action on this case, 396 U. S. 1055 (1970), thus permitting the 1970 elections to be held under the existing apportionment statutes declared unconstitutional by the District Court. On June 1, 1971, we were advised by the parties that the Indiana Legislature had passed, and the Governor had signed, new apportionment legislation soon to become effective for the 1972 elections and that the new legislation provides for single-member house and senate districts throughout the State, including Marion County.

II

With the 1970 elections long past and the appearance of new legislation abolishing multi-member districts in Indiana, the issue of mootness emerges. Neither party deems the case mooted by recent events. Appellees, plaintiffs below, urge that if the appeal is dismissed as moot and the judgment of the District Court is vacated, as is our practice in such cases, there would be no outstanding judgment invalidating the Marion County multi-member district and that the new apportionment legislation would be in conflict with the state constitutional provision forbidding the division of Marion County for the purpose of electing senators. If the new senatorial districts were invalidated in the state courts in this respect, it is argued that the issue involved in the present litigation would simply reappear for decision.

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the 1972 elections. In such event, all fifty senatorial seats shall be up for election every two years until such time as the legislature properly redistricts itself. It will then properly be the province of the legislature in redistricting to determine which senatorial districts shall elect senators to 4-year terms and which shall elect senators to 2-year terms to reinstate the staggering of terms." 307 F. Supp., at 1367.

The attorney general for the State of Indiana, for the appellant, taking a somewhat different tack, urges that the issue of the Marion County multi-member district is not moot since the District Court has retained jurisdiction to pass on the legality of subsequent apportionment statutes for the purpose, among others, of determining whether the alleged discrimination against a cognizable minority group has been remedied, an issue that would not arise if the District Court erred in invalidating multi-member districts in Indiana.

We agree that the case is not moot and that the central issues before us must be decided. We do not, however, pass upon the details of the plan adopted by the District Court, since that plan in any event would have required revision in light of the 1970 census figures.

III

The line of cases from *Gray* v. *Sanders,* 372 U. S. 368 (1963), and *Reynolds* v. *Sims,* 377 U. S. 533 (1964), to *Kirkpatrick* v. *Preisler,* 394 U. S. 526 (1969), and *Wells* v. *Rockefeller,* 394 U. S. 542 (1969), recognizes that "representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies." *Reynolds* v. *Sims,* 377 U. S., at 565. Since most citizens find it possible to participate only as qualified voters in electing their representatives, "[f]ull and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature." *Ibid.* Hence, apportionment schemes "which give the same number of representatives to unequal numbers of constituents," 377 U. S., at 563, unconstitutionally dilute the value of the votes in the larger districts. And hence the requirement that "the seats in both houses of a bicameral state legis-

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lature must be apportioned on a population basis." 377 U. S., at 568.

The question of the constitutional validity of multi-member districts has been pressed in this Court since the first of the modern reapportionment cases. These questions have focused not on population-based apportionment but on the quality of representation afforded by the multi-member district as compared with single-member districts. In *Lucas* v. *Colorado General Assembly,* 377 U. S. 713 (1964), decided with *Reynolds* v. *Sims,* we noted certain undesirable features of the multi-member district but expressly withheld any intimation "that apportionment schemes which provide for the at-large election of a number of legislators from a county, or any political subdivision, are constitutionally defective." 377 U. S., at 731 n. 21. Subsequently, when the validity of the multi-member district, as such, was squarely presented, we held that such a district is not *per se* illegal under the Equal Protection Clause. *Fortson* v. *Dorsey,* 379 U. S. 433 (1965); *Burns* v. *Richardson,* 384 U. S. 73 (1966); *Kilgarlin* v. *Hill,* 386 U. S. 120 (1967). See also *Burnette* v. *Davis,* 382 U. S. 42 (1965); *Harrison* v. *Schaefer,* 383 U. S. 269 (1966).[22] That voters in multi-member

[22] In *Fortson,* the Court reversed a three-judge District Court which found a violation of the Equal Protection Clause in that voters in single-member districts were allowed to "select their own senator" but that voters in multi-member districts were not. The statutory scheme in *Fortson* provided for subdistricting within the county, so that each subdistrict was the residence of exactly one senator. However, each senator was elected by the county at large. The Court said, "Each [sub]district's senator must be a resident of that [sub]district, but since his tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people in the county, and not merely those of people in his home [sub]district; thus in fact he is the county's and not merely the [sub]district's senator." 379 U. S., at 438. The question of whether the scheme "operate[d] to minimize or cancel out the voting

districts vote for and are represented by more legislators than voters in single-member districts has so far not demonstrated an invidious discrimination against the latter. But we have deemed the validity of multi-member district systems justiciable, recognizing also that they may be subject to challenge where the circumstances of a particular case may "operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Fortson,* 379 U. S., at 439, and *Burns,* 384 U. S., at 88. Such a tendency, we have said, is enhanced when the district is large and elects a substantial proportion of the seats in either house of a bicameral legislature, if it is multi-member for both

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strength of racial or political elements of the voting population" was not presented.

In *Burnette,* we summarily affirmed a three-judge District Court ruling, *Mann* v. *Davis,* 245 F. Supp. 241 (ED Va. 1965), which upheld a multi-member district consisting of the city of Richmond, Va., and suburban Henrico County over the objections of both urban Negroes and suburban whites. Since the urban Negroes did not appeal here, the affirmance is of no weight as to them, but as to the suburbanites it represents an adherence to *Fortson.* Similarly, *Harrison* summarily affirmed a District Court reapportionment plan, *Schaefer* v. *Thomson,* 251 F. Supp. 450 (Wyo. 1965), where multi-member districts in Wyoming were held necessary to keep county splitting at a minimum.

Burns vacated a three-judge court decree which required single-member districts except in extraordinary circumstances. The Court in *Burns* noted that "the demonstration that a particular multi-member scheme effects an invidious result must appear from evidence in the record." 384 U. S., at 88.

In *Kilgarlin,* the Court affirmed, *per curiam,* a district court ruling

"insofar as it held that appellants had not proved their allegations that [the Texas House of Representatives reapportionment plan] was a racial or political gerrymander violating the Fourteenth Amendment, that it unconstitutionally deprived Negroes of their franchise and that because of its utilization of single-member, multi-member and floterial districts it was an unconstitutional 'crazy quilt.'" 386 U. S., at 121.

houses of the legislature or if it lacks provision for at-large candidates running from particular geographical subdistricts, as in *Fortson*. *Burns*, 384 U. S., at 88. But we have insisted that the challenger carry the burden of proving that multi-member districts unconstitutionally operate to dilute or cancel the voting strength of racial or political elements. We have not yet sustained such an attack.

IV

Plaintiffs level two quite distinct challenges to the Marion County district. The first charge is that any multi-member district bestows on its voters several unconstitutional advantages over voters in single-member districts or smaller multi-member districts. The other allegation is that the Marion County district, on the record of this case, illegally minimizes and cancels out the voting power of a cognizable racial minority in Marion County. The District Court sustained the latter claim and considered the former sufficiently persuasive to be a substantial factor in prescribing uniform, single-member districts as the basic scheme of the court's own plan. See 307 F. Supp., at 1366.

In asserting discrimination against voters outside Marion County, plaintiffs recognize that *Fortson, Burns,* and *Kilgarlin* proceeded on the assumption that the dilution of voting power suffered by a voter who is placed in a district 10 times the population of another is cured by allocating 10 legislators to the larger district instead of the one assigned to the smaller district. Plaintiffs challenge this assumption at both the voter and legislator level. They demonstrate mathematically that in theory voting power does not vary inversely with the size of the district and that to increase legislative seats in proportion to increased population gives undue voting power to the voter in the multi-member district since he has more chances to determine election outcomes than

does the voter in the single-member district. This consequence obtains wholly aside from the quality or effectiveness of representation later furnished by the successful candidates. The District Court did not quarrel with plaintiffs' mathematics, nor do we. But like the District Court we note that the position remains a theoretical one [23] and, as plaintiffs' witness conceded, knowingly

[23] The mathematical backbone of this theory is as follows: In a population of n voters, where each voter has a choice between two alternatives (candidates), there are 2^n possible voting combinations. For example, with a population of three voters, A, B, and C, and two candidates, X and Y, there are eight combinations:

	A	*B*	*C*
#1.	X	X	X
#2.	X	X	Y
#3.	X	Y	X
#4.	X	Y	Y
#5.	Y	X	X
#6.	Y	X	Y
#7.	Y	Y	X
#8.	Y	Y	Y

The theory hypothesizes that the true test of voting power is the ability to cast a tie-breaking, or "critical" vote. In the population of three voters as shown above, any voter can cast a critical vote in four situations; in the other four situations, the vote is not critical since it cannot change the outcome of the election. For example, C can cast a tie-breaking vote only in situations 3, 4, 5, and 6. The number of combinations in which a voter can cast a tie-breaking vote is $2 \cdot \frac{(n-1)!}{\frac{n-1}{2}! \cdot \frac{n-1}{2}!}$, where n is the number of voters. Dividing this result (critical votes) by 2^n (possible combinations), one arrives at that fraction of possible combinations in which a voter can cast a critical vote. This is the theory's measure of voting power. In District K with three voters, the fraction is $\frac{4}{8}$, or 50%. In District L with nine voters, the fraction is $\frac{140}{512}$, or 28%. Conventional wisdom would give District K one representative and District L three. But under the

avoids and does "not take into account any political or other factors which might affect the actual voting power of the residents, which might include party affiliation, race, previous voting characteristics or any other factors which go into the entire political voting situation." [24] The real-life impact of multi-member districts on individual voting power has not been sufficiently demonstrated, at least on this record, to warrant departure from prior cases.

The District Court was more impressed with the other branch of the claim that multi-member districts inherently discriminate against other districts. This was the assertion that whatever the individual voting power of Marion County voters in choosing legislators may be, they nevertheless have more effective representation in the Indiana general assembly for two reasons. First, each voter is represented by more legislators and therefore, in theory at least, has more chances to influence critical legislative votes. Second, since multi-member delegations are elected at large and represent the voters of the entire district, they tend to vote as a bloc, which is tantamount to the district having one representative with several votes.[25] The District Court did not squarely

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theory, a voter in District L is not ⅓ as powerful as the voter in District K, but more than half as powerful. District L deserves only two representatives, and by giving it three the State causes voters therein to be overrepresented. For a fuller explanation of this theory, see Banzhaf, Multi-Member Electoral Districts—Do They Violate the "One Man, One Vote" Principle, 75 Yale L. J. 1309 (1966).

[24] Tr. 39. Plaintiffs' brief in this Court recognizes the issue: "The obvious question which the foregoing presentation gives rise to is that of whether the fact that a voter in a large multi-member district has a greater mathematical chance to cast a crucial vote has any practical significance." Brief of Appellees (Plaintiffs) 14.

[25] Cf. Banzhaf, Weighted Voting Doesn't Work: A Mathematical Analysis, 19 Rutgers L. Rev. 317 (1965).

sustain this position,[26] but it appears to have found it sufficiently persuasive to have suggested uniform districting to the Indiana Legislature and to have eliminated multi-member districts in the court's own plan redistricting the State. See 307 F. Supp., at 1368–1383.

We are not ready, however, to agree that multi-member districts, wherever they exist, overrepresent their voters as compared with voters in single-member districts, even if the multi-member delegation tends to bloc voting. The theory that plural representation itself unduly enhances a district's power and the influence of its voters remains to be demonstrated in practice and in the day-to-day operation of the legislature. Neither the findings of the trial court nor the record before us sustains it, even where bloc voting is posited.

In fashioning relief, the three-judge court appeared to embrace the idea that each member of a bloc-voting delegation has more influence than legislators from a single-member district. But its findings of fact fail to deal with the actual influence of Marion County's delegation in the Indiana Legislature. Nor did plaintiffs' evidence make such a showing. That bloc voting tended to occur is sustained by the record, and defendants' own witness thought it was advantageous for Marion County's delegation to stick together. But nothing demonstrates that senators and representatives from Marion County counted for more in the legislature than members from single-member districts or from smaller multi-member districts. Nor is there anything in the court's findings indicating that what might be true of Marion County is also true of other multi-member districts in Indiana or is true of

[26] It is apparent that the District Court declined to rule as a matter of law that a multi-member district was *per se* illegal as giving an invidious advantage to multi-member district voters over voters in single-member districts or smaller multi-member districts. See 305 F. Supp., at 1391–1392.

multi-member districts generally. Moreover, Marion County would have no less advantage, if advantage there is, if it elected from individual districts and the elected representatives demonstrated the same bloc-voting tendency, which may also develop among legislators representing single-member districts widely scattered throughout the State.[27] Of course it is advantageous to start with more than one vote for a bill. But nothing before us shows or suggests that any legislative skirmish affecting the State of Indiana or Marion County in particular would have come out differently had Marion County been subdistricted and its delegation elected from single-member districts.

Rather than squarely finding unacceptable discrimination against out-state voters in favor of Marion County voters, the trial court struck down Marion County's multi-member district because it found the scheme worked invidiously against a specific segment of the county's voters as compared with others. The court identified an area of the city as a ghetto, found it predominantly inhabited by poor Negroes with distinctive substantive-law interests and thought this group unconstitutionally underrepresented because the proportion of legislators with residences in the ghetto elected from 1960 to 1968 was less than the ghetto's proportion of the population, less than the proportion of legislators elected from Washington Township, a less populous district, and less than the ghetto would likely have elected had the

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[27] The so-called urban-rural division has been much talked about. Antagonistic bloc voting by the two camps may occur but it has perhaps been overemphasized. See White & Thomas, Urban and Rural Representation and State Legislative Apportionment, 17 W. Pol. Q. 724 (1964). Legislation dealing with uniquely urban problems may be routinely approved when urban delegations are in agreement but encounter insuperable difficulties when the delegations are split internally. See Kovach, Some Lessons of Reapportionment, 37 Reporter 26, 31 (Sept. 21, 1967).

county consisted of single-member districts.[28] We find major deficiencies in this approach.

First, it needs no emphasis here that the Civil War Amendments were designed to protect the civil rights of Negroes and that the courts have been vigilant in scrutinizing schemes allegedly conceived or operated as purposeful devices to further racial discrimination. There has been no hesitation in striking down those contrivances that can fairly be said to infringe on Fourteenth Amendment rights. *Sims* v. *Baggett,* 247 F. Supp. 96 (MD Ala. 1965); *Smith* v. *Paris,* 257 F. Supp. 901 (MD Ala. 1966), aff'd, 386 F. 2d 979 (CA5 1967); and see *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960). See also *Allen* v. *State Board of Elections,* 393 U. S. 544 (1969). But there is no suggestion here that Marion County's multi-member district, or similar districts throughout the State, were conceived or operated as purposeful devices to further racial or economic discrimination. As plaintiffs concede, "there was no basis for asserting that the legislative districts in Indiana were designed to dilute the vote of minorities." Brief of Appellees (Plaintiffs) 28–29. Accordingly, the circumstances here lie outside the reach of decisions such as *Sims* v. *Baggett, supra.*

Nor does the fact that the number of ghetto residents who were legislators was not in proportion to ghetto population satisfactorily prove invidious discrimination absent evidence and findings that ghetto residents had less opportunity than did other Marion County residents to participate in the political processes and to elect legislators of their choice. We have discovered nothing in the record or in the court's findings indicating that poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen. Nor did

[28] See Appendix to opinion, *post,* p. 164.

the evidence purport to show or the court find that inhabitants of the ghetto were regularly excluded from the slates of both major parties, thus denying them the chance of occupying legislative seats.[29] It appears reasonably clear that the Republican Party won four of the five elections from 1960 to 1968, that Center Township ghetto voted heavily Democratic and that ghetto votes were critical to Democratic Party success. Although we cannot be sure of the facts since the court ignored the question, it seems unlikely that the Democratic Party could afford to overlook the ghetto in slating its candidates.[30] Clearly, in 1964—the one election that the

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[29] It does not appear that the Marion County multi-member district always operated to exclude Negroes or the poor from the legislature. In the five general assemblies from 1960–1968, the county's Center Township ghetto had one senator and four representatives. The remainder of the township, which includes a white ghetto, elected one senator and eight representatives. Census tract 220, inhabited predominantly by Negroes but having different economic and social characteristics according to the trial court, elected one senator and five representatives. *Ibid.* Plaintiffs' evidence indicated that Marion County as a whole elected two Negro senators and seven representatives in those years. Plantiffs' Exhibit 10.

[30] Plaintiffs' Exhibit 10 purported to list the names and race of both parties' general assembly candidates from 1920 through 1968. For the 1960–1968 period which concerned the District Court, the exhibit purported to show that the Democratic Party slated one Negro representative in 1960; one in 1962; one senator and two representatives in 1964; three representatives in 1966; and one senator and two representatives in 1968. The Republican Party slated one Negro senator in 1960; two representatives in 1966; and three representatives in 1968. The racial designations on the exhibit, however, were excluded as hearsay.

The Brief of Appellees (Plaintiffs), at 23 n. 7, indicates that in the 1970 elections:

"[O]ne of the major political parties in Marion County held district 'mini-slating conventions' for purposes of determining its legislative candidates. All of the slated candidates were subsequently nominated in the primary. Black candidates filed in the slating

Democrats won— the party slated and elected one senator and one representative from Center Township ghetto as well as one senator and four representatives from other

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conventions in six of the fifteen Marion County 'districts' including the five that contain parts of the ghetto area. Only two black candidates were slated and nominated including one in the district that contains only a very small part of the ghetto area where the black candidate overwhelmingly defeated the white candidate in a head-on race notwithstanding a very substantial white voting majority. In a district that was almost entirely ghetto a white candidate won almost all of the vote in a head-on race against a black candidate who campaigned primarily on the basis of skin-color. All five of the candidates in the 'ghetto districts,' however, avowed a substantial commitment to the substantive interests of black people and the poor."

The record shows that plaintiff Chavis was slated by the Democratic Party and elected to the state senate in 1964. Exhibit 10. Also, plaintiffs Ramsey and Bryant were both slated by the same party as candidates for the House of Representatives in 1968 but were defeated in the general election. *Ibid.;* see also Tr. 131 (Ramsey), Tr. 133 (Bryant).

One of plaintiffs' witnesses, an attorney and political figure in the Republican Party, testified as follows:

"Q. In your experience, Mrs. Allen, aren't tickets put together by party organization to appeal [to] the various interest groups throughout Marion County?

"A. Yes.

"Q. Among these interest groups are economic groups, racial groups and others?

"A. Yes.

. . . . .

"Q. I show you exhibit 5B that is in evidence, showing the location of the elected Republican representatives' homes at the time they filed in the party primary, does it to you somehow reflect an interest in making an appeal to each conceivable faction in the family, in the county area, each geographical interest?

"A. Yes, it does, if I can explain.

"Q. Yes, you may.

"A. Back in 1966, as I stated, we had a real primary fight and at the time we selected our candidates in the primary Republican Action Committee was not real, real strong in some geographical areas, and we felt that necessary to come up with a 15 man slate,

parts of Center Township and two representatives from census tract 220, which was within the ghetto area described by plaintiff.[31] Nor is there any indication that the party failed to slate candidates satisfactory to the ghetto in other years. Absent evidence or findings we are not sure, but it seems reasonable to infer that had the Democrats won all of the elections or even most of them, the ghetto would have had no justifiable complaints about representation. The fact is, however, that four of the five elections were won by Republicans, which was not the party of the ghetto and which would not always slate ghetto candidates—although in 1962 it nominated and elected one representative and in 1968 two representatives from that area.[32]

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many of the people who lived in Center Township including myself did not feel ready to run for public office and therefore there was a hiatus in Center Township residents. However, many of the Washington Township residents, I believe at least two Washington Township residents had a number of family and historical ties in this Center Township Area, even though they did not live there and to the best of the Committee's ability they tried to achieve racial, geographical, economical and social diversity on the ticket. I can't say they were entirely successful, but they made a real good attempt and this is a result of their attempts.

"Q. And the real hard driving effort to put the Action Committees through did take place by the residents of Center Township; did it not?

"A. It was an over-all drive. Center Township, having the population it has, could not be ignored." Tr. 145–148.

Plaintiffs' lawyer was at the time of the trial the Marion County Democratic chairman, Tr. 256; plaintiff Chavis was a ward chairman and a longtime precinct committeeman, Tr. 77.

[31] See Appendix to opinion, p. 164.

[32] See *ibid.* In addition, the Republicans nominated and elected one senator (1960), and three representatives (1960, 1966, 1968) from census tract 220, and four representatives (three in 1962, one in 1966) from the nonghetto area of Center Township. *Ibid.*

Although plaintiffs asserted it, there was no finding by the District Court that Republican legislators residing in the ghetto were not representative of the area or had failed properly to represent ghetto interests in the general assembly.

If this is the proper view of this case, the failure of the ghetto to have legislative seats in proportion to its population emerges more as a function of losing elections than of built-in bias against poor Negroes. The voting power of ghetto residents may have been "cancelled out" as the District Court held, but this seems a mere euphemism for political defeat at the polls.

On the record before us plaintiffs' position comes to this: that although they have equal opportunity to participate in and influence the selection of candidates and legislators, and although the ghetto votes predominantly Democratic and that party slates candidates satisfactory to the ghetto, invidious discrimination nevertheless results when the ghetto, along with all other Democrats, suffers the disaster of losing too many elections. But typical American legislative elections are district-oriented, head-on races between candidates of two or more parties. As our system has it, one candidate wins, the others lose. Arguably the losing candidates' supporters are without representation since the men they voted for have been defeated; arguably they have been denied equal protection of the laws since they have no legislative voice of their own. This is true of both single-member *and* multi-member districts. But we have not yet deemed it a denial of equal protection to deny legislative seats to losing candidates, even in those so-called "safe" districts where the same party wins year after year.

Plainly, the District Court saw nothing unlawful about the impact of typical single-member district elections. The court's own plan created districts giving both Republicans and Democrats several predictably safe general assembly seats, with political, racial or economic minorities in those districts being "unrepresented" year after year. But similar consequences flowing from Marion County multi-member district elections were viewed differently. Conceding that all Marion County voters could fairly be said to be represented by the entire dele-

gation, just as is each voter in a single-member district by the winning candidate, the District Court thought the ghetto voters' claim to the partial allegiance of eight senators and 15 representatives was not equivalent to the undivided allegiance of one senator and two representatives; nor was the ghetto voters' chance of influencing the election of an entire slate as significant as the guarantee of one ghetto senator and two ghetto representatives.[33] As the trial court saw it, ghetto voters could not be adequately and equally represented unless some of Marion County's general assembly seats were reserved for ghetto residents serving the interests of the ghetto majority. But are poor Negroes of the ghetto any more underrepresented than poor ghetto whites who also voted Democratic and lost, or any more discriminated against than other interest groups or voters in Marion County with allegiance to the Democratic Party, or, conversely, any less represented than Republican areas or voters in years of Republican defeat? We think not. The mere fact that one interest group or another concerned with the outcome of Marion County elections has found itself

[33] The comparative merits of the two approaches to metropolitan representation has been much mooted and is still in contention. See the authorities cited in n. 38, *infra,* particularly the piece by Kovach and the series of studies by Collins, Dauer, David, Lacy, & Mauer. And, of course, witnesses in the trial court differed on this very issue. *E. g.,* Tr. 209–214, 223–229, 235–238, 256–258. David & Eisenberg in their study, *infra,* n. 38, concluded that the case for rigid insistence on single-member districting has not been proved. They would prefer a system of small multi-member districts in metropolitan areas to either the larger multi-member district or the single-member district, thereby minimizing the acknowledged shortcomings of each. More generally, still in suspense is definitive judgment about the long-range impact of voting systems and malapportionment on legislative output. Sokolow, After Reapportionment: Numbers or Policies?, 19 W. Pol. Q. Supp. 21 (1966); T. Dye, Politics, Economics, and the Public 260–277 (1966); D. Lockard, The Politics of State and Local Government 290–293 (2d ed. 1969).

outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where, as here, there is no indication that this segment of the population is being denied access to the political system.

There is another gap in the trial court's reasoning. As noted by the court, the interest of ghetto residents in certain issues did not measurably differ from that of other voters. Presumably in these respects Marion County's assemblymen were satisfactorily representative of the ghetto. As to other matters, ghetto residents had unique interests not necessarily shared by others in the community and on these issues the ghetto residents were invidiously underrepresented absent their own legislative voice to further their own policy views.

Part of the difficulty with this conclusion is that the findings failed to support it. Plaintiffs' evidence purported to show disregard for the ghetto's distinctive interests; defendants claimed quite the contrary. We see nothing in the findings of the District Court indicating recurring poor performance by Marion County's delegation with respect to Center Township ghetto, nothing to show what the ghetto's interests were in particular legislative situations and nothing to indicate that the outcome would have been any different if the 23 assemblymen had been chosen from single-member districts. Moreover, even assuming bloc voting by the delegation contrary to the wishes of the ghetto majority, it would not follow that the Fourteenth Amendment had been violated unless it is invidiously discriminatory for a county to elect its delegation by majority vote based on party or candidate platforms and so to some extent predetermine legislative votes on particular issues. Such tendencies are inherent in government by elected representatives; and surely elections in single-member districts visit precisely the same consequences on the supporters of losing candidates whose views are rejected at the polls.

V

The District Court's holding, although on the facts of this case limited to guaranteeing one racial group representation, is not easily contained. It is expressive of the more general proposition that any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area sufficiently compact to constitute a single-member district.[34] This approach would make it difficult to reject claims of Democrats, Republicans, or members of any political organization in Marion County who live in what would be safe districts in a single-member district system but who in one year or another, or year after year, are submerged in a one-sided multi-member district vote.[35] There are also union oriented workers, the university community, religious or ethnic groups occupying identifiable areas of our heterogeneous cities and urban areas. Indeed, it would be difficult for a great many, if not most, multi-member districts to survive analysis under the District Court's view unless combined with some voting arrangement such as proportional representation or cumulative voting aimed

[34] Interestingly enough, in *Wright* v. *Rockefeller,* 376 U. S. 52 (1964), challenge was to a single-member district plan with districts allegedly drawn on racial lines and designed to limit Negroes to voting for their own candidates in safe Negro districts. We rejected the challenge for failure of proof, but noted in passing that "some of these voters . . . would prefer a more even distribution of minority groups among the four congressional districts, but others, like the intervenors in this case, would argue strenuously that the kind of districts for which appellants contended would be undesirable and, because based on race or place of origin, would themselves be unconstitutional." 376 U. S., at 57–58.

[35] Plaintiffs' final arguments in the District Court asserted political as well as racial and economic discrimination in the workings of the Marion County district, in that the "political minority," whether Republicans or Democrats, is "always shut out" when the opposing party wins. Tr. 254. See n. 11, *supra.*

at providing representation for minority parties or interests.[36] At the very least, affirmance of the District Court would spawn endless litigation concerning the multi-member district systems now widely employed in this country.[37]

We are not insensitive to the objections long voiced to multi-member district plans.[38] Although not as prevalent as they were in our early history, they have been

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[36] For discussions of voting systems *designed* to achieve minority representation, see Dixon, *infra,* n. 38, at 516–527; Black, The Theory of Elections in Single-member Constituencies, 15 Can. J. of Economics and Pol. Sci. 158 (1949); Silva, Relation of Representation and the Party System to the Number of Seats Apportioned to a Legislative District, 17 W. Pol. Q. 742, 744 *et seq.* (1964); S. Bedford, The Faces of Justice (1961); E. Lakeman & J. Lambert, Voting in Democracies (1959); Blair, Cumulative Voting: An Effective Electoral Device in Illinois Politics, 45 Ill. Studies in the Social Sciences (1960).

[37] As of November 1970, 46% of the upper houses and 62% of the lower houses in the States contained some multi-member districts. National Municipal League, Apportionment in the Nineteen Sixties (Rev. Nov. 1970). In 1955, it was reported that the figures were 33% and 75%, respectively. Klain, A New Look at the Constituencies: The Need for a Recount and a Reappraisal, 49 Am. Pol. Sci. Rev. 1105 (1955). Though the overall effect of the reapportionment cases on this phenomenon is necessarily somewhat speculative, there is no doubt that some States switched to multi-member districts as a result of those decisions. Prior to the decisions, for example, Vermont's lower house was composed entirely of single-member districts. *Id.,* at 1109. This resulted in the colorful situation of one representative for a town of 33,155 and another for a town of 38 in 1962. National Municipal League, Apportionment in the Nineteen Sixties, pt. I (b). Reapportioned and redistricted in light of *Reynolds,* Vermont's lower house now has 36 multi-member and 36 single-member districts. *Buckley* v. *Hoff,* 243 F. Supp. 873 (Vt. 1965). Reapportionment has also been credited with abolishing Maryland's tradition of single-member districts in its senate. Burdette, Maryland Reapportionment, in Apportionment in the Nineteen Sixties, *supra.*

[38] The relative merits of multi-member and single-member plans have been much debated and the general preference for single-

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with us since colonial times and were much in evidence both before and after the adoption of the Fourteenth Amendment.[39] Criticism is rooted in their winner-take-

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member districts has not gone unchallenged. For representative treatment of the subject see:

R. Dixon, Democratic Representation: Reapportionment in Law and Politics 461–463, 470–472, 476–490, 503–507 (1968); P. David & R. Eisenberg, State Legislative Redistricting: Major Issues in the Wake of Judicial Decision (1962); Barnett, Unitary-Multiple Election Districts, 39 Am. Pol. Sci. Rev. 65 (1945); Silva, Compared Values of the Single- and the Multi-member Legislative District, 17 W. Pol. Q. 504 (1964); Hamilton, Legislative Constituencies: Single-member Districts, Multi-member Districts, and Floterial Districts, 20 W. Pol. Q. 321 (1967) (includes a discussion of districting in Indiana); Silva, Relation of Representation and the Party System to the Number of Seats Apportioned to a Legislative District, 17 W. Pol. Q. 742 (1964); Lindquist, Socioeconomic Status and Political Participation, 17 W. Pol. Q. 608 (1964); Klain, A New Look at the Constituencies: The Need for a Recount and a Reappraisal, 49 Am. Pol. Sci. Rev. 1105 (1955); Kovach, Some Lessons of Reapportionment, 37 Reporter 26 (Sept. 21, 1967); and M. Collins, M. Dauer, P. David, A. Lacy, & G. Mauer, Evolving Issues and Patterns of State Legislative Redistricting in Large Metropolitan Areas (1966).

Interesting material with respect to the relative merits of single- and multi-member districts may be found in the congressional debates surrounding the passage in 1842 of the statute requiring representatives to be elected in single-member districts. See n. 39, *infra*. Though the racial considerations present here were, not surprisingly, absent in these pre-Civil War Amendments debates, the concern voiced by congressmen over the submergence of minorities, bloc voting, and party control shows, at least, that the plaintiffs' apprehensions are not entirely new ones. See, *e. g.*, Cong. Globe, 27th Cong., 2d Sess., 445–448, 452–453, 463–464.

[39] In colonial days, "[m]ultiple districts were the rule, single ones the exception," and "[f]or nearly a century and a half after the Declaration of Independence the American states elected by far the greater part of their lawmakers in multiple constituencies." Klain, *supra*, n. 38, at 1112, 1113. Although a trend toward single-member districts began long ago, multiple districts are still much in evidence. See n. 37, *supra*. See also David & Eisenberg, *supra*, n. 38, at 20; Dixon, *supra*, n. 38, at 504.

In 1842, Congress by statute required single-member districts for

all aspects, their tendency to submerge minorities and to overrepresent the winning party as compared with the party's statewide electoral position, a general preference for legislatures reflecting community interests as closely as possible and disenchantment with political parties and elections as devices to settle policy differences between contending interests. The chance of winning or significantly influencing intraparty fights and issue-oriented elections has seemed to some inadequate protection to minorities, political, racial, or economic; rather, their voice, it is said, should also be heard in the legislative forum where public policy is finally fashioned. In our view, however, experience and insight have not yet dem-

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congressional elections. Act of June 25, 1842, § 2, 5 Stat. 491. The substance of the restriction was continued in Rev. Stat. § 23 and in apportionment legislation in this century until 1929. In 1941, Congress enacted a law that required that until a State is redistricted in a manner provided by law after decennial reapportionment of the House, representatives were to be elected from the districts prescribed by the law of the State, and that "if any of them are elected from the State at large they shall continue to be so elected," provided that if reapportionment of the House following a census shows that a State is entitled to an increase in the number of representatives, the additional representatives shall be elected at large until the State is redistricted, and if there is a decrease in the number of representatives and the number of districts in the State exceeds the number of representatives newly apportioned, all representatives shall be elected at large. Act of Nov. 15, 1941, 55 Stat. 762, amending § 22 (c) of the Act of June 18, 1929, 46 Stat. 27, 2 U. S. C. § 2a (c). In 1967, Congress reinstated the single-member district requirement, "except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-first Congress." 81 Stat. 581, 2 U. S. C. § 2c (1964 ed., Supp. V). Hawaii was the only State to take advantage of this exception. It has districted for the 92d Congress. Hawaii Rev. Stat. § 12–32.5 (Supp. 1969).

Congress has not purported to exercise Fourteenth Amendment powers to regulate or prohibit multi-member districts in state elections.

onstrated that multi-member districts are inherently invidious and violative of the Fourteenth Amendment. Surely the findings of the District Court do not demonstrate it. Moreover, if the problems of multi-member districts are unbearable or even unconstitutional it is not at all clear that the remedy is a single-member district system with its lines carefully drawn to ensure representation to sizable racial, ethnic, economic, or religious groups and with its own capacity for overrepresenting and underrepresenting parties and interests and even for permitting a minority of the voters to control the legislature and government of a State. The short of it is that we are unprepared to hold that district-based elections decided by plurality vote are unconstitutional in either single- or multi-member districts simply because the supporters of losing candidates have no legislative seats assigned to them. As presently advised we hold that the District Court misconceived the Equal Protection Clause in applying it to invalidate the Marion County multi-member district.

VI

Even if the District Court was correct in finding unconstitutional discrimination against poor inhabitants of the ghetto, it did not explain why it was constitutionally compelled to disestablish the entire county district and to intrude upon state policy any more than necessary to ensure representation of ghetto interests. The court entered judgment without expressly putting aside on supportable grounds the alternative of creating single-member districts in the ghetto and leaving the district otherwise intact, as well as the possibility that the Fourteenth Amendment could be satisfied by a simple requirement that some of the at-large candidates each year must reside in the ghetto. Cf. *Fortson* v. *Dorsey, supra.*

We are likewise at a loss to understand how on the court's own findings of fact and conclusions of law it

was justified in eliminating every multi-member district in the State of Indiana. It did not forthrightly sustain the theory that multi-member districts always overrepresent their voters to the invidious detriment of single-member residents. Nor did it examine any multi-member district aside from Marion County for possible intradistrict discrimination.

The remedial powers of an equity court must be adequate to the task, but they are not unlimited. Here the District Court erred in so broadly brushing aside state apportionment policy without solid constitutional or equitable grounds for doing so.

VII

At the same time, however, we reject defendant's suggestion that the court was wrong in ordering statewide reapportionment. After determining that Marion County required reapportionment, the court concluded that "it becomes clear beyond question that the evidence adduced in this case and the additional apportionment requirements set forth by the Supreme Court call for a redistricting of the entire state as to both houses of the General Assembly." 305 F. Supp., at 1391. This evidence, based on 1960 census figures, showed that Senate district 20, with one senator for 80,496, was overrepresented by 13.68% while district 5, with one senator for 106,790, was underrepresented by 14.52%, for a total variance of 28.20% and a ratio between the largest and smallest districts of 1.327 to 1. The house figures were similar. The variation ranged from one representative for 41,449 in district 39 to one for 53,003 in district 35, for a variance of 24.78% and a ratio of 1.279 to 1.[40] These

[40] The court was also impressed by the 1967 Indiana Board of Health Vital Statistics population estimates which showed a senate variance of 36.83% and a house variance of 37.30%. It did not base its order on these interim figures, however. See 307 F. Supp. 1362, 1366.

variations were in excess of, or very nearly equal to, the variation of 25.65% and the ratio of 1.30 to 1 which we held excessive for state legislatures [41] in *Swann* v. *Adams,* 385 U. S. 440 (1967). Even with this convincing showing of malapportionment, the court refrained from action in order to allow the Indiana Legislature to call a special session for the purpose of redistricting. When the legislature ignored the court's findings and suggestion, it was not improper for the court to order statewide redistricting, as district courts have done from the time *Reynolds* v. *Sims,* 377 U. S. 533 (1964), and its companion cases were decided.[42] And see *Maryland Committee for Fair Representation* v. *Tawes,* 377 U. S. 656, 673 (1964).

Nor can we accept defendant's argument that the statutory plan was beyond attack because the District Court had held in 1965 that at that time the plan met the "substantial equality" test of *Reynolds. Stout* v. *Bot-*

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[41] See also *Kirkpatrick* v. *Preisler,* 394 U. S. 526 (1969), and *Wells* v. *Rockefeller,* 394 U. S. 542 (1969), in which the Court held that variances of 5.97% and 13.096%, respectively, were impermissible for congressional redistricting.

[42] In redistricting the State, the District Court divided some counties into several districts, and defendant attacks this as an unwarranted violation of Indiana Const., Art. 4, § 6, which says "no county, for Senatorial apportionment, shall ever be divided." Defendant concedes that "[t]he error . . . is not the *per se* violation" of the constitution, but rather that the court drew its plan "without having meaningfully considered" the dictates of the constitution. Brief for Appellant (Defendant) 49. But the contrary appears to us to be true. The court announced that it "would strive to preserve the integrity of county and township lines" wherever possible, 307 F. Supp., at 1364, though it ultimately concluded that the "difficulty of devising . . . compact and contiguous . . . districts within that framework [of mathematical equality] has in large part precluded preservation of county lines." *Id.,* at 1366. We note that none of the statewide redistricting plans that were submitted for the court's consideration, including those of the house and senate minority leaders and the chairman of the senate majority caucus committee, followed the state constitution in this respect. R. 57–137, 198–228.

torff, 249 F. Supp. 488 (SD Ind. 1965). Defendant does not argue that the 1969 variances were acceptable under the *Reynolds* test, which has been considerably refined since that decision, see *Swann* v. *Adams, supra.* Rather, he contends that because *Reynolds* indicated that decennial reapportionment would be a "rational approach" to the problem, a State cannot be compelled to reapportion itself more than once in a 10-year period. Such a reading misconstrues the thrust of *Reynolds* in this respect. Decennial reapportionment was suggested as a presumptively rational method to avoid "daily, monthly, annual or biennial reapportionment" as population shifted throughout the State.[43] Here, the District Court did not order reapportionment as a result of population shifts since the 1965 *Stout* decision, but only because the disparities among districts which were thought to be permissible at the time of that decision had been shown by intervening decisions of this Court to be excessive.

We therefore reverse the judgment of the District Court and remand the case to that court for further proceedings consistent with this opinion.

It is so ordered.

[For Appendix to opinion of the Court, see *post,* p. 164.]

MR. JUSTICE STEWART joins in Part I through VI of the Court's opinion, holding that the multi-member districting scheme here in issue did not violate the Equal Protection Clause of the Fourteenth Amendment. He dissents from Part VII of the opinion for the reasons expressed in his dissenting opinion in *Lucas* v. *Colorado General Assembly,* 377 U. S. 713, 744.

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[43] In any event, the Court was careful to note that "we do not mean to intimate that more frequent reapportionment would not be constitutionally permissible or practicably desirable." 377 U. S., at 584.

The following table was included in the trial court's findings:

APPENDIX TO OPINION OF THE COURT

TABLE NO. 7

Residence of Legislators Elected (By Marion County Area)	*1* *1960–69 Average Population*	*2* *1960–69 Avg. Pop. as Percentage of Marion County Average Pop. 1960*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*	*11*	*12*	*13*	*14*	*15*	*16*
			Senators Elected						*Senators Elected as Percent of 1960–68 Total*	*Representatives Elected*						*Representatives Elected as Percent of 1960–68 Total*
			60	*62*	*64*	*66*	*68*	*60-68*		*60*	*62*	*64*	*66*	*68*	*60-68*	
Washington Twp. excluding Tract 220	103,615	13.98	3	1	2	1	3	10	47.52	6	2	5	5	5	23	34.33
Census Tract 220	4,866	0.66	1	0	0	0	0	1	4.75	1	0	2	1	1	5	7.46
Center Twp. excluding Ghetto	172,876	23.32	0	0	1	0	0	1	4.75	0	3	4	1	0	8	11.94
Center Twp. Ghetto	132,000	17.81	0	0	1	0	0	1	4.75	0	1	1	0	2	4	5.97
Pike Twp.	11,031	1.49	0	0	0	0	0	0	0	0	0	0	0	1	1	1.49
Wayne Twp.	105,961	14.30	0	0	0	0	0	0	0	1	2	0	2	2	7	10.45
Decatur Twp.	13,755	1.86	0	0	0	0	0	0	0	0	0	0	1	1	2	2.99
Perry Twp.	59,778	8.07	1	0	1	0	2	4	19.01	0	0	1	1	1	3	4.48
Franklin Twp.	8,929	1.21	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Lawrence Twp.	49,553	6.69	0	0	1	0	1	2	9.51	2	2	0	3	2	9	13.44
Warren Twp.	78,872	10.64	0	0	0	1	1	2	9.51	1	1	2	1	0	5	7.46
Marion County	741,234	[100%]	5	1	6	2	7	21	[100%]	11	11	15	15	15	67	[100%]

305 F. Supp., at 1383.

Separate opinion of MR. JUSTICE HARLAN.

Earlier this Term I remarked on "the evident *malaise* among the members of the Court" with prior decisions in the field of voter qualifications and reapportionment. *Oregon* v. *Mitchell,* 400 U. S. 112, 218 (1970) (separate opinion of this writer).

Today's opinions in this and two other voting cases now decided [1] confirm that diagnosis.

I

Past decisions have held that districting in local governmental units must approach equality of voter population "as far as is practicable," *Hadley* v. *Junior College District,* 397 U. S. 50, 56 (1970), and that the "as nearly as is practicable" standard of *Wesberry* v. *Sanders,* 376 U. S. 1, 7–8 (1964), for congressional districting forbade a maximum variation of 6%. *Kirkpatrick* v. *Preisler,* 394 U. S. 526 (1969). Today the Court sustains a local governmental apportionment scheme with a 12% variation. *Abate* v. *Mundt, post,* p. 182.

Other past decisions have suggested that multi-member constituencies would be unconstitutional if they could be shown "under the circumstances of a particular case . . . to minimize or cancel out the voting strength of racial or political elements of the voting population." *Fortson* v. *Dorsey,* 379 U. S. 433, 439 (1965); *Burns* v. *Richardson,* 384 U. S. 73, 88 (1966). Today the Court holds that a three-judge District Court, which struck down an apportionment scheme for just this reason, "misconceived the Equal Protection Clause." *Ante,* at 160.

Prior opinions stated that "once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded." *Gray* v. *Sanders,* 372 U. S. 368, 381 (1963); *Hadley* v. *Junior College District,* 397 U. S. 50,

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[1] *Abate* v. *Mundt, post,* p. 182; *Gordon* v. *Lance, ante,* p. 1.

59 (1970). Today the Court sustains a provision that gives opponents of school bond issues half again the voting power of proponents. *Gordon* v. *Lance, ante,* p. 1.

II

The Court justifies the wondrous results in these cases by relying on different combinations of factors. *Abate* v. *Mundt* relies on the need for flexibility in local governmental arrangements, the interest in preserving the integrity of political subdivisions, and the longstanding tradition behind New York's practice in the latter respect. This case finds elementary probability theory too simplistic as a guide to resolution of what is essentially a practical question of political power; the opinion relies on the long history of multi-member districts in this country and the fear that "affirmance of the District Court would spawn endless litigation." *Ante,* at 157. *Gordon* v. *Lance* relies heavily on the "federal analogy" and the prevalence of similar anti-majoritarian elements in the constitutions of the several States.

To my mind the relevance of such considerations as the foregoing is undeniable and their cumulative effect is unanswerable. I can only marvel, therefore, that they were dismissed, singly and in combination, in a line of cases which began with *Gray* v. *Sanders,* 372 U. S. 368 (1963), and ended with *Hadley* v. *Junior College District,* 397 U. S. 50 (1970).

That line of cases can best be understood, I think, as reflections of deep *personal* commitments by some members of the Court to the principles of pure majoritarian democracy. This majoritarian strain and its nonconstitutional sources are most clearly revealed in *Gray* v. *Sanders, supra,* at 381, where my Brother DOUGLAS, speaking for the Court, said: "The conception of political equality from the Declaration of Independence,

to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." If this philosophy of majoritarianism had been given its head, it would have led to different results in each of the cases decided today, for it is in the very nature of the principle that it regards majority rule as an imperative of social organization, not subject to compromise in furtherance of merely political ends. It is a philosophy which ignores or overcomes the fact that the scheme of the Constitution is one not of majoritarian democracy, but of federal republics, with equality of representation a value subordinate to many others, as both the body of the Constitution and the Fourteenth Amendment itself show on their face. See generally *Baker* v. *Carr,* 369 U. S. 186, 297–324 (1962) (Frankfurter, J., dissenting).

III

If majoritarianism is to be rejected as a rule of decision, as the Court implicitly rejects it today, then an alternative principle must be supplied if this earlier line of cases just referred to is still to be regarded as good law. The reapportionment opinions of this Court provide little help. They speak in conclusory terms of "debasement" or "dilution" of the "voting power" or "representation" of citizens without explanation of what these concepts are. The answers are hardly apparent, for as the Court observes today:

> "As our system has it, one candidate wins, the others lose. Arguably the losing candidates' supporters are without representation since the men they voted for have been defeated; arguably they have been denied equal protection of the laws since they have no legislative voice of their own. . . . But we have not yet deemed it a denial of equal protection to deny legislative seats to losing candidates,

> even in those so-called 'safe' districts where the same party wins year after year." *Ante,* at 153.

A coherent and realistic notion of what is meant by "voting power" might have restrained some of the extreme lengths to which this Court has gone in pursuit of the will-o'-the-wisp of "one man, one vote."

An interesting illustration of the light which a not implausible definition of "voting power" can shed on reapportionment doctrine is provided by the theoretical model created by Professor Banzhaf, to which the Court refers, *ante,* at 144–146.[2] This model uses as a measure of voting power the probability that a given voter will cast a tie-breaking ballot in an election. Two further assumptions are made: first, that the voting habits of all members of the electorate are alike; and second, that each voter is equally likely to vote for either candidate before him. On these assumptions, and taking the voting population in Marion County as roughly 300,000, it can be shown that the probability of an individual voter's casting a decisive vote in a given election is approximately .00146. This provides a standard to which "voting power" of residents in other districts may be compared. See generally Banzhaf, Multi-Member Electoral Districts—Do They Violate the "One Man, One Vote" Principle, 75 Yale L. J. 1309 (1966).

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[2] The Court, though stating that it does "not quarrel with plaintiffs' mathematics," nevertheless implies that it may be ignored because "the position remains a theoretical one . . . and does 'not take into account any political or other factors which might affect the actual voting power of the residents, which might include party affiliation, race, previous voting characteristics or any other factors which go into the entire political voting situation.'" *Ante,* at 145, 146. Precisely the same criticism applies, with even greater force, to the "one man, one vote" opinions of this Court. The only relevant difference between the elementary arithmetic on which the Court relies and the elementary probability theory on which Professor Banzhaf relies is that calculations in the latter field cannot be done on one's fingers.

However, Professor Banzhaf's model also reveals that minor variations in assumptions can lead to major variations in results. For instance, if the temper of the electorate changes by one-half of one percent,[3] each individual's voting power is reduced by a factor of approximately 1,000,000. Or if a few of the 300,000 voters are committed—say 15,000 to candidate *A* and 10,000 to candidate *B* [4]—the probability of any individual's casting a tie-breaking vote is reduced by a factor on the rough order of 120,000,000,000,000,000,000. Obviously in comparison with the astronomical differences in voting power which can result from such minor variations in political characteristics, the effects of the 12% and 28% population variations considered in *Abate* v. *Mundt* and in this case are *de minimis,* and even the extreme deviations from the norm presented in *Baker* v. *Carr,* 369 U. S. 186 (1962), and *Avery* v. *Midland County,* 390 U. S. 474 (1968), pale into insignificance.[5]

It is not surprising therefore that the Court in this case declines to embrace the measure of voting power suggested by Professor Banzhaf. But it neither suggests an alternative nor considers the consequences of its inability to measure what it purports to be equalizing. See n. 2, *supra.* Instead it becomes enmeshed in the haze of slogans and numerology which for 10 years has obscured its vision in this field, and finally remands the case "for further proceedings consistent with [its] opinion." *Ante,* at 163. This inexplicit mandate is at

[3] More precisely, the result follows if the second of Professor Banzhaf's assumptions is altered so that the probability of each voter's selecting candidate *A* over candidate *B* is 50.5% rather than 50%.

[4] The text assumes that each of the remaining 275,000 voters is equally likely to vote for *A* or for *B*.

[5] "There is something fascinating about science. One gets such wholesale returns of conjecture out of such a trifling investment of fact." Mark Twain, Life on the Mississippi 109 (Harper & Row, 1965).

least subject to the interpretation that the court below is to inquire into such matters as "the actual influence of Marion County's delegation in the Indiana Legislature," *ante,* at 147, and the possibility of "recurring poor performance by Marion County's delegation with respect to Center Township ghetto," *ante,* at 155, with a view to determining whether "any legislative skirmish affecting the State of Indiana or Marion County in particular would have come out differently had Marion County been subdistricted and its delegation elected from single-member districts." *Ante,* at 148. If there are less appropriate subjects for federal judicial inquiry, they do not come readily to mind. The suggestion implicit in the Court's opinion that appellees may ultimately prevail if they can make their record in these and other like respects should be recognized for what it is: a manifestation of frustration by a Court that has become trapped in the "political thicket" and is looking for the way out.

This case is nothing short of a complete vindication of Mr. Justice Frankfurter's warning nine years ago "of the mathematical quagmire (apart from divers judicially inappropriate and elusive determinants) into which this Court today catapults the lower courts of the country." *Baker* v. *Carr,* 369 U. S. 186, 268 (1962) (dissenting opinion). With all respect, it also bears witness to the morass into which the Court has gotten itself by departing from sound constitutional principle in the electoral field. See the dissenting opinion of Mr. Justice Frankfurter in *Baker* v. *Carr, supra,* and my separate opinions in *Reynolds* v. *Sims,* 377 U. S. 533, 589 (1964), and in *Oregon* v. *Mitchell,* 400 U. S. 112, 152 (1970). I hope the day will come when the Court will frankly recognize the error of its ways in ever having undertaken to restructure state electoral processes.

I would reverse the judgment below and remand the case to the District Court with directions to dismiss the complaint.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting in part and concurring in the result in part.

The Indiana Constitution provides that "no county, for Senatorial apportionment, shall ever be divided." Art. 4, § 6. The legislative apportionment statutes in Indiana which implemented that provision gave Marion County eight senators, all elected at large. The statutes also gave the county 15 at-large representatives.

Marion County is the most populous in the State. It contains nine townships and includes the city of Indianapolis. On January 9, 1969, this lawsuit was commenced to require a subdivision of the multi-member districting practiced in Marion County. Certain voters contended that the multi-member district deprived them of equal protection of the laws because it diluted the voting rights of an identifiable racial minority within the county.

To determine if there was an identifiable minority within the county the District Court adopted the following definition of "ghetto":

> "A primarily residential section of an urban area characterized by a higher relative density of population and a higher relative proportion of substandard housing than in the overall metropolitan area which is inhabited predominantly by members of a racial, ethnic, or other minority group, most of whom are of lower socioeconomic status than the prevailing status in the metropolitan area and whose residence in the section is often the result of social, legal, or economic restrictions or custom." 305 F. Supp. 1364, 1373.

Applying the definition to the extensive evidence in the case, the District Court found there was an identifiable ghetto area within Center Township. The court then contrasted the residence of those elected to the state

House and Senate from Marion County since 1960. There had been 21 elected senators; two came from Center Township, 11 from Washington Township. Of the 67 representatives, 12 came from Center Township and 28 from Washington Township.

The District Court concluded:

> "The inequity of representation by residence of legislators between Washington and Center Townships is apparent . . . . Washington Township, the upper middle-class and wealthy suburban area having 14.64% of the population of Marion County, was the residence of 52.27% of the senators and 41.79% of the representatives. Center Township, having 41.14% of the population (approximately three times as large), was the residence of 9.51% of the senators (less than one-fifth of Washington Township) and 17.91% of the representatives (approximately three-sevenths of Washington Township)." 305 F. Supp., at 1385.

The court found that the voting strength of the cognizable element within Center Township was severely minimized, that minimization occurred by virtue of the strong control which the political parties exert over the nomination process in Marion County, and that black voters within Center Township are unable to be assured of the opportunity of voting for prospective legislators of their choice. The court further found that "[u]nder the evidence before the Court such invidious effects will continue so long as Marion County is apportioned into large senate and house multi-member districts." 305 F. Supp., at 1399.

I

Based on its findings the District Court held the then Indiana apportionment acts unconstitutional and enjoined their enforcement. The court then determined

that to redistrict Marion County alone would leave constitutionally impermissible population variances between the newly created districts and the other districts in the State and therefore redistricting the entire State was necessary. In its redistricting plan the District Court divided well over half of the counties in the State despite Art. 4, § 6, of the Indiana Constitution. Marion County itself was divided into seven separate senatorial districts and an eighth was created by taking part of Marion and parts of Johnson and Morgan Counties. The court mandated that the 1970 election be conducted in accordance with the plan it approved and the court retained jurisdiction for the purpose of passing on any future claims of unconstitutionality made by the plaintiffs against any future legislative apportionment plan promulgated. This Court stayed the District Court's order. 396 U. S. 1055.

This suit was commenced some 22 months before the 1970 election in ample time for a decision on the merits. The plaintiffs in fact won below but this Court stayed the order. Now the election has been held and a federal decennial census has been taken. Under the compulsion of the decree of the District Court the legislature has adopted single-member districts for the entire State. But absent a federal decree they would certainly follow the mandate of the Indiana Constitution.

As the Court says, the fact that the 1970 election is history does not affect the underlying claim in this case. We have a finding of fact that an identifiable racial minority has its voting strength severely minimized by the operation of multi-member districts. We also have a finding that the invidious effects will continue so long as Marion County has multi-member districts. Under the order of the District Court (absent our stay) the 1965 apportionment statutes could not be used. The District Court would retain jurisdiction and no attempt by the state

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legislature to apply Art. 4, § 6, of the Constitution would be successful because under the conclusions of the District Court it is unconstitutional as applied to Marion County. See *Reynolds* v. *Sims,* 377 U. S. 533, 584. There is no chance that the Indiana Constitution can be amended in time to undo the harm. By its own provisions any amendment requires a majority vote in each house of two consecutive general assemblies; it is then referred to the voters and ratified by majority vote. Art. 16, § 1.

The Indiana Constitution requires "an enumeration . . . of all male inhabitants over the age of twenty-one years" to be made every six years. Art. 4, § 4. Then at the next legislative session, the general assembly is directed to reapportion the State according to the number of male inhabitants above the age of 21. Art. 4, § 5. These provisions fell into disuse and the last enumeration provided for was in 1921 and, prior to *Baker* v. *Carr,* 369 U. S. 186, the legislature had not been apportioned since that time. See *Matthews* v. *Handley,* 179 F. Supp. 470 (ND Ind. 1959); *Fruit* v. *Metropolitan School District,* 241 Ind. 621, 172 N. E. 2d 864. Indiana courts had no power to require reapportioning under the state constitution. *Parker* v. *State ex rel. Powell,* 133 Ind. 178, 32 N. E. 836.

In 1969 the legislature initially approved proposed constitutional changes to those two sections which will provide for using the federal decennial census for Indiana and apportioning the State immediately thereafter, such apportionment to remain unaltered until the next decennial census. S. J. Res. No. 26, Acts 1969, c. 464. The provision must still be approved by the 1971 general assembly and a majority of the voters. See Art. 16, § 1, of the Indiana Constitution. At the time this case was argued under the Indiana Apportionment Act of 1965 (2d Spec. Sess.), c. 4, § 1, and c. 5, § 1, the 1960 Decennial Census was accepted as correct.

Nor does the fact that the state legislature has passed a reapportionment plan abolishing multi-member districts throughout the entire State moot this case. But for the decision below no such plan would have been forthcoming. The plan is in plain violation of the state constitution and in view of the fact that no Indiana Legislature has ever violated that provision of the state constitution before it is obvious that the impetus came from the outside.[1] The provision of the state constitution forbidding dividing a county for senatorial apportionment is unconstitutional under the Federal Constitution as applied to Marion County. See *Reynolds* v. *Sims,* 377 U. S., at 584. Mooting the case would accomplish nothing. If we were to moot it, the state courts would likely void the 1971 apportionment plan as violative of the state constitution and then the parties would be right back where they were at the beginning of this lawsuit. It is apparent this controversy remains alive and that there is no reason to wait two or more years in order to decide it in a case growing out of a state court determination on the constitutionality of single-member districts in Marion County, as would happen should we vacate the decree below and force the parties to another forum for another round of litigation on the same issue.

The constitutional provision which now requires multi-member senatorial districts has been in Indiana's constitution from the date of enactment—1851. And the ghetto voters' position as a class will not change. The findings of the District Court clearly state the invidious effects will last so long as multi-member districting lasts. The District Court found that "to redistrict Marion County alone, to provide single-member districts or any other type of districts meeting constitutional standards, would

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[1] Wallace, Legislative Apportionment In Indiana: A Case History, 42 Ind. L. J. 6, 30 (1966).

leave impermissible population variations between the new Marion County districts and other districts in the State." 305 F. Supp., at 1399. Accordingly the court redistricted the entire State.[2] The decision to redistrict the State and the finding of minimization of the ghetto voters' strength are intertwined. As the District Court stated, the "portions of the . . . statutes relating to Marion County" were found to be not severable from the full body of the statutes. 305 F. Supp., at 1399. There is no showing here that that finding is even partially erroneous let alone clearly erroneous. A decision to redistrict Marion County involves the entire State; each properly must be considered with the other.

II

The merits of the case go to the question reserved in *Fortson* v. *Dorsey,* 379 U. S. 433, 439, and in *Wells* v. *Rockefeller,* 394 U. S. 542, 544, whether a gerrymander can be "constitutionally impermissible." The question of the gerrymander[3] is the other half of *Reynolds* v. *Sims,* 377 U. S. 533. Fair representation of voters in a legislative assembly—one man, one vote—would seem to require (1) substantial equality of population within each district and (2) the avoidance of district lines that weigh the power of one race more heavily than another. The latter can be done—and is done—by astute drawing of district lines that makes the district either heavily Democratic or heavily Republican as the case may be. Lines may be drawn so as to make the voice

[2] The District Court also found independent of the new districts that there were impermissible population variances in the Indiana apportionment. The ratio between the largest and smallest Senate district was 1.327 to 1. For the House it was 1.279 to 1. Under the plan promulgated by the District Court these were reduced to 1.017 to 1 and 1.020 to 1 respectively.

[3] See Tyler & Wells, The New Gerrymander Threat, AFL–CIO American Federationist 1 (Feb. 1971).

of one racial group weak or strong, as the case may be.

The problem of the gerrymander is how to defeat or circumvent the sentiments of the community. The problem of the law is how to prevent it. As MR. JUSTICE HARLAN once said "A computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of critical issues." *Wells* v. *Rockefeller,* 394 U. S., at 551 (dissenting). The easy device is the gerrymander. The District Court found that it operated in this case to dilute the vote of the blacks.

III

In *Gomillion* v. *Lightfoot,* 364 U. S. 339, we dealt with the problem of a State intentionally making a district smaller to exclude black voters. Here we have almost the converse problem. The State's districts surround the black voting area with white voters.

Gomillion, involving the turning of the city of Tuskegee from a geographical square "to an uncouth twenty-eight-sided figure," 364 U. S., at 340, was only one of our cases which dealt with elevating the political interests of one identifiable group over those of another. Georgia's county unit system was similar, although race was not a factor. Under the Georgia system a farmer in a rural county could have up to 99 times the voting power of his urban-dwelling brother. See *Gray* v. *Sanders,* 372 U. S. 368. Here the districting plan operates to favor "upper-middle class and wealthy" suburbanites. 305 F. Supp., at 1385.

A showing of racial motivation is not necessary when dealing with multi-member districts. *Burns* v. *Richardson,* 384 U. S. 73, 88; *Fortson* v. *Dorsey,* 379 U. S., at 439. Although the old apportionment plan which is in full harmony with the State's 1851 constitution, may not be racially motivated, the test for multi-member districts is whether there are invidious effects.

That rule is but an application of a basic principle applied in *Hunter* v. *Erickson,* 393 U. S. 385. There a city passed a housing law which provided that before an ordinance regulating the sale or lease of realty on the basis of race could become effective it must be approved by a majority vote. Thus, the protection of minority interests became much more difficult. We held that a State or a state agency could not in its voting scheme so disadvantage black interests.

Multi-member districts are not *per se* unconstitutional. *Fortson* v. *Dorsey,* 379 U. S., at 439. In that case we expressly reserved judgment on the question of whether a multi-member districting plan which operated "to minimize or cancel out the voting strength of racial or political elements of the voting population" could pass constitutional muster. *Ibid.*

In *Burns* v. *Richardson, supra,* we again considered the problems of multi-member districts. The doubts noted in *Fortson* v. *Dorsey* were resolved and we stated that assuming the requirements of *Reynolds* v. *Sims,* 377 U. S. 533, were satisfied, multi-member districts are unconstitutional "only if it can be shown that 'designedly or otherwise' . . . [such a district would operate] to minimize or cancel out the voting strength of racial or political elements of the voting population." 384 U. S., at 88. We went on to suggest how the burden of proof could be met.

> "It may be that this invidious effect can more easily be shown if, in contrast to the facts in *Fortson,* districts are large in relation to the total number of legislators, if districts are not appropriately subdistricted to assure distribution of legislators that are resident over the entire district, or if such districts characterize both houses of a bicameral legislature rather than one." *Ibid.*

These factors are all present in this case. Between the

largest (Marion) and second largest (Lake) counties in the State, 26% of each house of the legislature is controlled. There is no subdistricting under the Indiana plan. Cf. *Dusch* v. *Davis,* 387 U. S. 112. And multi-member districts are used in both houses of the legislature.

In both *Fortson* and *Burns* we demanded that the invidious effects of multi-member districts appear from evidence in the record. Here that demand is satisfied by (1) the showing of an identifiable voting group living in Center Township, (2) the severe discrepancies of residency of elected members of the general assembly between Center and Washington Townships, cf. BRENNAN, J., dissenting in *Abate* v. *Mundt, post,* p. 187, (3) the finding of pervasive influence of the county organizations of the political parties, and (4) the finding that legislators from the county maintain "common, undifferentiated" positions on political issues.[4] 305 F. Supp., at 1385.

IV

Little time need be spent on the District Court's decision to redistrict the entire State. The court found that there were already impermissible population variances between districts under the current apportionment plan. The ratio between the largest and smallest Senate district was 1.327 to 1. For the House it was 1.279 to 1. The court also found that the new Marion County districts would also have impermissible population variances when compared to existing districts.

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[4] The three-judge court "emphasized that the black plaintiffs were members of an identifiable interest group whose voting strength had been minimized by the multi-member districting scheme. They were not only unable to elect a legislator who was attuned to their interests, but were also saddled with lawmakers who reflected white suburban ideology and were controlled by political leaders." Note, *Chavis* v. *Whitcomb:* Apportionment, Gerrymandering, and Black Voting Rights, 24 Rutgers L. Rev. 521, 533 (1970).

On these facts the demands of our decisions required redistricting. As *Reynolds* v. *Sims* showed, the state constitution must give way to requirements of the Supremacy Clause when there is a conflict with the Federal Constitution. And, finally, the District Court's own plan was exemplary. The population ratio for the largest and smallest Senate districts was 1.017 to 1 and for the House it was 1.020 to 1.

V

It is said that if we prevent racial gerrymandering today, we must prevent gerrymandering of any special interest group tomorrow, whether it be social, economic, or ideological. I do not agree. Our Constitution has a special thrust when it comes to voting; the Fifteenth Amendment says the right of citizens to vote shall not be "abridged" on account of "race, color, or previous condition of servitude."

Our cases since *Baker* v. *Carr* have never intimated that "one man, one vote" meant "one white man, one vote." Since "race" may not be gerrymandered, I think the Court emphasizes the irrelevant when it says that the effect on "the actual voting power" of the blacks should first be known. They may be all Democratic or all Republican; but once their identity is purposely washed out of the system, the system, as I see it, has a constitutional defect. It is asking the impossible for us to demand that the blacks first show that the effect of the scheme was to discourage or prevent poor blacks from voting or joining such party as they chose. On this record, the voting rights of the blacks have been "abridged," as I read the Constitution.

The District Court has done an outstanding job, bringing insight to the problems. One can always fault a lower court by stating theoretical aspects of apportionment plans that may not have been considered. This

District Court acted earnestly and boldly to correct a festering electoral system. I would not even vacate and remand so that it could revise its plan in accordance with the 1970 census figures. That court has retained jurisdiction of the cause and has sense enough to update its own plan. We can make the contribution of the District Court enormous and abiding by leaving it the initiative to carry out the mandate of *Reynolds* v. *Sims*.

I would affirm the judgment.

ABATE ET AL. *v.* MUNDT ET AL.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 71. Argued November 19, 1970—Decided June 7, 1971

For more than a century the Rockland County board of supervisors consisted of the supervisors of the county's five towns, resulting in extensive functional interrelationships and intergovernmental coordination between county and towns. Severe malapportionment due to population growth led to court-ordered reapportionment. The proposed plan, challenged by petitioners, provides for a county legislature of 18 members chosen from five districts, corresponding with the towns, each district being assigned legislators in the proportion of its population to that of the smallest town. The plan produces a total deviation from equality of 11.9%. The Court of Appeals of New York upheld the plan. *Held:* In light of the long tradition of overlapping functions and dual personnel in the Rockland County government and the fact that the plan does not contain any built-in bias favoring particular political interests or geographic areas, the plan is not violative of the Equal Protection Clause. Pp. 185–187.

25 N. Y. 2d 309, 253 N. E. 2d 189, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, WHITE, and BLACKMUN, JJ., joined. HARLAN, J., filed a statement concurring in the result. STEWART, J., concurred in the judgment. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS, J., joined, *post,* p. 187.

Frank P. Barone argued the cause and filed a brief for petitioner Abate. *Doris Friedman Ulman* argued the cause and filed a brief for petitioners Molof et al. *Paul H. Rivet* argued the cause and filed a brief for petitioners O'Sullivan et al.

J. Martin Cornell argued the cause for respondents. With him on the brief was *Arthur J. Prindle.*

Louis J. Lefkowitz, Attorney General, *Ruth Kessler Toch,* Solicitor General, and *Robert W. Imrie,* Assistant Attorney General, filed a brief for the State of New York as *amicus curiae.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

In this case, petitioners challenge the constitutionality of a reapportionment plan proposed in response to both federal and state court findings of malapportionment in Rockland County, New York. The Court of Appeals of the State of New York upheld the plan. We affirm.

For more than 100 years, Rockland County was governed by a board of supervisors consisting of the supervisors of each of the county's five constituent towns. This county legislature was not separately elected; rather, its members held their county offices by virtue of their election as town supervisors—a pattern that typified New York county government. The result has been a local structure in which overlapping public services are provided by the towns and their county working in close cooperation. For example, in Rockland County the towns adopt their own budgets and submit them to the county which levies taxes. These taxes are based on real property assessments established by the towns but equalized by the county board. Similarly, public services such as waste disposal and snow removal are provided through cooperative efforts among the municipalities. There is no indication that these joint efforts have declined in importance; in fact, respondents strenuously urge that the county's rapidly expanding population has amplified the need for town and county coordination in the future.

The county's increased population also produced severe malapportionment—so severe that, in 1966, a federal district court required that the county board submit a reapportionment plan to the Rockland County voters, *Lodico* v. *Board of Supervisors,* 256 F. Supp. 440 (SDNY). Pursuant to that order, three different plans were devised and submitted to the electorate; but each was rejected at the polls. The present action was brought in 1968 to compel the board to reapportion. After its

initial proposal was rejected by the New York courts, the board submitted the plan that is the subject of this decision.

The challenged plan, based on 1969 population figures, provides for a county legislature composed of 18 members chosen from five legislative districts. These districts exactly correspond to the county's five constituent towns. Each district is assigned its legislators according to the district's population in relation to the population of the smallest town, Stony Point. Stony Point has a population of 12,114 and is assigned one representative in the county legislature. The number of representatives granted the other districts is determined by dividing the population of each by the population of the smallest town. Fractional results of the computation are rounded to the nearest integer, and this need to round off "fractional representatives" produces some variations among districts in terms of population per legislator. Under 1969 population figures, the Orangetown district is the most "underrepresented" (7.1%); while Clarkstown is the most "overrepresented" (4.8%). Thus, the plan presently produces a total deviation from population equality of 11.9%.[1] Petitioners attack these deviations as unconstitutional.[2]

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[1] All of the population figures and percentage deviations are:

District	*Population**	*Number of Representatives*	*Percentage** Deviations*
Stony Point	12,114	1	0.3
Haverstraw	23,676	2	2.5
Orangetown	52,080	4	—7.1
Clarkstown	57,883	5	4.8
Ramapo	73,051	6	—0.2

*1969 Population data.

**(—) refers to "underrepresented."

[2] Petitioners also attack the plan's use of multi-member districts. However, they have not shown that these multi-member districts, by themselves, operate to impair the voting strength of particular racial or political elements of the Rockland County voting population, see *Burns* v. *Richardson,* 384 U. S. 73, 88 (1966).

It is well established that electoral apportionment must be based on the general principle of population equality and that this principle applies to state and local elections, *Avery* v. *Midland County,* 390 U. S. 474, 481 (1968). "Mathematical exactness or precision is hardly a workable constitutional requirement," *Reynolds* v. *Sims,* 377 U. S. 533, 577 (1964), but deviations from population equality must be justified by legitimate state considerations, *Swann* v. *Adams,* 385 U. S. 440, 444 (1967). Because voting rights require highly sensitive safeguards, this Court has carefully scrutinized state interests offered to justify deviations from population equality.

In assessing the constitutionality of various apportionment plans, we have observed that viable local governments may need considerable flexibility in municipal arrangements if they are to meet changing societal needs, *Sailors* v. *Board of Education,* 387 U. S. 105, 110–111 (1967), and that a desire to preserve the integrity of political subdivisions may justify an apportionment plan which departs from numerical equality. *Reynolds* v. *Sims, supra,* at 578. These observations, along with the facts that local legislative bodies frequently have fewer representatives than do their state and national counterparts and that some local legislative districts may have a much smaller population than do congressional and state legislative districts, lend support to the argument that slightly greater percentage deviations may be tolerable for local government apportionment schemes, cf. *ibid.* Of course, this Court has never suggested that certain geographic areas or political interests are entitled to disproportionate representation. Rather, our statements have reflected the view that the particular circumstances and needs of a local community as a whole may sometimes justify departures from strict equality.

Accordingly, we have underscored the danger of apportionment structures that contain a built-in bias tending

to favor particular geographic areas or political interests or which necessarily will tend to favor, for example, less populous districts over their more highly populated neighbors, see *Hadley* v. *Junior College District,* 397 U. S. 50, 57–58 (1970). In this case, we have no such indigenous bias; there is no suggestion that the Rockland County plan was designed to favor particular groups. It is true that the existence of any deviations from strict equality means that certain districts are advantaged at that point in time; but, under this plan, changing demographic patterns may shift electoral advantages from one town to another.[3]

The mere absence of a built-in bias is not, of course, justification for a departure from population equality. In this case, however, Rockland County defends its plan by asserting the long history of, and perceived need for, close cooperation between the county and its constituent towns. The need for intergovernmental coordination is often greatest at the local level, and we have already commented on the extensive functional interrelationships between Rockland County and its towns. But because almost all governmental entities are interrelated in numerous ways, we would be hesitant to accept this justification by itself. To us, therefore, it is significant that Rockland County has long recognized the advantages of having the same individuals occupy the governing positions of both the county and its towns. For over 100 years, the five town supervisors were the only members of the county board, a system that necessarily fostered extensive interdependence between the towns and their county government. When population shifts required that some towns receive a greater portion of seats on the

[3] Naturally, we express no opinion on the contention that, in future years, the Rockland County plan may produce substantially greater deviations than presently exist. Such questions can be answered if and when they arise.

county legislature, Rockland County responded with a plan that substantially remedies the malapportionment and that, by preserving an exact correspondence between each town and one of the county legislative districts, continues to encourage town supervisors to serve on the county board.

We emphasize that our decision is based on the long tradition of overlapping functions and dual personnel in Rockland County government and on the fact that the plan before us does not contain a built-in bias tending to favor particular political interests or geographic areas. And nothing we say today should be taken to imply that even these factors could justify substantially greater deviations from population equality. But we are not prepared to hold that the Rockland County reapportionment plan violates the Constitution, and, therefore, we affirm.

MR. JUSTICE HARLAN concurs in the result for the reasons stated in his separate opinion in *Whitcomb* v. *Chavis*, *ante*, p. 165.

MR. JUSTICE STEWART concurs in the judgment.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS joins, dissenting.

The Court today reaffirms all of the principles of *Reynolds* v. *Sims*, 377 U. S. 533 (1964), and its progeny but refuses, for a combination of reasons unpersuasive to me, to apply those principles to this apportionment scheme. I believe that our recent decisions in *Avery* v. *Midland County*, 390 U. S. 474 (1968); *Kirkpatrick* v. *Preisler*, 394 U. S. 526 (1969), and *Wells* v. *Rockefeller*, 394 U. S. 542 (1969), require reversal and I therefore dissent.

The Court holds that "a desire to preserve the integrity of political subdivisions may justify an apportionment plan which departs from numerical equality. *Reynolds*

v. *Sims, supra,* at 578." *Ante,* at 185. The Court's reliance on *Reynolds* is misplaced. We said there that "it may be feasible to use political subdivision lines to a greater extent in establishing state legislative districts than in congressional districting." 377 U. S., at 578. But we warned that "[t]o do so would be constitutionally valid, *so long as* the resulting apportionment was one based substantially on population and the equal-population principle was not diluted in *any* significant way." *Ibid.* (emphasis added). Moreover, the Court did not at that point in time "deem it expedient . . . to attempt to spell out any precise constitutional tests." We have done so since.

In *Kirkpatrick* v. *Preisler, supra,* we explained that because "[t]oleration of even small deviations detracts from" the constitutional command of "equal representation for equal numbers of people," only those "limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown" are permissible. 394 U. S., at 531. "[T]he State must justify each variance, no matter how small." *Ibid.* On the record presented here it is clear that such a good-faith effort has not been made. Nor can it be said that sufficient justification has been demonstrated for an 11.9% deviation from voting equality.

The plan approved here allegedly represents as close to mathematical exactness as is possible without changing existing political boundaries or using weighted or fractional votes. But a plan devised under these constraints is not devised in the good-faith effort that the Constitution requires. In *Wells* v. *Rockefeller, supra,* we struck down a similar plan. We held that an attempt to maintain existing county lines was insufficient justification for a 12.1% variance. In explanation we stated that an attempt "to keep regions with distinct interests intact"

was insufficient because to accept such a justification "would permit groups of districts with defined interest orientations to be overrepresented at the expense of districts with different interest orientations." 394 U. S., at 546. That is precisely what we are dealing with here. The attempt to maintain existing town lines has resulted in a variance from equality of 11.9%. I cannot believe that a 0.2% differential is the determining factor in approving this apportionment scheme.

The Court explains that it is, rather, a combination of factors that dictates this result, and that among them is the fact that New York has a long history of maintaining the integrity of existing counties. It is not clear to me why such a history, no matter how protracted, should alter the constitutional command to make a good-faith effort to achieve equality of voting power as near to mathematical exactness as is possible.

Today's result cannot be excused by asserting that local governments are somehow less important than national and state governments. We have already fully applied the principle of one man, one vote to local polities because "the States universally leave much policy and decisionmaking to their governmental subdivisions. . . . In a word, institutions of local government have always been a major aspect of our system, and their responsible and responsive operation is today of increasing importance to the quality of life of more and more of our citizens." *Avery* v. *Midland County*, 390 U. S., at 481.

It is clear to me that none of the factors relied upon by the Court today can, singly or in combination, justify this variation. Obviously no other local apportionment scheme can possibly present the same combination of factors relied on by the Court today. In that sense this decision can have little or no precedential value. Nevertheless, I cannot help but regret even this small departure from the basic constitutional concept of one man, one vote.

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UNITED STATES ET AL. *v.* MITCHELL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 798. Argued April 20, 1971—Decided June 7, 1971

A married woman domiciled in Louisiana, where under state law the wife has a present vested interest in community property equal to that of her husband, is personally liable for federal income taxes on her one-half interest in community income realized during the existence of the community, notwithstanding her subsequent renunciation under state law of her community rights, since federal, not state, law governs what is exempt from federal taxation. Pp. 194–206.

430 F. 2d 1 and 7, reversed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

William Terry Bray argued the cause for the United States et al. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Walters, Matthew J. Zinn,* and *Crombie J. D. Garrett.*

Paul K. Kirkpatrick, Jr., argued the cause and filed a brief for respondent Mitchell. *Patrick M. Schott* argued the cause and filed a brief for respondent Angello.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The petition here, arising from two cases below, presents the issue whether a married woman domiciled in the community property State of Louisiana is personally liable for federal income tax on half the community income realized during the existence of the community despite the exercise of her statutory right of exoneration. The issue arises in the context, in one case, of a divorce, and, in the other, of the husband's death.

I

Mrs. Mitchell and Mrs. Sims. The Commissioner of Internal Revenue determined deficiencies against Anne Goyne Mitchell and Jane Isabell Goyne Sims for the tax years 1955–1959, inclusive. These were for federal income tax and for additions to tax under § 6651 (a) (failure to file return), § 6653 (a) (underpayment due to negligence or intentional disregard of rules and regulations), and § 6654 (underpayment of estimated tax) of the Internal Revenue Code of 1954, 26 U. S. C. §§ 6651 (a), 6653 (a), and 6654. Mrs. Sims is the sister of Mrs. Mitchell. The determinations as to her were made under § 6901 as Mrs. Mitchell's transferee without consideration.

Anne Goyne and Emmett Bell Mitchell, Jr., were married in 1946. They lived in Louisiana. In July 1960, however, they began to live separately and apart. In August 1961 Mrs. Mitchell sued her husband in state court for separation. Upon his default, she was granted this relief. A final decree of divorce was entered in October 1962. In her separation suit Mrs. Mitchell prayed that she be allowed to accept the community of acquets and gains with benefit of inventory. However, taking advantage of the privilege granted her by Art. 2410 of the Louisiana Civil Code,[1] she formally renounced the community on September 18, 1961. As a consequence, she received neither a distribution of community property nor a property settlement upon dissolution of her marriage. This renunciation served to exonerate her of "debts contracted during the marriage."

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[1] Art. 2410. "Both the wife and her heirs or assigns have the privilege of being able to exonerate themselves from the debts contracted during the marriage, by renouncing the partnership or community of gains."

Mrs. Mitchell earned $4,200 as a teacher during 1955 and 1956. From these earnings tax was withheld. Mr. Mitchell enjoyed taxable income during the five years in question. All income realized by both spouses during this period was community income.

Mrs. Mitchell had little knowledge of her husband's finances. She rarely knew the balance in the family bank account. She possessed a withdrawal privilege on that account, and occasionally exercised it. Her husband was in charge of the couple's financial affairs and did not usually consult his wife about them. She was aware of fiscal irresponsibility on his part. She questioned him each year about tax returns. She knew returns were required, but relied on his assurances that he was filing timely returns and paying the taxes due. She signed no return herself and assumed that he had signed her name for her. In July 1960 she learned that, in fact, no returns had ever been filed for 1955–1959.

The deficiencies determined against Mrs. Mitchell were based upon half the community income. The Commissioner sought to collect the deficiencies from property Mrs. Mitchell inherited from her mother in 1964 and immediately transferred, without consideration, to Mrs. Sims.

Mrs. Mitchell sought redetermination in the Tax Court. Judge Forrester held that under Louisiana community property law Mrs. Mitchell possessed an immediate vested ownership interest in half the community property income and was personally responsible for the tax on her share. He also ruled that this tax liability was not affected by her Art. 2410 renunciation. *Mitchell* v. *Commissioner,* 51 T. C. 641 (1969).

On appeal, the Fifth Circuit reversed, holding that by the renunciation Mrs. Mitchell avoided any federal income tax liability on the community income. *Mitchell*

v. *Commissioner,* 430 F. 2d 1 (CA5 1970).[2] Judge Simpson dissented on the basis of Judge Forrester's opinion in the Tax Court. 430 F. 2d, at 7.

Mrs. Angello. Throughout the calendar years 1959–1961 Mrs. Angello, who was then Frances Sparacio, lived with her husband, Jack Sparacio, in Louisiana. Community income was realized by the Sparacios during those years, but neither the husband nor the wife filed any returns. In 1965 the District Director made assessments against them for taxes, penalties, and interest, filed a notice of lien, and addressed a notice of levy to the Metropolitan Life Insurance Company, which had a policy outstanding on Mr. Sparacio's life. The insured died in March 1966 and the notice of levy (for that amount of tax and interest resulting from imputing to Mrs. Sparacio half the community's income for the tax years in question) attached to the proceeds of the policy. The widow, who was the named beneficiary, sued the Metropolitan in state court to recover the policy proceeds. The United States intervened to assert and protect its lien. The case was then removed to federal court. The Metropolitan paid the proceeds into the court registry and was dismissed from the case.

Each side then moved for summary judgment. Judge Christenberry granted the Government's motion and denied Mrs. Angello's. Despite the absence of any formal renunciation by Mrs. Angello under Art. 2410, the Government did not contend that she had accepted any benefits of the community. On appeal, the Court of Appeals reversed, relying on the same panel's decision in the *Mitchell* case. *Angello* v. *Metropolitan Life Ins. Co.,* 430 F. 2d 7 (CA5 1970). Judge Simpson again dissented.

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[2] Accord, with respect to Texas law, *Ramos* v. *Commissioner,* 429 F. 2d 487 (CA5 1970).

We granted certiorari in both cases, 400 U. S. 1008 (1971), on a single petition filed under our Rule 23 (5).

II

Sections 1 and 3 of the 1954 Code, 26 U. S. C. §§ 1 and 3, as have all of their predecessors since the Revenue Act of 1917,[3] impose a tax on the taxable income "of every individual." The statutes, however, have not specified what that phrase includes.

Forty years ago this Court had occasion to consider the phrase in the face of various state community property laws and of §§ 210 and 211 of the Revenue Act of 1926. A husband and wife, residents of the State of Washington, had income in 1927 consisting of the husband's salary and of amounts realized from real and personal property of the community. The spouses filed separate returns for 1927 and each reported half the community income. Mr. Justice Roberts, in speaking for a unanimous Court (two Justices not participating) upholding this tax treatment, said:

> "These sections lay a tax upon the net income of every individual. The Act goes no farther, and furnishes no other standard or definition of what constitutes an individual's income. The use of the word 'of' denotes ownership. It would be a strained construction, which, in the absence of further defini-

[3] Internal Revenue Code of 1939, §§ 11 and 12; Revenue Act of 1938, §§ 11 and 12, 52 Stat. 452, 453; Revenue Act of 1936, §§ 11 and 12, 49 Stat. 1653; Revenue Act of 1934, §§ 11 and 12, 48 Stat. 684; Revenue Act of 1932, §§ 11 and 12, 47 Stat. 174; Revenue Act of 1928, §§ 11 and 12, 45 Stat. 795, 796; Revenue Act of 1926, §§ 210 and 211, 44 Stat. 21; Revenue Act of 1924, §§ 210 and 211, 43 Stat. 264, 265; Act of March 4, 1923, 42 Stat. 1507; Revenue Act of 1921, §§ 210 and 211, 42 Stat. 233; Revenue Act of 1918, §§ 210 and 211, 40 Stat. 1062; Revenue Act of 1917, §§ 1 and 201, 40 Stat. 300, 303.

> tion by Congress, should impute a broader significance to the phrase." *Poe* v. *Seaborn,* 282 U. S. 101, 109 (1930).

The Court thus emphasized ownership. It looked to the law of the State as to the ownership of community property and of community income. It concluded that in Washington the wife has "a vested property right in the community property, equal with that of her husband; and in the income of the community, including salaries or wages of either husband or wife, or both." *Id.,* at 111. It noted that, in contrast, in an earlier case, *United States* v. *Robbins,* 269 U. S. 315 (1926), the opposite result had been reached under the then California law. But:

> "In the *Robbins* case, we found that the law of California, as construed by her own courts, gave the wife a mere expectancy and that the property rights of the husband during the life of the community were so complete that he was in fact the owner." 282 U. S., at 116.

In companion cases the Court came to the same conclusion, as it had reached in *Seaborn,* with respect to the community property laws of Arizona, Texas, and Louisiana. *Goodell* v. *Koch,* 282 U. S. 118 (1930); *Hopkins* v. *Bacon,* 282 U. S. 122 (1930); *Bender* v. *Pfaff,* 282 U. S. 127 (1930). In the Louisiana case it was said:

> "If the test be, as we have held it is, ownership of the community income, this case is probably the strongest of those presented to us, in favor of the wife's ownership of one-half of that income." 282 U. S., at 131.

The Court then reviewed the relevant Louisiana statutes and the power of disposition possessed by each spouse. It noted that, while the husband is the manager of the affairs of the marital partnership, the limitations upon

the wrongful exercise of his power over community property are more stringent than in many other States. It concluded:

> "Inasmuch, therefore, as, in Louisiana, the wife has a present vested interest in community property equal to that of her husband, we hold that the spouses are entitled to file separate returns, each treating one-half of the community income as income of each 'of' them as an 'individual' as those words are used in §§ 210 (a) and 211 (a) of the Revenue Act of 1926." 282 U. S., at 132.

Two months later the Court arrived at the same conclusion with respect to California community property law and federal income tax under the 1928 Act, with the Government conceding the effectiveness, in this respect, of amendments made to the California statutes since the *Robbins* decision. *United States* v. *Malcolm,* 282 U. S. 792 (1931). Significantly, the Court there answered in the affirmative, citing *Seaborn, Koch,* and *Bacon,* the following certified question:

> "Has the wife under § 161 (a) of the Civil Code of California such an interest in the community income that she should separately report and pay tax on one-half of such income?" 282 U. S., at 794.

This affirmative answer to a question phrased in terms of "should," not "may," clearly indicates that the wife had the obligation, not merely the right, to report half the community income.

The federal courts since *Malcolm* consistently have held that the wife is required to report half the community income and that the husband is taxable only on the other half. *Gilmore* v. *United States,* 154 Ct. Cl. 365, 290 F. 2d 942 (1961), rev'd on other grounds, 372 U. S. 39 (1963); *Van Antwerp* v. *United States,* 92 F. 2d 871 (CA9 1937); *Simmons* v. *Cullen,* 197 F. Supp. 179

(ND Cal. 1961); *Dillin* v. *Commissioner,* 56 T. C. 228 (1971); *Kimes* v. *Commissioner,* 55 T. C. 774 (1971); *Hill* v. *Commissioner,* 32 T. C. 254 (1959); *Hunt* v. *Commissioner,* 22 T. C. 228 (1954); *Freundlich* v. *Commissioner,* T. C. Memo. 1955–177; *Cavanagh* v. *Commissioner,* 42 B. T. A. 1037, 1044 (1940), aff'd, 125 F. 2d 366 (CA9 1942). There were holdings from the Fifth Circuit to this apparent effect with respect to Louisiana taxpayers. *Commissioner* v. *Hyman,* 135 F. 2d 49, 50 (1943); *Saenger* v. *Commissioner,* 69 F. 2d 633 (1934); *Smith* v. *Donnelly,* 65 F. Supp. 415 (ED La. 1946). See *Henderson's Estate* v. *Commissioner,* 155 F. 2d 310 (CA5 1946), and *Gonzalez* v. *National Surety Corp.,* 266 F. 2d 667, 669 (CA5 1959).

Thus, with respect to community income, as with respect to other income, federal income tax liability follows ownership. *Blair* v. *Commissioner,* 300 U. S. 5, 11–14 (1937). See *Hoeper* v. *Tax Comm'n,* 284 U. S. 206 (1931). In the determination of ownership, state law controls. "The state law creates legal interests but the federal statute determines when and how they shall be taxed." *Burnet* v. *Harmel,* 287 U. S. 103, 110 (1932); *Morgan* v. *Commissioner,* 309 U. S. 78, 80–81 (1940); *Helvering* v. *Stuart,* 317 U. S. 154, 162 (1942); *Commissioner* v. *Harmon,* 323 U. S. 44, 50–51 (1944) (DOUGLAS, J., dissenting); see *Commissioner* v. *Estate of Bosch,* 387 U. S. 456 (1967). The dates of the cited cases indicate that these principles are long established in the law of taxation.

III

This would appear to foreclose the issue for the present cases. Nevertheless, because respondents and the Court of Appeals stress the evanescent nature of the wife's interest in community property in Louisiana, a review of the pertinent Louisiana statutes and decisions is perhaps in order.

Every marriage contracted in Louisiana "superinduces of right partnership or community of acquets or gains, if there be no stipulation to the contrary." La. Civ. Code Ann., Art. 2399 (1971). "This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estate which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase. . . ." Art. 2402. The debts contracted during the marriage "enter into the partnership or community of gains, and must be acquitted out of the common fund . . . ." Art. 2403. "The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife." Also "he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons." Art. 2404. The same article, however, denies him the power of conveyance, "by a gratuitous title," of community immovables, or of the whole or a quota of the movables, unless for the children; and if the husband has sold or disposed of the common property in fraud of the wife, she has an action against her husband's heirs. At the dissolution of a marriage "all effects which both husband and wife reciprocally possess, are presumed common effects or gains . . . ." Art. 2405. At dissolution, "The effects which compose the partnership or community of gains, are divided into two equal portions

between the husband and the wife, or between their heirs . . . ." Art. 2406. "It is understood that, in the partition of the effects of the partnership or community of gains, both husband and wife are to be equally liable for their share of the debts contracted during the marriage, and not acquitted at the time of its dissolution." Art. 2409. Then the wife and her heirs or assigns may "exonerate themselves from the debts contracted during the marriage, by renouncing the partnership or community of gains." Art. 2410. And the wife "who renounces, loses every sort of right to the effects of the partnership or community of gains" except that "she takes back all her effects, whether dotal or extradotal." Art. 2411.

The Louisiana court has described and forcefully stated the nature of the community interest. In *Phillips* v. *Phillips,* 160 La. 813, 825–826, 107 So. 584, 588 (1926), it was said:

> "The wife's half interest in the community property is not a mere expectancy during the marriage; it is not transmitted to her by or in consequence of a dissolution of the community. The title for half of the community property is vested in the wife the moment it is acquired by the community or by the spouses jointly, even though it be acquired in the name of only one of them. . . . There are loose expressions, appearing in some of the opinions rendered by this court, to the effect that the wife's half interest in the community property is only an expectancy, or a residuary interest, until the community is dissolved and liquidated. But that is contrary to the provisions of the Civil Code . . . and is contrary to the rule announced in every decision of this court since the error was first committed . . . ."

Later, in *Succession of Wiener,* 203 La. 649, 14 So. 2d 475 (1943), a state inheritance tax case, the court, after referring to Arts. 2399 and 2402 of the Civil Code, said:

> "That this community is a partnership in which the husband and wife own equal shares, their title thereto vesting at the very instant such property is acquired, is well settled in this state . . . ."
>
> "The conclusion we have reached in this case is in keeping with the decision of the United States Supreme Court in the case of Bender v. Pfaff, supra, where that court recognized that under the law of Louisiana the wife is not only vested with the ownership of half of the community property from the moment it is acquired, but is likewise the owner of half of the community income. . . ." 203 La., at 657 and 662, 14 So. 2d, at 477 and 479.

After reviewing joint tenancy and tenancy by the entirety known to the common law, the court observed:

> "In Louisiana, the situation is entirely different, for here the civil law prevails, and the theory of the civil law is that the acquisition of all property during the marriage is due to the joint or common efforts, labor, industry, economy, and sacrifices of the husband and wife; in her station the wife is just as much an agency in acquiring this property as is her husband. In Louisiana, therefore, the wife's rights in and to the community property do not rest upon the mere gratuity of her husband; they are just as great as his and are entitled to equal dignity. . . . She is the half-partner and owner of all acquisitions made during the existence of the community, *whether they be property or income.* . . .
>
> "It is true that in weaving this harmonious commercial partnership around the intimate and sacred marital relationship, the framers of our law and its

> codifiers saw fit, in their wisdom, to place the husband at the head of the partnership, but this did not in any way affect the status of the property or the wife's ownership of her half thereof. . . . And the husband was made the managing partner of the community and charged with the administration of its effects, as well as with the alienation of its effects and revenues by onerous title, because he was deemed the best qualified to act." 203 La., at 665–667, 14 So. 2d, at 480–481.

The court then outlined in detail the various protections afforded by Louisiana law to the wife and concluded:

> "It is obvious, therefore, that the wife's interest in the community property in Louisiana does not spring from any fiction of the law or from any gift or act of generosity on the part of her husband but, instead, from an express legal contract of partnership entered into at the time of the marriage. There is no substantial difference between her interest therein and the interest of an ordinary member of a limited or ordinary partnership, the control and management of whose affairs has, by agreement, been entrusted to a managing partner. The only real difference is that the limitations placed on the managing partner in the community partnership are fixed by law, while those placed on the managing partner in an ordinary or limited partnership are fixed by convention or contract." 203 La., at 669, 14 So. 2d, at 481–482.

The husband thus is the manager and agent of the Louisiana community, but his powers as manager do not serve to defeat the ownership rights of the wife.

These principles repeatedly have found expression in Louisiana cases. *United States Fidelity & Guaranty Co.* v. *Green,* 252 La. 227, 232–233, 210 So. 2d 328, 330

(1968); *Gebbia* v. *City of New Orleans,* 249 La. 409, 415–416, 187 So. 2d 423, 425 (1966); *Azar* v. *Azar,* 239 La. 941, 946, 120 So. 2d 485, 487 (1960); *Messersmith* v. *Messersmith,* 229 La. 495, 507, 86 So. 2d 169, 173 (1956); *Dixon* v. *Dixon's Executors,* 4 La. 188 (1832).

This Court recognized these Louisiana community property principles in the Wiener estate's federal estate tax litigation. *Fernandez* v. *Wiener,* 326 U. S. 340 (1945). There the inclusion in the decedent's gross estate of the entire community property was upheld for purposes of the federal estate tax which is an excise tax. Mr. Chief Justice Stone noted the respective interests of the spouses when, in the following language, he spoke of the effect of death:

> "As we have seen, the death of the husband of the Louisiana marital community not only operates to transfer his rights in his share of the community to his heirs or those taking under his will. It terminates his expansive and sometimes profitable control over the wife's share, and for the first time brings her half of the property into her full and exclusive possession, control and enjoyment. The cessation of these extensive powers of the husband, even though they were powers over property which he never 'owned,' and the establishment in the wife of new powers of control over her share, though it was always hers, furnish appropriate occasions for the imposition of an excise tax.
>
> "Similarly, with the death of the wife, her title or ownership in her share of the community property ends, and passes to her heirs or other appointees. More than this, her death, by ending the marital community, liberates her husband's share from the restrictions which the existence of the community had placed upon his control of it. . . .

> "This redistribution of powers and restrictions upon power is brought about by death notwithstanding that the rights in the property subject to these powers and restrictions were in every sense 'vested' from the moment the community began. . . ." 326 U. S., at 355–356.

Thus the Louisiana statutes and cases also seem to foreclose the claims advanced by the respondents.

IV

Despite all this, despite the concession that the wife's interest in the community property is not a mere expectancy,[4] and despite the further concession that she has a vested title in, and is the owner of, a half share of the community income,[5] respondents take the position that somehow the wife's interest is insufficient to make her liable for federal income tax computed on that half of the community income.

It is said that her right to renounce the community and to place herself in the same position as if it had never existed is substantive; that the wife is not personally liable for a community debt; that it is really the community as an entity, not the husband or the wife, that owns the property; and that *Seaborn* and its companion cases were concerned only with the right to split income, not with the obligation so to do. It is also said that the wife's dominion over the community property is nonexistent in Louisiana; that the husband administers the community's affairs as he sees fit; that he is not required to account to the wife, even for mismanagement, unless he enriches his estate at her expense by fraud; that she has no way to terminate the community other than by suit for separation, and then only

[4] Angello Brief 2.

[5] Angello Brief 2, 9.

by showing mismanagement on his part that threatens her separate estate; that her status is imposed by law, as contrasted with a commercial partnership where status is consensual; that she has no legal right to obtain the information necessary to file a tax return or to obtain the funds with which to pay the tax; and that *Robbins* authorizes taxing the whole of the community income to the husband. The same arguments, however, were advanced in *Seaborn,* 282 U. S., at 103–105, and in its companion cases, 282 U. S., at 119, 123, and 128, and were unavailing there, 282 U. S., at 111–113. They do not persuade us here. Specifically, the power to renounce, granted by Article 2410, is of no comfort to the wife-taxpayer. As Judge Forrester aptly expressed it, 51 T. C., at 646, Mrs. Mitchell's renunciation "came long after her liabilities for the annual income taxes here in issue had attached." Further, "[t]his right of the wife to renounce or repudiate must not be misconstrued as an indication that she had never owned and possessed her share, for that fact was not denied; but she did have, under the principles of community property, the right to revoke her ownership and possession. . . ." 1 W. deFuniak, Principles of Community Property § 218, p. 621 (1943).

The results urged by the respondents might follow, of course, in connection with a tax or other obligation the collection of which is controlled by state law. But an exempt status under state law does not bind the federal collector. Federal law governs what is exempt from federal levy.

Section 6321 of the 1954 Code imposes a lien for the income tax "upon all property and rights to property . . . belonging to" the person liable for the tax. Section 6331 (a) authorizes levy "upon all property and rights to property . . . belonging to such person . . . ." What is exempt from levy is specified in § 6334 (a). Section

6334 (c) provides, "Notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a)." This language is specific and it is clear and there is no room in it for automatic exemption of property that happens to be exempt from state levy under state law. *United States* v. *Bess,* 357 U. S. 51, 56–57 (1958); *Shambaugh* v. *Scofield,* 132 F. 2d 345 (CA5 1942); *United States* v. *Heffron,* 158 F. 2d 657 (CA9), cert. denied, 331 U. S. 831 (1947); Treas. Reg. § 301.6334–1 (c). See *Birch* v. *Dodt,* 2 Ariz. App. 228, 407 P. 2d 417 (1965). As a consequence, state law which exempts a husband's interest in community property from his premarital debts does not defeat collection of his federal income tax liability for premarital tax years from his interest in the community. *United States* v. *Overman,* 424 F. 2d 1142, 1145 (CA9 1970); *In re Ackerman,* 424 F. 2d 1148 (CA9 1970). The result as to Mrs. Mitchell and Mrs. Angello is no different.

It must be conceded that these cases are "hard" cases and exceedingly unfortunate for the two women taxpayers.[6] Mrs. Mitchell loses the benefit of her inheritance from her mother, an inheritance that ripened after the dissolution of her marriage. Mrs. Angello loses her beneficiary interest in her deceased husband's life insurance policy. This takes place with each wife not really aware of the community tax situation, and not really in a position to ascertain the details of the community income. The law, however, is clear. The taxes were due. They were not paid. Returns were not even filed. The "fault," if fault there be, lies with the four taxpayers and flows from the settled principles of the community prop-

[6] Of course, as Baron Rolfe long ago observed, hard cases "are apt to introduce bad law." *Winterbottom* v. *Wright,* 10 M. & W. 109, 116, 152 Eng. Rep. 402, 406 (1842).

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erty system. If the wives were to prevail here, they would have the best of both worlds.

The remedy is in legislation. An example is Pub. L. 91–679 of January 12, 1971, 84 Stat. 2063, adding to the Code subsection (e) of § 6013 and the final sentence of § 6653 (b). These amendments afford relief to an innocent spouse, who was a party to a joint return, with respect to omitted income and fraudulent underpayment. Relief of that kind is the answer to the respondents' situation.

The judgment in each case is reversed.

It is so ordered.

CONNELL *v.* HIGGINBOTHAM ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

No. 79. Argued November 19, 1970—Decided June 7, 1971

Florida's statutory loyalty oath provision requiring a Florida public employee as an employment condition to swear that he will support the Federal and State Constitutions is constitutionally valid. The portion of the oath requiring him to swear that he does not believe in the violent overthrow of the Federal or State Government is invalid as providing for his dismissal without hearing or inquiry required by due process.

305 F. Supp. 445, affirmed in part, reversed in part.

Sanford Jay Rosen argued the cause for appellant. With him on the brief were *Tobias Simon* and *Melvin L. Wulf.*

Stephen Marc Slepin argued the cause for appellees. With him on the brief were *Rivers Buford, Jr.,* and *James W. Markel.*

PER CURIAM.

This is an appeal from an action commenced in the United States District Court for the Middle District of Florida challenging the constitutionality of §§ 876.05–876.10 of Fla. Stat. (1965), and the various loyalty oaths upon which appellant's employment as a school teacher was conditioned. The three-judge U. S. District Court declared three of the five clauses contained in the oaths to be unconstitutional,* and enjoined the State from con-

* The clauses declared unconstitutional by the court below required the employee to swear: (a) "that I am not a member of the Communist Party"; (b) "that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party"; and (c) "that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence."

ditioning employment on the taking of an oath including the language declared unconstitutional. The appeal is from that portion of the District Court decision which upheld the remaining two clauses in the oath: I do hereby solemnly swear or affirm (1) "that I will support the Constitution of the United States and of the State of Florida"; and (2) "that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence."

On January 16, 1969, appellant made application for a teaching position with the Orange County school system. She was interviewed by the principal of Callahan Elementary School, and on January 27, 1969, appellant was employed as a substitute classroom teacher in the fourth grade of that school. Appellant was dismissed from her teaching position on March 18, 1969, for refusing to sign the loyalty oath required of all Florida public employees, Fla. Stat. § 876.05.

The first section of the oath upheld by the District Court, requiring all applicants to pledge to support the Constitution of the United States and of the State of Florida, demands no more of Florida public employees than is required of all state and federal officers. U. S. Const., Art. VI, cl. 3. The validity of this section of the oath would appear settled. See *Knight* v. *Board of Regents,* 269 F. Supp. 339 (1967), aff'd *per curiam,* 390 U. S. 36 (1968); *Hosack* v. *Smiley,* 276 F. Supp. 876 (1967), aff'd *per curiam,* 390 U. S. 744 (1968); *Ohlson* v. *Phillips,* 304 F. Supp. 1152 (1969), aff'd *per curiam,* 397 U. S. 317 (1970).

The second portion of the oath, approved by the District Court, falls within the ambit of decisions of this Court proscribing summary dismissal from public employment without hearing or inquiry required by due process. *Slochower* v. *Board of Education,* 350 U. S. 551

(1956). Cf. *Nostrand* v. *Little,* 362 U. S. 474 (1960); *Speiser* v. *Randall,* 357 U. S. 513 (1958). That portion of the oath, therefore, cannot stand.

Affirmed in part, and reversed in part.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, concurring in the result.

I agree that Florida may require state employees to affirm that they "will support the Constitution of the United States and of the State of Florida." Such a forward-looking, promissory oath of constitutional support does not in my view offend the First Amendment's command that the grant or denial of governmental benefits cannot be made to turn on the political viewpoints or affiliations of a would-be beneficiary. I also agree that Florida may not base its employment decisions, as to state teachers or any other hiring category, on an applicant's willingness *vel non* to affirm "that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence."

However, in striking down the latter oath, the Court has left the clear implication that its objection runs, not against Florida's determination to exclude those who "believe in the overthrow," but only against the State's decision to regard unwillingness to take the oath as conclusive, irrebuttable proof of the proscribed belief. Due process may rightly be invoked to condemn Florida's mechanistic approach to the question of proof. But in my view it simply does not matter what kind of evidence a State can muster to show that a job applicant "believe[s] in the overthrow." For state action injurious to an individual cannot be justified on account of the nature of the individual's beliefs, whether he "believe[s] in the overthrow" or has any other sort of belief. "If

there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ." *Board of Education* v. *Barnette,* 319 U. S. 624, 642 (1943).

I would strike down Florida's "overthrow" oath plainly and simply on the ground that belief as such cannot be the predicate of governmental action.

MR. JUSTICE STEWART, concurring in part and dissenting in part.

The Court upholds as clearly constitutional the first clause of the oath as it comes to us from the three-judge District Court: "I will support the Constitution of the United States and of the State of Florida . . . ." With this ruling I fully agree.

As to the second contested clause of the oath, "I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence," I would remand to the District Court to give the parties an opportunity to get from the state courts an authoritative construction of the meaning of the clause. If the clause embraces the teacher's philosophical or political beliefs, I think it is constitutionally infirm. *Baird* v. *State Bar of Arizona,* 401 U. S. 1, 9–10 (concurring opinion); *Board of Education* v. *Barnette,* 319 U. S. 624, 642; *Cantwell* v. *Connecticut,* 310 U. S. 296, 303–304. If, on the other hand, the clause does no more than test whether the first clause of the oath can be taken "without mental reservation or purpose of evasion," I think it is constitutionally valid. *Law Students Civil Rights Research Council, Inc.* v. *Wadmond,* 401 U. S. 154, 163–164. The Florida courts should, therefore, be given an opportunity to construe the clause before the federal courts pass on its constitutionality.

See *Fornaris* v. *Ridge Tool Co.*, 400 U. S. 41, 43–44; *Reetz* v. *Bozanich*, 397 U. S. 82, 85–87; *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496, 498–501.

The Supreme Court of Florida has explicitly held that the various clauses of the oath are severable. *Cramp* v. *Board of Public Instruction*, 137 So. 2d 828, 830–831.

JOHNSON *v.* MISSISSIPPI

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

No. 5485. Argued April 21, 1971—Decided June 7, 1971

In a charge of criminal contempt against petitioner which arose from petitioner's alleged violation of courtroom procedure during an earlier criminal trial where it is not clear from the record that the judge was personally aware of the contemptuous action when it occurred, petitioner should be provided a fair hearing with an opportunity to show that the version of the event related to the judge was inaccurate, misleading, or incomplete. And where a motion that trial judge recuse himself was supported by lawyers' affidavits that the judge had revealed deep prejudice against civil rights workers, and the judge was a losing defendant in a civil rights suit brought by petitioner, he should have recused himself from trying the charge.

233 So. 2d 116, reversed and remanded.

Stephen W. Porter argued the cause for petitioner. With him on the brief was *Richard B. Ruge.*

G. Garland Lyell, Jr., Assistant Attorney General of Mississippi, argued the cause for respondent. With him on the brief was *A. F. Summer,* Attorney General.

PER CURIAM.

Petitioner, a defendant in a criminal proceeding in the Circuit Court of Grenada County, Mississippi, was summarily convicted of criminal contempt by Judge Marshall Perry of that court.

The alleged contempt occurred on January 23, 1967. It occurred after Judge Perry directed the bailiffs and deputies to keep all people entering the courtroom from walking between the space reserved for jurors and county officers and the judge, while jurors were being called. A deputy attempted to route petitioner around the area

in question whereupon, according to the orders adjudging petitioner in contempt, he said:

> "What the Hell do you mean go around.
>
> "Said Johnson, defendant, then continued to stand and look around over the room, disrupting the court proceedings."

Judge Perry, however, did not take instant action on the alleged contempt but only had petitioner removed from the courtroom. The next day, January 24, he ordered that process issue against petitioner directing him to appear February 1, 1967, an action he later rescinded. On January 27, 1967, petitioner, an active civil rights worker, asked through his attorney that Judge Perry recuse himself, asserting:

> "a. That Judge Perry is personally prejudiced against the defendant and against the civil rights organizations he represents.
>
> "b. That Judge Perry is personally prejudiced against the lawyers' organization defending Mr. Johnson, namely the Lawyers' Committee For Civil Rights Under Law."

The motion was supported by two affidavits of lawyers that Judge Perry, through charges made to grand juries in his courtroom, revealed deep prejudice against civil rights workers and civil rights lawyers.

No hearing was ever granted on that motion.

When petitioner was removed from the courtroom on January 23, 1967, his lawyer, one Rowe, objected to Judge Perry's action. Judge Perry ordered Rowe arrested and charged with criminal contempt. On January 31, 1967, a federal court in Mississippi issued a temporary restraining order enjoining trial of the contempt charge against Rowe; and we are advised that that charge has never been further prosecuted.

On February 1, 1967, petitioner filed a petition for removal of the contempt proceedings in his case to the federal court. On November 14, 1968, that court remanded the case to Judge Perry's court. Thereupon Judge Perry ordered that a $1,000 bond be posted guaranteeing petitioner's appearance on January 27, 1969, to answer the contempt charge.

On January 22, 1969, petitioner and others filed suit in the federal court to enjoin trials of either Negroes or women in the Circuit Court of Grenada County until such time as Negroes and women were not systematically excluded from juries. Judge Perry was named as a defendant. The federal court held a hearing on January 24, 1969, and on January 25, 1969, temporarily enjoined Judge Perry from discrimination "by reason of race, color, or sex" in jury selections.

Two days later, January 27, 1969, Judge Perry adjudged petitioner in contempt and sentenced him to four months and set bail at $2,000 pending appeal. He denied petitioner's request for a hearing on the merits and for an opportunity to show why Judge Perry should recuse himself. On appeal the Supreme Court of Mississippi affirmed the contempt but reduced the sentence to one month. 233 So. 2d 116. The case is here on a petition for a writ of certiorari which we granted. 400 U. S. 991.

Instant action may be necessary where the misbehavior is in the presence of the judge and is known to him, and where immediate corrective steps are needed to restore order and maintain the dignity and authority of the court. *Cooke* v. *United States,* 267 U. S. 517, 534; *Harris* v. *United States,* 382 U. S. 162, 165. The contempt power is within the judge's "arsenal of authority" which we recently described in *Illinois* v. *Allen,* 397 U. S. 337. But there was no instant action here, a week expiring before removal of the case to the federal court was sought.

Moreover, from this record we cannot be sure that Judge Perry was personally aware of the contemptuous action when it occurred. The State's version of what happened is described as follows in its motion that petitioner show cause why he should not be punished for contempt:

> "[T]he Sheriff and Deputy Sheriff, Howard Hayward seized Robert Johnson and immediately carried him before the Circuit Judge, Marshall Perry, and *related to the Judge what had transpired.*" (Italics added.)

As we said in *In re Oliver,* 333 U. S. 257, 275–276,

> "If some essential elements of the offense are not personally observed by the judge, so that he must depend upon statements made by others for his knowledge about these essential elements, due process requires . . . that the accused be accorded notice and a fair hearing . . . ."

And see *In re Savin,* 131 U. S. 267, 277.

It would, therefore, seem that a fair hearing would entail the opportunity to show that the version of the event related to the judge was inaccurate, misleading, or incomplete.

We mention this latter point because our remand will entail a hearing before another judge. In concluding that Judge Perry should have recused himself, we do not rely solely on the affidavits filed by the lawyers reciting intemperate remarks of Judge Perry concerning civil rights litigants. Beyond all that was the fact that Judge Perry immediately prior to the adjudication of contempt was a defendant in one of petitioner's civil rights suits and a losing party at that. From that it is plain that he was so enmeshed in matters involving petitioner as to make it most appropriate for another judge

to sit. Trial before "an unbiased judge" is essential to due process. *Bloom* v. *Illinois*, 391 U. S. 194, 205; *Mayberry* v. *Pennsylvania*, 400 U. S. 455, 465.

We accordingly reverse the judgment below and remand the case for proceedings not inconsistent with this opinion.

Reversed and remanded.

Syllabus

PALMER ET AL. *v.* THOMPSON, MAYOR OF THE CITY OF JACKSON, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 107. Argued December 14, 1970—Decided June 14, 1971

Following the Court of Appeals' affirmance of a District Court judgment invalidating enforced segregation on equal protection grounds, the city council of Jackson, Mississippi, desegregated its public recreational facilities, including its five public parks, except for their swimming pools. Stating that the pools could not be operated safely and economically on an integrated basis, the council closed four city-owned pools and surrendered its lease on a fifth, which the lessor, the YMCA, continued to operate for whites only. Petitioners, Negro citizens of Jackson, then brought this action, mainly on equal protection grounds, to force the city to reopen and operate the pools on a desegregated basis. The District Court held that there was no denial of equal protection. The Court of Appeals affirmed, rejecting the contention that since the pools had been closed to avoid desegregation there was a denial of equal protection. *Held:*

1. The closing of the pools to all persons did not constitute a denial of equal protection of the laws under the Fourteenth Amendment to the Negroes. Pp. 219–226.

(a) This case is distinguishable from *Griffin* v. *County School Board of Prince Edward County,* 377 U. S. 218, and *Reitman* v. *Mulkey,* 387 U. S. 369, on both of which petitioners rely. In *Griffin* there were many facets of state involvement in the segregated operation of "private" schools; here there is no city involvement in the operation or funding of any pool. In *Reitman* the evidence was deemed sufficient to show that the State, by enacting a constitutional amendment establishing the right of private persons to discriminate in realty transactions, thereby repealing two housing anti-discrimination laws, was abetting refusal to rent apartments on racial grounds; here there was no evidence that the city conspired with the YMCA that its pool be segregated. Pp. 221–224.

(b) In this case, where there was substantial evidence to support the council's stated reason for closing the pools and there

was no evidence of state action affecting Negroes differently from whites, petitioners' contention that equal protection requirements were violated because the pool-closing decision was motivated by anti-integration considerations, must also fail since courts will not invalidate legislation based solely on asserted illicit motivation by the enacting legislative body. Pp. 224–226.

2. The city council's action in closing the pools instead of keeping them open on an integrated basis did not create a "badge or incident" of slavery in violation of the Thirteenth Amendment. Pp. 226–227.

419 F. 2d 1222, affirmed.

BLACK, J., delivered the opinion of the Court, in which BURGER, C. J., and HARLAN, STEWART, and BLACKMUN, JJ., joined. BURGER, C. J., *post,* p. 227, and BLACKMUN, J., *post,* p. 228, filed concurring opinions. DOUGLAS, J., filed a dissenting opinion, *post,* p. 231. WHITE, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post,* p. 240. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and WHITE, JJ., joined, *post,* p. 271.

Paul A. Rosen and *William M. Kunstler* argued the cause for petitioners. With them on the briefs were *Ernest Goodman* and *Arthur Kinoy.*

William F. Goodman, Jr., argued the cause for respondents. On the brief were *John E. Stone, Thomas H. Watkins,* and *Elizabeth W. Grayson.*

Briefs of *amici curiae* urging reversal were filed by *Solicitor General Griswold, Assistant Attorney General Leonard,* and *Deputy Solicitor General Wallace* for the United States, and by *Armand Derfner* for James Moore et al.

MR. JUSTICE BLACK delivered the opinion of the Court.

In 1962 the city of Jackson, Mississippi, was maintaining five public parks along with swimming pools, golf links, and other facilities for use by the public on a racially segregated basis. Four of the swimming pools were used by whites only and one by Negroes only. Plaintiffs brought an action in the United States District

Court seeking a declaratory judgment that this state-enforced segregation of the races was a violation of the Thirteenth and Fourteenth Amendments, and asking an injunction to forbid such practices. After hearings the District Court entered a judgment declaring that enforced segregation denied equal protection of the laws but it declined to issue an injunction.[1] The Court of Appeals affirmed, and we denied certiorari.[2] The city proceeded to desegregate its public parks, auditoriums, golf courses, and the city zoo. However, the city council decided not to try to operate the public swimming pools on a desegregated basis. Acting in its legislative capacity, the council surrendered its lease on one pool and closed four which the city owned. A number of Negro citizens of Jackson then filed this suit to force the city to reopen the pools and operate them on a desegregated basis. The District Court found that the closing was justified to preserve peace and order and because the pools could not be operated economically on an integrated basis.[3] It held the city's action did not deny black citizens equal protection of the laws. The Court of Appeals sitting *en banc* affirmed, six out of 13 judges dissenting.[4] That court rejected the contention that since the pools had been closed either in whole or in part to avoid desegregation the city council's action was a denial of equal protection of the laws. We granted certiorari to decide that question. We affirm.

I

Petitioners rely chiefly on the first section of the Fourteenth Amendment which forbids any State to "deny to any person within its jurisdiction the equal protection

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[1] *Clark* v. *Thompson,* 206 F. Supp. 539 (SD Miss. 1962).

[2] 313 F. 2d 637 (CA5), cert. denied, 375 U. S. 951 (1963).

[3] The court's opinion is not officially reported.

[4] 419 F. 2d 1222 (CA5 1969).

of the laws." There can be no doubt that a major purpose of this amendment was to safeguard Negroes against discriminatory state laws—state laws that fail to give Negroes protection equal to that afforded white people. History shows that the achievement of equality for Negroes was the urgent purpose not only for passage of the Fourteenth Amendment but for the Thirteenth and Fifteenth Amendments as well. See, *e. g., Slaughter-House Cases,* 16 Wall. 36, 71–72 (1873). Thus the Equal Protection Clause was principally designed to protect Negroes against discriminatory action by the States. Here there has unquestionably been "state action" because the official local government legislature, the city council, has closed the public swimming pools of Jackson. The question, however, is whether this closing of the pools is state action that denies "the equal protection of the laws" to Negroes. It should be noted first that neither the Fourteenth Amendment nor any Act of Congress purports to impose an affirmative duty on a State to begin to operate or to continue to operate swimming pools. Furthermore, this is not a case where whites are permitted to use public facilities while blacks are denied access. It is not a case where a city is maintaining different sets of facilities for blacks and whites and forcing the races to remain separate in recreational or educational activities.[5] See, *e. g., Watson* v. *City of Memphis,* 373 U. S. 526 (1963); *Brown* v. *Board of Education,* 347 U. S. 483 (1954).

Unless, therefore, as petitioners urge, certain past cases require us to hold that closing the pools to all denied

[5] My Brother WHITE's dissent suggests that the pool closing operates unequally on white and blacks because, "The action of the city in this case interposes a major deterrent to seeking judicial or executive help in eliminating racial restrictions on the use of public facilities." *Post,* at 269. It is difficult to see the force of this argument since Jackson has desegregated its public parks, auditoriums, golf courses, city zoo, and the record indicates it now maintains no segregated public facilities.

equal protection to Negroes, we must agree with the courts below and affirm.

II

Although petitioners cite a number of our previous cases, the only two which even plausibly support their argument are *Griffin* v. *County School Board of Prince Edward County,* 377 U. S. 218 (1964), and *Reitman* v. *Mulkey,* 387 U. S. 369 (1967). For the reasons that follow, however, neither case leads us to reverse the judgment here.[6]

A. In *Griffin* the public schools of Prince Edward County, Virginia, were closed under authority of state and county law, and so-called "private schools" were set up in their place to avoid a court desegregation order. At the same time, public schools in other counties in Virginia remained open. In Prince Edward County the "private schools" were open to whites only and these schools were in fact run by a practical part-

[6] *Bush* v. *Orleans Parish School Board,* 187 F. Supp. 42 (ED La. 1960), aff'd, 365 U. S. 569 (1961), does not lead us to reverse the judgment here. In *Bush* we wrote no opinion but merely affirmed a lower federal court judgment that held unconstitutional certain laws designed to perpetuate segregation in the Louisiana public schools. One law held unconstitutional by the lower court empowered the State Governor to close any school ordered to integrate; another empowered him to close all state schools if one were integrated. Of course that case did not involve swimming pools but rather public schools, an enterprise we have described as "perhaps the most important function of state and local governments." *Brown* v. *Board of Education, supra,* at 493. More important, the laws struck down in *Bush* were part of an elaborate package of legislation through which Louisiana sought to maintain public education on a segregated basis, not to end public education. See also *Bush* v. *Orleans Parish School Board,* 188 F. Supp. 916 (ED La. 1960). Of course there was no serious problem of probing the motives of a legislature in *Bush* because most of the Louisiana statutes explicitly stated they were designed to forestall integrated schools. 187 F. Supp., at 45.

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nership between State and county, designed to preserve segregated education. We pointed out in *Griffin* the many facets of state involvement in the running of the "private schools." The State General Assembly had made available grants of $150 per child to make the program possible. This was supplemented by a county grant program of $100 per child and county property tax credits for citizens contributing to the "private schools." Under those circumstances we held that the closing of public schools in just one county while the State helped finance "private schools" was a scheme to perpetuate segregation in education which constituted a denial of equal protection of the laws. Thus the *Griffin* case simply treated the school program for what it was—an operation of Prince Edward County schools under a thinly disguised "private" school system actually planned and carried out by the State and the county to maintain segregated education with public funds. That case can give no comfort to petitioners here. This record supports no intimation that Jackson has not completely and finally ceased running swimming pools for all time. Unlike Prince Edward County, Jackson has not pretended to close public pools only to run them under a "private" label. It is true that the Leavell Woods pool, previously leased by the city from the YMCA, is now run by that organization and appears to be open only to whites. And according to oral argument, another pool owned by the city before 1963 is now owned and operated by Jackson State College, a predominantly black institution, for college students and their guests.[7] But unlike the "private schools" in Prince Edward County there is nothing here to show the city is directly or indirectly involved in the funding or operation of either pool.[8] If the time ever

[7] Tr. of Oral Arg. 31–32.

[8] There is no question before us here whether the black citizens of Jackson may be entitled to utilize the swimming facilities of Leavell

comes when Jackson attempts to run segregated public pools either directly or indirectly, or participates in a subterfuge whereby pools are nominally run by "private parties" but actually by the city, relief will be available in the federal courts.

B. Petitioners also claim that Jackson's closing of the public pools authorizes or encourages private pool owners to discriminate on account of race and that such "encouragement" is prohibited by *Reitman* v. *Mulkey, supra.*

In *Reitman,* California had repealed two laws relating to racial discrimination in the sale of housing by passing a constitutional amendment establishing the right of private persons to discriminate on racial grounds in real estate transactions. This Court there accepted what it designated as the holding of the Supreme Court of California, namely that the constitutional amendment was an official authorization of racial discrimination which significantly involved the State in the discriminatory acts of private parties. 387 U. S., at 376–378, 380–381.

In the first place there are no findings here about any state "encouragement" of discrimination, and it is not clear that any such theory was ever considered by the District Court. The implication of petitioners' argument appears to be that the fact the city turned over to the YMCA a pool it had previously leased is sufficient to show automatically that the city has conspired with the YMCA to deprive Negroes of the opportunity to swim in integrated pools. Possibly in a case where the city and the YMCA were both parties, a court could find that the city engaged in a subterfuge, and that liability could be fastened on it as an active participant

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Woods pool. Nothing on the present record indicates state involvement in the running of that pool. The YMCA, which apparently now operates the pool, was not joined as a party and thus, of course, no judgment could be entered against it.

in a conspiracy with the YMCA. We need not speculate upon such a possibility, for there is no such finding here, and it does not appear from this record that there was evidence to support such a finding. *Reitman* v. *Mulkey* was based on a theory that the evidence was sufficient to show the State was abetting a refusal to rent apartments on racial grounds. On this record, *Reitman* offers no more support to petitioners than does *Griffin*.

III

Petitioners have also argued that respondents' action violates the Equal Protection Clause because the decision to close the pools was motivated by a desire to avoid integration of the races. But no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it. The pitfalls of such analysis were set forth clearly in the landmark opinion of Mr. Chief Justice Marshall in *Fletcher* v. *Peck*, 6 Cranch 87, 130 (1810), where the Court declined to set aside the Georgia Legislature's sale of lands on the theory that its members were corruptly motivated in passing the bill.

A similar contention that illicit motivation should lead to a finding of unconstitutionality was advanced in *United States* v. *O'Brien*, 391 U. S. 367, 383 (1968), where this Court rejected the argument that a defendant could not be punished for burning his draft card because Congress had allegedly passed the statute to stifle dissent. That opinion explained well the hazards of declaring a law unconstitutional because of the motivations of its sponsors. First, it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment. *Id.*, at 383, 384. Here, for example, petitioners have argued that the Jackson pools were closed because of ideological opposition to racial integration in swim-

ming pools. Some evidence in the record appears to support this argument. On the other hand the courts below found that the pools were closed because the city council felt they could not be operated safely and economically on an integrated basis. There is substantial evidence in the record to support this conclusion. It is difficult or impossible for any court to determine the "sole" or "dominant" motivation behind the choices of a group of legislators. Furthermore, there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons.

It is true there is language in some of our cases interpreting the Fourteenth and Fifteenth Amendments which may suggest that the motive or purpose behind a law is relevant to its constitutionality. *Griffin* v. *County School Board, supra; Gomillion* v. *Lightfoot,* 364 U. S. 339, 347 (1960). But the focus in those cases was on the actual effect of the enactments, not upon the motivation which led the States to behave as they did. In *Griffin,* as discussed *supra,* the State was in fact perpetuating a segregated public school system by financing segregated "private" academies. And in *Gomillion* the Alabama Legislature's gerrymander of the boundaries of Tuskegee excluded virtually all Negroes from voting in town elections. Here the record indicates only that Jackson once ran segregated public swimming pools and that no public pools are now maintained by the city. Moreover, there is no evidence in this record to show that the city is now covertly aiding the maintenance and operation of pools which are private in name only. It shows no state action affecting blacks differently from whites.

Petitioners have argued strenuously that a city's possible motivations to ensure safety and save money cannot validate an otherwise impermissible state action. This proposition is, of course, true. Citizens may not be compelled to forgo their constitutional rights because officials fear public hostility or desire to save money. *Buchanan* v. *Warley,* 245 U. S. 60 (1917); *Cooper* v. *Aaron,* 358 U. S. 1 (1958); *Watson* v. *City of Memphis,* 373 U. S. 526 (1963). But the issue here is whether black citizens in Jackson *are* being denied their constitutional rights when the city has closed the public pools to black and white alike. Nothing in the history or the language of the Fourteenth Amendment nor in any of our prior cases persuades us that the closing of the Jackson swimming pools to all its citizens constitutes a denial of "the equal protection of the laws."

IV

Finally, some faint and unpersuasive argument has been made by petitioners that the closing of the pools violated the Thirteenth Amendment which freed the Negroes from slavery. The argument runs this way: The first Mr. Justice Harlan's dissent in *Plessy* v. *Ferguson,* 163 U. S. 537, 552 (1896), argued strongly that the purpose of the Thirteenth Amendment was not only to outlaw slavery but also all of its "badges and incidents." This broad reading of the amendment was affirmed in *Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409 (1968). The denial of the right of Negroes to swim in pools with white people is said to be a "badge or incident" of slavery. Consequently, the argument seems to run, this Court should declare that the city's closing of the pools to keep the two races from swimming together violates the Thirteenth Amendment. To reach that result from the Thirteenth Amendment would severely stretch its short simple words and do violence to its history. Establish-

ing this Court's authority under the Thirteenth Amendment to declare new laws to govern the thousands of towns and cities of the country would grant it a law-making power far beyond the imagination of the amendment's authors. Finally, although the Thirteenth Amendment is a skimpy collection of words to allow this Court to legislate new laws to control the operation of swimming pools throughout the length and breadth of this Nation, the Amendment does contain other words that we held in *Jones* v. *Alfred H. Mayer Co.* could empower Congress to outlaw "badges of slavery." The last sentence of the Amendment reads:

> "Congress shall have power to enforce this article by appropriate legislation."

But Congress has passed no law under this power to regulate a city's opening or closing of swimming pools or other recreational facilities.

It has not been so many years since it was first deemed proper and lawful for cities to tax their citizens to build and operate swimming pools for the public. Probably few persons, prior to this case, would have imagined that cities could be forced by five lifetime judges to construct or refurbish swimming pools which they choose not to operate for any reason, sound or unsound. Should citizens of Jackson or any other city be able to establish in court that public, tax-supported swimming pools are being denied to one group because of color and supplied to another, they will be entitled to relief. But that is not the case here.

The judgment is

Affirmed.

MR. CHIEF JUSTICE BURGER, concurring.

I join the opinion of MR. JUSTICE BLACK, but add a brief comment.

The elimination of any needed or useful public ac-

commodation or service is surely undesirable and this is particularly so of public recreational facilities. Unfortunately the growing burdens and shrinking revenues of municipal and state governments may lead to more and more curtailment of desirable services. Inevitably every such constriction will affect some groups or segments of the community more than others. To find an equal protection issue in every closing of public swimming pools, tennis courts, or golf courses would distort beyond reason the meaning of that important constitutional guarantee. To hold, as petitioners would have us do, that every public facility or service, once opened, constitutionally "locks in" the public sponsor so that it may not be dropped (see the footnote to MR. JUSTICE BLACKMUN's concurring opinion), would plainly discourage the expansion and enlargement of needed services in the long run.

We are, of course, not dealing with the wisdom or desirability of public swimming pools; we are asked to hold on a very meager record that the Constitution *requires* that public swimming pools, once opened, may not be closed. But all that is good is not commanded by the Constitution and all that is bad is not forbidden by it. We would do a grave disservice, both to elected officials and to the public, were we to require that every decision of local governments to terminate a desirable service be subjected to a microscopic scrutiny for forbidden motives rendering the decision unconstitutional.

MR. JUSTICE BLACKMUN, concurring.

I, too, join MR. JUSTICE BLACK's opinion and the judgment of the Court.

Cases such as this are "hard" cases for there is much to be said on each side. In isolation this litigation may

not be of great importance; however, it may have significant implications.

The dissent of MR. JUSTICE WHITE rests on a conviction that the closing of the Jackson pools was racially motivated, at least in part, and that municipal action so motivated is not to be tolerated. That dissent builds to its conclusion with a detailed review of the city's and the State's official attitudes of past years.

MR. JUSTICE BLACK's opinion stresses, on the other hand, the facially equal effect upon all citizens of the decision to discontinue the pools. It also emphasizes the difficulty and undesirability of resting any constitutional decision upon what is claimed to be legislative motivation.

I remain impressed with the following factors: (1) No other municipal recreational facility in the city of Jackson has been discontinued. Indeed, every other service—parks, auditoriums, golf courses, zoo—that once was segregated, has been continued and operates on a nonsegregated basis. One must concede that this was effectuated initially under pressure of the 1962 declaratory judgment of the federal court. (2) The pools are not part of the city's educational system. They are a general municipal service of the nice-to-have but not essential variety, and they are a service, perhaps a luxury, not enjoyed by many communities. (3) The pools had operated at a deficit. It was the judgment of the city officials that these deficits would increase. (4) I cannot read into the closing of the pools an official expression of inferiority toward black citizens, as MR. JUSTICE WHITE and those who join him repetitively assert, *post,* at 240–241, 266, and 268, and certainly on this record I cannot perceive this to be a "fact" or anything other than speculation. Furthermore, the alleged deterrent to relief, said to exist because of the risk of losing other public facilities, *post,* at 269,

is not detectable here in the face of the continued and desegregated presence of all other recreational facilities provided by the city of Jackson. (5) The response of petitioners' counsel at oral argument to my inquiry* whether the city was to be "locked in" with its pools for an indefinite time in the future, despite financial loss of whatever amount, just because at one time the pools of Jackson had been segregated, is disturbing.

There are, of course, opposing considerations enumerated in the two dissenting opinions. As my Brothers BLACK, DOUGLAS, and WHITE all point out, however, the Court's past cases do not precisely control this one, and the present case, if reversed, would take us farther than any before. On balance, in the light of the factors I have listed above, my judgment is that this is neither the time nor the occasion to be punitive toward Jackson for its past constitutional sins of segregation. On the record as presented to us in this case, I therefore vote to affirm.

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*"Q. Mr. Rosen, if you were to prevail here, would the city of Jackson be locked in to operating the pools irrespective of the economic consequences of that operation?

"A. If the question is forever. If it was purely an economic problem, having nothing to do with race, or opposition to integration, they could handle that problem the way any community handles that problem, if it is purely an economic decision. But if it becomes a consideration of race, which creates the economic difficulties, then it seems to me that this Court in numerous decisions has answered that question. It answered it in *Watson,* it answered it in *Brown,* and it answered it in *Green.*

"Q. Well, this is in the premise of my question, for you to prevail here, this racial overtone, I will assume, you must concede must be present. Now suppose you prevail, and suppose they lose economically year after year by increasing amounts. My question is, are they locked in forever?

"A. If the question is, are they locked in forever because of racial problems which cause a rise in economic difficulties in operating the pool, my answer is that they would be locked in." Tr. of Oral Arg. 43–44.

MR. JUSTICE DOUGLAS, dissenting.

Jackson, Mississippi, closed all the swimming pools owned and operated by it, following a judgment of the Court of Appeals in *Clark* v. *Thompson,* 313 F. 2d 637, which affirmed the District Court's grant of a declaratory judgment that three Negroes were entitled to the desegregated use of the city's swimming pools. 206 F. Supp. 539. No municipal swimming facilities have been opened to any citizen of either race since that time; and the city apparently does not intend to reopen the pools on an integrated basis.

That program is not, however, permissible if it denies rights created or protected by the Constitution. *Buchanan* v. *Warley,* 245 U. S. 60, 81. I think that the plan has that constitutional defect; and that is the burden of this dissent.

Hunter v. *Erickson,* 393 U. S. 385, *Reitman* v. *Mulkey,* 387 U. S. 369, and *Griffin* v. *County School Board,* 377 U. S. 218, do not precisely control the present case. They are different because there state action perpetuated ongoing regimes of racial discrimination in which the State was implicated.

In *Griffin,* the State closed public schools in one county only, not in the others, and meanwhile contributed to the support of private segregated white schools. 377 U. S., at 232. That, of course, was a continuation of segregation in another form. In *Hunter* a city passed a housing law which provided that before an ordinance regulating the sale or lease of realty on the basis of race could become effective it had to be approved by a majority vote. Thus the protection of minority interests became much more difficult.[1] We held that a state agency

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[1] *James* v. *Valtierra,* 402 U. S. 137, undertook to distinguish *Hunter* on the ground that the California referendum on low-rent housing which submitted the issue to majority vote was "neutral on

could not in its voting scheme so disadvantage Negro interests. In *Reitman* the State repealed legislation prohibiting racial discrimination in housing, thus encouraging racial discrimination in the housing market. 387 U. S., at 376.

Whether, in the closing of all municipal swimming pools in Jackson, Mississippi, any artifices and devices were employed as in *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, to make the appearance not conform to the reality, is not shown by this record. Under *Burton,* if the State has a continuing connection with a swimming pool, it becomes a public facility and the State is under obligation to see that the operators meet all Fourteenth Amendment responsibilities. 365 U. S., at 725. We may not reverse under *Burton* because we do not know what the relevant facts are.

Closer in point is *Bush* v. *Orleans Parish School Board,* 187 F. Supp. 42, aff'd, 365 U. S. 569. Louisiana, as part of her strategy to avoid a desegregated public school system, authorized the Governor to close any public school ordered to be integrated. The three-judge District Court relying on *Cooper* v. *Aaron,* 358 U. S. 1, 17, held that the Act was unconstitutional and enjoined the Governor from enforcing it. The District Court decision was so clearly correct that we wrote no opinion when we affirmed the three-judge court. While there were other Louisiana laws also held unconstitutional as perpetuating a state segregated school system, the one giving the Governor the right to close any public school ordered integrated seems indistinguishable from this one.

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its face" and not "aimed at a racial minority." The regime of *Hunter,* therefore, remains undisturbed. Yet there was no answer to the claim that a referendum solely for housing for the poor violates the Equal Protection Clause. However that may be, in the instant case the target was not the poor, but a racial minority.

May a State in order to avoid integration of the races abolish all of its public schools? That would dedicate the State to backwardness, ignorance, and existence in a new Dark Age. Yet is there anything in the Constitution that says that a State must have a public school system? Could a federal court enjoin the dismantling of a public school system? Could a federal court order a city to levy the taxes necessary to construct a public school system? Such supervision over municipal affairs by federal courts would be a vast undertaking, conceivably encompassing schools, parks, playgrounds, civic auditoriums, tennis courts, athletic fields, as well as swimming pools.

My conclusion is that the Ninth Amendment has a bearing on the present problem. It provides:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Rights, not explicitly mentioned in the Constitution, have at times been deemed so elementary to our way of life that they have been labeled as basic rights. Such is the right to travel from State to State. *United States* v. *Guest,* 383 U. S. 745, 758. Such is also the right to marry. *Loving* v. *Virginia,* 388 U. S. 1, 12. The "rights" retained by the people within the meaning of the Ninth Amendment may be related to those "rights" which are enumerated in the Constitution. Thus the Fourth Amendment speaks of the "right of the people to be secure in their persons, houses, papers, and effects" and protects it by well-known procedural devices. But we have held that that enumerated "right" also has other facets commonly summarized in the concept of privacy. *Griswold* v. *Connecticut,* 381 U. S. 479.

There is, of course, not a word in the Constitution, unlike many modern constitutions, concerning the right of

the people to education or to work or to recreation by swimming or otherwise. Those rights, like the right to pure air and pure water, may well be rights "retained by the people" under the Ninth Amendment. May the people vote them down as well as up?

A State may not, of course, interfere with interstate commerce; and to the extent that public services are rendered by interstate agencies the State by reason of the Supremacy Clause is powerless to escape. The right to vote is a civil right guaranteed by the Constitution as we recently re-emphasized in *Oregon* v. *Mitchell,* 400 U. S. 112. In *Anderson* v. *Martin,* 375 U. S. 399, the State required designation on the ballots of every candidate's race. We said:

> "In the abstract, Louisiana imposes no restriction upon anyone's candidacy nor upon an elector's choice in the casting of his ballot. But by placing a racial label on a candidate at the most crucial stage in the electoral process—the instant before the vote is cast—the State furnishes a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another. This is true because by directing the citizen's attention to the single consideration of race or color, the State indicates that a candidate's race or color is an important—perhaps paramount—consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot along racial lines." 375 U. S., at 402.

A constitutional right cannot be so burdened. We stated in *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 638, that: "One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." And we added in *Lucas* v. *Colorado General Assembly,* 377 U. S. 713, 736–737, "A citi-

zen's constitutional rights can hardly be infringed simply because a majority of the people choose that [they] be." Thus the right of privacy, which we honored in *Griswold,* may not be overturned by a majority vote at the polls, short of a constitutional amendment.

In determining what municipal services may not be abolished the Court of Appeals drew the line between "an essential public function" and other public functions. Whether state constitutions draw that line is not our concern. Certainly there are no federal constitutional provisions which make that distinction.

Closing of the pools probably works a greater hardship on the poor than on the rich; and it may work greater hardship on poor Negroes than on poor whites, a matter on which we have no light. Closing of the pools was at least in part racially motivated. And, as stated by the dissenters in the Court of Appeals:

> "The closing of the City's pools has done more than deprive a few thousand Negroes of the pleasures of swimming. It has taught Jackson's Negroes a lesson: In Jackson the price of protest is high. Negroes there now know that they risk losing even segregated public facilities if they dare to protest segregation. Negroes will now think twice before protesting segregated public parks, segregated public libraries, or other segregated facilities. They must first decide whether they wish to risk living without the facility altogether, and at the same time engendering further animosity from a white community which has lost its public facilities also through the Negroes' attempts to desegregate these facilities.
>
> "The long-range effects are manifold and far-reaching. If the City's pools may be eliminated from the public domain, parks, athletic activities, and libraries also may be closed. No one can say

how many other cities may also close their pools or other public facilities. The City's action tends to separate the races, encourage private discrimination, and raise substantial obstacles for Negroes asserting the rights of national citizenship created by the Wartime Amendments." 419 F. 2d 1222, 1236.

That view has strong footing in our decisions. "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Loving* v. *Virginia,* 388 U. S., at 10. Cf. *McLaughlin* v. *Florida,* 379 U. S. 184, 196. When the effect is "to chill the assertion of constitutional rights by penalizing those who choose to exercise them" (*United States* v. *Jackson,* 390 U. S. 570, 581) that state action is "patently unconstitutional."

While Chief Justice Marshall intimated in *Fletcher* v. *Peck,* 6 Cranch 87, 130, that the motives which dominate or influence legislators in enacting laws are not fit for judicial inquiry, we do look closely at the thrust of a law to determine whether in purpose or effect there was an invasion of constitutional rights. See *Epperson* v. *Arkansas,* 393 U. S. 97, 109; *Griffin* v. *County School Board,* 377 U. S., at 231. A candidate may be defeated because the voters are bigots. A racial issue may inflame a community causing it to vote a humane measure down. The federal judiciary cannot become involved in those kinds of controversies. The question for the federal judiciary is not what the motive was, but what the consequences are.

In *Reitman* an active housing program had been racially dominated and then controlled by a state law ending discrimination. But in time the State reversed its policy and lifted the anti-discrimination controls. Thus it launched or at least tolerated a regime of racially discriminatory housing.

It is earnestly argued that the same result obtains here because the regime of desegregated swimming decreed by the District Court is ended and is supplanted by state-inspired, state-favored private swimming pools by clubs and others which perpetuate segregation.

We are told that the history of this episode shows the "steel-hard, inflexible, undeviating official policy of segregation" in Mississippi. *United States* v. *City of Jackson,* 318 F. 2d 1, 5.

I believe that freedom from discrimination based on race, creed, or color has become by reason of the Thirteenth, Fourteenth, and Fifteenth Amendments one of the "enumerated rights" under the Ninth Amendment that may not be voted up or voted down.

Much has been written concerning the Ninth Amendment including the suggestion that the rights there secured include "rights of natural endowment." [2] B. Patterson, The Forgotten Ninth Amendment 53 (1955).

Mr. Justice Goldberg, concurring in *Griswold* v. *Connecticut, supra,* at 492, said:

> "[T]he Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive." [3]

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[2] And see Comment, Ninth Amendment Vindication of Unenumerated Fundamental Rights, 42 Temple L. Q. 46, 53–56 (1968); Bertelsman, The Ninth Amendment and Due Process of Law—Toward a Viable Theory of Unenumerated Rights, 37 U. Cin. L. Rev. 777, 787 *et seq.* (1968); Forkosch, Does "Secure the Blessings of Liberty" Mandate Governmental Action?, 1 Ariz. St. L. J. 17, 32 (1970).

[3] "Nor am I turning somersaults with history in arguing that the Ninth Amendment is relevant in a case dealing with a *State's* infringement of a fundamental right. While the Ninth Amendment—and indeed the entire Bill of Rights—originally concerned restrictions

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We need not reach that premise in this case. We deal here with analogies to rights secured by the Bill of Rights or by the Constitution itself. Franklin, The Ninth Amendment as Civil Law Method and its Implications for Republican Form of Government, 40 Tul. L. Rev. 487, 490–492 (1966); Redlich, Are There "Certain Rights . . . Retained by the People"?, 37 N. Y. U. L. Rev. 787, 810–812 (1962); Black, The Unfinished Business of the Warren Court, 46 Wash. L. Rev. 3, 37–45 (1970); Kutner, The Neglected Ninth Amendment: The "Other Rights" Retained by the People, 51 Marq. L. Rev. 121, 134–137 (1968).

"The Fourteenth Amendment and the two escorting amendments establish a principle of absolute equality, an equality which is denied by racial separation or segregation because the separation in truth consecrates a hierarchy of racial relations, and hence permits inequality." [4]

The Solicitor General says:

> "[T]o the extent that the municipality had voluntarily undertaken to provide swimming facilities for its citizens, making it unnecessary for the private sector to develop equally adequate facilities, the closing of the pools has insured that racial segregation will be perpetuated."

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upon *federal* power, the subsequently enacted Fourteenth Amendment prohibits the States as well from abridging fundamental personal liberties. And, the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement. In sum, the Ninth Amendment simply lends strong support to the view that the 'liberty' protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments." 381 U. S., at 493.

[4] Franklin, The Relation of the Fifth, Ninth and Fourteenth Amendments to the Third Constitution, 4 How. L. J. 170, 180 (1958).

Our cases condemn the creation of state laws and regulations which foster racial discrimination—segregated schools, segregated parks, and the like. The present case, to be sure, is only an analogy. The State enacts no law saying that the races may not swim together. Yet it eliminates all its swimming pools so that the races will not have the opportunity to swim together. While racially motivated state action is involved, it is of an entirely negative character. Yet it is in the penumbra [5] of the policies of the Thirteenth, Fourteenth, and Fifteenth Amendments and as a matter of constitutional policy should be in the category of those enumerated rights protected by the Ninth Amendment. If not included, those rights become narrow legalistic concepts which turn on the formalism of laws, not on their spirit.

I conclude that though a State may discontinue any of its municipal services—such as schools, parks, pools, athletic fields, and the like—it may not do so for the purpose of perpetuating or installing *apartheid* or because it finds life in a multi-racial community difficult or unpleasant. If that is its reason, then abolition of a designated public service becomes a device for perpetuating a segregated way of life. That a State may not do.

As MR. JUSTICE BRENNAN said in *Evans* v. *Abney*, 396 U. S. 435, 453 (dissenting), where a State abandoned a park to avoid integration:

> "I have no doubt that a public park may constitutionally be closed down because it is too ex-

[5] While the Equal Protection Clause protects individuals against state action, "the involvement of the State" need not be "either exclusive or direct." *United States* v. *Guest*, 383 U. S. 745, 755. "In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation." *Id.*, at 755–756.

> pensive to run or has become superfluous, or for some other reason, strong or weak, or for no reason at all. But under the Equal Protection Clause a State may not close down a public facility solely to avoid its duty to desegregate that facility."

Hunter and *Reitman* went to the verge of that problem. *Bush* went the whole way. We should reaffirm what our summary affirmance of *Bush* plainly implied.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

I agree with the majority that the central purpose of the Fourteenth Amendment is to protect Negroes from invidious discrimination. Consistent with this view, I had thought official policies forbidding or discouraging joint use of public facilities by Negroes and whites were at war with the Equal Protection Clause. Our cases make it unquestionably clear, as all of us agree, that a city or State may not enforce such a policy by maintaining officially separate facilities for the two races. It is also my view, but apparently not that of the majority, that a State may not have an official stance against desegregating public facilities and implement it by closing those facilities in response to a desegregation order.

Let us assume a city has been maintaining segregated swimming pools and is ordered to desegregate them. Its express response is an official resolution declaring desegregation to be contrary to the city's policy and ordering the facilities closed rather than continued in service on a desegregated basis. To me it is beyond cavil that on such facts the city is adhering to an unconstitutional policy and is implementing it by abandoning the facilities. It will not do in such circumstances to say that whites and Negroes are being treated alike because both are denied use of public services. The fact is that closing the pools is an expression of official policy that Negroes

are unfit to associate with whites. Closing pools to prevent interracial swimming is little different from laws or customs forbidding Negroes and whites from eating together or from cohabiting or intermarrying. See *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144 (1970); *Loving* v. *Virginia*, 388 U. S. 1 (1967); *McLaughlin* v. *Florida*, 379 U. S. 184 (1964); *Lombard* v. *Louisiana*, 373 U. S. 267 (1963). The Equal Protection Clause is a hollow promise if it does not forbid such official denigrations of the race the Fourteenth Amendment was designed to protect.

The case before us is little, if any, different from the case just described. Jackson, Mississippi, closed its swimming pools when a district judge struck down the city's tradition of segregation in municipal services and made clear his expectation that public facilities would be integrated. The circumstances surrounding this action and the absence of other credible reasons for the closings leave little doubt that shutting down the pools was nothing more or less than a most effective expression of official policy that Negroes and whites must not be permitted to mingle together when using the services provided by the city.

I am quite unpersuaded by the majority's assertion that it is impermissible to impeach the otherwise valid act of closing municipal swimming pools by resort to evidence of invidious purpose or motive. Congress has long provided civil and criminal remedies for a variety of official and private conduct. In various situations these statutes and our interpretations of them provide that such conduct falls within the federal proscription only upon proof of forbidden racial motive or animus. An otherwise valid refusal to contract the sale of real estate falls within the ban of 42 U. S. C. § 1982 upon proof that the refusal was racially motivated. *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968). A restau-

rant's refusal to serve a white customer is actionable under 42 U. S. C. § 1983 where the evidence shows that refusal occurred because the white was accompanied by Negroes and was pursuant to a state-enforced custom of racial segregation. *Adickes, supra.* Just last week in *Griffin* v. *Breckenridge, ante,* p. 88, we construed 42 U. S. C. § 1985 (3) to reach wholly private conspiracies—in that case to commit assault on Negroes—where sufficient evidence of "racial . . . animus" or "invidiously discriminatory motivation" accompanied the conspirators' actions. *Griffin* v. *Breckenridge, supra,* at 102. In rejecting the argument that § 1985 (3) was subject to an implied state action limitation, we indicated that racially motivated conspiracies or activities would be actionable under § 1983 if done under color of law. *Id.,* at 98–99. Official conduct is no more immune to characterization based on its motivation than is private conduct, and we have so held many times. The police are vulnerable under § 1983 if they subject a person "to false arrest for vagrancy for the purpose of harassing and punishing [him] for attempting to eat with black people," *Adickes, supra,* at 172, or if they "intentionally tolerate violence or threats of violence directed toward those who violated the practice of segregating the races at restaurants." *Ibid.*

In another decision last week, we reversed a three-judge court ruling in a suit under § 1983 that the multi-member apportionment plan there involved operated to minimize or dilute the voting strength of Negroes in an identifiable ghetto area. However, in an opinion joined by four members of the majority in the instant case, we cautioned that:

> "[T]he courts have been vigilant in scrutinizing schemes allegedly conceived or operated as purposeful devices to further racial discrimination. . . . But there is no suggestion here that Marion County's

> multi-member district, or similar districts throughout the State, *were conceived* or operated *as purposeful devices to further racial* or economic *discrimination.*" *Whitcomb* v. *Chavis, ante,* p. 124, at 149 (emphasis added).

Further, motivation analysis has assumed great importance in suits under 42 U. S. C. § 1983 as a result of this Court's opinions in *Younger* v. *Harris,* 401 U. S. 37 (1971), and its companion cases. There the Court held that even though a state criminal prosecution was pending, federal relief would be appropriate on allegations in a complaint to the effect that state officials were utilizing state criminal statutes in bad faith, with no hope of obtaining valid convictions under them, in an effort to harass individuals in the exercise of their constitutional rights. Obviously, in order to determine its jurisdiction in each such case, a federal court must examine and make a determination of the same kind of official motivation which the Court today holds unreviewable.

In thus pursuing remedies under the federal civil rights laws, as petitioners are doing under §§ 1981 and 1983 here, Negro plaintiffs should have every right to prove that the action of the city officials was motivated by nothing but racial considerations. In examining their contentions, it will be helpful to re-create the context in which this case arises.

I

In May 1954, this Court held that "[s]eparate educational facilities are inherently unequal." *Brown* v. *Board of Education,* 347 U. S. 483, 495. In a series of opinions following closely in time, the Court emphasized the universality and permanence of the principle that segregated public facilities of any kind were no longer permissible under the Fourteenth Amendment.

Muir v. *Louisville Park Theatrical Assn.*, 347 U. S. 971 (1954), decided one week after *Brown*, saw the Court review a decision of the Court of Appeals for the Sixth Circuit which had affirmed a district court order holding that Negro plaintiffs were entitled to the use of public golf courses and a public fishing lake in Iroquois Park in Louisville, but that the privately owned theatrical association that leased a city-owned amphitheater in the same park was not guilty of discrimination proscribed by the Fourteenth Amendment in refusing to admit Negroes to its operatic performances. The Court vacated the judgment and remanded "for consideration in the light of the Segregation Cases decided May 17, 1954 . . . and conditions that now prevail." *Ibid.*[1]

At the beginning of the October 1955 Term, the Court resolved any possible ambiguity about the action taken in *Muir*. In a pair of summary decisions, the Court made it clear that state-sanctioned segregation in the operation of public recreational facilities was prohibited. *Mayor and City Council of Baltimore* v. *Dawson*, 350 U. S. 877 (1955), was a summary affirmance of a decision by the Court of Appeals for the Fourth Circuit that officials of the State and city could not enforce a policy of racial segregation at public beaches and bathhouses. On the same day, the Court confirmed that use of a public golf course could not be denied to any person on account of his race. *Holmes* v. *City of Atlanta*, 350 U. S. 879 (1955).

The lower federal courts played a very important role in this ongoing process. For example, in June 1956,

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[1] See *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961) (segregated restaurant operated under lease in municipal facility).

a three-judge district court in Alabama, relying on *Brown, Dawson,* and *Holmes,* held that:

> "[T]he statutes and ordinances requiring segregation of the white and colored races on the motor buses of a common carrier of passengers in the City of Montgomery and its police jurisdiction violate the due process and equal protection of the law clauses of the Fourteenth Amendment . . . ."

Browder v. *Gayle,* 142 F. Supp. 707, 717 (MD Ala.). Again this Court affirmed summarily, citing *Brown, Dawson,* and *Holmes.* 352 U. S. 903 (1956). Some public officials remained unconvinced. In early 1958, the Court of Appeals for the Fifth Circuit summarily rejected as without merit an appeal by the New Orleans City Park Improvement Association from a summary judgment including a permanent injunction prohibiting the Association, a municipal corporation, from denying Negroes the use of the facilities of the New Orleans City Park. *New Orleans City Park Improvement Assn.* v. *Detiege,* 252 F. 2d 122 (CA5 1958). When the Association took a further appeal to this Court, the judgment was affirmed in a one-line opinion. *New Orleans City Park Improvement Assn.* v. *Detiege,* 358 U. S. 54 (1958). Other decisions in this Court and the lower federal courts demonstrated the pervasive idea that officially segregated public facilities were *not* equal.[2]

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[2] See, *e. g., Boynton* v. *Virginia,* 364 U. S. 454 (1960) (application of Interstate Commerce Act); *Burton, supra,* n. 1; *Turner* v. *City of Memphis,* 369 U. S. 350 (1962) (public restaurant in municipal airport); *Johnson* v. *Virginia,* 373 U. S. 61 (1963) (courtrooms); *Brown* v. *Louisiana,* 383 U. S. 131, 139 (1966) (libraries); *City of St. Petersburg* v. *Alsup,* 238 F. 2d 830 (CA5 1956) (beach and swimming pool); *Department of Conservation & Development* v. *Tate,* 231 F. 2d 615 (CA4), cert. denied, 352 U. S. 838 (1956) (state park); *Willie* v. *Harris County,* 202 F. Supp. 549 (SD Tex. 1962)

Throughout the same period, this Court and other courts rejected attempts by various public bodies to evade their clear duty under *Brown* and its progeny by employing delaying tactics or other artifices short of open defiance. *Cooper* v. *Aaron,* 358 U. S. 1 (1958); *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715 (1961); *Watson* v. *City of Memphis,* 373 U. S. 526 (1963); *Griffin* v. *County School Board of Prince Edward County,* 377 U. S. 218 (1964).[3] Meanwhile, countless class suits seeking desegregation orders were successfully prosecuted by Negro plaintiffs in the lower federal courts. Many public facilities were opened to all citizens, regardless of race, without direct intervention by this Court. Several of these local suits are relevant to the present case.

The city of Jackson was one of many places where the consistent line of decisions following from *Brown* had little or no effect.[4] Public recreational facilities were

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(county park); *Shuttlesworth* v. *Gaylord,* 202 F. Supp. 59 (ND Ala. 1961), aff'd *sub nom. Hanes* v. *Shuttlesworth,* 310 F. 2d 303 (CA5 1962) (parks, tennis courts, swimming pools, zoo, golf courses, baseball parks, museum, auditorium); *Moorhead* v. *City of Ft. Lauderdale,* 152 F. Supp. 131 (SD Fla.), aff'd, 248 F. 2d 544 (CA5 1957) (golf course); *Ward* v. *City of Miami,* 151 F. Supp. 593 (SD Fla. 1957) (golf course); *Holley* v. *City of Portsmouth,* 150 F. Supp. 6 (ED Va. 1957) (golf course); *Fayson* v. *Beard,* 134 F. Supp. 379 (ED Tex. 1955) (city parks).

[3] See also *Green* v. *County School Board of New Kent County,* 391 U. S. 430 (1968).

[4] See *Thomas* v. *Mississippi,* 380 U. S. 524 (1965); *NAACP* v. *Thompson,* 357 F. 2d 831 (CA5 1966); *Bailey* v. *Patterson,* 199 F. Supp. 595 (SD Miss. 1961), vacated, 369 U. S. 31 (1962); *United States* v. *City of Jackson,* 206 F. Supp. 45 (SD Miss. 1962), rev'd, 318 F. 2d 1, 5–6 (CA5 1963) (common carrier terminals), where the Court of Appeals stated:

"We again take judicial notice that the State of Mississippi has a steel-hard, inflexible, undeviating official policy of segregation. The policy is stated in its laws. It is rooted in custom. The segregation signs at the terminals in Jackson carry out that policy. The Jackson

not desegregated although it had become clear that such action was required by the Constitution. As respondents state in their brief in this case:

> "In 1963 the City of Jackson was operating equal but separate recreational facilities such as parks and golf links, including swimming pools. A suit was brought in the Southern District of Mississippi to enjoin the segregated operation of these facilities. The City of Jackson took the position in that litigation that the segregation of recreational facilities, if separate but equal recreational facilities were provided and if citizens voluntarily used segregated facilities, was constitutional." Respondents' Brief 2.

This was nearly nine years after *Brown* and more than seven years after *Dawson* and *Holmes*.

The suit respondents refer to was instituted in 1962 as a class action by three Negro plaintiffs who alleged that some city facilities—parks, libraries, zoo, golf courses, playgrounds, auditoriums, and other recreational complexes—were closed to them because of their race. The defendants were Jackson city officials, including Mayor Allen C. Thompson and Director of Parks and Recreation George Kurts, both respondents in the present case. The plaintiffs in that suit were successful. The District Court's opinion began by stating that Jackson

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police add muscle, bone, and sinew to the signs." (Footnotes omitted.)

See also *Singleton* v. *Jackson Municipal Separate School Dist.*, 348 F. 2d 729 (CA5 1965); *Singleton* v. *Jackson Municipal Separate School Dist.*, 355 F. 2d 865 (CA5 1966); *Singleton* v. *Jackson Municipal Separate School Dist.*, 419 F. 2d 1211 (CA5 1969), rev'd in part *sub nom. Carter* v. *West Feliciana Parish School Board*, 396 U. S. 290 (1970); *Singleton* v. *Jackson Municipal Separate School Dist.*, 426 F. 2d 1364 (CA5), *modified*, 430 F. 2d 368 (CA5 1970); *Singleton* v. *Jackson Municipal Separate School Dist.*, 432 F. 2d 927 (CA5 1970).

was a city "noted for its low crime rate and lack of racial friction except for the period in 1961 when the self-styled Freedom Riders made their visits." *Clark* v. *Thompson,* 206 F. Supp. 539, 541 (SD Miss. 1962). It was also stated that Jackson had racially exclusive neighborhoods, that as this residential pattern had developed the city had "duplicated" its recreational facilities in white and Negro areas, and that members of each race "have customarily used the recreational facilities located in close proximity to their homes." *Ibid.* The final finding of fact was that the "defendants are not enforcing separation of the races in public recreational facilities in the City of Jackson. The defendants do encourage voluntary separation of the races." *Ibid.*[5]

Among the District Court's conclusions of law were the following: (1) that the suit was not a proper class action since the Negro plaintiffs had failed to show that their interests were not antagonistic to or incompatible with those of the purported class; [6] (2) that the three original plaintiffs were entitled to an adjudication by declaratory judgment of "their personal claims of right to unsegregated use of public recreational facilities," 206 F. Supp.,

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[5] In an affidavit filed August 18, 1965, in the District Court in the present case, Mayor Thompson stated, "I believe that the welfare of both races would have best been served if [the custom that members of each race would use the recreational facilities near their homes] had continued."

[6] But see *Brown* v. *Board of Education,* 347 U. S. 483, 495 (1954); *Dawson* v. *Mayor and City Council of Baltimore,* 220 F. 2d 386 (CA4), aff'd, 350 U. S. 877 (1955); *Holmes* v. *City of Atlanta,* 223 F. 2d 93, 94–95 (CA5), rev'd, 350 U. S. 879 (1955); *Browder* v. *Gayle,* 142 F. Supp. 707, 714 (MD Ala.), aff'd, 352 U. S. 903 (1956); *New Orleans City Park Improvement Assn.* v. *Detiege,* 252 F. 2d 122, 123 (CA5), aff'd, 358 U. S. 54 (1958); see also *Carter* v. *Jury Comm'n of Greene County,* 396 U. S. 320, 329–330 (1970).

at 542; (3) that injunctive relief was inappropriate as a matter of law;[7] and (4) that

> "The individual defendants in this case are all outstanding, high class gentlemen and in my opinion will not violate the terms of the declaratory judgment issued herein. They know now what the law is and what their obligations are, and I am definitely of the opinion that they will conform to the ruling of this Court without being coerced so to do by an injunction. The City of Jackson, a municipality, of course is operated by some of these high class citizens. I am further of the opinion that during this period of turmoil the time now has arrived when the judiciary should not issue injunctions perfunctorily, but should place trust in men of high character that they will obey the mandate of the Court without an injunction hanging over their heads." 206 F. Supp., at 543.

As the city has stressed in its brief here, it did not appeal from this judgment, which was entered in May 1962. The Negro plaintiffs, however, did appeal, claiming that the relief afforded was inadequate. The Court of Appeals for the Fifth Circuit affirmed *per curiam,* 313 F. 2d 637 (CA5 1963). On December 16, 1963, this Court denied certiorari, 375 U. S. 951.

It must be noted here that none of Jackson's public recreational facilities was desegregated until after the appellate proceedings in *Clark* v. *Thompson* were fully concluded.[8] This was true despite the fact that under this Court's prior decisions the only possible result of such review would have been a broadening of the relief

[7] But see cases cited n. 6, *supra.*

[8] See Respondents' Brief 3; Affidavit of Allen C. Thompson, App. 21; Affidavit of George T. Kurts, App. 18.

granted by the District Judge. Moreover, from the time of the trial court's decision in *Clark* v. *Thompson,* the mayor of Jackson made public statements, of record in this case, indicating his dedication to maintaining segregated facilities. On May 24, 1962, nine days after the District Court's decision in *Clark* v. *Thompson,* the Jackson Daily News quoted Mayor Thompson as saying:

> " 'We will do all right this year at the swimming pools . . . but if these agitators keep up their pressure, we would have five colored swimming pools because we are not going to have any intermingling.' . . . He said the City now has legislative authority to sell the pools or close them down if they can't be sold." App. 15.

A year passed while the appeals in *Clark* v. *Thompson* were pending, but the city's official attitude did not change. On May 24, 1963, the Jackson Daily News reported that "Governor Ross Barnett today commended Mayor Thompson for his pledge to maintain Jackson's present separation of the races." App. 15. On the next day, the same newspaper carried a front page article stating that "Thompson said neither agitators nor President Kennedy will change the determination of Jackson to retain segregation." App. 16.

During May and June 1963, the Negro citizens of Jackson organized to present their grievances to city officials. On May 27, a committee representing the Negro community met with the mayor and two city commissioners. Among the grievances presented was a specific demand that the city desegregate public facilities, including the city-operated parks and swimming pools.

On the day following this meeting, the Jackson Daily News quoted the mayor as saying:

> " 'In spite of the current agitation, the Commissioners and I shall continue to plan and seek money

> for additional parks for our Negro citizens. Tomorrow we are discussing with local Negro citizens plans to immediately begin a new clubhouse and library in the Grove Park area, and other park and recreational facilities for Negroes throughout the City. We cannot proceed, however, on the proposed $100,000 expenditure for a Negro swimming pool in the Grove Park area as long as there is the threat of racial disturbances.' " App. 15.

On May 30, 1963, the same paper reported that the mayor had announced that "[p]ublic swimming pools would not be opened on schedule this year due to some minor water difficulty." App. 5.

The city at this time operated five swimming facilities on a segregated basis: the Livingston Lake swimming facility, in reality a lake with beach facilities, at Livingston Park; a swimming pool in Battlefield Park; a swimming pool and a wading pool in Riverside Park; a pool that the city leased from the YMCA in Leavell Woods Park; a swimming pool and a wading pool for Negroes in College Park.[9] In literature describing its Department of Parks and Recreation, the city stressed that "[o]ur $.10 and $.20 charge for swimming . . . [is] the lowest to be found anywhere in the country. The fees are kept low in order to serve as many people as possible." In one of two affidavits that he filed below, Parks Director Kurts stated that for the years 1960, 1961, and 1962, the average annual expense to the city of operating each of the pools in Battlefield, Riverside, and College Park was $10,000. The average annual revenue from the pools in Battlefield

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[9] At the time *Clark* v. *Thompson* was decided, the population of Jackson consisted of approximately 100,000 whites and 50,000 Negroes. Despite this 2:1 ratio in population, there were four swimming facilities for whites and only one for Negroes.

and Riverside Parks was $8,000 apiece; the average annual revenue from the Negro pool in College Park was $2,300. Thus, for these three facilities, the city was absorbing an annual loss of approximately $11,700, and was doing so "in order to serve as many people as possible."

From the time of the announcement of "minor water difficulty" at the end of May 1963, none of these swimming facilities has operated under public aegis. The city canceled its lease on the Leavell Woods pool, and it has since been operated on a "whites only" basis by its owner, the YMCA, apparently without city involvement.[10] At oral argument, counsel for the city informed us that the pool that was located in the Negro neighborhood—the College Park pool—"was sold by the City to the Y. The YMCA opened it up and the black people boycotted so it wasn't being used, then the YMCA sold it to Jackson State College, Jackson State now owns it and operates it . . . for the students at Jackson State and their guests . . . ." Tr. of Oral Arg. 31. According to the record below, the Battlefield Park and Riverside Park pools, both in white neighborhoods, have remained closed but have been properly maintained and

[10] I agree fully with the majority that if a city or State becomes involved in any way in the operation of facilities on a segregated basis by private parties, the Fourteenth Amendment is violated. See *Burton* v. *Wilmington Parking Authority, supra,* n. 1; *Hampton* v. *City of Jacksonville,* 304 F. 2d 320 (CA5), cert. denied *sub nom. Ghioto* v. *Hampton,* 371 U. S. 911 (1962); *Smith* v. *Young Men's Christian Assn. of Montgomery,* 316 F. Supp. 899 (MD Ala. 1970) (city agreement with YMCA to coordinate city and YMCA recreational activities to eliminate duplication of services had as its primary purpose and effect encouragement and assistance of YMCA in maintaining segregated recreational facilities and programs); *Chinn* v. *Canton,* Civ. No. 3764 (SD Miss., Nov. 18, 1965) (unreported) (town leased municipal pool to private all-white association; pool ordered desegregated).

prevented from falling into disrepair by the city, although they produce no offsetting revenue. The Livingston Lake facility has apparently remained in its natural state.[11]

In August 1965, petitioners brought the present class action in the Southern District of Mississippi. They challenged the closing of the pools and racial segregation in the city jail, seeking both declaratory and injunctive relief. The case was tried on affidavits and stipulations and submitted to the District Judge. In addition to the evidence summarized above, Mayor Thompson filed an affidavit which stated:

> "Realizing that the personal safety of all of the citizens of the City and the maintenance of law and order would prohibit the operation of swimming pools on an integrated basis, and realizing that the said pools could not be operated economically on an integrated basis, the City made the decision subsequent to the Clark case to close all pools owned and operated by the City to members of both races." App. 21.[12]

Parks Director Kurts filed a similar affidavit, averring:

> "That after the decision of the Court in the case of Clark v. Thompson, it became apparent that the swimming pools owned and operated by the City of Jackson could not be operated peacefully, safely, or economically on an integrated basis, and the City

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[11] During the proceedings in this case, it was developed that the benches in the Livingston Park Zoo were removed in 1961, and that the public rest rooms in the Municipal Court Building were closed at some point in time. See *Palmer* v. *Thompson,* 419 F. 2d 1222, 1231 (CA5 1969) (dissenting opinion); affidavit of Allen C. Thompson, App. 21.

[12] The Mayor's affidavit makes no mention of "minor water difficulty."

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> decided that the best interest of all citizens required the closing of all public swimming pools owned and operated by the City . . . ." App. 18.[13]

Based on these affidavits, the District Judge found as a fact that the decision to close the pools was made after *Clark* v. *Thompson* and that the pools could not be operated safely or economically on an integrated basis. Accordingly, he held that petitioners were not entitled to any relief and dismissed the complaint. On appeal, a panel of the Court of Appeals for the Fifth Circuit affirmed. *Palmer* v. *Thompson,* 391 F. 2d 324 (1967). On rehearing *en banc,* the Court of Appeals, by a seven-to-six vote, again affirmed dismissal of the complaint. 419 F. 2d 1222 (1969). Both courts below rejected petitioners' argument that because the pools were closed to avoid court orders that would require their desegregation, the city's action was a denial of equal protection. We granted certiorari to decide that issue, 397 U. S. 1035 (1970), and for the reasons that follow I would reverse.

II

There is no dispute that the closing of the pools constituted state action. Similarly, there can be no disagreement that the desegregation ruling in *Clark* v. *Thompson* was the event that precipitated the city's decision to cease furnishing public swimming facilities to its citizens.[14] Although the secondary evidence of what the city officials thought and believed about the wisdom of desegregation is relevant, it is not necessary to rely on it to establish the causal link between *Clark* v. *Thompson* and the closings. The officials' sworn affidavits,

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[13] The Parks Director's affidavit makes no mention of "minor water difficulty."

[14] At oral argument, counsel for the city so conceded. Tr. of Oral Arg. 28–29.

accepted by the courts below, stated that loss of revenue and danger to the citizens would obviously result from operating the pools on an integrated basis. Desegregation, and desegregation alone, was the catalyst that would produce these undesirable consequences. Implicit in this official judgment were assumptions that the citizens of Jackson were of such a mind that they would no longer pay the 10- or 20-cent fee imposed by the city if their swimming and wading had to be done with their neighbors of another race, that some citizens would direct violence against their neighbors for using pools previously closed to them, and that the anticipated violence would not be controllable by the authorities. Stated more simply, although the city officials knew what the Constitution required after *Clark* v. *Thompson* became final, their judgment was that compliance with that mandate, at least with respect to swimming pools, would be intolerable to Jackson's citizens.

Predictions such as this have been presented here before. One year after the District Court's opinion in *Clark* v. *Thompson,* this Court reviewed a case in which municipal officials had made the same assumption and had acted upon it. In Memphis, Tennessee, *Brown* and the cases discussed above had little effect until May 1960, when Negro residents sued for declaratory and injunctive relief directing immediate desegregation of the municipal parks and other city-owned and city-operated recreational facilities. The city agreed that the Fourteenth Amendment required all facilities to be opened to citizens regardless of race and that the majority of city-run facilities remained segregated at the time of suit, six years after *Brown.* It was nevertheless asserted that desegregation was under way and that further delay in achieving full desegregation was the wise and proper course. Both of the lower courts denied plaintiffs relief, the net result being an order directing the city to submit

within six months a plan providing for gradual desegregation of all the city's recreational facilities.

This Court unanimously rejected further delay in integrating these facilities. *Watson* v. *City of Memphis,* 373 U. S. 526 (1963). It did so although the city asserted its good-faith attempt to comply with the Constitution and its honest belief that gradual desegregation, facility by facility, was necessary to prevent interracial strife. The Court's "compelling answer to this contention [was] that constitutional rights may not be denied simply because of hostility to their assertion or exercise." *Id.,* at 535. See also *Buchanan* v. *Warley,* 245 U. S. 60, 81 (1917); *Brown* v. *Board of Education,* 349 U. S. 294, 300 (1955); *Cooper* v. *Aaron,* 358 U. S., at 16; *Wright* v. *Georgia,* 373 U. S. 284, 291–293 (1963). The record in the case was reviewed in some detail. I quote at length because of the pertinence of the Court's observations.

> "Beyond this, however, neither the asserted fears of violence and tumult nor the asserted inability to preserve the peace was demonstrated at trial to be anything more than personal speculations or vague disquietudes of city officials. There is no indication that there had been any violence or meaningful disturbances when other recreational facilities had been desegregated. In fact, the only evidence in the record was that such prior transitions had been peaceful. The Chairman of the Memphis Park Commission indicated that the city had 'been singularly blessed by the absence of turmoil up to this time on this race question'; notwithstanding the prior desegregation of numerous recreational facilities, the same witness could point as evidence of the unrest or turmoil which would assertedly occur upon complete desegregation of such facilities only to a number of anonymous letters and phone calls

which he had received. The Memphis Chief of Police mentioned without further description some 'troubles' at the time bus service was desegregated and referred to threatened violence in connection with a 'sit-in' demonstration at a local store, but, beyond making general predictions, gave no concrete indication of any inability of authorities to maintain the peace. The only violence referred to at any park or recreational facility occurred in segregated parks and was not the product of attempts at desegregation. Moreover, there was no factual evidence to support the bare testimonial speculations that authorities would be unable to cope successfully with any problems which in fact might arise or to meet the need for additional protection should the occasion demand.

"The existing and commendable goodwill between the races in Memphis, to which both the District Court and some of the witnesses at trial made express and emphatic reference as in some inexplicable fashion supporting the need for further delay, can best be preserved and extended by the observance and protection, not the denial, of the basic constitutional rights here asserted. The best guarantee of civil peace is adherence to, and respect for, the law.

"The other justifications for delay urged by the city or relied upon by the courts below are no more substantial, either legally or practically. It was, for example, asserted that immediate desegregation of playgrounds and parks would deprive a number of children—both Negro and white—of recreational facilities; this contention was apparently based on the premise that a number of such facilities would have to be closed because of the inadequacy of the 'present' park budget to provide additional 'supervision' assumed to be necessary to operate unsegregated

playgrounds. As already noted, however, there is no warrant in this record for assuming that such added supervision would, in fact, be required, much less that police and recreation personnel would be unavailable to meet such needs if they should arise. More significantly, however, it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them. We will not assume that the citizens of Memphis accept the questionable premise implicit in this argument or that either the resources of the city are inadequate, or its government unresponsive, to the needs of all of its citizens." 373 U. S., at 536–538 (footnotes omitted).

So it is in this case. The record before us does not include live testimony. It was stipulated by the parties after the District Judge had entered his order denying relief that the "parties had an opportunity to offer any and all evidence desired." The official affidavits filed were even less compelling than the evidence presented by city officials in *Watson.* The conclusion of city officials that integrated pools would not be "economical" was no more than "personal speculation." The city made no showing that integrated operation would increase the annual loss of at least $11,700—a loss that, prior to 1963, the city purposely accepted for the benefit of its citizens as long as segregated facilities could be maintained. The prediction that the pools could not be operated safely if they were desegregated was nothing more than a "vague disquietude." In *Watson,* the record reflected that the parks commissioner had received a number of anonymous phone calls and letters presumably threatening violence, and that the chief of police had testified about troubles in connection with a sit-in demonstration and desegregation of the city buses. Here, Mayor Thomp-

son's affidavit, filed in 1965, refers only to a time in 1961 "when racial tensions were inflamed by the visits of the freedom riders to Jackson." Both the Thompson and Kurts affidavits assert that all other public recreational facilities in Jackson were desegregated following *Clark* v. *Thompson.* Neither affidavit contains the slightest hint—in general or specific terms—that this transition caused disorder or violence.[15] As in *Watson,* there is no factual evidence that city law enforcement authorities would be unable to cope with any disturbances that might arise; unlike *Watson,* however, there is in this record not even a "bare testimonial speculation" that this would be the case.

With all due respect, I am quite unable to agree with the majority's assertion, *ante,* at 225, that there is "substantial evidence in the record" to support the conclusion of the lower courts that the pools could not be operated safely and economically on an integrated basis. Officials may take effective action to control violence or to prevent it when it is reasonably imminent. But the anticipation of violence in this case rested only on unsupported assertion, to which the *permanent* closing of swimming pools was a wholly unjustified response. The city seems to fear that even if some or all of the pools suffered a sharp decline in revenues from the levels pertaining before 1963 because Negro and white neighbors refused to use integrated facilities, the city could never close the pools for that reason. I need only ob-

[15] In its brief, the city argues: "This Court will take judicial knowledge of the fact that there still exists a serious danger of violent clashes between young people of different racial groups, whether stemming from acts of or promoted by one group or the other." Respondents' Brief 10. But this is, as noted in the text, contrary to the record developed in the courts below. Moreover, at oral argument counsel for the respondents stated that to his knowledge there has been no interracial violence in Jackson since the 1961 Freedom Rider incidents. See Tr. of Oral Arg. 36.

serve that such a case, if documented by objective record evidence, would present different considerations. As Judge Wisdom stated below, "We do not say that a city may never abandon a previously rendered municipal service. If the facts show that the city has acted in good faith for economic or other nonracial reasons, the action would have no overtones of racial degradation, and would therefore not offend the Constitution." 419 F. 2d, at 1237 n. 16 (dissenting opinion). It is enough for the present case to re-emphasize that the only evidence in this record is the conclusions of the officials themselves, unsupported by even a scintilla of added proof.

Watson counsels us to reject the vague speculation that the citizens of Jackson will not obey the law, as well as the correlative assumption that they would prefer no public pools to pools open to all residents who come in peace. The argument based on economy is no more than a claim that a major portion of the city's population will not observe constitutional norms. The argument based on potential violence, as counsel for the city indicated at oral argument, unfortunately reflects the views of a few immoderates who purport to speak for the white population of the city of Jackson. Tr. of Oral Arg. 36. Perhaps it could have been presented, but there is no evidence now before us that there exists any group among the citizens of Jackson that would employ lawless violence to prevent use of swimming pools by Negroes and whites together. In my view, the Fourteenth Amendment does not permit any official act—whether in the form of open refusal to desegregate facilities that continue to operate, decisions to delay complete desegregation, or closure of facilities—to be predicated on so weak a reed. Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply

held. Surely the promise of the Fourteenth Amendment demands more than nihilistic surrender. As Mr. Justice Frankfurter observed more than 12 years ago:

> "The process of ending unconstitutional exclusion of pupils from the common school system—'common' meaning shared alike—solely because of color is no doubt not an easy, overnight task in a few States where a drastic alteration in the ways of communities is involved. Deep emotions have, no doubt, been stirred. They will not be calmed by letting violence loose—violence and defiance employed and encouraged by those upon whom the duty of law observance should have the strongest claim—nor by submitting to it under whatever guise employed. Only the constructive use of time will achieve what an advanced civilization demands and the Constitution confirms." *Cooper* v. *Aaron,* 358 U. S., at 25 (concurring opinion).

III

I thus arrive at the question of whether closing public facilities to citizens of both races, whatever the reasons for such action, is a special kind of state action somehow insulated from scrutiny under the Fourteenth Amendment. As the opinions of the majority and MR. JUSTICE DOUGLAS show, most of our prior decisions, because of their facts, do not deal with this precise issue.

Bush v. *Orleans Parish School Board,* 187 F. Supp. 42 (ED La. 1960), aff'd, 365 U. S. 569 (1961), is relevant. In that case, a three-judge court declared unconstitutional a number of Louisiana statutes designed to avoid desegregation of the public schools in that State. Among the laws stricken down was a statute giving the Governor the right to close any school ordered to integrate, a statute giving the Governor the right to close all schools if one was integrated, and a statute giving the Governor

the right to close any school threatened with violence or disorder. We affirmed the District Court summarily and without dissent. *Ibid.*[16] See also *Hall* v. *St. Helena*

[16] I cannot agree with the majority's attempt to discount the significance of *Bush*. First, the action taken in *Bush* in no sense depended on our conclusion in *Brown* that the provision of public education was an especially important state function. Had that been the case, and had recreational facilities somehow been considered less essential, the Court should have accepted the argument made by some States that *Brown* not be extended to recreational facilities. This we did not do. See *Dawson, supra,* and *Holmes, supra.* Similarly, if such a distinction was at all tenable, the extension of the "all deliberate speed" approach to desegregating public facilities might have been appropriate. But this argument was also emphatically rejected. See *Watson, supra,* at 529–530. When a public agency furnishes a service—regardless of whether or not it is an "essential" one—it must act in a nondiscriminatory manner with regard to that service.

Second, even accepting the majority's characterization of public schools as "important," there is much in our previous decisions to contradict its implication that providing swimming pools and other public recreational facilities is not a significant state function. In *Evans* v. *Newton,* 382 U. S. 296, 302 (1966), the Court stated:

"A park . . . is more like a fire department or police department that traditionally serves the community. Mass recreation through the use of parks is plainly in the public domain, *Watson* v. *Memphis,* 373 U. S. 526; and state courts that aid private parties to perform that public function on a segregated basis implicate the State in conduct proscribed by the Fourteenth Amendment."

See also *Evans* v. *Abney,* 396 U. S. 435, 443–444, 445 (1970), where MR. JUSTICE BLACK, writing for the Court, stated:

"When a city park is destroyed because the Constitution requires it to be integrated, there is reason for everyone to be disheartened. We agree with petitioners that in such a case it is not enough to find that the state court's result was reached through the application of established principles of state law. No state law or act can prevail in the face of contrary federal law, and the federal courts must search out the fact and truth of any proceeding or transaction to determine if the Constitution has been violated.

. . . . . .

"A second argument for petitioners stresses the similarities be-

Parish School Board, 197 F. Supp. 649 (ED La. 1961), aff'd, 368 U. S. 515 (1962).

Griffin v. *County School Board of Prince Edward County,* 377 U. S. 218 (1964), is perhaps distinguishable,

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tween this case and the case in which a city holds an absolute fee simple title to a public park and then closes that park of its own accord solely to avoid the effect of a prior court order directing that the park be integrated as the Fourteenth Amendment commands. Yet, assuming *arguendo* that the closing of the park would in those circumstances violate the Equal Protection Clause, that case would be clearly distinguishable from the case at bar because there it is the State and not a private party which is injecting the racially discriminatory motivation. In the case at bar there is not the slightest indication that any of the Georgia judges involved were motivated by racial animus or discriminatory intent of any sort in construing and enforcing Senator Bacon's will."

This was the inquiry made in *Bush,* and it led to striking down the statutes in question. We affirmed that ruling, and the record here is no less clear. And as the majority concedes, *ante,* at 221 n. 6, surely it is not irrelevant in considering the context in which Jackson's pools were closed, that a statute of the State of Mississippi, in effect since 1956, provides:

"That the entire executive branch of the government of the State of Mississippi, and of its subdivisions, and all persons responsible thereto, including the governor, the lieutenant governor, the heads of state departments, sheriffs, boards of supervisors, constables, mayors, boards of aldermen and other governing officials of municipalities by whatever name known . . . whether specifically named herein or not . . . shall give full force and effect in the performance of their official and political duties, to the Resolution of Interposition . . . and all of said members of the executive branch be and they are hereby . . . directed and required to prohibit, by any lawful, peaceful and constitutional means, the implementation of or the compliance with the Integration Decisions of the United States Supreme Court of May 17, 1954 (347 US 483), . . . and of May 31, 1955 (349 US 294), . . . and to prohibit by any lawful, peaceful, and constitutional means, the causing of a mixing or integration of the white and Negro races in public schools, public parks, public waiting rooms, public places of amusement, recreation or assembly in this state, by any branch of the federal government, any person employed by the federal government, any commission, board or

but only if one ignores its basic rationale and the purpose and direction of this Court's decisions since *Brown*. First, and most importantly, *Griffin* stands for the proposition that the reasons underlying certain official acts are highly relevant in assessing the constitutional validity of those acts. We stated:

> "But the record in the present case could not be clearer that Prince Edward's public schools were closed and private schools operated in their place with state and county assistance, for one reason, and one reason only: to ensure, through measures taken by the county and the State, that white and colored children in Prince Edward County would not, under any circumstances, go to the same school. Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional." 377 U. S., at 231.

See also *Gomillion* v. *Lightfoot,* 364 U. S. 339, 346–348 (1960); *Board of Education* v. *Allen,* 392 U. S. 236, 243 (1968); *Epperson* v. *Arkansas,* 393 U. S. 97, 109 (1968); Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L. J. 1205 (1970); Note, Legislative Purpose and Federal Constitutional Adjudication, 83 Harv. L. Rev. 1887 (1970). Second,

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agency of the federal government, or any subdivision of the federal government, and to prohibit, by any lawful, peaceful and constitutional means, the implementation of any orders, rules or regulations of any board, commission or agency of the federal government, based on the supposed authority of said Integration Decisions, to cause a mixing or integration of the white and Negro races in public schools, public parks, public waiting rooms, public places of amusement, recreation or assembly in this state." Miss. Code Ann. § 4065.3 (1957); see *United States* v. *City of Jackson,* 318 F. 2d 1, 5–6 (CA5 1963) (judicial notice taken of this statute).

Griffin contains much that is relevant to the kind of decree that would be appropriate if the decision below is reversed. See 377 U. S., at 232–234.

The majority, conceding the relevance of the quoted passage from *Griffin*, states that the "focus in [both *Griffin* and *Gomillion*] was on the actual effect of the enactments, not upon the motivation which led the States to behave as they did." Respondents agree, and argue further that the present record shows only that Jackson has closed facilities that were once open on a segregated basis and that the closing operates equally on Negroes and whites alike.

But if effect was all that the Court considered relevant in *Griffin*, there was no need to mention underlying purpose and to stress the delay that took place in Virginia in implementing *Brown*.[17] More importantly, *Griffin* was only one case in a series stressing that the Fourteenth Amendment rights "declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.' *Smith* v. *Texas*, 311 U. S. 128, 132." *Cooper* v. *Aaron*, *supra*, at 17. It seems to me neither wise nor warranted to limit this principle in a case where the record is as clear as is the one presently before us.

State action predicated solely on opposition to a lawful court order to desegregate is a denial of equal protection of the laws. As Judge Wisdom said in dissent below, the argument that the closing of the pools operated equally on Negroes and whites "is a tired contention, one that has been overworked in civil rights cases." 419 F. 2d, at 1232 (dissenting opinion). It was made and rejected in *Griffin*. See, *e. g.*, Brief of Respondent Board of Super-

[17] See also *Green*, *supra*, n. 3.

visors of Prince Edward County in *Griffin* 57–84.[18] It was advanced and rejected in different contexts in *Anderson* v. *Martin,* 375 U. S. 399 (1964) (designation of race on ballots), and *Loving* v. *Virginia,* 388 U. S. 1 (1967) (miscegenation law). The same argument was rejected in *Hunter* v. *Erickson,* 393 U. S. 385, 391 (1969), where we stated that "although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that."

Here, too, the reality is that the impact of the city's act falls on the minority. Quite apart from the question whether the white citizens of Jackson have a better chance to swim than do their Negro neighbors absent city pools, there are deep and troubling effects on the racial minority that should give us all pause. As stated at the outset of this opinion, by closing the pools solely because of the order to desegregate, the city is expressing its official view that Negroes are so inferior that they are unfit to share with whites this particular type of public facility, though pools were long a feature of the city's segregated recreation program. But such an official position may not be enforced by designating certain pools for use by whites and others for the use of Negroes. Closing the pools without a colorable nondiscriminatory reason was every bit as much an official endorsement of

[18] In their briefs in *Griffin,* No. 592, O. T. 1963, the respondents relied on previous lower court cases that have permitted closing public recreational facilities after decrees had been entered ordering that they be desegregated. See Brief of Respondent Board of Supervisors in *Griffin* 65–66. See also Brief of Respondents State Board of Education and Superintendent of Public Instruction in *Griffin* 53–63. *Griffin* rejected the relevance of these decisions; however, the present respondents rely on them here and the majority implicitly embraces them.

the notion that Negroes are not equal to whites as was the use of state National Guard troops in 1957 to bar the entry of nine Negro students into Little Rock's Central High School, a public facility that was ordered desegregated in the wake of *Brown*. See *Cooper* v. *Aaron,* 358 U. S., at 11. Both types of state actions reflect implementation of the same official conclusion: Negroes cannot be permitted to associate with whites. But that notion had begun to break down as this Court struggled with the "separate but equal" doctrine, see *Brown,* 347 U. S., at 491–494,[19] and I had thought it was emphatically laid to rest in *Brown* itself, where we quoted with approval the finding of a district judge that:

> " 'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of the negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.' " 347 U. S., at 494.

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[19] The Court in *Brown* noted that in *Sweatt* v. *Painter,* 339 U. S. 629 (1950), the Court had held that a segregated law school for Negroes could not provide them equal educational opportunities, relying in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." 339 U. S., at 634. The Court in *Brown* also relied on *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637 (1950), in which it was required that a Negro student in a white graduate school be treated like all other students in order to avoid impairing "his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." 339 U. S., at 641.

These considerations were not abandoned as *Brown* was applied in other contexts, and it is untenable to suggest that the closing of the swimming pools—a pronouncement that Negroes are somehow unfit to swim with whites—operates equally on Negroes and whites. Whites feel nothing but disappointment and perhaps anger at the loss of the facilities. Negroes feel that and more. They are stigmatized by official implementation of a policy that the Fourteenth Amendment condemns as illegal. And the closed pools stand as mute reminders to the community of the official view of Negro inferiority.

Moreover, this Court has carefully guarded the rights of Negroes to attack state-sanctioned segregation through the peaceful channels of the judicial process. This Court has recently discussed and analyzed various provisions of the Reconstruction civil rights statutes, and there is little need here to repeat anything more than the most recent observation that "[t]he approach of this Court . . . has been to 'accord [these statutes] a sweep as broad as [their] language.'" *Griffin* v. *Breckenridge, ante,* p. 88, at 97.[20] Of course, 42 U. S. C. § 1981 specifically declares that "[a]ll persons . . . shall have the same right . . . to sue . . . as is enjoyed by white citizens . . . ." Congress has supplemented this early legislation, and this Court has commented on the importance of private plaintiffs in enforcing civil rights statutes. *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U. S. 400, 401–402 (1968); see also *NAACP* v. *Alabama,* 357 U. S. 449 (1958). The Civil Rights Act of 1964 provided an additional avenue for a potential private plaintiff to follow. Provisions of that Act authorize the Attorney General to bring a civil suit in the name of the United States whenever he receives a signed complaint in writing

[20] Quoting *United States* v. *Price,* 383 U. S. 787, 801 (1966); see also *Adickes* v. *S. H. Kress & Co.,* 398 U. S. 144 (1970); *Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409 (1968).

from an individual that such person is being denied equal protection of the laws by being denied equal utilization of any public facilities such as those involved in the present case. 42 U. S. C. § 2000b (a). The Attorney General may bring such a suit if he believes the complaint to be meritorious and certifies that the signer of the complaint is unable, in his judgment, to initiate and maintain an appropriate private suit. *Ibid.* The statute further defines when the Attorney General may deem a complainant unable to initiate or maintain a private action, specifying inability to bear the expense of private litigation and the possibility that "the institution of such litigation would jeopardize the personal safety, employment, or economic standing of such person or persons, their families, or their property." 42 U. S. C. § 2000b (b).

It is evident that closing a public facility after a court has ordered its desegregation has an unfortunate impact on the minority considering initiation of further suits or filing complaints with the Attorney General. As Judge Wisdom said, "[T]he price of protest is high. Negroes . . . now know that they risk losing even segregated public facilities if they dare to protest . . . segregated public parks, segregated public libraries, or other segregated facilities. They must first decide whether they wish to risk living without the facility altogether . . . ." 419 F. 2d, at 1236 (dissenting opinion). It is difficult to measure the extent of this impact, but it is surely present and surely we should not ignore it. The action of the city in this case interposes a major deterrent to seeking judicial or executive help in eliminating racial restrictions on the use of public facilities.[21] As such, it is illegal under the

[21] Nor should we be lulled by the suggestion that all of Jackson's public facilities have been integrated. As the majority correctly states, "[i]f the time ever comes when Jackson attempts to run segregated public pools either directly or indirectly, or partici-

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Fourteenth Amendment. See *Shapiro* v. *Thompson,* 394 U. S. 618, 631 (1969); *United States* v. *Jackson,* 390 U. S. 570, 581 (1968); *Dombrowski* v. *Pfister,* 380 U. S. 479, 486–487 (1965); see also *Oregon* v. *Mitchell,* 400 U. S. 112, 292 (1970) (STEWART, J., concurring and dissenting).

IV

From what has been stated above, it is clear that the city's action in closing the pools because of opposition to the decision in *Clark* v. *Thompson* was "an exercise of the state police power which trenches upon the constitutionally protected freedom from invidious official discrimination based on race." *McLaughlin* v. *Florida,* 379

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pates in a subterfuge whereby pools are nominally run by 'private parties' but actually by the city, relief will be available in the federal courts." This is but a partial summary of the litigation that may lie ahead as some cities attempt to avoid the requirement that public facilities be operated on an integrated basis. It demonstrates that it is surely wrong to suggest that simply because a city presently operates no segregated facilities there is nothing that will need to be done by way of litigation to enforce the Fourteenth Amendment in the future. Assume for instance that it can be shown that a city is providing some form of covert assistance to a "private" organization such as the YMCA to run swimming pools on a segregated basis, one for the whites and one for the Negroes; another example would be a "desegregated" public school offering segregated classes, perhaps including physical education and swimming. Although we are all agreed that such conduct is illegal, the majority apparently believes that allowing a city to close public facilities solely because of opposition to desegregation would exert no effect whatsoever on the deliberations of Negro plaintiffs considering a court challenge to these newer, more subtle discriminatory practices. See n. 10, *supra.* To me, it is clear that the majority's edict places a powerful weapon at the disposal of public officials hostile to fulfilling the promise of the Fourteenth Amendment. Threat of suit by Negroes in either case hypothesized above is likely to be countered by a threat, and perhaps action, to close the covertly run segregated pools—in schools or outside.

U. S. 184, 196 (1964). As such, it "bears a heavy burden of justification . . . and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *Ibid.;* see also *Loving* v. *Virginia,* 388 U. S. 1 (1967). The city has only opposition to desegregation to offer as a justification for closing the pools, and this opposition operates both to demean the Negroes of Jackson and to deter them from exercising their constitutional and statutory rights. The record is clear that these public facilities had been maintained and would have been maintained but for one event: a court order to open them to all citizens without regard to race. I would reverse the judgment of the Court of Appeals and remand the cause for further proceedings.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE WHITE join, dissenting.

While I am in complete agreement with the opinions of JUSTICES DOUGLAS and WHITE, I am obliged to add a few words of my own.

First, the majority and concurring opinions' reliance on the "facially equal effect upon all citizens" of the decision to discontinue all public pools is misplaced. As long ago as 1948 in *Shelley* v. *Kraemer,* 334 U. S. 1, 22, this Court held:

> "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."

In short, when the officials of Jackson, Mississippi, in the circumstances of this case detailed by MR. JUSTICE WHITE denied a single Negro child the opportunity to go swimming simply because he is a Negro, rights guaranteed to that child by the Fourteenth Amendment were lost. The fact that the color of his skin is used to prevent others from swimming in public pools is irrelevant.

Second, since *Brown* v. *Board of Education,* 347 U. S. 483 (1954), public schools and public recreational facilities such as swimming pools have received identical Fourteenth Amendment protection. Indeed, exactly one week after *Brown I* this Court remanded three cases in the *same* per curiam: *Florida ex rel. Hawkins* v. *Board of Control of Florida; Tureaud* v. *Board of Supervisors;* and *Muir* v. *Louisville Park Theatrical Assn.,* 347 U. S. 971. The first two involved university *education* and the latter involved *recreational facilities.*

Even before *Brown II,* 349 U. S. 294 (1955), it was recognized as obvious that "racial segregation in recreational activities can no longer be sustained as a proper exercise of the police power of the State; for if that power cannot be invoked to sustain racial segregation in the schools, where attendance is compulsory and racial friction may be apprehended from the enforced commingling of the races, it cannot be sustained with respect to public beach and bathhouse facilities, the use of which is entirely optional." *Dawson* v. *Mayor and City Council of Baltimore,* 220 F. 2d 386, 387 (CA4), aff'd *per curiam,* 350 U. S. 877 (1955). See also *Department of Conservation & Development* v. *Tate,* 231 F. 2d 615 (CA4), cert. denied, 352 U. S. 838 (1956).

By effectively removing publicly owned swimming pools from the protection of the Fourteenth Amendment—at least if the pools are outside school buildings—the majority and concurring opinions turn the clock back 17 years. After losing a hard fought legal battle to

maintain segregation in public facilities, the Jackson, Mississippi, authorities now seek to pick and choose* which of the existing facilities will be kept open. Their choice is rationalized on the basis of economic need and is even more transparent than putting the matter to a referendum vote.

Finally, I cannot conceive why the writers of the concurring opinions believe that the city is "locked in" and must operate the pools no matter what the economic consequences. Certainly, I am not bound by any admission of an attorney at oral argument as to his version of the law. Equity courts have always had continuing supervisory powers over their decrees; and if a proper basis for closing the facilities—other than a conclusory statement about the projected human and thus economic consequences of desegregation—could be shown, swimming pools, as I imagine schools or even golf courses, could be closed.

I dissent.

*The economic loss incident to the operation of public swimming pools could not be much more than that incident to maintaining public golf courses that charge green fees of $0.75 to $1.25, admittedly the lowest in the country.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA ET AL. *v.* LOCKRIDGE

CERTIORARI TO THE SUPREME COURT OF IDAHO

No. 76. Argued December 15, 1970—Decided June 14, 1971

Respondent, who had been discharged from employment on the ground that he had forfeited his good standing membership in petitioner Union by dues arrearage and was therefore subject to termination under the union security clause in the applicable collective-bargaining agreement, brought suit in the state court against the Union and the employer (which was later dropped as a party). The two-count complaint charged (1) that the Union in suspending respondent from membership, which resulted in his loss of employment, acted wrongfully and deprived respondent of the employment with his employer that accrued to him and would accrue to him by reason of his employment, seniority, and experience, and (2) that by the suspension in violation of the Union's constitution and general laws (which constituted a contract between respondent as a union member and the Union) the Union had breached its contract with respondent. The trial court, rejecting the Union's contention that the complaint charged the commission of an unfair labor practice within the exclusive jurisdiction of the National Labor Relations Board (NLRB), held that it had jurisdiction under *Machinists* v. *Gonzales,* 356 U. S. 617, concluded that there had been a breach of contract, for which it awarded money damages for lost wages, and ordered respondent restored to union membership. The Idaho Supreme Court, which also ordered respondent's seniority rights restored, affirmed by a divided vote, concluding that, although the Union's conduct "did most certainly" violate §§ 8 (b) (1) (A) and 8 (b) (2) of the National Labor Relations Act and "probably caused the employer to violate § 8(a) (3)," the state courts had jurisdiction because the complaint charged a breach of contract rather than an unfair labor practice; state courts in interpreting contract terms deal with different conduct than would the NLRB in deciding whether a union is discriminating against a member; and *Gonzales, supra,* constitutes an exception that permits state courts to exercise jurisdiction in a case like this. *Held:*

1. Respondent's complaint that the Union had wrongfully interfered with his employment relation involved a matter that was arguably protected by § 7 or prohibited by § 8 of the National Labor Relations Act and thus was within the exclusive jurisdiction of the NLRB. *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236. Pp. 285–291.

2. The reasons relied on for the assumption of state court jurisdiction in this case do not suffice to overcome the factors on which the pre-emption doctrine of *Garmon* was predicated, *viz.*, the congressional purpose for effectuating a comprehensive national labor policy to be administered by an expert central agency rather than by a federalized judicial system; the necessity for carrying out that labor policy without specific congressional direction or judicial resolution on a case-by-case basis; and the avoidance of different treatment of the judicial power to deal with conduct that the Act protects from that which the Act prohibits. Pp. 285–297.

(a) Since pre-emption is designed to shield the system from conflicting regulation of conduct, the formal description of that conduct (here the characterization that a breach of contract was involved) is immaterial. Pp. 291–292.

(b) Since the conduct here was arguably protected by § 7 or prohibited by § 8 of the Act, the substantial interests sought to be protected by the pre-emption doctrine are directly involved, and the fact that the Union may have misconstrued its own rules in this case would not be treated by the NLRB as a defense to a claimed violation of § 8 (b) (2). Pp. 292–293.

(c) The *Gonzales* case "was focused on purely internal union matters" and the state courts only had to consider the union's constitution and bylaws, whereas respondent's case turned on the construction of the applicable union security clause, as to which federal concern is pervasive and its regulation complex. Pp. 293–297.

3. Respondent's contention that his action is excepted from the *Garmon* principle as being a suit for the enforcement of a collective-bargaining agreement is without merit since respondent specifically dropped the employer as a defendant, as is his alternative contention that his suit is essentially one to redress the Union's breach of its duty of fair representation, for to sustain such a claim respondent would have to prove "arbitrary or bad faith conduct on the part of the union," whereas the Idaho Supreme Court found only that the Union had misinterpreted the contract. Pp. 298–301.

93 Idaho 294, 460 P. 2d 719, reversed.

HARLAN, J., delivered the opinion of the Court, in which BLACK, BRENNAN, STEWART, and MARSHALL, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post,* p. 302. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post,* p. 309. BLACKMUN, J., filed a dissenting statement, *post,* p. 332.

Isaac N. Groner argued the cause for petitioners. With him on the briefs were *Earle W. Putnam* and *Paul T. Bailey.*

John L. Kilcullen argued the cause for respondent. With him on the brief were *Robert W. Green* and *Samuel Kaufman.*

Briefs of *amici curiae* urging reversal were filed by *Solicitor General Griswold, Arnold Ordman, Dominick L. Manoli, Norton J. Come,* and *Linda Sher* for the National Labor Relations Board, and by *J. Albert Woll, Laurence Gold,* and *Thomas E. Harris* for the American Federation of Labor and Congress of Industrial Organizations.

Jonathan C. Gibson filed a brief for the National Right to Work Legal Defense and Education Foundation as *amicus curiae* urging affirmance.

MR. JUSTICE HARLAN delivered the opinion of the Court.

San Diego Building Trades Council v. *Garmon,* 359 U. S. 236 (1959), established the general principle that the National Labor Relations Act pre-empts state and federal court jurisdiction to remedy conduct that is arguably protected or prohibited by the Act. That decision represents the watershed in this Court's continuing effort to mark the extent to which the maintenance of a general federal law of labor relations combined with a centralized administrative agency to implement its provisions necessarily supplants the operation of the more traditional legal processes in this field. We granted certiorari in

this case, 397 U. S. 1006 (1970), because the divided decision of the Idaho Supreme Court demonstrated the need for this Court to provide a fuller explication of the premises upon which *Garmon* rests and to consider the extent to which that decision must be taken to have modified or superseded this Court's earlier efforts to treat with the knotty pre-emption problem.

I

Respondent, Wilson P. Lockridge, has obtained in the Idaho courts a judgment for $32,678.56 against petitioners, Northwest Division 1055 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America and its parent international association,[1] on the grounds that, in procuring Lockridge's discharge from employment, pursuant to a valid union security clause in the applicable collective-bargaining agreement, the Union breached a contractual obligation embodied in the Union's constitution and bylaws.

From May 1943 until November 2, 1959, Lockridge was a member of petitioner Union and employed within the State of Idaho as a bus driver for Western Greyhound Lines, or its predecessor. At the time of Lockridge's dismissal from the Union, § 3 (a) of the collective-bargaining agreement in effect between the Union and Greyhound provided:

> "All present employees covered by this contract shall become members of the ASSOCIATION [Union] not later than thirty (30) days following

[1] The local and its parent are, of course, separate legal entities for many purposes and were joined as codefendants below so that each appears as a petitioner in this Court. However both will be jointly described throughout this opinion as "the petitioner" or "the Union" since the parent was held liable on the theory that it was responsible for the acts of the local here involved, not on the basis of any separate acts committed only by the parent.

> its effective date and shall remain members as a condition precedent to continued employment. This section shall apply to newly hired employees thirty (30) days from the date of their employment with the COMPANY." App. 88.

In addition, § 91 of the Union's Constitution and General Laws provided, in pertinent part, that:

> "All dues . . . of the members of this Association are due and payable on the first day of each month for that month . . . . They must be paid by the fifteenth of the month in order to continue the member in good standing. . . . A member in arrears for his dues . . . after the fifteenth day of the month is not in good standing . . . and where a member allows his arrearage . . . to run into the second month before paying the same, he shall be debarred from benefits for one month after payment. Where a member allows his arrearage . . . to run over the last day of the second month without payment, he does thereby suspend himself from membership in this Association . . . . Where agreements with employing companies provide that members must be in continuous good financial standing, the member in arrears one month may be suspended from membership and removed from employment, in compliance with the terms of the agreement." App. 91–92.

Prior to September 1959, Lockridge's dues had been deducted from his paycheck by Greyhound, pursuant to a checkoff arrangement. During that year, however, Lockridge and a few other employees were released at their request from the checkoff, and thereby became obligated to pay their dues directly to the Union's office in Portland, Oregon. On November 2, 1959, C. A. Bankhead, the treasurer and financial secretary of the union local, suspended Lockridge from membership on the sole ground that since respondent had not yet paid his October

dues he was therefore in arrears contrary to § 91. Bankhead simultaneously notified Greyhound of this determination and requested that Lockridge be removed from employment. Greyhound promptly complied. Lockridge's wife received notice of the suspension from membership in early November, while her husband was on vacation, and on November 10, 1959, tendered Bankhead a check to cover respondent's dues for October and November, which Bankhead refused to accept.

This chain of events, combined with the disparity between the above-quoted terms of the collective-bargaining agreement and the union constitution and general laws, generated this lawsuit. Lockridge has contended, and the Idaho courts have so held, that because he was less than two months behind in his payment of dues, respondent had not yet "suspended himself from membership" within the meaning of the Union's rules, but instead had merely ceased to be a "member in good standing." And, because the collective-bargaining agreement required only that employees "remain members," those courts held that neither that agreement nor the final sentence of § 91 justified the Union's action in procuring Lockridge's discharge. Therefore, the Idaho courts have held, Lockridge's dismissal violated a promise, implied in law, that the Union would not seek termination of his employment unless he was sufficiently derelict in his dues payments to subject him to loss of his job under the terms of the applicable collective-bargaining agreement.

Although the trial court made no formal findings of fact on this score,[2] it appears likely that the Union pro-

[2] Because the Idaho courts treated as irrelevant the actual motivation for the Union's conduct, see Part III, *infra*, the trial court did not incorporate in its formal findings of fact and conclusions of law any reference to this checkoff dispute. However, some such evidence was allowed at trial, as well as testimony about the Union's past

cured Lockridge's dismissal in the mistaken belief that the applicable union security agreement with Greyhound did, in fact, require employees to remain members in good standing and that the Union insisted on what it thought was a technically valid position because it was piqued by Lockridge's obtaining his release from the checkoff. The trial court did find specifically that "almost without exception" it had been the past practice of this local division of the Union merely to suspend delinquent members from service, rather than to strip them of membership, and to put them back to work without loss of seniority when their dues were paid.

Lockridge initially made some efforts, with Bankhead's assistance, to obtain reinstatement in the Union but these proved unsuccessful. No charges were filed before the National Labor Relations Board.[3] Instead, Lockridge

practice regarding dues-delinquent members, on the theory that this might ultimately bear on the issue whether Lockridge had properly exhausted his administrative remedies. The trial judge in his initial memorandum decision, however, did indicate his belief that "the true facts are" as stated in the text accompanying this footnote.

[3] It appears that at least one other person, Elmer Day, was similarly suspended from membership in the Union and discharged from Greyhound. On November 12, 1959, he filed a formal charge with the Board's Regional Director. On December 15, 1959, the Director advised Day, by letter, that "it appears that, because there is insufficient evidence of violations, further proceedings are not warranted at this time. I am therefore refusing to issue Complaint in these matters." The Director further informed Day that "you may obtain a review of this action by filing a request for such review with the General Counsel of the National Labor Relations Board . . . ." Day did not seek review. Instead, he filed suit against the Union in the Circuit Court of Multnomah County, Oregon, for tortious interference with employment, and obtained a jury award for general and punitive damages. On appeal, the Supreme Court of Oregon (two judges dissenting) reversed, holding the conduct complained of to be within the Board's exclusive jurisdiction. *Day* v. *Northwest Division 1055,* 238 Ore. 624, 389 P. 2d 42 (1964). (Some of these facts are taken from the dissenting opinion in that case.)

filed suit in September 1960 in the Idaho State District Court against the Union and Greyhound, which was later dropped as a party. That court, on the Union's motion, dismissed the complaint in April 1961 on the grounds that it charged the Union with the commission of an unfair labor practice and consequently fell within the exclusive jurisdiction of the NLRB. A year later, the Idaho Supreme Court reversed, holding that the state courts had jurisdiction under this Court's decision in *Machinists* v. *Gonzales,* 356 U. S. 617 (1958), and remanded for trial on the merits. *Lockridge* v. *Amalgamated Assn. of St., El. Ry. & M. C. Emp.,* 84 Idaho 201, 369 P. 2d 1006 (1962).

In 1965 Lockridge filed a second amended complaint which has since served as the basis for this lawsuit. Its first count alleged that

> "in suspending plaintiff from membership in the [Union] which resulted in plaintiff's loss of employment, the [Union] . . . acted wantonly, wilfully and wrongfully and without just cause, and . . . deprived plaintiff of his . . . employment with Greyhound Corporation that accrued to him and would accrue to him by reason of his employment, seniority and experience, and plaintiff has been harassed and subject to mental anguish . . . ." App. 46–47.

Count Two, sounding squarely in contract, alleged that

> "in wrongfully suspending plaintiff from membership in the [Union], which resulted in plaintiff's discharge from employment with the Greyhound Corporation, the [Union] . . . acted wrongfully, wantonly, wilfully and maliciously and without just cause and violated the constitution and general laws of the [Union] which constituted a contract between the plaintiff as a member thereof and the [Union], and as a result of said breach of contract plaintiff has been deprived of his . . . employment with . . .

> Greyhound Corporation . . . and plaintiff has been embarrassed and subjected to mental anguish . . . ." App. 48.

The complaint sought damages in the amount of $212,000 "and such other and further relief as to the court may appear meet and equitable in the premises." *Ibid.*

After trial, the Idaho District Court found the facts as stated above and held that they did, indeed, amount to a breach of contract. The court felt itself bound by the prior determination of the Idaho Supreme Court to consider that it might properly exercise jurisdiction over the controversy and to "decide [the] case on the theories of" *Machinists* v. *Gonzales, supra.* Consequently, the trial judge concluded that Lockridge was entitled to a decree restoring him to membership in the Union, "although plaintiff has never sought such remedy." Lockridge was also awarded $32,678.56 as compensation for wages actually lost due to his dismissal from Greyhound's employ, but his requests for future damages arising from continued loss of employment, compensation for loss of seniority or fringe benefits, and punitive damages were all denied. On appeal the Idaho Supreme Court affirmed, over one dissenting vote, except that it also ordered restoration of respondent's seniority rights. 93 Idaho 294, 460 P. 2d 719 (1969). Having granted certiorari for the reasons stated at the outset of this opinion, we now reverse.

II

A

On the surface, this might appear to be a routine and simple case. Section 8 (b)(2) of the National Labor Relations Act, as amended, 61 Stat. 141, 29 U. S. C. § 158 (b)(2), makes it an unfair labor practice for a union

> "to cause or attempt to cause an employer to dis-

> criminate against an employee in violation of subsection (a)(3) . . . or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

Section 8 (b)(1)(A), 29 U. S. C. § 158 (b)(1)(A), makes it an unfair labor practice for a union "to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7," which includes the right not only "to form, join, or assist labor organizations" but also "the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a)(3)." 61 Stat. 140, 29 U. S. C. § 157. Section 8 (a)(3) makes it an unfair labor practice for an employer

> "by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . : *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization . . . if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly re-

quired as a condition of acquiring or retaining membership . . . ." 29 U. S. C. § 158 (a)(3).

Further, in *San Diego Building Trades Council* v. *Garmon,* 359 U. S., at 245, we held that the National Labor Relations Act pre-empts the jurisdiction of state and federal courts to regulate conduct "arguably subject to § 7 or § 8 of the Act." On their face, the above-quoted provisions of the Act at least arguably either permit or forbid the union conduct dealt with by the judgment below. For the evident thrust of this aspect of the federal statutory scheme is to permit the enforcement of union security clauses, by dismissal from employment, only for failure to pay dues. Whatever other sanctions may be employed to exact compliance with those internal union rules unrelated to dues payment, the Act seems generally to exclude dismissal from employment. See *Radio Officers' Union* v. *NLRB,* 347 U. S. 17 (1954). Indeed, in the course of rejecting petitioner's pre-emption argument, the Idaho Supreme Court stated that, in its opinion, the Union "did most certainly violate 8 (b)(1)(A), did most certainly violate 8 (b)(2) . . . and probably caused the employer to violate 8 (a)(3)." 93 Idaho, at 299, 460 P. 2d, at 724. Thus, given the broad pre-emption principle enunciated in *Garmon,* the want of state court power to resolve Lockridge's complaint might well seem to follow as a matter of course.

The Idaho Supreme Court, however, concluded that it nevertheless possessed jurisdiction in these circumstances. That determination, as we understand it, rested upon three separate propositions, all of which are urged here by respondent. The first is that the Union's conduct was not only an unfair labor practice, but a breach of its contract with Lockridge as well. "Pre-emption is not established simply by showing that the same facts will sustain two different legal wrongs." 93 Idaho, at 300,

460 P. 2d, at 725. In other words *Garmon,* the state court and respondent assert, states a principle applicable only where the state law invoked is designed specifically to regulate labor relations; it has no force where the State applies its general common law of contracts to resolve disputes between a union and its members. Secondly, it is urged that the facts that might be shown to vindicate Lockridge's claim in the Idaho state courts differ from those relevant to proceedings governed by the National Labor Relations Act. It is said that the conduct regulated by the Act is union and employer discrimination; general contract law takes into account only the correctness of competing interpretations of the language embodied in agreements. 93 Idaho, at 303–304, 460 P. 2d, at 728–729. Finally, there recurs throughout the state court opinion, and the arguments of respondent here, the theme that the facts of the instant case render it virtually indistinguishable from *Machinists* v. *Gonzales,* 356 U. S. 617 (1958), where this Court upheld the exercise of state court jurisdiction in an opinion written only one Term prior to *Garmon,* by the author of *Garmon* and which was approvingly cited in the *Garmon* opinion itself.

We do not believe that any of these arguments suffice to overcome the plain purport of *Garmon* as applied to the facts of this case. However, we have determined to treat these considerations at some length because of the understandable confusion, perhaps in a measure attributable to the previous opinions of this Court, they reflect over the jurisprudential bases upon which the *Garmon* doctrine rests.

B

The constitutional principles of pre-emption, in whatever particular field of law they operate, are designed with a common end in view: to avoid conflicting regulation of conduct by various official bodies which might

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have some authority over the subject matter. A full understanding of the particular pre-emption rule set forth in *Garmon* especially requires, we think, appreciation of the precise nature and extent of the potential for injurious conflict that would inhere in a system unaffected by such a doctrine, and also the setting in which the general problem of accommodating conflicting claims of competence to resolve disputes touching upon labor relations has been presented to this Court.

The course of events that eventuated in the enactment of a comprehensive national labor law, entrusted for its administration and development to a centralized, expert agency, as well as the very fact of that enactment itself, reveals that a primary factor in this development was the perceived incapacity of common-law courts and state legislatures, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces so as to further the common good.[4] The principle of pre-emption that informs our general national labor law was born of this Court's efforts, without the aid of explicit congressional guidance, to delimit state and federal judicial authority over labor disputes in order to preclude, so far as reasonably possible, conflict between the exertion of judicial and administrative power in the attainment of the multifaceted policies underlying the federal scheme.

As it appears to us, nothing could serve more fully to defeat the congressional goals underlying the Act than to subject, without limitation, the relationships it seeks to create to the concurrent jurisdiction of state and federal courts free to apply the general local law. Nor

[4] For a discussion of these problems that formed a backdrop for the federal act, see H. Wellington, Labor and the Legal Process, c. 1 (1968). See also Cox, Federalism in the Law of Labor Relations, 67 Harv. L. Rev. 1297, 1302–1304, 1315–1317 (1954).

would an approach suffice that sought merely to avoid disparity in the content of proscriptive behavioral rules. As the Court observed in *Garner* v. *Teamsters Union,* 346 U. S. 485, 490–491 (1953), Congress in establishing overriding federal supervision of labor law

> "did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision . . . . Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

Conflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy. As the passage from *Garner* indicates, in matters of dispute concerning labor relations a simple recitation of the formally prescribed rights and duties of the parties constitutes an inadequate description of the actual process for settlement Congress has provided. The technique of administration and the range and nature of those remedies that are and are not available is a fundamental part and parcel of the operative legal system established by the National Labor Relations Act. "Administration is more than a means of regulation; administration is regulation. We have been concerned with conflict in its

broadest sense; conflict with a complex and interrelated federal scheme of law, remedy, and administration." *Garmon,* 359 U. S., at 243.

The rationale for pre-emption, then, rests in large measure upon our determination that when it set down a federal labor policy Congress plainly meant to do more than simply to alter the then-prevailing substantive law. It sought as well to restructure fundamentally the processes for effectuating that policy, deliberately placing the responsibility for applying and developing this comprehensive legal system in the hands of an expert administrative body rather than the federalized judicial system.[5] Thus, that a local court, while adjudicating a

[5] This appears to be the precise point of difference between our assessment of congressional purpose and that of MR. JUSTICE WHITE. While it is not clear how he would treat the *Garmon* principle where the conflict is between unions and employers, he expressly argues that state power to regulate union conduct harmful to its members that is within the compass of the National Labor Relations Act should be unlimited, except by the obvious qualification that States may not punish conduct affirmatively protected by federal law. Thus, in his view, when it enacted the NLRA, Congress would have fully served those interests it intended to promote in the conduct of union-member relations had it simply declared that the States may not proscribe certain, defined conduct. Certainly, he is prepared to adopt a judicial construction of the Act that is consistent only with such a view of congressional intent. At bottom, what his position seems to imply is that giving the National Labor Relations Board jurisdiction to enforce federal law regulating the use of union security clauses was largely, if not wholly, without rational purpose. As we have explained at some length above, we do not understand how courts may properly take such a limited view of congressional intent in the face of legislation that is in fact much more wide ranging, and in the absence of a contrary expression of intention from Congress itself.

Further, MR. JUSTICE WHITE apparently regards the remedial aspects of the federal scheme as unimportant to those who designed it. For example, assuming arguendo that petitioner's conduct was prohibited under both federal and state law, he would deem it of no

labor dispute also within the jurisdiction of the NLRB, may purport to apply legal rules identical to those prescribed in the federal Act or may eschew the authority to define or apply principles specifically developed to regulate labor relations does not mean that all relevant potential for debilitating conflict is absent.

A second factor that has played an important role in our shaping of the pre-emption doctrine has been the necessity to act without specific congressional direction. The precise extent to which state law must be displaced to achieve those unifying ends sought by the national legislature has never been determined by the Congress. This has, quite frankly, left the Court with few available options. We cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much of this is left to the States. Nor can we proceed on a case-by-case basis to determine whether each particular final judicial pronouncement does, or might reasonably be thought to, conflict in some relevant manner with federal labor policy. This Court

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national significance if one State punished such conduct with a jail sentence, and another utilized punitive damages, while the NLRB merely awarded back pay. His position apparently is that Congress considered any state tribunal equally capable, with the Board, of assessing the appropriateness of a given remedy and was unconcerned about disparities in the reactions of the States to unlawful union behavior. This argument, too, seems incompatible with the simple fact that Congress committed enforcement of the federal law here involved to a centralized agency.

For these reasons, MR. JUSTICE WHITE's analogies do not persuade us. Unlike the problem here under review, Congress did not put enforcement of the Labor-Management Reporting and Disclosure Act of 1959 into the hands of the Board. 73 Stat. 519. And it affirmatively expressed an intention that the Board not possess pre-emptive jurisdiction over suits to enforce collective bargaining agreements. See Part III, *infra*.

is ill-equipped to play such a role and the federal system dictates that this problem be solved with a rule capable of relatively easy application, so that lower courts may largely police themselves in this regard. Equally important, such a principle would fail to take account of the fact, as discussed above, that simple congruity of legal rules does not, in this area, prove the absence of untenable conflict. Further, it is surely not possible for this Court to treat the National Labor Relations Act section by section, committing enforcement of some of its provisions wholly to the NLRB and others to the concurrent domain of local law. Nothing in the language or underlying purposes of the Act suggests any basis for such distinctions. Finally, treating differently judicial power to deal with conduct protected by the Act from that prohibited by it would likewise be unsatisfactory.[6] Both areas equally involve conduct whose legality is governed by federal law, the application of which Congress committed to the Board, not courts.

This is not to say, however, that these inherent limitations on this Court's ability to state a workable rule that comports reasonably with apparent congressional objectives are necessarily self-evident. In fact, varying approaches were taken by the Court in initially grappling with this pre-emption problem. Thus, for example, some early cases suggested the true distinction lay between judicial application of general common law, which was permissible, as opposed to state rules specifically designed to regulate labor relations, which were pre-empted. See,

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[6] The objections raised to this latter point, *post*, at 325–332 (WHITE, J., dissenting), seem largely irrelevant to the case under review. This is not a situation where the sole argument for pre-emption is that the union's conduct was arguably protected. Clearly, if the facts are as respondent believes them to be, there is ample reason to conclude that petitioner probably committed an unfair labor practice.

e. g., Automobile Workers v. *Russell,* 356 U. S. 634, 645 (1958). Others made pre-emption turn on whether the States purported to apply a remedy not provided for by the federal scheme, *e. g., Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468, 479–480 (1955), while in still others the Court undertook a thorough scrutiny of the federal Act to ascertain whether the state courts had, in fact, arrived at conclusions inconsistent with its provisions, *e. g., Automobile Workers* v. *Wisconsin Employment Relations Bd.,* 336 U. S. 245 (1949). For the reasons outlined above none of these approaches proved satisfactory, however, and each was ultimately abandoned. It was, in short, experience—not pure logic—which initially taught that each of these methods sacrificed important federal interests in a uniform law of labor relations centrally administered by an expert agency without yielding anything in return by way of predictability or ease of judicial application.

The failure of alternative analyses and the interplay of the foregoing policy considerations, then, led this Court to hold in *Garmon,* 359 U. S., at 244:

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law."

C

Upon these premises, we think that *Garmon* rather clearly dictates reversal of the judgment below. None of the propositions asserted to support that judgment

can withstand an application, in light of those factors that compelled its promulgation, of the *Garmon* rule.

Assuredly the proposition that Lockridge's complaint was not subject to the exclusive jurisdiction of the NLRB because it charged a breach of contract rather than an unfair labor practice is not tenable. Pre-emption, as shown above, is designed to shield the system from conflicting regulation of conduct. It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern. Indeed, the notion that a relevant distinction exists for such purposes between particularized and generalized labor law was explicitly rejected in *Garmon* itself. 359 U. S., at 244.

The second argument, closely related to the first, is that the state courts, in resolving this controversy, did deal with different conduct, *i. e.*, interpretation of contractual terms, than would the NLRB which would be required to decide whether the Union discriminated against Lockridge. At bottom, of course, the Union's action in procuring Lockridge's dismissal from employment is the conduct which Idaho courts have sought to regulate. Thus, this second point demonstrates at best that Idaho defines differently what sorts of such union conduct may permissibly be proscribed. This is to say either that the regulatory schemes, state and federal, conflict (in which case pre-emption is clearly called for) or that Idaho is dealing with conduct to which the federal Act does not speak. If the latter assertion was intended, it is not accurate. As pointed out in Part II–A, *supra*, the relevant portions of the Act operate to prohibit a union from causing or attempting to cause an employer to discriminate against an employee because his membership in the union has been terminated "on some ground other than" his failure to pay those dues requisite to member-

ship. This has led the Board routinely and frequently to inquire into the proper construction of union regulations in order to ascertain whether the union properly found an employee to have been derelict in his dues-paying responsibilities, where his discharge was procured on the asserted grounds of nonmembership in the union. See, *e. g., NLRB* v. *Allied Independent Union,* 238 F. 2d 120 (CA7 1956); *NLRB* v. *Leece-Neville Co.,* 330 F. 2d 242 (CA6 1964); *Communications Workers* v. *NLRB,* 215 F. 2d 835 (CA2 1954); *NLRB* v. *Spector Freight System, Inc.,* 273 F. 2d 272 (CA8 1960). See generally 3 CCH Lab. L. Rep. ¶ 4525 (Labor Relations). That a union may in good faith have misconstrued its own rules has not been treated by the Board as a defense to a claimed violation of § 8 (b)(2). In the Board's view, it is the fact of misapplication by a union of its rules, not the motivation for that discrimination, that constitutes an unfair labor practice. See, in addition to the authorities cited above, *Electrical, Radio & Machine Workers* v. *NLRB,* 113 U. S. App. D. C. 342, 347, 307 F. 2d 679, 684 (1962), and *Teamsters Local* v. *NLRB,* 365 U. S. 667, 681 (1961) (concurring opinion).

From the foregoing, then, it would seem that this case indeed represents one of the clearest instances where the *Garmon* principle, properly understood, should operate to oust state court jurisdiction. There being no doubt that the conduct here involved was arguably protected by § 7 or prohibited by § 8 of the Act, the full range of very substantial interests the pre-emption doctrine seeks to protect is directly implicated here.

However, a final strand of analysis underlies the opinion of the Idaho Supreme Court, and the position of respondent, in this case. Our decision in *Machinists* v. *Gonzales,* 356 U. S. 617 (1958), it is argued, fully survived the subsequent reorientation of pre-emption doc-

trine effected by the *Garmon* decision, providing, in effect, an express exception for the exercise of judicial jurisdiction in cases such as this.

The fact situation in *Gonzales* does resemble in some relevant regards that of the instant case. There the California courts had entertained a complaint by an individual union member claiming he had been expelled from his union in violation of rights conferred upon him by the union's constitution and bylaws, which allegedly constituted a contract between him and his union. Gonzales prevailed on his breach-of-contract theory and was awarded damages for wages lost due to the revocation of membership as well as a decree providing for his reinstatement in the union. This Court confirmed the California courts' power to award the monetary damages, the only aspect of the action below challenged in this Court. The primary rationale for the result reached was that California should be competent to "fill out," 356 U. S., at 620, the reinstatement remedy by utilizing "the comprehensive relief of equity," *id.*, at 621, which the Board did not fully possess. Secondarily, it was said that the lawsuit "did not purport to remedy or regulate union conduct on the ground that it was designed to bring about employer discrimination against an employee, the evil the Board is concerned to strike at as an unfair labor practice under § 8 (b)(2)." *Id.*, at 622.

Although it was decided only one Term subsequent to *Gonzales, Garmon* clearly did not fully embrace the technique of the prior case. It was precisely the realization that disparities in remedies and administration could produce substantial conflict, in the practical sense of the term, between the relevant state and federal regulatory schemes and that this Court could not effectively and responsibly superintend on a case-by-case basis the exertion of state power over matters arguably governed by the National Labor Relations Act that impelled the some-

what broader formulation of the pre-emption doctrine in *Garmon.* It seems evident that the full-blown rationale of *Gonzales* could not survive the rule of *Garmon.* Nevertheless, *Garmon* did not cast doubt upon the result reached in *Gonzales,* but cited it approvingly as an example of the fact that state court jurisdiction is not pre-empted "where the activity regulated was a merely peripheral concern of the . . . Act." 359 U. S., at 243.

Against this background, we attempted to define more precisely the reach of *Gonzales* within the more comprehensive framework *Garmon* provided in the companion cases of *Plumbers' Union* v. *Borden,* 373 U. S. 690 (1963), and *Iron Workers* v. *Perko,* 373 U. S. 701 (1963).

Borden had sued his union in state courts, alleging that the union had arbitrarily refused to refer him to a particular job which he had lined up. He recovered damages, based on lost wages, on the grounds that this conduct constituted both tortious interference with his right to contract for employment and a breach of promise, implicit in his membership arrangement with the union, not to discriminate unfairly against any member or deny him the right to work. Perko had obtained a large money judgment in the Ohio courts on proof that the union had conspired, without cause, to deprive him of employment as a foreman by demanding his discharge from one such position he had held and representing to others that his foreman's rights had been suspended. We held both Perko's and Borden's judgments inconsistent with the *Garmon* rule essentially for the same reasons we have concluded that Lockridge could not, consistently with the *Garmon* decision, maintain his lawsuit in the state courts. We further held there was no necessity to "consider the present vitality of [the *Gonzales*] rationale in the light of more recent decisions," because in those cases, unlike *Gonzales,* "the crux of the action[s] . . . concerned alleged interference with the plaintiff's exist-

ing or prospective employment relations and was not directed to internal union matters." Because no specific claim for restoration of membership rights had been advanced, "there was no permissible state remedy to which the award of consequential damages for loss of earnings might be subordinated." *Perko,* 373 U. S., at 705. See also *Borden,* 373 U. S., at 697.

In sum, what distinguished *Gonzales* from *Borden* and *Perko* was that the former lawsuit "was focused on purely internal union matters," *Borden, supra,* at 697, a subject the National Labor Relations Act leaves principally to other processes of law. The possibility that, in defining the scope of the union's duty to Gonzales, the state courts would directly and consciously implicate principles of federal law was at best tangential and remote. In the instant case, however, this possibility was real and immediate. To assess the legality of his union's conduct toward Gonzales the California courts needed only to focus upon the union's constitution and by-laws. Here, however, Lockridge's entire case turned upon the construction of the applicable union security clause, a matter as to which, as shown above, federal concern is pervasive and its regulation complex. The reasons for Gonzales' deprivation of union membership had nothing to do with matters of employment, while Lockridge's cause of action and claim for damages were based solely upon the procurement of his discharge from employment. It cannot plausibly be argued, in any meaningful sense, that Lockridge's lawsuit "was focused on purely internal union matters." Although nothing said in *Garmon* necessarily suggests that States cannot regulate the general conditions which unions may impose on their membership, it surely makes crystal clear that *Gonzales* does not stand for the proposition that resolution of any union-member conflict is within state competence so long as one of the

remedies provided is restoration of union membership. This much was settled by *Borden* and *Perko,* and it is only upon such an unwarrantably broad interpretation of *Gonzales* that the judgment below could be sustained.

III

The pre-emption doctrine we apply today is, like any other purposefully administered legal principle, not without exception. Those same considerations that underlie *Garmon* have led this Court to permit the exercise of judicial power over conduct arguably protected or prohibited by the Act where Congress has affirmatively indicated that such power should exist, *Smith* v. *Evening News Assn.,* 371 U. S. 195 (1962); *Teamsters Union* v. *Morton,* 377 U. S. 252 (1964), where this Court cannot, in spite of the force of the policies *Garmon* seeks to promote, conscientiously presume that Congress meant to intrude so deeply into areas traditionally left to local law, *e. g., Linn* v. *Plant Guard Workers,* 383 U. S. 53 (1966); *Automobile Workers* v. *Russell,* 356 U. S. 634 (1958),[7] and where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the

[7] *Garmon* itself recognized that *Russell* permitted state courts "to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order." 359 U. S., at 247. However, whereas the Court in *Russell* had justified that result principally upon the broad grounds that state law not specifically relating to labor relations *per se* was not pre-empted by the Act, the Court in *Garmon* restated this result as dictated by "the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace [which] is not overridden in the absence of clearly expressed congressional direction." *Ibid.* It is, of course, this latter and narrower rationale that survives today.

interests promoted by the federal labor statutes, *Vaca* v. *Sipes,* 386 U. S. 171 (1967).[8]

In his brief before this Court, respondent has argued for the first time since this lawsuit was started that two of these exceptions to the *Garmon* principle independently justify the Idaho courts' exercise of jurisdiction over this controversy. First, Lockridge contends that his action, properly viewed, is one to enforce a collective-bargaining agreement. Alternatively, he asserts the suit, in essence, was one to redress petitioner's breach of its duty of fair representation. As will be seen, these contentions are somewhat intertwined.

In § 301 of the Taft-Hartley Act, 61 Stat. 156, Congress authorized federal courts to exercise jurisdiction over suits brought to enforce collective-bargaining agreements. We have held that such actions are judicially cognizable, even where the conduct alleged was arguably protected or prohibited by the National Labor Relations Act because the history of the enactment of § 301 reveals that "Congress deliberately chose to leave the enforcement of collective agreements 'to the usual processes of the law.' " *Charles Dowd Box Co.* v. *Courtney,* 368 U. S. 502, 513 (1962). It is firmly established, further, that state courts retain concurrent jurisdiction to adjudicate such claims, *Charles Dowd Box Co., supra,* and that individual employees have standing to protect rights conferred upon them by such agreements, *Smith* v. *Evening News, supra; Humphrey* v. *Moore,* 375 U. S. 335 (1964).

Our cases also clearly establish that individual union members may sue their employers under § 301 for breach of a promise embedded in the collective-bargaining agree-

[8] It may be that a similar exception would arise where the Board affirmatively indicates that, in its view, pre-emption would not be appropriate. Cf. *post,* at 310–312, 319 n. 2 (WHITE, J., dissenting). As the Board's *amicus* brief in the instant case makes clear, no such question is now before us.

ment that was intended to confer a benefit upon the individual. *Smith* v. *Evening News, supra.* Plainly, however, this is not such a lawsuit. Lockridge specifically dropped Greyhound as a named party from his initial complaint and has never reasserted a right to redress from his former employer.

This Court has further held in *Humphrey* v. *Moore, supra,* that § 301 will support, regardless of otherwise applicable pre-emption considerations, a suit in the state courts by a union member against his union that seeks to redress union interference with rights conferred on individual employees by the employer's promises in the collective-bargaining agreement, where it is proved that such interference constituted a breach of the duty of fair representation. Indeed, in *Vaca* v. *Sipes,* 386 U. S. 171 (1967), we held that an action seeking damages for injury inflicted by a breach of a union's duty of fair representation was judicially cognizable in any event, that is, even if the conduct complained of was arguably protected or prohibited by the National Labor Relations Act and whether or not the lawsuit was bottomed on a collective agreement. Perhaps Count One of Lockridge's second amended complaint could be construed to assert either or both of these theories of recovery. However, it is unnecessary to pass upon the extent to which *Garmon* would be inapplicable if it were shown that in these circumstances petitioner not only breached its contractual obligations to respondent, but did so in a manner that constituted a breach of the duty of fair representation. For such a claim to be made out, Lockridge must have proved "arbitrary or bad-faith conduct on the part of the Union." *Vaca* v. *Sipes, supra,* at 193. There must be "substantial evidence of fraud, deceitful action or dishonest conduct." *Humphrey* v. *Moore, supra,* at 348. Whether these requisite elements have been proved is a matter of federal law. Quite

obviously, they were not even asserted to be relevant in the proceedings below. As the Idaho Supreme Court stated in affirming the verdict for Lockridge, "[t]his was a misinterpretation of a contract. Whatever the underlying motive for expulsion might have been, this case has been submitted and tried on the interpretation of the contract, not on a theory of discrimination." 93 Idaho, at 303–304, 460 P. 2d, at 728–729. Thus, the trial judge's conclusion of law in sustaining Lockridge's claim specifically incorporates the assumption that the Union's "acts . . . were predicated solely upon the ground that [Lockridge] had failed to tender periodic dues in conformance with the requirements of the union Constitution and employment contract as they interpreted [it] . . . ." App. 66. Further, the trial court excluded as irrelevant petitioner's proffer of evidence designed to show that the Union's interpretation of the contract was reasonably based upon its understanding of prior collective-bargaining agreements negotiated with Greyhound. Tr. 259–260.

Nor can it be fairly argued that our resolution of respondent's final contentions entails simply attaching variegated labels to matters of equal substance. We have exempted § 301 suits from the *Garmon* principle because of the evident congressional determination that courts should be free to interpret and enforce collective-bargaining agreements even where that process may involve condemning or permitting conduct arguably subject to the protection or prohibition of the National Labor Relations Act. The legislative determination that courts are fully competent to resolve labor relations disputes through focusing on the terms of a collective-bargaining agreement cannot be said to sweep within it the same conclusion with regard to the terms of union-employee contracts that are said to be implied in law. That is

why the principle of *Smith* v. *Evening News* is applicable only to those disputes that are governed by the terms of the collective-bargaining agreement itself.

Similarly, this Court's refusal to limit judicial competence to rectify a breach of the duty of fair representation rests upon our judgment that such actions cannot, in the vast majority of situations where they occur, give rise to actual conflict with the operative realities of federal labor policy. The duty of fair representation was judicially evolved, without the participation of the NLRB, to enforce fully the important principle that no individual union member may suffer invidious, hostile treatment at the hands of the majority of his coworkers. Where such union conduct is proved it is clear, beyond doubt, that the conduct could not be otherwise regulated by the substantive federal law. And the fact that the doctrine was originally developed and applied by courts, after passage of the Act, and carries with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives ensures that the risk of conflict with the general congressional policy favoring expert, centralized administration, and remedial action is tolerably slight. *Vaca* v. *Sipes, supra,* at 180–181. So viewed, the duty of fair representation, properly defined, operates to limit the scope of *Garmon* where the sheer logic of the preemption principle might otherwise cause it to be extended to a point where its operation might be unjust. *Vaca* v. *Sipes, supra,* at 182–183. If, however, the congressional policies *Garmon* seeks to promote are not to be swallowed up, the very distinction, embedded within the instant lawsuit itself, between honest, mistaken conduct, on the one hand, and deliberate and severely hostile and irrational treatment, on the other, needs strictly to be maintained.

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IV

Finally, we deem it appropriate to discuss briefly two other considerations underlying the conclusion we have reached in this case. First, our decision must not be taken as expressing any views on the substantive claims of the two parties to this controversy. Indeed, our judgment is, quite simply, that it is not the task of federal or state courts to make such determinations. Secondly, in our explication of the reasons for the *Garmon* rule, and the various exceptions to it, we noted that, although largely of judicial making, the labor relations pre-emption doctrine finds its basic justification in the presumed intent of Congress. While we do not assert that the *Garmon* doctrine is without imperfection, we do think that it is founded on reasoned principle and that until it is altered by congressional action or by judicial insights that are born of further experience with it, a heavy burden rests upon those who would, at this late date, ask this Court to abandon *Garmon* and set out again in quest of a system more nearly perfect. A fair regard for considerations of *stare decisis* and the coordinate role of the Congress in defining the extent to which federal legislation pre-empts state law strongly support our conclusion that the basic tenets of *Garmon* should not be disturbed.[9]

For the reasons stated above, the judgment below is

Reversed.

MR. JUSTICE DOUGLAS, dissenting.

I would affirm this judgment on the basis of *Machinists* v. *Gonzales*, 356 U. S. 617, rather than overrule it. I

[9] Indeed, MR. JUSTICE WHITE's dissenting opinion fails to demonstrate the need for such a departure from our traditional judicial role. On the contrary, he affirmatively establishes that Congress has taken an active, conscious role in apportioning power to deal with controversies implicating federal labor law among various competent tribunals.

would not extend *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, so as to make Lockridge, the employee, seek his relief in faraway Washington, D. C., from the National Labor Relations Board.

When we hold that a grievance is "arguably" within the jurisdiction of the National Labor Relations Board and remit the individual employee to the Board for remedial relief, we impose a great hardship on him, especially where he is a lone individual not financed out of a lush treasury. I would allow respondent recourse to litigation in his home town tribunal and not require him to resort to an elusive remedy in distant and remote Washington, D. C., which takes money to reach.

He has six months within which to file an unfair labor practice charge with the Regional Director and serve it upon the other party. If he does not file within six months, the claim is barred. 29 U. S. C. § 160 (b). The charge must be in writing and contain either a declaration that the contents are true to the best of his knowledge, or else a notarization. 29 CFR § 101.2. When the charge is received, it is filed, docketed, and given a number (29 CFR § 101.4) and assigned to a member of the field staff for investigation. 29 CFR § 101.4.

Following the investigation, the Regional Director makes his decision. "If investigation reveals that there has been no violation of the National Labor Relations Act or the evidence is insufficient to substantiate the charge, the regional director recommends withdrawal of the charge by the person who filed." 29 CFR § 101.5. If the complaining party does not withdraw the charge, the Regional Director dismisses it. 29 CFR § 101.6. Following dismissal, the complainant has 10 days to appeal the decision to the General Counsel who reviews the decision. *Ibid.* If the General Counsel holds against the complaining party and refuses to issue an unfair labor practice complaint, the decision is apparently un-

reviewable. A. Cox & D. Bok, Labor Law 138 (7th ed. 1969); *General Drivers Local 886* v. *NLRB,* 179 F. 2d 492.

From the viewpoint of an aggrieved employee, there is not a trace of equity in this long-drawn, expensive remedy. If he musters the resources to exhaust the administrative remedy, the chances are that he too will be exhausted. If the General Counsel issues a complaint, then he stands in line for some time waiting for the Board's decision.[1] If the General Counsel refuses to act, then the employee is absolutely without remedy. For as *Garmon* states:

> "[T]he Board may also fail to determine the status of the disputed conduct by declining to assert juris-

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[1] For the backlog of the Board see 34th Annual Report of NLRB for fiscal year 1969. Table 1, p. 196, shows the following number of unfair labor practice cases:

Pending July 1, 1968	7,377
Received fiscal 1969	18,651
On docket fiscal 1969	26,028
Closed fiscal 1969	18,939
Pending June 30, 1969	7,089

Table 8, p. 212, shows that the 18,939 unfair labor practice cases in 1969 were closed as follows:

Before issuance of complaint	16,135
After issuance of complaint, before opening of hearing	1,251
After hearing opened, before issuance of Trial Examiner's decision	186
After Trial Examiner's decision, before issuance of Board decision	134
After Board order adopting Trial Examiner's decision in absence of exceptions	131
After Board decision, before circuit court decree	606
After circuit court decree, before Supreme Court action	427
After Supreme Court action	69

Of the foregoing—

31% were dismissed before complaint.

24.9% were settled and adjusted.

36% were withdrawn before complaint.

In only 5.7% did the Board issue orders. *Id.,* at 4.

> diction, or by refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance. This was the basic problem underlying our decision in *Guss* v. *Utah Labor Relations Board,* 353 U. S. 1. In that case we held that the failure of the National Labor Relations Board to assume jurisdiction did not leave the States free to regulate activities they would otherwise be precluded from regulating. It follows that the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act." 359 U. S., at 245–246.

From this it follows that if the General Counsel refuses to act, no one may act and the employee is barred from relief in either state or federal court.[2] See *Day* v. *Northwest Division 1055,* 238 Ore. 624, 389 P. 2d 42, cert. denied, 379 U. S. 878.

When we tell a sole individual that his case is "arguably" within the jurisdiction of the Board, we in practical effect deny him any remedy. I repeat what I said before, "When the basic dispute is between a union and an employer, any *hiatus* that might exist in the jurisdictional balance that has been struck can be filled by resort to economic power. But when the union member has a dispute with his union, he has no power on which to rely." *Plumbers' Union* v. *Borden,* 373 U. S. 690, 700 (dissenting).

Garmon involved a union-employer dispute. It should not be extended to the individual employee who seeks a remedy for his grievance against his union.

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[2] Since we have yet to rule on the reviewability of the refusal of the General Counsel to act, that route might be open although at present the authority is to the contrary. See A. Cox & D. Bok, Labor Law 138 (7th ed. 1969).

The complaint in this state court suit sought damages from the union for its action in causing the employer to discharge him pursuant to the union-security clause in the collective-bargaining agreement. It also asked for "such other and further relief as to the court may appear meet and equitable in the premises."

It appears that the collective agreement only required Lockridge to be a *member* of the union as a condition of employment, not a *member in good standing.* Lockridge, it appears, was one month delinquent in payment of dues but was still a member.

The case for relief by Lockridge in a state court is as strong as, if not stronger than, the case of Gonzales. Lockridge, who was refused employment because of the union's representations to the employer, had never been expelled from the union. On the other hand, Gonzales had been expelled from the union because he brought assault and battery charges against a representative of the union. He sued for restoration of membership and for damages. The state court found that the union had breached its contract with the employee and ordered him reinstated and awarded him damages. 356 U. S., at 618. We sustained the state court, saying that "the subject matter of the litigation . . . was the breach of a contract governing the relations" between the employee and the union and that the "suit did not purport to remedy or regulate union conduct on the ground that it was designed to bring about employer discrimination against an employee, the evil the Board is concerned to strike at as an unfair labor practice under § 8 (b)(2)." *Id.,* at 621–622. We held that in those circumstances the state court had power to order the employee reinstated to membership and was not deprived of jurisdiction to "fill out" his remedy by awarding damages. *Id.,* at 620–621.

Whether in the present case the discharge of Lockridge

was "arguably" an unfair labor practice within the meaning of *Garmon* is irrelevant. The reason is that the Board would not have the power to supply the total remedy which Lockridge seeks even if the employer had committed an unfair labor practice. True, the Board has authority to award back pay [3] but it has no authority to award damages beyond back pay. Moreover, under *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, the union is in a fiduciary relation to its members. As we stated in *Vaca* v. *Sipes*, 386 U. S. 171, 177:

> "Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct."

We emphasized in the *Sipes* case that the *Garmon* rule was "not applicable to cases involving alleged breaches of the union's duty of fair representation." *Id.*, at 181. We held that in this type of case Congress did not intend "to oust the courts of their traditional jurisdiction to curb arbitrary conduct by the individual employee's statutory representative." *Id.*, at 183.

As demonstrated by MR. JUSTICE WHITE in his dissent in this case, the exceptions to the pre-emption rule are so many and so important that they make amazing the Court's "uncritical resort to it."

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[3] Under § 10 (c) of the Act, 29 U. S. C. § 160 (c), the Board can award back pay against an employer, *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, and the Board will order back pay against a union where it causes an employer to discriminate against an employee. See *International Association of Heat & Frost Insulators, Local 84*, 146 N. L. R. B. 660; *United Mine Workers (Blue Diamond Coal Co.)*, 143 N. L. R. B. 795.

The wrongs suffered by Lockridge stemmed from the union's breach of its contract. Rather than overrule *Gonzales,* we should reaffirm what we said there:

> "[T]he protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied. The proviso to § 8 (b) (1) of the Act states that 'this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .' 61 Stat. 141, 29 U. S. C. § 158 (b)(1). The present controversy is precisely one that gives legal efficacy under state law to the rules prescribed by a labor organization for 'retention of membership therein.' Thus, to preclude a state court from exerting its traditional jurisdiction to determine and enforce the rights of union membership would in many cases leave an unjustly ousted member without remedy for the restoration of his important union rights. Such a drastic result, on the remote possibility of some entanglement with the Board's enforcement of the national policy, would require a more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act." 356 U. S., at 620.

Where the quarrel between the employee and the union is over a particular job, his remedy is before the Board. *Plumbers' Union* v. *Borden,* 373 U. S. 690; *Iron Workers* v. *Perko,* 373 U. S. 701. But where the union contract is breached by expulsion of the employee, as alleged in *Gonzales,* or where he is wrongfully treated as no longer being a member of the union (which is the present case) the suit lies in the state court for damages, for declaratory or other relief that he still is a member, and for such other remedies as may be appropriate.

While I joined the dissent in *Gonzales,* experience under *Garmon* convinces me that we should not apply its rule to the grievances of individual employees against a union. I would affirm the judgment below.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, dissenting.

Like MR. JUSTICE DOUGLAS, I would neither overrule nor eviscerate *Machinists* v. *Gonzales,* 356 U. S. 617 (1958). In light of present statutory law and congressional intention gleaned therefrom, state courts should not be foreclosed from extending relief for union deprivation of members' state law rights under the union constitution and bylaws. Even if I agreed that the doctrine of *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236 (1959), properly pre-empts such union member actions based on state law where the challenged conduct is arguably an unfair labor practice, I could not join the opinion of the Court since it unqualifiedly applies the same doctrine where the conduct of the union is only arguably protected under the federal law.

The *Garmon* doctrine, which is today reaffirmed and extended, has as its touchstone the presumed congressional goal of a uniform national labor policy; to this end, the Court has believed, the administration of that policy must insofar as is possible be in the hands of a single, centralized agency. In many ways I have no quarrel with this view. Many would agree that as a general matter some degree of uniformity is preferable to the conflicting voices of 50 States, particularly in view of the structure of industrial and commercial activities in this country. Congress determined as much when it enacted the National Labor Relations Act (NLRA).

But it is time to recognize that Congress has not federalized the entire law of labor relations, even labor-management relations, and that within the area occupied

by federal law neither Congress, this Court, nor the National Labor Relations Board itself has, in the name of uniformity, insisted that the agency always be the exclusive expositor of federal policy in the first instance. To put the matter in proper perspective it will be helpful to set down some of the important contexts in which federal law is implemented by the courts or other institutions without the prior intervention of the Board, as well as those in which state rather than federal law is permitted to operate. Part I, following, undertakes this task. Against that background, Part II deals with union member actions against their union, and Part III considers the *Garmon* doctrine in those situations where the conduct complained of is arguably protected by federal law.

I

It is well established that the Board has jurisdiction over unfair labor practices even though they might also be arguable violations of the collective-bargaining agreement and subject to arbitration under the terms of the contract. See 29 U. S. C. § 160 (a); *Carey* v. *Westinghouse Corp.*, 375 U. S. 261, 272 (1964); *NLRB* v. *Strong*, 393 U. S. 357, 360–361 (1969); *NLRB* v. *Acme Industrial Co.*, 385 U. S. 432 (1967). But as a policy matter the Board will not overturn arbitration awards based on behavior that is also an alleged unfair labor practice if the arbitration proceedings comply with certain procedures, among which is that the arbitrator must have given consideration to the alleged unfair labor practice. *Spielberg Mfg. Co.*, 112 N. L. R. B. 1080 (1955); *International Harvester Co.*, 138 N. L. R. B. 923 (1962), enforced *sub nom. Ramsey* v. *NLRB*, 327 F. 2d 784 (CA7 1964). The Board has said:

> "If complete effectuation of the Federal policy is to be achieved, we firmly believe that the Board, which

> is entrusted with the administration of one of the many facets of national labor policy, should give hospitable acceptance to the arbitral process as 'part and parcel of the collective bargaining process itself,' and voluntarily withhold its undoubted authority to adjudicate alleged unfair labor practice charges involving the same subject matter, unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act." *International Harvester Co., supra,* at 927 (citations omitted).

See also *Carey* v. *Westinghouse Corp., supra,* at 270–272; *Raley's Inc.,* 143 N. L. R. B. 256 (1963).

Thus, not only does Board policy *allow* arbitrators to pass on conduct which is also an alleged unfair labor practice, but the Board will not consider an unfair labor practice charge *unless* the arbitrator has passed on it.[1] And even then, the Board has made quite clear that its standard of review is far from *de novo;* it will let stand an arbitrator's award not "clearly repugnant" to the Act. See, *e. g., Virginia-Carolina Freight Lines,* 155 N. L. R. B. 447 (1965), where the Board refused to uphold an arbitrator's award allowing discharge of an employee for "disloyalty" where the "disloyalty" consisted of seeking assistance from the Board. The Board's standard of review for arbitration awards seems to be even narrower than the substantial-evidence test, for the Board has not purported to overturn awards simply on the evidence before the arbitrator. The standards chosen by the Board operate entirely separately from the substantial-

[1] This obviously does not apply unless the parties have agreed to arbitrate. Cf. *Smith* v. *Evening News Assn.,* 371 U. S. 195, 196 n. 1 (1962).

evidence test. See § 10 (e), Administrative Procedure Act, 5 U. S. C. § 706 (1970 ed.). In fact, in *International Harvester* itself, the Board agreed to accept the arbitrator's award "since it plainly appears to us that the award is not palpably wrong." To require a wider scope of evidentiary review, said the Board, "would mean substituting the Board's judgment for that of the arbitrator, thereby defeating the purposes of the Act and the common goal of national labor policy of encouraging the final adjustment of disputes, 'as part and parcel of the collective bargaining process.' " 138 N. L. R. B., at 929.

Congress, no less than the Board, has indicated its approval and endorsement of the arbitral process even though this may result in controversies being adjudicated by forums other than the Board. Section 203 (d) of the Labor Management Relations Act (LMRA), 1947, 61 Stat. 154, 29 U. S. C. § 173 (d), declares:

> "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

See *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 566–568 (1960); *United Steelworkers* v. *Warrior & Gulf Co.*, 363 U. S. 574, 582 (1960). See also § 10 (k) of NLRA, 29 U. S. C. § 160 (k). Indeed, § 301 (a) of the LMRA, 29 U. S. C. § 185 (a), may be considered the birthplace of much of modern arbitration law. As the Court said in *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 455 (1957): "[Section 301] expresses a federal policy that federal courts should enforce these [arbitration] agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way."

Finally, this Court itself has expressed the view, in construing federal law pursuant to § 301 (a), that the policy of encouraging arbitration was sufficient to overcome considerations favoring pre-emption. In the Court's words, "Arbitral awards construing a seniority provision . . . or awards concerning unfair labor practices, may later end up in conflict with Board rulings. . . . Yet, as we held in *Smith* v. *Evening News Assn.* [371 U. S. 195 (1962)], the possibility of conflict is no barrier to resort to a tribunal other than the Board." *Carey* v. *Westinghouse Corp.*, 375 U. S., at 272.

The cumulative effect of all of this is that the jurisdiction of one forum—in this case, arbitration—is not displaced simply because the Board also has jurisdiction to act. The policy of pre-emption and, to some extent, of uniformity itself is subordinated to the greater policy of encouraging arbitration of grievances.

Deference to the arbitral forum is not the only instance where arguable or conceded unfair labor practices are excepted from the pre-emption doctrine. In *Smith* v. *Evening News Assn.*, 371 U. S. 195 (1962), the employee brought suit under § 301 (a) of the LMRA, 29 U. S. C. § 185 (a), to enforce the collective-bargaining contract, alleging that the employer discriminated against certain employees because of their union affiliation. The conduct, if proved, would not only have been a violation of the contract but would concededly have been an unfair labor practice as well. The Court expressly rejected the *Garmon* doctrine in the context of such suits, holding that, while Board jurisdiction over unfair labor practices was not displaced when the conduct also allegedly violated the terms of the contract, neither was the jurisdiction exclusive. This result was consistent with the expressed intent of Congress that enforcement of collective-bargaining agreements be "left to the usual processes of the law," rather than to the Board. *Charles Dowd Box*

Co. v. *Courtney,* 368 U. S. 502, 511 (1962). See also *Local 174* v. *Lucas Flour Co.,* 369 U. S. 95, 101 n. 9 (1962); Sovern, Section 301 and the Primary Jurisdiction of the NLRB, 76 Harv. L. Rev. 529 (1963).

These cases, like those dealing with arbitration, indicate a willingness to subordinate the *Garmon* doctrine when other, more pressing problems are at hand. Here, the policy to be served was that collective-bargaining agreements be enforced by the judiciary, notwithstanding concurrent Board jurisdiction to regulate that activity which was also an unfair labor practice. To be sure, the Court has required that, in the interests of uniform development of the law, state courts must apply federal law. *Lucas Flour, supra,* at 102–104. But the Court was no less aware in *Smith* than it had been nine years earlier in *Garner* v. *Teamsters Union,* 346 U. S. 485, 490–491 (1953), that: "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." The point is simply that the perceived interest in judicial adjudication of contractual disputes was more important than the interests of uniformity that would be promoted by pre-emption.

In *Vaca* v. *Sipes,* 386 U. S. 171 (1967), this Court refused to apply the pre-emption doctrine to suits charging a breach of the union's duty of fair representation, even though the Board had held that such a breach was also an unfair labor practice. *Miranda Fuel Co.,* 140 N. L. R. B. 181 (1962). Though one reason for this result was that the duty of fair representation had been for the most part developed by the judiciary rather than the Board, the other reason was concern over the possibility of denying a hearing to an employee who felt his individual interests had been unfairly subordinated by the union. The Court expressed fear that, were pre-emption the rule, "the individual employee injured by

arbitrary or discriminatory union conduct could no longer be assured of impartial review of his complaint, since the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint." 386 U. S., at 182.

Congress has expressly given a federal cause of action for damages to parties injured by secondary union activity under § 8 (b)(4), which may be enforced by suits brought in either state or federal court. 29 U. S. C. § 187 (b). The union's activity giving rise to liability is of necessity an unfair labor practice, but Congress elected to have the question adjudicated in court, even though the activity might be the subject of a parallel and possibly inconsistent determination by the Board. See *Teamsters Union* v. *Morton,* 377 U. S. 252, 256 (1964). Of course federal law governs such cases, at least where the union activity is not violent; and presumably the decisions of the NLRB on secondary activity would be consulted for guidance. But the Congress chose not to have the Board hear such suits, even though the Board is probably far more familiar than the courts with the variety of problems posed by secondary activity.

The phenomenon of the no-man's land and the conclusions that can be drawn on pre-emption are also instructive, for they cast substantial doubt not only on the intent of Congress but on the very foundations of *Garmon* itself. In *Guss* v. *Utah Labor Relations Board,* 353 U. S. 1 (1957), the Court held that States were powerless to intervene in labor disputes where the NLRB possessed jurisdiction, even though the Board had refused to assert its jurisdiction because of the "predominantly local" character of the company's operations. The Court conceded that this would likely produce "a vast no-man's-land, subject to regulation by no agency or court," *id.,* at 10, but insisted this was the intent of the Congress and that Congress could change the situation if it desired.

Congress did change the situation soon thereafter, providing that the States may assert jurisdiction over any dispute where the Board declines to do so because of the insubstantial effect on interstate commerce. § 14 (c) of NLRA, as amended, 73 Stat. 541, 29 U. S. C. § 164 (c). The purpose of this section was to fill the chasm created by *Guss*. See, *e. g.*, 105 Cong. Rec. 6430 (Sen. Goldwater). The situation was roundly condemned by legislators, who called it variously "a no man's land, in which there are grievous wrongs and no remedy under American jurisprudence as of this time," *id.*, at 6413 (Sen. McClellan), and "a stench in the nostrils of justice." *Id.*, at 6544 (Sen. Ervin). In short, the reaction to *Guss* indicates that this Court was quite wrong in determining that the no-man's land was justified in the name of congressional intent to achieve uniformity in law and administration.

Of some interest is the fact that *Garmon* was based upon, and expanded to a significant degree, the rationale of *Guss:*

> "It follows [from *Guss*] that the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act. In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. *The withdrawal of this narrow area from possible state activity follows from our decisions in* Weber *and* Guss." 359 U. S., at 246. (Emphasis added.)

Yet five months after the announcement of the *Garmon* decision, Congress in effect overruled *Guss* and thus at least counseled caution in applying the *Garmon* rationale.

The provisions of § 14 (c), however, do not allow state jurisdiction where the Board refuses to assert jurisdiction for "policy" reasons, as where the General Counsel refuses to issue a complaint because he is not convinced of the merits of the plaintiff's cause. In such a situation, *Garmon* precludes state action (or action by federal courts) because the Board's action does not define the activity "with unclouded legal significance." 359 U. S., at 246. In 1965, the Court eased the harsh strictures of *Garmon* in this area by holding that reasons articulated by the General Counsel for his refusal to issue a complaint would open the way for state action if the explanations "squarely define the nature of the activity" sought to be subjected to Board consideration. *Hanna Mining Co.* v. *Marine Engineers Beneficial Assn.*, 382 U. S. 181, 192 (1965).

Even though federal law is pervasive in labor-management relations, state law is preserved in some respects. At first blush, it might seem that these matters present no problems of uniformity, for there is no national law being applied. But the simple fact that Congress and this Court have deferred to the States in these areas indicates a subordination of the interest in uniformity to the interests of the States. By making the matter one of state law, Congress has not only authorized multiformity on the subject, but practically guaranteed it. The results, as far as uniformity is concerned, are no different than if the States applied federal law with abandon. For example, the controversial § 14 (b) of NLRA, 61 Stat. 151, 29 U. S. C. § 164 (b), has authorized States to choose for themselves whether to require or permit union shops. This allows the States to regulate union or agency shop clauses, *Algoma Plywood Co.* v. *Wisconsin Board,* 336 U. S. 301 (1949), *Retail Clerks* v. *Schermerhorn,* 373 U. S. 746, 375 U. S. 96 (1963), so that union insistence on a security agreement as part of a col-

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lective-bargaining agreement may be prohibited in one State and protected or even encouraged in another. The policy choice made by Congress on this matter necessarily subordinated uniformity in national law to what were perceived to be overriding concerns of the States.

Other examples are familiar. In *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U. S. 656 (1954), the Court upheld a state court damage award for injuries suffered as a result of the tortious conduct of the union's agent, who threatened violence if the company's employees did not join the union. The Court assumed that the union conduct was an unfair labor practice, seeking as it did to interfere with the employee's § 7 right not to join a labor union. But it noted the inadequacy of the existing Board procedure to provide suitable remedies for those injured as a result of the conduct, and was impressed by the fact that to hold the state courts pre-empted "will, in effect, grant petitioners immunity from liability for their tortious conduct." The Court found "no substantial reason for reaching such a result." 347 U. S., at 664. Accord, *Automobile Workers* v. *Russell*, 356 U. S. 634 (1958); *Linn* v. *Plant Guard Workers*, 383 U. S. 53, 61–62 (1966). Again, it is entirely possible that some States will require a greater showing of violence than others before awarding damages, so that behavior that violently seeks to coerce union membership will be prohibited in one State and allowed in another. But the interest in uniformity is subordinated to the larger interests that persons injured by such violence have preserved to them whatever remedies state law may authorize.

To summarize, the "rule" of uniformity that the Court invokes today is at best a tattered one, and at worst little more than a myth. In the name of national labor policy, parties are encouraged by the Board, by Congress, and by this Court to seek other forums if

the unfair labor practice arises in an arbitrable dispute, violates the collective-bargaining agreement, or otherwise qualifies as one of the exceptions mentioned.[2]

Until today, *Machinists* v. *Gonzales, supra,* had been thought to stand for the proposition that *Garmon* did not reach cases "when the possibility of conflict with federal policy is . . . remote." 356 U. S., at 621. But with today's emasculation of *Gonzales,* there is probably little that remains of it. *Linn* v. *Plant Guard Workers,* 383 U. S. 53 (1966), was ostensibly based in part on this rationale, *id.,* at 59–61, but it was equally bottomed on *Laburnum Construction* and other cases upholding state power to regulate matters of "overriding state interest" such as violence or, as in *Linn,* defamation. I see no reason why this exception has not, for all practical purposes, thus expired. In my view, however, and for the reasons set forth in Part II, *Gonzales* controls this case.[3]

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[2] A possible addition to the list of exceptions is the provision of § 10 (a), 29 U. S. C. § 160 (a), which allows the Board to cede jurisdiction over labor disputes to state agencies if state law is not inconsistent with federal law. However, this provision has never been invoked by the Board. American Bar Assn., The Developing Labor Law 807 (C. Morris ed. 1971).

[3] With all respect, the majority's attempt to distinguish the instant case from *Gonzales* is unpersuasive. According to the majority, "The reasons for Gonzales' deprivation of union membership had nothing to do with matters of employment, while Lockridge's cause of action and claim for damages were based solely upon the procurement of his discharge from employment." *Ante,* at 296. In the first place, Lockridge squarely alleged that his damages had been caused by suspension from union membership contrary to the constitution and laws of the union; his cause of action was bottomed upon this breach of duty by the union. More importantly, it is inaccurate to imply, as the foregoing quoted statement does, that *Lockridge* is somehow different from *Gonzales* in that Gonzales' "deprivation of union membership" did not result in his loss of employment. The *Gonzales* Court said, "The evidence adduced at the trial showed that plaintiff, *because of* his loss of membership,

II

There are two broad, but overlapping, relationships among employers, labor unions, and union members. On the one hand, there is the relationship between employer and employee, generally termed labor-management relations, which involves the union at virtually every step, where the employees have chosen to be represented by one. The other relationship, union-member relations, involves the affairs between the union and the employee as union member.

In enacting the NLRA in 1935, 49 Stat. 449, Congress defined and prohibited unfair labor practices by employers. Experience under the Act showed that labor organizations were quite as capable as employers of pernicious behavior, and in 1947 Congress enacted the Labor Management Relations Act, 61 Stat. 136, which, among other things, protected employees and employers against certain unfair labor practices by labor organizations that were defined by the Act. Protection given employees, whether union members or not, was primarily job related. Although unions were forbidden to restrain or coerce employees in the exercise of their § 7 rights, Congress expressly negated any intention to "impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership . . . ." 29 U. S. C. § 158 (b) (1). The unmistakable focus of both the NLRA and the LMRA is on labor-management relations, rather than union-member relations, as such.

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was unable to obtain employment and was *thereby* damaged. . . . [T]his damage was not charged nor treated as the result of an unfair labor practice but *as a result of* the breach of contract." 356 U. S., at 622 n. (Quoting the California court's opinion.) (Emphasis added.)

During the 1950's there came to light various patterns of union abuse of power, and in the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 73 Stat. 519, Congress acted to correct these evils by directly addressing itself to some aspects of union-member affairs. The LMRDA provides a "bill of rights," which gives union members the right to participate in union affairs, to speak freely, and to be protected from arbitrary discipline. It also imposes certain requirements on unions to disclose their financial affairs, regulates union elections, and safeguards labor organizations against unscrupulous agents or officers. Throughout the Act are provisions for civil or criminal enforcement of the Act in federal courts. See 73 Stat. 523, 525, 529–530, 531, 534, 536, 537, 539. But in a crucial departure from what the Court has held the legislative intention was in regulating *labor-management* relations, the Congress declared:

> "Except as explicitly provided to the contrary, nothing in this Act shall reduce or limit the responsibilities of any labor organization or any officer . . . or other representative of a labor organization . . . under any other Federal law or under the laws of any State, and, *except as explicitly provided to the contrary, nothing in this Act shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State.*" § 603 (a), 73 Stat. 540, 29 U. S. C. § 523 (a) (emphasis added).

If this were not clarity enough, Congress also provided in Title I, the "bill of rights":

> "Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution

and bylaws of any labor organization." § 103, 73 Stat. 523, 29 U. S. C. § 413.

Beyond any doubt whatever, although Congress directly imposed some far-reaching *federal* prohibitions on union conduct, it specifically denied any pre-emption of rights or remedies created by either state law or union constitutions and bylaws. Thus, as to union-member relations, any parallel rights created by the States, either directly or indirectly through enforcement of union constitutions or bylaws, were to stand at full strength. Congress backed up this power by requiring unions to make available to members the constitution and bylaws of the union, as well as financial information. § 201, 73 Stat. 524, 29 U. S. C. § 431.

The LMRDA was a major effort by Congress to regulate the rights and responsibilities of the union-member relationship as such, but, as shown by § 603 (a), it was clearly not an attempt to make federal law the exclusive arbiter of this relationship.[4] In *Gonzales* the Court

[4] Not only were the rights and obligations created by the LMRDA made supplemental to state law, but large areas of union-member relations were left untouched. For instance, Title I provides that "nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution . . . ." § 101 (a)(2), 73 Stat. 522, 29 U. S. C. § 411 (a)(2). Precisely what a union member may be required to do as part of his "responsibility . . . toward the organization as an institution" is obviously far ranging, and Congress could no doubt have defined those responsibilities had it chosen to do so. For another instance, Congress protected the right of the union member to sue a labor organization, but conditioned this on whatever exhaustion of "reasonable hearing procedures . . . within such organization" the union may require. § 101 (a)(4), 29 U. S. C. § 411 (a)(4). When compared to the step-by-step statutory procedure required for the adjudication of unfair labor practices, 29 U. S. C. § 160, it is clear that Congress meant to leave some flexibility to the unions

noted that "the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law . . . ." 356 U. S., at 620. Though in the following year the LMRDA certainly "undertook" to protect members in important respects, it specifically disavowed any notion of pre-empting state law and thus left unimpaired the *Gonzales* conclusion that state law has a proper role in union-member disputes.[5]

If, as I have attempted to show in Part I, the Board is not the sole arbiter even of federal law and if, as I have also attempted to show, there is room for the operation of state law in certain areas of even labor-management relations, then to me the conclusion is inescapable that in the area of union-member relations, which Congress has not sought to deal with comprehensively and where Congress has preserved state remedies for the very conduct prohibited by federal law, we should be very careful about assuming congressional intention to brush aside local rights and remedies. Indeed, far from pre-empting state law, one of the major thrusts of the LMRDA was to enforce state rights and remedies. At the very least, the inquiry presented by this or any other case dealing with union-member relations cannot be

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in dealing with member complaints. Still other examples may be seen by noting what Congress omitted even from mention. Perhaps most important of all in this context is the fact that Congress provided for no central agency, such as it had in the NLRA, to administer the Act. Although the Secretary of Labor has in some respects a major role in implementing the Act, disputes arising under the Act are for the courts in the first instance.

[5] The majority's opinion simply refuses to face this issue. There is no "absence of a contrary expression of intention from Congress," as the majority contends. See *ante*, at 288 n. 5. When Congress addressed itself to union-member relations as such it specifically preserved existing state remedies even though there may be federal remedies to redress the same conduct.

answered by automatic invocation of the purported rule of pre-emption in the name of uniformity.

Like many States, Idaho construes the union-member relation to be a contractual one, defined by the constitution and bylaws of the union. As such, the contracts are enforceable through the State's traditional common-law jurisdiction. Here, Lockridge was discharged for alleged nonpayment of dues in accordance with the union constitution and brought suit alleging that he had in fact not been unduly tardy and that the union's action was a breach of the contract. The face of the complaint did not implicate federal law. If the Idaho court were allowed to proceed, it would not have purported to adjudicate an unfair labor practice by reference to federal law but, if it found the conduct unprotected by federal law, see Part III, *infra,* would have enforced rights and obligations created by the union constitution. The Court nevertheless holds that because the union conduct alleged in the complaint also constitutes, or arguably so, an unfair labor practice, the controversy must be adjudicated by the National Labor Relations Board. I find little in the Court's opinion to convince me that Congress intended this result. With all respect, I agree with *Gonzales* that this result is at best "abstractly justifiable, as a matter of wooden logic." 356 U. S., at 619.

Furthermore, this Court's decision in *Smith* v. *Evening News, supra,* seems contrary to the result reached today. *Smith* held that suits to enforce the collective-bargaining agreement could be brought in state or federal courts under § 301 notwithstanding the fact that the conduct alleged would also constitute an unfair labor practice. Thus, courts enforcing *Smith*-type actions are dealing in contract rights, not unfair labor practices. There seems little reason why suits for breach of the union-member contract cannot similarly be brought in state courts (or in federal courts in diversity actions), notwith-

standing the alternate nature of the behavior as an unfair labor practice.

Indeed, § 301 actions are governed by federal law and even here the NLRB does not pre-empt the courts. There is even less justification for precluding actions under state law in the area of union-member relations which Congress has expressly said is not an exclusively federal domain.

I find no merit in the argument that Congress passed § 301 though recognizing that some § 301 suits would involve unfair labor practices, but, by *not* providing analogous federal court jurisdiction for breaches of union constitutions, manifested its expectation that breaches which also involve unfair labor practices should be a matter for Board jurisdiction. Some readily imaginable union actions prohibited by Title I of the LMRDA could be unfair labor practices as well, but by providing for federal suit to enforce the remedies, and leaving state remedies untouched, Congress certainly disavowed, as clearly as if it had said so explicitly, any notion that the Board was to pre-empt other forums in passing on statutory breaches which were also unfair labor practices. Arbitration of grievances is a similar situation, since arbitrators, rather than the Board, construe and enforce contractual rights that are breached in the commission of putative unfair labor practices. See Part I, *supra.*

III

I have attempted to show in Part II that invocation of *Garmon*-type pre-emption is inappropriate where a union member brings suit against a union for breach of the union's constitution or bylaws. Wholly apart from such considerations, however, I cannot agree with the opinion of the Court because it reaffirms the *Garmon* doctrine as applied to conduct arguably protected under § 7, as well as to that arguably prohibited under § 8.

The essential difference, for present purposes, between activity that is arguably prohibited and that which is arguably protected is that a hearing on the latter activity is virtually impossible unless one deliberately commits an unfair labor practice. In a typical unfair practice case, by alleging conduct arguably prohibited by § 8 the charging party can at least present the General Counsel with the facts, and if the General Counsel issues a complaint, the charging party can present the Board with the facts and arguments to support the claim. But for activity that is arguably protected, there is no provision for an authoritative decision by the Board in the first instance; yet the *Garmon* rule blindly pre-empts other tribunals. *Longshoremen's Assn.* v. *Ariadne Shipping Co.*, 397 U. S. 195, 201 (1970) (WHITE, J., concurring). The Assistant General Counsel of the NLRB has described the situation:

> "[A]pplication of the *Garmon* 'arguably protected' test in this situation leaves the employer's interests in an unsatisfactory condition. The employer cannot obtain relief from the state court with respect to activity that may in fact not be protected by section 7 of the Act, and the only way that he can obtain a Board determination of that question is by resorting to self-help measures; if he guesses wrong, this may subject him not only to a Board remedy but also to tort suits. That result is as undesirable as the 'no-man's land' created by the holding in *Guss* . . . ." (Footnotes omitted.) Come, Federal Preemption of Labor-Management Relations: Current Problems in the Application of *Garmon*, 56 Va. L. Rev. 1435, 1444 (1970).

I believe that the considerations that justify exceptions to the rule of uniformity apply with greater force to § 7 situations and further, that basic concepts of

fundamental fairness, regardless of their effect on the model of uniformity, counsel against any rule that so inflexibly bars a hearing.

A

The Assistant General Counsel of the Board has stated the paradox succinctly:

> "When a union engages in peaceful picketing that is not prohibited by section 8 of the NLRA, a state court cannot enjoin the picketing as a trespass because the activity is 'arguably protected' by section 7. But since there is no unfair labor practice, the employer cannot bring the question before the Board for adjudication. The only way for him to get a Board ruling as to whether the picketing is actually protected is to resort to 'self-help' to expel the pickets, thereby forcing the union to file unfair labor practice charges to which he can raise the status of the picketing as a defense." Come, *supra,* at 1437–1438.

Though the most natural arena for this conflict occurs when picketers trespass on private property, see *Taggart* v. *Weinacker's, Inc.,* 397 U. S. 223, 227 (1970) (BURGER, C. J., concurring), Broomfield, Preemptive Federal Jurisdiction Over Concerted Trespassory Union Activity, 83 Harv. L. Rev. 552 (1970), other instances include "quickie" strikes or slowdowns, see *NLRB* v. *Holcombe,* 325 F. 2d 508 (CA5 1963), or employees' inaccurate complaints to state officials about sanitary conditions in the plant, *Walls Mfg. Co.* v. *NLRB,* 116 U. S. App. D. C. 140, 321 F. 2d 753 (1963), or collective activity designed to persuade the employer to hire Negroes, *NLRB* v. *Tanner Motor Livery, Ltd.,* 349 F. 2d 1 (CA9 1965), or failure to participate in a union check-off, *Radio Officers' Union* v. *NLRB,* 347 U. S. 17, 24–28, 39–42 (1954).

There seems little point in a doctrine that, in the name of national policy, encourages the commission of unfair labor practices, the evils which above all else were the object of the Act. Surely the policy of seeking uniformity in the regulation of labor practices must be given closer scrutiny when it leads to the alternative "solutions" of denying the aggrieved party a hearing or encouraging the commission of a putative unfair labor practice as the price of that hearing.[6]

[6] Perhaps the tools with which the Board can fashion relief in this area are already at hand, in the form of the declaratory order. Such an order is binding on the agency and is judicially reviewable. *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 372 n. 3 (1969); *Frozen Food Express* v. *United States,* 351 U. S. 40 (1956); *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125 (1939); *Pennsylvania R. Co.* v. *United States,* 363 U. S. 202 (1960). The NLRA gives the Board "authority . . . to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions" of the NLRA. § 6, 29 U. S. C. § 156. The Administrative Procedure Act, in turn, specifically provides that agencies may issue declaratory orders "as in the case of other orders, and in its sound discretion" in order to "terminate a controversy or remove uncertainty." 5 U. S. C. § 554 (e) (1970 ed.). The Board currently provides for declaratory orders in only a few situations, such as for determination of the commercial impact aspect of the jurisdictional issue where the employer has both unfair labor practice charges and representation proceedings pending before the Board, 29 CFR §§ 102.105–102.110. The use of declaratory orders in unfair labor practice proceedings is nonexistent, and the same seems to be true for determining whether or not activities arguably subject to § 7 are protected. See Hickey, Declaratory Orders and the National Labor Relations Board, 45 Notre Dame Law. 89, 106 (1969).

Before an agency may issue a declaratory order, it must have independent subject matter jurisdiction. But we held in *Red Lion, supra,* that the FCC's declaratory order in that case could be sustained on any of several grounds including the requirement that the FCC see that the "public interest be served" in granting and renewing licenses. So here, the argument for Board jurisdiction would be that it is empowered to "prevent any person from engaging

B

The exceptions to the pre-emption rule are so many and so important as to cast substantial doubt on the Court's uncritical resort to it, as I have attempted to show in Part I. When considered in conjunction with arguably protected activity, however, these exceptions do more than mock the rule; they illustrate substantively why invocation of the rule against such activity is a disservice to the greater interests of national labor policy. For example, the refusal to pre-empt arbitrable disputes serves the policy of encouraging arbitration, a policy universally agreed to be of greater importance than uniformity. See Part I, *supra.* The policy at stake in § 7 cases is simply to secure a resolution of the dispute rather than none at all. Yet the Court's opinion would insist on pre-empting such disputes from the States even though there is no way to present them to the Board. If the Board refused to hear a dispute alleging an unfair labor practice because it wished to encourage arbitration, but ignored the fact that the parties had no arbitration clause in their contract, we could hardly consider arbitration to have been encouraged. But, with all respect, the Court's opinion today is just as exasperating.

Similarly, in holding that alleged breaches of the union's duty of fair representation were not pre-empted, *Vaca* v. *Sipes, supra,* the Court was apprehensive that the worker would be without a forum if the General

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in any unfair labor practice." 29 U. S. C. § 160 (a). If, as pointed out earlier, the price of not resorting to an adequate forum for resolution of the § 7 status can be the commission of an unfair labor practice, the power of the Board to prevent unfair labor practices gives it jurisdiction to issue such § 7 declaratory orders. Such an order finding certain conduct protected would override state law, but would be reviewable. If the conduct was found unprotected, there would be no barrier to suits based on state law.

Counsel refused to initiate an unfair labor practice complaint. How much more pressing must those considerations be where the Board is in fact barred from regular adjudication. The "intensely practical considerations" that we felt governed in *Vaca,* 386 U. S., at 183, seem even more practical here, especially in view of the concern expressed in *Vaca* that the aggrieved party be able to obtain a hearing on his complaint. If the possible refusal of the General Counsel to issue a complaint is a prominent reason for refusing to pre-empt the States, I should think that, *a fortiori,* his inability to act at all is at least as great a justification for doing away with pre-emption in this situation.

Finally, it must be mentioned that in precluding the aggrieved party from a hearing, we are following a particularly disfavored course. The importance in our jurisprudence of the opportunity for a hearing need not be reviewed, but at the very least it teaches that where persons with otherwise justiciable claims cannot obtain a hearing under the law, the law is subject to close scrutiny to discover the circumstances compelling this result. There is precious little in the *Garmon* doctrine that justifies its existence as to § 7 activities under this test. Certainly neither the evidence of congressional intent nor the presumed but overdrawn interest in uniformity is adequate to justify denial of a hearing.

Most cases concerning the hearing requirement are those where some adverse consequence is visited upon the individual unless he can explain his side of the story, *Bell* v. *Burson,* 402 U. S. 535 (1971), or where there is continuing conflict and dissatisfaction with no tribunal available to fashion relief. Cf. *Boddie* v. *Connecticut,* 401 U. S. 371 (1971). The problems seem similar to those facing us here. In a § 7 case, the employer is faced with, for example, picketing that turns away customers and suppliers and inflicts progressive economic

injury on the employer. For a small businessman with no forum available for relief, the effect is similar to a wage earner who finds that claims of another have cut his take-home pay in half. Cf. *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969).

The majority's treatment of this important issue is deficient. It says only that treating judicial power to deal with arguably protected activity different from the power to deal with prohibited activity would be "unsatisfactory," since "[b]oth areas equally involve conduct whose legality is governed by federal law, the application of which Congress committed to the Board, not courts." *Ante*, at 290. I have no quarrel with the first point—by definition federal law will determine if federal law protects the conduct from state proscription; but I hardly see how that alone pre-empts state courts. See *Dowd Box, Lucas Flour, Smith* v. *Evening News, Teamsters Union* v. *Morton*, 377 U. S. 252 (1964). As to the second point, the fact is that Congress has not committed the arguably protected area exclusively to the Board. It has provided no mechanism for § 7 cases to get before the Board except where conduct threatens § 7 rights; nor has its functionary, the Board, opened a path to its door for those who seek to ascertain whether conduct threatening them is truly protected by federal law and hence unassailable under local law. Congress found the no-man's land created by *Guss* unacceptable precisely because there was no way to have rights determined. In terms of congressional intention I find it unsupportable to hold that one threatened by conduct illegal under state law may not proceed against it because it is arguably protected by federal law when he has absolutely no lawful method for determining whether that is actually, as well as arguably, the case. Particularly is this true where the dispute is between a union and its members and the latter are asserting claims under state law based

on the union constitution. I would permit the state court to entertain the action and if the union defends on the ground that its conduct is protected by federal law, to pass on that claim at the outset of the proceeding. If the federal law immunizes the challenged union action, the case is terminated; but if not, the case is adjudicated under state law.

MR. JUSTICE BLACKMUN also dissents for the basic reasons set forth by MR. JUSTICE DOUGLAS and MR. JUSTICE WHITE in their respective dissenting opinions.

HODGSON, SECRETARY OF LABOR *v.* LOCAL UNION 6799, UNITED STEELWORKERS OF AMERICA, AFL–CIO, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 655. Argued March 23, 1971—Decided June 14, 1971

Failure of labor union member's election complaint to include an objection to meeting-attendance rule during his pursuit of internal union remedies when the member was aware of the existence of the rule bars the Secretary of Labor from later challenging that rule in an action under § 402 of the Labor-Management Reporting and Disclosure Act, which provides that once a member challenging an election has exhausted his internal union remedies and filed a complaint with the Secretary of Labor, the Secretary "shall investigate such complaint and, if he finds probable cause to believe that a violation . . . has occurred and has not been remedied, he shall . . . bring a civil action against the labor organization." Pp. 336–341.

426 F. 2d 969, affirmed.

MARSHALL, J., wrote the opinion of the Court, in which BURGER, C. J., and BLACK, DOUGLAS, HARLAN, STEWART, and BLACKMUN, JJ., joined. BRENNAN, J., *post,* p. 341, and WHITE, J., *post,* p. 343, filed dissenting opinions.

Deputy Solicitor General Wallace argued the cause for petitioner. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Gray, Richard B. Stone, Peter G. Nash, George T. Avery, Beate Bloch,* and *Cornelius S. Donoghue, Jr.*

Michael H. Gottesman argued the cause for respondents. With him on the brief were *Bernard Kleiman, George H. Cohen, Carl Frankel,* and *Jerome Smith.*

Opinion of the Court by MR. JUSTICE MARSHALL, announced by MR. JUSTICE STEWART.

Petitioner, the Secretary of Labor, instituted this action under § 402 (b) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 534, 29 U. S. C. § 482 (b), against Local 6799, United Steelworkers of America, to set aside a general election of officers conducted by the union.[1] The lawsuit arose after Nicholas Hantzis, an unsuccessful candidate for president of the local, protested the election to both the local and international union organizations. His protest concerned several matters including the use of union facilities to prepare campaign materials for the incumbent president who was re-elected.[2]

After failing to obtain relief through the internal procedures of either union organization, Hantzis filed a complaint with the Secretary of Labor pursuant to § 402 (a) of the Act, 29 U. S. C. § 482 (a). The complaint repeated the charge that union facilities had been used to promote the candidacy of the incumbent president and raised, for the first time, an additional objection concerning a meeting-attendance requirement imposed as a condition of candidacy for union office.[3] At no time during his

[1] The United Steelworkers of America, an international union under which Local 6799 is chartered, intervened as a party defendant.

[2] Hantzis' written protest consisted of a letter to the International Union which purported to describe the election's operation. Since the letter did not make specific allegations, it is difficult precisely to define Hantzis' objections. However, in addition to his general charge that union machinery had been used to aid incumbents, Hantzis also protested several procedural matters including the methods used to nominate and swear in officers. The Secretary of Labor subsequently concluded that none of these procedural matters constituted a violation of the Act.

[3] The attendance rule, which is contained in the constitution of the International Union, provides that a union member, in order to be eligible for election as a local union officer or grievance committee-

internal union protests did Hantzis challenge the attendance requirement.

Following an investigation of the complaint, the Secretary concluded that union facilities had been used improperly to aid the re-election of the incumbent president in violation of § 401 (g) of the Act, 29 U. S. C. § 481 (g). The Secretary also concluded that § 401 (e) had been violated because the meeting-attendance requirement had not been uniformly administered and because the requirement itself was not a reasonable qualification on the right of union members to hold office. Respondents were advised of these conclusions and were asked to take voluntary remedial action. When they failed to comply with the request, the Secretary brought this proceeding in the District Court for the Central District of California.

The District Court held that § 401 (g) had been violated by the use of union facilities for the benefit of the incumbent president's campaign and ordered a new election for the office of president.[4] The District Court also held, however, that the meeting-attendance rule was reasonable and that Local 6799 had not violated § 401 (e) by imposing the rule as a qualification on candidacies for union office.

On appeal, the Court of Appeals for the Ninth Circuit affirmed without reaching the question whether the attendance requirement was reasonable. In the court's view, Hantzis' failure to challenge the requirement during his pursuit of internal union remedies precluded the Secretary from later raising the issue. The court

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man, must have attended at least one-half of the regular meetings of his local union for 36 months previous to the election unless union activities or working hours prevented his attendance. It is unclear from Hantzis' complaint whether he objected to the attendance rule itself or to the way in which the rule was administered during the election. Hantzis himself qualified under the rule.

[4] This facet of the District Court's decision is not challenged here.

reasoned that since the Act requires that union members protesting the conduct of elections exhaust their internal union remedies before complaining to the Secretary, Congress intended to empower the Secretary to assert only "those violations that are fairly apparent from a member's protest to the union . . . ." 426 F. 2d 969, 971.

Because the case presents an important issue concerning the scope of the Secretary's authority under the Act, we granted certiorari, 400 U. S. 940. We conclude that Hantzis' failure to object to the attendance rule during pursuit of his internal union remedies bars the Secretary from later challenging the rule in a § 402 (b) action. We therefore affirm the decision of the Court of Appeals.

Section 402 (b) provides that once a member challenging an election has exhausted his internal union remedies and filed a complaint with the Secretary of Labor, the Secretary "shall investigate such complaint and, if he finds probable cause to believe that a violation of this title has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization . . . ." [5] At

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[5] "SEC. 402. (a) A member of a labor organization—

"(1) who has exhausted the remedies avaliable under the constitution and bylaws of such organization and of any parent body, or

"(2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation,

"may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 401 (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

"(b) The Secretary shall investigate such complaint and, if he

the outset, petitioner contends that the language of the section empowers the Secretary to investigate and litigate any and all violations that may have affected the outcome of an election once a union member has exhausted his internal union remedies concerning any violation that occurred during that election. Emphasis is placed on the fact that the Secretary is authorized to act if his investigation uncovers "a violation"—this, it is

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finds probable cause to believe that a violation of this title has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance wtih the provisions of this title and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization.

"(c) If, upon a preponderance of the evidence after a trial upon the merits, the court finds—

"(1) that an election has not been held within the time prescribed by section 401, or

"(2) that the violation of section 401 may have affected the outcome of an election,

"the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization. The Secretary shall promptly certify to the court the names of the persons elected, and the court shall thereupon enter a decree declaring such persons to be the officers of the labor organization. If the proceeding is for the removal of officers pursuant to subsection (h) of section 401, the Secretary shall certify the results of the vote and the court shall enter a decree declaring whether such persons have been removed as officers of the labor organization.

"(d) An order directing an election, dismissing a complaint, or designating elected officers of a labor organization shall be appealable in the same manner as the final judgment in a civil action, but an order directing an election shall not be stayed pending appeal."

said, means that the Secretary is not limited to seeking redress only in respect of the claims earlier presented by the union member to his union. However, the statutory language is not so devoid of ambiguity that it alone can bear the weight of the Secretary's expansive view of his authority. While the words "a violation" might mean "any violation whatever revealed by the investigation," the words are susceptible of other readings. In particular, they can fairly be read to mean, "any of the violations raised by the union member during his internal union election protest." In *Wirtz* v. *Laborers' Union*, 389 U. S. 477 (1968), this Court noted that the range of the Secretary's authority under § 402 (b) must be determined "by inference since there is lacking an explicit provision regarding the permissible scope of the Secretary's complaint," 389 U. S., at 481. We must, therefore, examine the legislative history and statutory policies behind § 402 and the rest of the Act to decide the issue presented by this case.

Examination of the relevant legislative materials reveals a clear congressional concern for the need to remedy abuses in union elections without departing needlessly from the longstanding congressional policy against unnecessary governmental interference with internal union affairs, *Wirtz* v. *Glass Bottle Blowers Assn.*, 389 U. S. 463, 470–471 (1968). The introduction to the Senate report accompanying the Act summarizes the general objectives of Congress:

> "A strong independent labor movement is a vital part of American institutions. The shocking abuses revealed by recent investigations have been confined to a few unions. The overwhelming majority are honestly and democratically run. In providing remedies for existing evils the Senate should be careful neither to undermine self-government within the labor movement nor to weaken unions in their role

> as the bargaining representatives of employees." S. Rep. No. 187, 86th Cong., 1st Sess., 5 (1959).

The requirement of § 402 (a), that a union member first seek redress of alleged election violations within the union before enlisting the aid of the Secretary, was similarly designed to harmonize the need to eliminate election abuses with a desire to avoid unnecessary governmental intervention. The same Senate Report, in reference to Title IV of the Act and to the exhaustion requirement, states:

> "In filing a complaint the member must show that he has pursued any remedies available to him within the union and any parent body in a timely manner. This rule preserves a maximum amount of independence and self-government by giving every international union the opportunity to correct improper local elections." *Id.*, at 21.

Plainly Congress intended to foster a situation in which the unions themselves could remedy as many election violations as possible without the Government's ever becoming involved. Achieving this objective would not only preserve and strengthen unions as self-regulating institutions, but also avoid unnecessary expenditure of the limited resources of the Secretary of Labor.

Petitioner contends that the congressional concerns underpinning the exhaustion requirement were in fact adequately served in this case, because the election in question was actually protested by a union member within the union, and because the union was later given a chance to remedy specific violations before being taken to court by the Secretary. In this view, it is irrelevant that Hantzis himself did not focus his election challenge on the attendance requirement when seeking internal union remedies. In sum, the Secretary urges that § 402 (b) empowers him to act so long as a union member ob-

jects in any way to an election and so long as the union is given the opportunity to remedy voluntarily any violations that the Secretary determines may have affected the outcome of that election, regardless whether the member objected to the violations during his protest to the union.

However, under petitioner's limited view of congressional objectives, the exhaustion requirement of § 402 (a) is left with virtually no purpose or part to play in the statutory scheme. "Exhaustion" would be accomplished given any sort of protest within the union, no matter how remote the complaint made there from the alleged violation later litigated. The obvious purpose of an exhaustion requirement is not met when the union, during "exhaustion," is given no notice of the defects to be cured. Indeed, the primary objective of the exhaustion requirement is to preserve the vitality of internal union mechanisms for resolving election disputes—mechanisms to decide complaints brought by members of the union themselves. To accept petitioner's contention that a union member, who is aware of the facts underlying an alleged violation, need not first protest this violation to his union before complaining to the Secretary would be needlessly to weaken union self-government. Plainly petitioner's approach slights the interest in protecting union self-regulation and is out of harmony with the congressional purpose reflected in § 402 (a).

Of course, any interpretation of the exhaustion requirement must reflect the needs of rank and file union members—those people the requirement is designed ultimately to serve. We are not unmindful that union members may use broad or imprecise language in framing their internal union protests and that members will often lack the necessary information to be aware of the existence or scope of many election violations. Union democracy is far too important to permit these deficiencies to fore-

close relief from election violations; and in determining whether the exhaustion requirement of § 402 (a) has been satisfied, courts should impose a heavy burden on the union to show that it could not in any way discern that a member was complaining of the violation in question.[6] But when a union member is aware of the facts supporting an alleged election violation, the member must, in some discernible fashion, indicate to his union his dissatisfaction with those facts if he is to meet the exhaustion requirement.

In this case, it is clear that the protesting member knew of the existence of the meeting-attendance provision and that his election protests to the local and international unions concerned matters wholly unrelated to the rule. We therefore hold that internal union remedies were not properly exhausted and that the Secretary was barred from litigating the claim. Given this holding, we do not reach the question whether the meeting-attendance rule itself is reasonable.

The judgment is

Affirmed.

MR. JUSTICE BRENNAN, dissenting.

I dissent. The Court acknowledges that 29 U. S. C. § 482 (b), in permitting the Secretary to bring a civil action against the union if his investigation discloses "*a* violation" of § 481, might well mean "any violation whatever revealed by the investigation." *Ante,* at 338. Nonetheless, it concludes that "*a* violation" is limited to "any of the violations raised by the union member during his internal union election protest," *ibid.,* because the broader interpretation would disregard the congressional

[6] For much the same reasons, members should not be held to procedural niceties while seeking redress within their union, and exhaustion is not required when internal union remedies are unnecessarily complex or otherwise operate to confuse or inhibit union protestors.

purpose in imposing the exhaustion requirement. It is in giving controlling significance to the exhaustion requirement rather than to the clear and primary policy judgment enacted by Congress that the Court, in my view, falls into error.

Wirtz v. *Glass Bottle Blowers Assn.*, 389 U. S. 463 (1968), and *Wirtz* v. *Laborers' Union*, 389 U. S. 477 (1968), comprehensively analyzed the policy Congress meant to further in enacting the Secretary's enforcement powers under 29 U. S. C. § 482. We said that "Title IV's special function in furthering the overall goals of the LMRDA is to insure 'free and democratic' elections," 389 U. S., at 470, an interest "vital" not alone to union members but also to the general public. 389 U. S., at 475, 483. While we recognized that Congress desired to further this basic policy with minimal interference with a union's management of its own affairs, we made clear that where governmental intrusion was necessary to realize the vital public policy favoring free and democratic elections, "it would be anomalous to limit the reach of the Secretary's cause of action by the specifics of the union member's complaint." 389 U. S., at 483. We accordingly held that "it is incorrect to read [the exhaustion provision] . . . as somehow conditioning [the Secretary's] right to relief once that intervention has been properly invoked." 389 U. S., at 473.

That holding fits precisely the situation before us. Intervention was properly invoked when the dissident union member pursued his complaint through the union's internal procedures. When the Secretary's subsequent investigation uncovered another Title IV violation, surely it was "*a* violation" that Congress meant should also be corrected. Indeed, 29 U. S. C. § 482 (b) provides that if the Secretary's investigation leads him to conclude that there is "probable cause to believe that a violation of this subchapter has occurred" the Secretary should seek in a

civil action an order to set the election aside and "to direct the conduct of an election . . . *in accordance with the provisions of this subchapter.*" (Emphasis added.) The new election must, under § 482 (c), be conducted "*so far as lawful* and practicable, in conformity with the constitution and bylaws of the labor organization." (Emphasis added.) These provisions make inescapable the conclusion that Congress authorized the Secretary to ground an action for a new election not only on violations processed by the union member but also on other violations uncovered in his investigation. The Court's contrary construction ignores "the fact that Congress, although committed to minimal intervention, was obviously equally committed to making that intervention, once warranted, effective in carrying out the basic aim of Title IV." 389 U. S., at 473.

MR. JUSTICE WHITE, dissenting.

If, as in this case, a new election is ordered because a candidate used union facilities when he should not have, the Act directs a new election "under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization." 29 U. S. C. § 482 (c). I take it, then, that the Secretary is under no obligation, indeed forbidden, to follow a provision of the bylaws or constitution that is unlawful. If, in proceedings that order a new election, the Secretary discovers in the bylaws or constitution a provision regulating elections that he deems unlawful—such as the meeting-attendance rule—but the union insists that it is entirely lawful, does the Secretary simply ignore the provision in holding the election, may he or the union secure a judicial ruling on it, or is court action foreclosed and the Secretary required to follow the provision simply because a member in challenging

the election failed to attack the meeting-attendance rule, probably because it did not affect him?

I agree that if Hantzis' claim of using union facilities had been rejected, a new election could not have been ordered even though the Secretary turned up the meeting-attendance rule in his investigation and discovered that the ballot boxes had also been stuffed. But if the Secretary finds an invalid bylaw that purports to govern a new election that has been validly ordered on a claim that has been exhausted, as in this case, the Secretary appears to have express grounds in the Act, independent of the complaint-exhaustion requirements, to insist that the new election be conducted in accordance with the law and to insist that a court adjudicate the matter if the union stands by its bylaw provision.

COMMISSIONER OF INTERNAL REVENUE *v.* LINCOLN SAVINGS & LOAN ASSN.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 544. Argued February 23, 1971—
Decided June 14, 1971

Payment by a state-chartered savings and loan association of the "additional premium" required by § 404 (d) of the National Housing Act to be paid to the Federal Savings and Loan Insurance Corp. is not deductible for income tax purposes as an ordinary and necessary business expense under § 162 (a) of the Internal Revenue Code. Pp. 352–359.

422 F. 2d 90, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, HARLAN, BRENNAN, STEWART, WHITE, and MARSHALL, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 359.

Matthew J. Zinn argued the cause for petitioner. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Walters, Thomas L. Stapleton,* and *David English Carmack.*

Adam Y. Bennion argued the cause for respondent. With him on the brief were *A. Calder Mackay* and *Victor L. Walch.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the question whether the "additional premium" paid in 1963 by a state-chartered savings and loan association to the Federal Savings and Loan Insurance Corporation under the compulsion of § 404 (d) of the National Housing Act, as amended, 12 U. S. C.

§ 1727 (d),[1] is deductible by the association, for income tax purposes, as an ordinary and necessary business expense under § 162 (a) of the Internal Revenue Code of 1954, 26 U. S. C. § 162 (a).

The Commissioner of Internal Revenue determined a deficiency of $461,454.38 in the 1963 cash basis federal income tax of Lincoln Savings and Loan Association. Nearly all the deficiency was attributable to the disallowance of a deduction claimed for Lincoln's payment of $882,636.86 made pursuant to § 404 (d). Lincoln sought redetermination in the Tax Court. Judge Raum, in a decision reviewed by the court without dissent, upheld the deficiency. 51 T. C. 82 (1968). On appeal the Ninth Circuit reversed, one judge dissenting. 422 F. 2d 90 (1970).[2] Because of the importance of the issue for

[1] Section 404 (d), as amended by the Act of Sept. 8, 1961, § 6, 75 Stat. 483, read:

"(d) Each insured institution, except as otherwise provided in this section, shall annually pay to the Corporation, at such time and in such manner as the Corporation shall by regulations or otherwise prescribe, an additional premium in the nature of a prepayment with respect to future premiums of such institution under subsection (b) equal to 2 per centum of the net increase in all accounts of its insured members during the next preceding calendar year, less an amount equal to any requirement, as of the end of such calendar year, for the purchase of stock of the Federal Home Loan Bank of which such institution is a member, calculated in accordance with the provisions of subsection (c) of section 6 of the Federal Home Loan Bank Act and without regard to any net increase during such calendar year in its holdings of such stock, and such prepayments shall be credited to the Secondary Reserve . . . ."

The foregoing is the form of the statute in effect during 1963. Subsection (d) was further amended by the Act of Sept. 21, 1968, § 6 (a), 82 Stat. 858, and by the Act of Dec. 24, 1969, § 416 (c)(1), 83 Stat. 401, in ways of no significance here.

[2] Accord, as to federal savings and loan associations: *Washington Fed. S. & L. Assn.* v. *United States,* 304 F. Supp. 1072 (SD Fla. 1969), appeal pending in the United States Court of Appeals for the Fifth Circuit; *First Fed. S. & L. Assn.* v. *United States,* 288 F. Supp. 477 (WD Mo. 1968).

the savings and loan industry and for the Government, we granted certiorari. 400 U. S. 901 (1970).

I

The pertinent facts are not in dispute. Lincoln is a California savings and loan association organized in 1925 and is licensed under state law. It is subject to Division 2 of the California Financial Code, § 5000 *et seq.*, and is also subject to the regulations of the State's Savings and Loan Commissioner. California Administrative Code, Tit. 10, c. 2.

In 1936 Lincoln applied for membership in the Federal Home Loan Bank of San Francisco (then of Los Angeles). That application was granted and Lincoln has remained a member of the Bank since that time. The San Francisco Bank is one of 12 regional ones established and supervised by the Federal Home Loan Bank Board under the Federal Home Loan Bank Act of 1932, 47 Stat. 725, as amended, 12 U. S. C. §§ 1421–1449. These banks provide liquidity and funds for mortgage lending by making advances to member institutions as needed to meet unusual or heavy withdrawal and credit demands. Each member must purchase capital stock in its bank in an amount equal to 1% of its outstanding "aggregate unpaid loan principal" and maintain that percentage. 12 U. S. C. § 1426 (c).

In June 1938 Lincoln became, and still is, an institution insured by the Federal Savings and Loan Insurance Corporation (FSLIC), a corporation created by § 402 of the National Housing Act, 48 Stat. 1256, 12 U. S. C. § 1725, and under the direction of the Federal Home Loan Bank Board. By statute FSLIC has the duty to insure the accounts of all federal savings and loan associations; it also may insure the accounts of qualified state-chartered associations such as Lincoln. Section 403 (a), 12 U. S. C. § 1726 (a).

Each institution so insured was originally required, by § 404 (a) of the Act, 48 Stat. 1258, to pay FSLIC an annual insurance premium measured by the total amount of its accounts plus creditor obligations.[3] The statute provided that these premiums were to continue annually until FSLIC's reserve for losses amounted to 5% of the insured accounts plus creditor obligations of all its insured institutions, and at such intervals thereafter as were necessary to maintain the reserve at that level.

This pattern was changed, however, effective January 1, 1962, by the Act of September 8, 1961, 75 Stat. 482. That Act, by its § 3, amended § 404 (a), 12 U. S. C. § 1727 (a), to its present form.[4]

Section 404 (a) now requires FSLIC to establish two reserves, namely, a Primary Reserve "which shall be the general reserve," and a Secondary Reserve. The requirement for the annual premium of 1/12 of 1% is continued, but the level of the general reserve was lowered from 5% to 2% of the total of accounts plus creditor obligations. Sections 404 (b)(1) and 404 (b)(2), 12 U. S. C. §§ 1727 (b)(1) and 1727 (b)(2). The 1961 Act, moreover, added subsection (d) to § 404. 12 U. S. C. § 1727 (d). This required that the insured institution pay FSLIC, with respect to any calendar year, an "additional premium in the nature of a prepayment with respect to future premiums of such institution under subsection (b) . . . ." This "additional premium" was, and

[3] For more than a decade before 1963 the annual premium was at the rate of 1/12 of 1% of that total, 64 Stat. 259; prior thereto the premium had been, successively, 1/4 and 1/8 of 1%. 48 Stat. 1258; 49 Stat. 298.

[4] Section 404.

"(a) The Corporation shall establish a Primary Reserve which shall be the general reserve of the Corporation and a Secondary Reserve to which shall be credited the amounts of the prepayments made by insured institutions pursuant to subsection (d) and the credits made pursuant to the first sentence of subsection (e)."

still is, 2% of the net increase in the total of the institution's insured accounts, less any amount the institution is required, by 12 U. S. C. § 1426 (c), as of the end of that year, to expend in purchasing stock in the Federal Home Loan Bank.[5] The additional premium is to be credited to the Secondary Reserve. Section 404 (a), 12 U. S. C. § 1727 (a).

As noted, FSLIC's statutorily prescribed Primary Reserve is its general reserve. It is credited annually with the Corporation's net income; this net thus represents retained earnings. The § 404 (b)(1) premium payments, that is, the 1/12 of 1% required of each insured institution, constitute a major item in FSLIC's gross income. To the extent these premium payments exceed the corporation's expenses and insurance losses for the year, they flow as part of FSLIC's net to the Primary Reserve. The insured institutions have no property interest in the funds constituting the Primary Reserve.

The Secondary Reserve subsists separately and possesses different characteristics. It, of course, receives the 2% "additional premium," to the extent such is payable, required by § 404 (d) from each insured institution. FSLIC must also credit the Secondary Reserve annually with a "return" on the Secondary Reserve's "outstanding balances . . . at a rate equal to the average annual rate of return to the Corporation during the year . . . on the investments held by the Corporation in obligations of,

[5] The 1961 Act, by its § 2, repealed § 6 (l) of the Federal Home Loan Bank Act, 12 U. S. C. § 1426 (l), which had the effect of reducing from 2% to 1% the stock an insured institution is required to hold in relation to its outstanding unpaid loan principal. (The 2% requirement had been provided by the Act of June 27, 1950, § 2, 64 Stat. 257.) It was contemplated that for most institutions this reduction would approximately offset the additional payment to the Secondary Reserve required under § 404 (d). H. R. Rep. No. 823, 87th Cong., 1st Sess., 2 (1961); S. Rep. No. 778, 87th Cong., 1st Sess., 1–2 (1961).

or guaranteed as to principal and interest by, the United States." Sections 404 (a) and 404 (e), 12 U. S. C. §§ 1727 (a) and 1727 (e). In contrast with the Primary Reserve, the Secondary Reserve is "available . . . only for losses of the Corporation" and then "only to such extent as other accounts of the Corporation which are available therefor are insufficient for such losses." Section 404 (e), 12 U. S. C. § 1727 (e).

Each insured institution has a pro rata share in the Secondary Reserve. Section 404 (e) states that this is not assignable or transferable except as FSLIC, by regulation or otherwise, provides "in cases of merger or consolidation, transfer of bulk assets . . . and similar transactions . . . ." An insured institution may obtain a cash refund of its pro rata share if its status as an insured is terminated, § 407, 12 U. S. C. § 1730, or if a receiver or other legal custodian is appointed for purposes of liquidation, or if the Corporation determines that the institution has gone into liquidation. Section 404 (f), 12 U. S. C. § 1727 (f).

Following any December 31 on which the aggregate of the Primary Reserve and the Secondary Reserve equals or exceeds 2% of the total of all insured accounts plus creditor obligations of all the insured institutions (and the Primary Reserve alone does not equal or exceed such 2%), the additional premiums required by § 404 (d) are suspended. Section 404 (g), 12 U. S. C. § 1727 (g).[6] When this takes place, the pro rata share of each insured institution in the Secondary Reserve is used, to the extent available, to discharge the institution's obligation to pay its regular, or basic, premium required for that year under § 404 (b)(1). Thereafter, if the aggregate of the two

[6] The Act of Dec. 23, 1969, Pub. L. 91–151, § 6 (a), 83 Stat. 375, changed, effective after 1969, the applicable reserve and premium measures to the designated percentages of only "accounts" rather than accounts plus "creditor obligations."

reserves decreases to less than 1¾%, the obligation to pay the additional premium under § 404 (d) resumes and the pro rata share in the Secondary Reserve is no longer used to pay the § 404 (b)(1) regular premium. Whenever, following any December 31, the Primary Reserve alone equals or exceeds such 2%, the Corporation shall pay in cash to each insured institution its pro rata share of the Secondary Reserve and shall not thereafter accept further § 404 (d) prepayments.[7]

FSLIC maintains a separate account for each insured institution's share of the Secondary Reserve. It submits to the institution annually a statement disclosing that share and the interest credited to it.[8] Under regulations issued by the California Savings and Loan Commissioner and by the Federal Home Loan Bank Board, Lincoln reports its interest in FSLIC's Secondary Reserve as an asset on its balance sheet and treats the interest earned on its pro rata share of the Secondary Reserve as income.[9]

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[7] In 1961 FSLIC projected that the aggregate of the Primary and Secondary Reserves would equal or exceed 2% of all accounts and creditor obligations of all insured institutions by 1970; that no payments to the Secondary Reserve would be required for 1971–1975 and 1980–1995; that the Primary Reserve alone would reach the 2% level by 1995; and that the Secondary Reserve would be consumed by 1995 in discharging the insured institutions' premium obligations under § 404 (b)(1).

As a consequence of the 1969 amendments effected by Pub. L. 91–151, eliminating creditor obligations in measuring the adequacy of the reserves, the aggregate of FSLIC's Primary and Secondary Reserves reached the 2% suspension level in 1969 rather than 1970. Beginning in 1970 the Secondary Reserve is being used to fulfill the institutions' premium obligations under § 404 (b)(1).

[8] As of December 31, 1963, Lincoln's share amounted to $1,034,689.86. As of December 31, 1967, it was $4,922,115.46. This had been accumulated since the § 404 (d) and (e) payments and credits began as required by the 1961 Act.

[9] The Internal Revenue Service has ruled that, for a cash basis taxpayer, this interest is not taxable in the year earned, but only

FSLIC annually sends Lincoln an "Insurance Premium Notice" for the basic premium due under § 404 (b)(1). It also sends Lincoln annually a "Notice of Insurance Premium Prepayment" for the amount, if any, due under § 404 (d). For 1963 the former was $135,760.52 and the latter was $882,636.86. Each was paid by Lincoln.

On its 1963 federal income tax return Lincoln deducted both its § 404 (b)(1) payment and its § 404 (d) payment as ordinary and necessary business expenses under § 162 (a) of the Code. The Commissioner allowed the former, but disallowed the latter.

The Tax Court held that the § 404 (d) payment was a nondeductible capital expenditure and was not an ordinary and necessary business expense, and that the payment was deductible only when used from the Secondary Reserve to pay § 404 (b)(1) premiums or to meet actual losses of FSLIC. As noted above, the Ninth Circuit reversed by a divided panel.

II

To qualify as an allowable deduction under § 162 (a) of the 1954 Code, an item must (1) be "paid or incurred during the taxable year," (2) be for "carrying on any trade or business," (3) be an "expense," (4) be a "necessary" expense, and (5) be an "ordinary" expense. This Court has considered these several requirements, or one or more of them, in a number of cases. See, for example, *Welch* v. *Helvering,* 290 U. S. 111 (1933); *Helvering* v. *Winmill,* 305 U. S. 79 (1938); *Deputy* v. *du Pont,* 308 U. S. 488 (1940); *Interstate Transit Lines* v. *Commissioner,* 319 U. S. 590 (1943); *Commissioner* v. *Heininger,* 320 U. S. 467 (1943); *Commissioner* v. *Tellier,* 383 U. S.

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when it is utilized from the Secondary Reserve to pay the institution's § 404 (b)(1) premium or when it is otherwise made available to the institution. Rev. Rul. 66–49, 1966–1 Cum. Bull. 36, 38.

687 (1966); *Woodward* v. *Commissioner,* 397 U. S. 572 (1970); *United States* v. *Hilton Hotels Corp.,* 397 U. S. 580 (1970).

In *Welch* Mr. Justice Cardozo emphasized the difference between the "ordinary" and the "necessary" and the need for satisfying both in order to achieve the deduction. It is in that case where his well-known, but elusive, suggestion for the answer appears:

> "The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle." 290 U. S., at 115.

In *du Pont* MR. JUSTICE DOUGLAS stressed, 308 U. S., at 493, 495–496, the accepted rule of the "popular or received import" of a statute's words, and further emphasized that "[o]rdinary has the connotation of normal, usual, or customary," and that each case "turns on its special facts." In *Tellier* MR. JUSTICE STEWART also emphasized the double requirement of "ordinary" and "necessary" and said:

> "Our decisions have consistently construed the term 'necessary' as imposing only the minimal requirement that the expense be 'appropriate and helpful' for 'the development of the [taxpayer's] business' . . . . The principal function of the term 'ordinary' in § 162 (a) is to clarify the distinction, often difficult, between those expenses that are currently deductible and those that are in the nature of capital expenditures, which, if deductible at all, must be amortized over the useful life of the asset." 383 U. S., at 689–690.

So much for generalities. Here clearly, as to its § 404 (d) "additional premium" payment in 1963, Lincoln satisfied three of the five listed requirements. The pay-

ment was made during the taxable year. It was made in carrying on a trade or business. And it was a "necessary" payment, for it was compelled by the provisions of the National Housing Act. The Government so concedes. The focus, therefore, and our only concern here, is whether the payment was an expense and an ordinary one within the meaning of § 162 (a) of the Code.

Lincoln's argument essentially is that its § 404 (d) payment was really no different from its § 404 (b)(1) payment for both were premiums for insurance of its depositors' accounts and creditor obligations; that all similarly situated insured savings and loan associations (there were 4,419 on December 31, 1963) paid the § 404 (d) premium; and that the possibility of a future benefit from the expenditure does not serve to make it capital in nature as distinguished from an expense.

We feel that the very recital of the facts and of the structure and operation of FSLIC's reserves, in Part I of this opinion, itself provides an answer adverse to Lincoln's argument. It is not enough, in order that an expenditure qualify as an income tax deduction, that it merely be one paid by all similarly insured associations, or that it serves to fortify FSLIC's insurance purpose and operation. Further, the presence of an ensuing benefit that may have some future aspect is not controlling; many expenses concededly deductible have prospective effect beyond the taxable year.

What is important and controlling, we feel, is that the § 404 (d) payment serves to create or enhance for Lincoln what is essentially a separate and distinct additional asset and that, as an inevitable consequence, the payment is capital in nature and not an expense, let alone an ordinary expense, deductible under § 162 (a) in the absence of other factors not established here. We note the following:

A. The § 404 (d) payment to FSLIC, when made, is subject to positive and rigid continuing controls. The payment must flow into the Secondary Reserve. That reserve is primarily available only for stated and circumscribed purposes, namely, the payment of losses and then only to the extent all other assets of FSLIC are insufficient to cover those losses. The Secondary Reserve thus has complete seniority with respect to demands upon FSLIC. It is the asset last called upon.

B. The insured institution has a distinct and recognized property interest in the Secondary Reserve. This is revealed by: (1) The recognition, in § 404 (e), of transferability of the institution's pro rata share therein. This transferability is limited and restricted, to be sure, but it exists for approved situations of merger, consolidation, and the like. (2) The prospective refund, and in cash at that, of the institution's pro rata share upon termination of its insured status, or upon receivership or liquidation, or when the Primary Reserve alone reaches the suspension level. (3) The use of the institution's pro rata share to pay its basic premium under § 404 (b)(1) when the suspension level is reached by the aggregate of the Primary and Secondary Reserves. (4) FSLIC's maintenance of a separate account for each insured institution's share in the Secondary Reserve. (5) The statutorily required annual credit from FSLIC's earnings to the institution's share of the Secondary Reserve. The share thus is an income-producing entity and the income inures to the benefit of the insured institution.

C. Although compulsory accounting rules do not control tax consequences, *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552, 562 (1932), there is significance in the fact that all concerned here have recognized the presence and the significance of this property interest

in the Secondary Reserve. FSLIC submits annual statements to its insured institutions showing payments and credits to their respective shares. Lincoln, albeit by federal and state requirements, shows that interest as an asset on its balance sheet and the credit as income. And Lincoln's parent corporation, First Lincoln Financial Corporation, although not subject to such regulation, has done the same in its financial statements.

D. The nature of the adjustments effected by the 1961 Act is of some import. Due primarily to the rapid growth of insured institutions in the years preceding the passage of that Act, the ratio of FSLIC's reserves to potential liability had declined. S. Rep. No. 778, 87th Cong., 1st Sess., 2, 12; Hearing on H. R. 7108 and H. R. 7109 before Subcommittee No. 1 of the House Committee on Banking and Currency, 87th Cong., 1st Sess., 10. By the Act Congress reduced the requirement for Federal Home Loan Bank stock and at the same time channeled new funds to FSLIC's Secondary Reserve. The § 404 (d) payment and the reduction in the FHLB stock purchase requirement were effectuated together. Certainly the FHLB stock is an asset and its acquisition is capital in nature. The complementary § 404 (d) payment is directed to a fund. Each is a device designed to achieve a particular and common result, namely, the providing of protection to the insured institution and to its depositors by way, in the one case, of liquidity and availability of loan funds and, in the other, by way of segregated amounts available to offset possible losses. Each is more permanent than temporary. Each partakes more of the character of an asset than of an expense. And the two are made complementary by the very provisions of § 404 (d).

We do not regard as contrarily persuasive, or as imposing an expense characteristic on the § 404 (d) pay-

ments, six features emphasized by Lincoln or by the Court of Appeals:

A. The possibility that Lincoln's share of the Secondary Reserve would be consumed by FSLIC's losses and thus would never be refunded to Lincoln. The Tax Court pointed out, 51 T. C., at 97, that this hazard exists with any routine investment in a bank or an insurance company and yet its presence does not make that investment an expense rather than a capital undertaking.

B. The general unlikelihood, as a practical matter, of Lincoln's recovery of its pro rata share of the Secondary Reserve. It is suggested that liquidation will not take place because in this day corporate activity is assumed to be a continuing process and not limited in duration. It is further pointed out that termination of FSLIC insurance is a business impossibility for it would result in mass withdrawal of depositors' accounts and in institutional suicide. It may well be true that liquidation is unlikely and that termination of insurance would be an undesirable business decision. The same may usually be said, however, of a manufacturing corporation's investment in plant and equipment or in patents or in many other assets basic to its business and function.

C. The claimed identity of purpose of the § 404 (b)(1) and § 404 (d) payments, namely, the providing of insurance for depositors' accounts. The former, however, is only annual in phase and operation. It provides insurance for the year. When the year passes, the insurance ceases. The latter, however, provides a fund available for losses not only in the current year, but in the future. It is a fund capable under certain circumstances of finding its way back to the coffers of the insured institutions. The ultimate purpose of the two payments may have much in common, but the route and the life of each differ from those of the other.

D. The compulsory character of the payment imposed both by the governing statute and the economic facts of life. Lincoln concedes, however, "Compulsion, whether legal or economic, should have no bearing upon the question whether a payment is an expense or a capital expenditure." [10]

E. The annual accounting concept of the income tax. This factor is relevant when the year of deduction is in issue. It has less consequence in the determination of whether an item is or is not an ordinary expense. As to this, the mere maturing of liability is not enough.

F. The suggestion that the § 404 (d) payment is not included in the list of nondeductible capital expenditures specified by § 263 of the 1954 Code. It is clear from the very language of §§ 162 (a) and 263 that the two sections together are not all inclusive, and that § 263 does not provide a complete list of nondeductible expenditures. *Iowa Southern Utilities Co.* v. *Commissioner,* 333 F. 2d 382, 385 (CA8 1964), cert. denied, 379 U. S. 946; *General Bancshares Corp.* v. *Commissioner,* 326 F. 2d 712, 716 (CA8 1964), cert. denied, 379 U. S. 832. See *Helvering* v. *Winmill,* 305 U. S. 79 (1938); *Woodward* v. *Commissioner,* 397 U. S. 572 (1970); *United States* v. *Hilton Hotels Corp.,* 397 U. S. 580 (1970).

III

Lincoln's pro rata share of the Secondary Reserve, of course, is not without its tax aspects. If its share is used to pay losses or if, when the suspension level is reached, it is devoted to the payment of Lincoln's § 404 (b)(1) premium, a deduction at that time for the amount so used would appear to be in order. Indeed, the Internal Revenue Service has so ruled. Rev. Rul. 66–49, 1966–1 Cum. Bull. 36, 37. Cf. Treas. Reg. on Income Tax § 1.162–13.

[10] Brief in Opposition 17.

We emphasize that just as compulsory accounting is not controlling taxwise, *Old Colony R. Co.* v. *Commissioner, supra,* so the statutory labels of "prepayment" and "additional premium" contained in § 404 (d) are not controlling. *Burnett* v. *Commissioner,* 356 F. 2d 755, 758 (CA5 1966), cert. denied, 385 U. S. 832. We also emphasize that the fact that a payment is imposed compulsorily upon a taxpayer does not in and of itself make that payment an ordinary and necessary expense within the meaning of § 162 (a) of the 1954 Code.

We therefore conclude that Lincoln's § 404 (d) payment made in 1963 is not deductible under § 162 (a). See *Wichita State Bank & Trust Co.* v. *Commissioner,* 69 F. 2d 595, 596 (CA5 1934), cert. denied, 293 U. S. 562.

The judgment of the Court of Appeals is reversed.

It is so ordered.

MR. JUSTICE DOUGLAS, dissenting.

Respondent is a state-chartered savings and loan institution, whose deposits are insured by the Federal Savings and Loan Insurance Corporation (FSLIC). To obtain this coverage, respondent must pay two premiums. Under § 404 (b) of the National Housing Act, it pays an annual premium of $\frac{1}{12}$ of one percent of the total amount of its savings accounts and creditor obligations. Pursuant to § 404 (d), it must also pay an additional premium equal to two percent of any net increase in the total amount of its insured accounts.[1] The § 404 (b) premium is considered gross income of FSLIC, approximately 95% of which is transferred to its Primary Reserve to cover losses. These premiums must be paid by insured institutions until the Primary Reserve equals two percent of

[1] This amount may be reduced by an amount equal to any requirement for the purchase of stock in the Federal Home Loan Bank of which the insured is a member.

the total insured savings accounts and creditor obligations of all insured institutions. Thereafter, insured institutions need pay no premiums unless and until the Primary Reserve drops below two percent. The § 404 (d) premium is not considered gross income of FSLIC but is transferred to a Secondary Reserve, to be used to cover losses only if other accounts prove insufficient, a possibility considered extremely remote. A separate accounting is kept for each insured institution, showing the § 404 (d) premiums paid. Under § 404 (g), at any time that the aggregate of the Primary and Secondary Reserves reaches 2% of all insured accounts and creditor obligations, no § 404 (d) payments need be made, and funds from the Secondary Reserve may be used to make § 404 (b) premium payments, until the aggregate falls below 1¾%. When the Primary Reserve reaches 2%, FSLIC is to pay each insured institution its pro rata share of the Secondary Reserve in cash. By FSLIC's projections, no § 404 (d) premium payments will be required in the years 1971 to 1975 and after 1979. No § 404 (b) premiums will be required after 1995, as the Primary Reserve will reach 2%. The respondent argues that there will be no payments of pro rata shares at that time, as the calculations of FSLIC show that the Secondary Fund will be exhausted prior to 1995.[2]

On its federal tax return for 1963 respondent deducted both its § 404 (b) and § 404 (d) premium payments as ordinary and necessary business expenses. The Commissioner of Internal Revenue allowed the deduction of § 404 (b) premiums, but disallowed the latter, characterizing these payments as nondeductible capital investments in

[2] The Solicitor General argues that it is possible that some insured institutions might receive refunds from the Secondary Reserve, if their growth fits a certain pattern. This however only raises the possibility of such a return, without showing that such a possibility is more than remote.

FSLIC, to be deducted only when used to pay § 404 (b) premiums or when used to meet actual losses of FSLIC. The Tax Court affirmed this ruling. The Court of Appeals for the Ninth Circuit reversed the Tax Court, finding the § 404 (d) premiums to be a reasonable and necessary business expense, deductible in the year paid. I agree with the Court of Appeals and dissent from the decision here.

There is no claim that the § 404 (d) premiums are not necessary. The position of the United States is that these premiums are not "ordinary," but "in the nature of capital expenditures, which, if deductible at all, must be amortized over the useful life of the asset." *Commissioner* v. *Tellier,* 383 U. S. 687, 689–690 (1966). The Commissioner relies on the principle that a cost which results in the creation of an asset having a useful life which extends substantially beyond the close of the taxable year is a capital outlay. From this he argues that the determination of whether respondent's § 404 (d) premiums are capital expenditures or deductible business expenses depends on whether the payments will provide a benefit in future years.

Because the respondent will obtain a benefit in the future from these premiums, in the form of lower § 404 (b) premiums or by a full refund of its pro rata share on termination or liquidation, he argues, the Secondary Reserve is a capital asset. It is not used for losses, and will never be used except in the event of a national catastrophe. These premiums are not recurring, and will likely be paid only in 13 of the 34 years from 1962 to 1995. Accounting principles, the Commissioner claims, demand that these payments be deducted when they are used, either to pay § 404 (b) premiums or to pay losses. "Only in this manner will the costs of FSLIC insurance be matched against the revenues generated because such insurance is maintained."

The rule professed by the United States is, of course, sound. The error is in applying it to this case. Respondent has not established an asset for future benefit. It has merely paid the premiums necessary to obtain insurance. It is true that premiums paid in 1963 may result in a reduction in premiums in later years. But labeling this the creation of an asset proves too much, for it invalidates the deduction of § 404 (b) premiums as well.

The benefit to be obtained from the payment of § 404 (d) premiums, whether they be capital expenditures or deductible expenses, is not the reduction of future premiums but insurance coverage. The Government readily admits that the present level of § 404 (b) premiums is not needed to cover current foreseeable losses. Indeed, losses have never exceeded investment income. The high premium rate is for the purpose of establishing a Primary Reserve, to cover conceivably serious losses in the future. When the Primary Reserve reaches a level deemed sufficient, no premium payments will be required at all. If "the costs of FSLIC insurance [are to] be matched against the revenues generated because such insurance is maintained," a major portion of the § 404 (b) premiums should also be capitalized, to be depreciated over some appropriate term.

Nor is it controlling that the Secondary Reserve is a capital account insofar as FSLIC is concerned. As the Court of Appeals stated:

> "We think the emphasis upon the treatment of the receipt by the payee, FSLIC, is mistaken and that in determining whether an expense is an ordinary and necessary expense of doing business, the focus should be on the taxpayer and the taxpayer's business, not on what the payee does with the money paid. This is not to say that rights retained by the taxpayer are to be ignored." 422 F. 2d 90, 92.

A decision that § 404 (d) premiums are not deductible, while § 404 (b) premiums are, must rest on the only distinction between the two, the rights retained by respondent in the Secondary Reserve. These are evidenced by the keeping of separate "accounts," the payment of earnings to these accounts, and the possibility of a recovery of a pro rata share of the Reserve. But, as the Court of Appeals noted, respondent is a going concern, and the possibility of a return of its share on liquidation is not a proper consideration. As termination of insurance would surely lead to liquidation, this could not be considered either. The possibility that some part of the Secondary Reserve might be returned to respondent when the Primary Reserve reaches a sufficient level is, at best, remote. This contingent possibility of recovery does not render an otherwise deductible payment nondeductible. *Alleghany Corp.* v. *Commissioner,* 28 T. C. 298, 305; *Electric Tachometer Corp.* v. *Commissioner,* 37 T. C. 158, 161.

The returns paid on a pro rata share of the Secondary Reserve are paid out of earnings, that is, out of funds which would otherwise be transferred to the Primary Reserve. The payment does not increase the aggregate amount of the reserves. The returns paid are not available to the insured institution, and not taxable to it until paid for its benefit, according to the Internal Revenue Service. At that point, the insured institution would declare the income and deduct the amount as an expense. Therefore, absent the remote possibility that the insured institution might receive a pro rata share, it is immaterial whether returns are paid to the Secondary Reserve or only to the Primary Reserve. Also, the revenue ruling that the insured institution does not have even constructive possession of a pro rata share of the Secondary Reserve, for purposes of taxing returns

on that fund, is inconsistent with the position that the same pro rata share is a capital asset of the institution.

On these facts, the Court of Appeals was correct in determining that the § 404 (d) premiums, paid for the purpose of obtaining insurance necessary for the success of respondent's business, were deductible as an ordinary business expense.

Syllabus

GRAHAM, COMMISSIONER, DEPARTMENT OF PUBLIC WELFARE OF ARIZONA *v.* RICHARDSON ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. 609. Argued March 22, 1971—Decided June 14, 1971*

State statutes, like the Arizona and Pennsylvania statutes here involved, that deny welfare benefits to resident aliens or to aliens who have not resided in the United States for a specified number of years are violative of the Equal Protection Clause and encroach upon the exclusive federal power over the entrance and residence of aliens; and there is no authorization for Arizona's 15-year durational residency requirement in § 1402 (b) of the Social Security Act. Pp. 370–383.

313 F. Supp. 34 and 321 F. Supp. 250, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, DOUGLAS, BRENNAN, STEWART, WHITE, and MARSHALL, JJ., joined. HARLAN, J., filed a statement joining in the judgment and in Parts III and IV of the Court's opinion, *post*, p. 383.

Michael S. Flam, Assistant Attorney General of Arizona, argued the cause for appellant in No. 609. With him on the briefs were *Gary K. Nelson,* Attorney General, and *James B. Feeley, Andrew W. Bettwy, Roger M. Horne,* and *Peter Sownie,* Assistant Attorneys General. *Joseph P. Work,* Assistant Attorney General of Pennsylvania, argued the cause for appellants in No. 727. With him on the brief were *Fred Speaker,* Attorney General, *Barry A. Roth,* Assistant Deputy Attorney General, and *Edward Friedman.*

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*Together with No. 727, *Sailer et al.* v. *Leger et al.,* on appeal from the United States District Court for the Eastern District of Pennsylvania.

Anthony B. Ching argued the cause and filed a brief for appellees in No. 609. *Jonathan M. Stein* argued the cause for appellees in No. 727, *pro hac vice*. With him on the brief were *Harvey N. Schmidt* and *Jonathan Weiss*.

Mr. Weiss filed a brief for the Legal Services for the Elderly Poor Project of the Center on Social Welfare Policy and Law as *amicus curiae* urging affirmance in No. 609. *Robert A. Sedler* and *Melvin L. Wulf* filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance in both cases. Briefs of *amici curiae* urging affirmance in No. 727 were filed by *Edith Lowenstein* for Migration and Refugee Services, U. S. Catholic Conference, Inc., et al., and by *Jack Wasserman* and *Esther M. Kaufman* for the Association of Immigration and Nationality Lawyers.

Mr. Justice Blackmun delivered the opinion of the Court.

These are welfare cases. They provide yet another aspect of the widening litigation in this area.[1] The issue here is whether the Equal Protection Clause of the Fourteenth Amendment prevents a State from conditioning welfare benefits either (a) upon the beneficiary's possession of United States citizenship, or (b) if the beneficiary is an alien, upon his having resided in this country for a specified number of years. The facts are not in dispute.

I

No. 609. This case, from Arizona, concerns the State's participation in federal categorical assistance programs. These programs originate with the Social Security Act

[1] See, for example, *King* v. *Smith*, 392 U. S. 309 (1968); *Shapiro* v. *Thompson*, 394 U. S. 618 (1969); *Goldberg* v. *Kelly*, 397 U. S. 254 (1970); *Rosado* v. *Wyman*, 397 U. S. 397 (1970); *Dandridge* v. *Williams*, 397 U. S. 471 (1970); *Wyman* v. *James*, 400 U. S. 309 (1971).

of 1935, 49 Stat. 620, as amended, 42 U. S. C., c. 7. They are supported in part by federal grants-in-aid and are administered by the States under federal guidelines. Arizona Rev. Stat. Ann., Tit. 46, Art. 2, as amended, provides for assistance to persons permanently and totally disabled (APTD). See 42 U. S. C. §§ 1351–1355. Arizona Rev. Stat. Ann. § 46–233 (Supp. 1970–1971), as amended in 1962, reads:

> "A. No person shall be entitled to general assistance who does not meet and maintain the following requirements:
>
> "1. Is a citizen of the United States, or has resided in the United States a total of fifteen years. . . ."

A like eligibility provision conditioned upon citizenship or durational residence appears in § 46–252 (2), providing old-age assistance, and in § 46–272 (4), providing assistance to the needy blind. See 42 U. S. C. §§ 1201–1206, 1381–1385.

Appellee Carmen Richardson, at the institution of this suit in July 1969, was 64 years of age. She is a lawfully admitted resident alien. She emigrated from Mexico in 1956 and since then has resided continuously in Arizona. She became permanently and totally disabled. She also met all other requirements for eligibility for APTD benefits except the 15-year residency specified for aliens by § 46–233 (A)(1). She applied for benefits but was denied relief solely because of the residency provision.

Mrs. Richardson instituted her class action [2] in the District of Arizona against the Commissioner of the State's Department of Public Welfare seeking declaratory relief, an injunction against the enforcement of §§ 46–

[2] The suit is brought on behalf of appellee and similarly situated Arizona resident aliens who, but for their inability to meet the Arizona residence requirement, are eligible to receive welfare benefits under state-administered federal categorical assistance programs for the permanently and totally disabled, the aged, and the blind.

233 (A)(1), 46–252 (2), and 46–272 (4), and the award of amounts allegedly due. She claimed that Arizona's alien residency requirements violate the Equal Protection Clause and the constitutional right to travel; that they conflict with the Social Security Act and are thus overborne by the Supremacy Clause; and that the regulation of aliens has been pre-empted by Congress.

The three-judge court upheld Mrs. Richardson's motion for summary judgment on equal protection grounds. *Richardson* v. *Graham,* 313 F. Supp. 34 (Ariz. 1970). It did so in reliance on this Court's opinions in *Takahashi* v. *Fish & Game Comm'n,* 334 U. S. 410 (1948), and *Shapiro* v. *Thompson,* 394 U. S. 618 (1969). The Commissioner appealed. The judgment was stayed as to all parties plaintiff other than Mrs. Richardson. Probable jurisdiction was noted. 400 U. S. 956 (1970).

No. 727. This case, from Pennsylvania, concerns that portion of a general assistance program that is not federally supported. The relevant statute is § 432 (2) of the Pennsylvania Public Welfare Code, Pa. Stat. Ann., Tit. 62, § 432 (2) (1968),[3] originally enacted in 1939. It provides that those eligible for assistance shall be (1) needy persons who qualify under the federally supported categorical assistance programs and (2) those other needy persons who are citizens of the United States. Assistance to the latter group is funded wholly by the Commonwealth.

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[3] "§ 432. Eligibility

"Except as hereinafter otherwise provided . . . needy persons of the classes defined in clauses (1) and (2) of this section shall be eligible for assistance:

"(1) Persons for whose assistance Federal financial participation is available to the Commonwealth . . . .

"(2) Other persons who are citizens of the United States, or who, during the period January 1, 1938 to December 31, 1939, filed their declaration of intention to become citizens. . . ."

Appellee Elsie Mary Jane Leger is a lawfully admitted resident alien. She was born in Scotland in 1937. She came to this country in 1965 at the age of 28 under contract for domestic service with a family in Havertown. She has resided continuously in Pennsylvania since then and has been a taxpaying resident of the Commonwealth. In 1967 she left her domestic employment to accept more remunerative work in Philadelphia. She entered into a common-law marriage with a United States citizen. In 1969 illness forced both Mrs. Leger and her husband to give up their employment. They applied for public assistance. Each was ineligible under the federal programs. Mr. Leger, however, qualified for aid under the state program. Aid to Mrs. Leger was denied because of her alienage. The monthly grant to Mr. Leger was less than the amount determined by both federal and Pennsylvania authorities as necessary for a minimum standard of living in Philadelphia for a family of two.

Mrs. Leger instituted her class action [4] in the Eastern District of Pennsylvania against the Executive Director of the Philadelphia County Board of Assistance and the Secretary of the Commonwealth's Department of Public Welfare. She sought declaratory relief, an injunction against the enforcement of the restriction of § 432 (2), and the ordering of back payments wrongfully withheld. She obtained a temporary restraining order preventing the defendants from continuing to deny her assistance. She then began to receive, and still receives, with her husband, a public assistance grant.

Appellee Beryl Jervis was added as a party plaintiff to

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[4] It was stipulated that the class of persons the appellees represent approximates 65 to 70 cases annually. This figure stands in striking contrast to the 585,000 persons in the Commonwealth on categorical assistance and 85,000 on general assistance. Department of Public Welfare Report of Public Assistance, Dec. 31, 1969.

the Leger action. She was born in Panama in 1912 and is a citizen of that country. In March 1968, at the age of 55, she came to the United States to undertake domestic work under contract in Philadelphia. She has resided continuously in Pennsylvania since then and has been a taxpaying resident of the Commonwealth. After working as a domestic for approximately one year, she obtained other, more remunerative, work in the city. In February 1970 illness forced her to give up her employment. She applied for aid. However, she was ineligible for benefits under the federally assisted programs and she was denied general assistance solely because of her alienage. Her motion for immediate relief through a temporary restraining order was denied.

It was stipulated that "the denial of General Assistance to aliens otherwise eligible for such assistance causes undue hardship to them by depriving them of the means to secure the necessities of life, including food, clothing and shelter," and that "the citizenship bar to the receipt of General Assistance in Pennsylvania discourages continued residence in Pennsylvania of indigent resident aliens and causes such needy persons to remove to other States which will meet their needs."

The three-judge court, one judge dissenting, ruled that § 432 (2) was violative of the Equal Protection Clause and enjoined its further enforcement. *Leger* v. *Sailer*, 321 F. Supp. 250 (ED Pa. 1970). The defendants appealed. Probable jurisdiction was noted. 400 U. S. 956.

II

The appellants argue initially that the States, consistent with the Equal Protection Clause, may favor United States citizens over aliens in the distribution of welfare benefits. It is said that this distinction involves no "invidious discrimination" such as was condemned in

King v. *Smith,* 392 U. S. 309 (1968), for the State is not discriminating with respect to race or nationality.

The Fourteenth Amendment provides, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It has long been settled, and it is not disputed here, that the term "person" in this context encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside. *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369 (1886); *Truax* v. *Raich,* 239 U. S. 33, 39 (1915); *Takahashi* v. *Fish & Game Comm'n,* 334 U. S., at 420. Nor is it disputed that the Arizona and Pennsylvania statutes in question create two classes of needy persons, indistinguishable except with respect to whether they are or are not citizens of this country. Otherwise qualified United States citizens living in Arizona are entitled to federally funded categorical assistance benefits without regard to length of national residency, but aliens must have lived in this country for 15 years in order to qualify for aid. United States citizens living in Pennsylvania, unable to meet the requirements for federally funded benefits, may be eligible for state-supported general assistance, but resident aliens as a class are precluded from that assistance.

Under traditional equal protection principles, a State retains broad discretion to classify as long as its classification has a reasonable basis. *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78 (1911); *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 489 (1955); *Morey* v. *Doud,* 354 U. S. 457, 465 (1957); *McGowan* v. *Maryland,* 366 U. S. 420, 425–427 (1961). This is so in "the area of economics and social welfare." *Dandridge* v. *Williams,* 397 U. S. 471, 485 (1970). But the Court's decisions

have established that classifications based on alienage, like those based on nationality [5] or race,[6] are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a "discrete and insular" minority (see *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152–153, n. 4 (1938)) for whom such heightened judicial solicitude is appropriate. Accordingly, it was said in *Takahashi,* 334 U. S., at 420, that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits."

Arizona and Pennsylvania seek to justify their restrictions on the eligibility of aliens for public assistance solely on the basis of a State's "special public interest" in favoring its own citizens over aliens in the distribution of limited resources such as welfare benefits. It is true that this Court on occasion has upheld state statutes that treat citizens and noncitizens differently, the ground for distinction having been that such laws were necessary to protect special interests of the State or its citizens. Thus, in *Truax* v. *Raich,* 239 U. S. 33 (1915), the Court, in striking down an Arizona statute restricting the employment of aliens, emphasized that "[t]he discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other States." 239 U. S., at 39–40. And in *Crane* v. *New York,* 239 U. S.

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[5] See *Oyama* v. *California,* 332 U. S. 633, 644–646 (1948); *Korematsu* v. *United States,* 323 U. S. 214, 216 (1944); *Hirabayashi* v. *United States,* 320 U. S. 81, 100 (1943).

[6] *McLaughlin* v. *Florida,* 379 U. S. 184, 191–192 (1964); *Loving* v. *Virginia,* 388 U. S. 1, 9 (1967); *Bolling* v. *Sharpe,* 347 U. S. 497, 499 (1954).

195 (1915), the Court affirmed the judgment in *People* v. *Crane,* 214 N. Y. 154, 108 N. E. 427 (1915), upholding a New York statute prohibiting the employment of aliens on public works projects. The New York court's opinion contained Mr. Justice Cardozo's well-known observation:

> "To disqualify aliens is discrimination indeed, but not arbitrary discrimination, for the principle of exclusion is the restriction of the resources of the state to the advancement and profit of the members of the state. Ungenerous and unwise such discrimination may be. It is not for that reason unlawful. . . . The state in determining what use shall be made of its own moneys, may legitimately consult the welfare of its own citizens rather than that of aliens. Whatever is a privilege rather than a right, may be made dependent upon citizenship. In its war against poverty, the state is not required to dedicate its own resources to citizens and aliens alike." 214 N. Y., at 161, 164, 108 N. E., at 429, 430.

See *Heim* v. *McCall,* 239 U. S. 175 (1915); *Ohio ex rel. Clarke* v. *Deckebach,* 274 U. S. 392 (1927). On the same theory, the Court has upheld statutes that, in the absence of overriding treaties, limit the right of noncitizens to engage in exploitation of a State's natural resources,[7] restrict the devolution of real property to aliens,[8] or deny to aliens the right to acquire and own land.[9]

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[7] *McCready* v. *Virginia,* 94 U. S. 391 (1877); *Patsone* v. *Pennsylvania,* 232 U. S. 138 (1914).

[8] *Hauenstein* v. *Lynham,* 100 U. S. 483 (1880); *Blythe* v. *Hinckley,* 180 U. S. 333 (1901).

[9] *Terrace* v. *Thompson,* 263 U. S. 197 (1923); *Porterfield* v. *Webb,* 263 U. S. 225 (1923); *Webb* v. *O'Brien,* 263 U. S. 313 (1923); *Frick* v. *Webb,* 263 U. S. 326 (1923); but see *Oyama* v. *California,* 332 U. S. 633 (1948).

Takahashi v. *Fish & Game Comm'n,* 334 U. S. 410 (1948), however, cast doubt on the continuing validity of the special public-interest doctrine in all contexts. There the Court held that California's purported ownership of fish in the ocean off its shores was not such a special public interest as would justify prohibiting aliens from making a living by fishing in those waters while permitting all others to do so. It was said:

> "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws." 334 U. S., at 420.

Whatever may be the contemporary vitality of the special public-interest doctrine in other contexts after *Takahashi,* we conclude that a State's desire to preserve limited welfare benefits for its own citizens is inadequate to justify Pennsylvania's making noncitizens ineligible for public assistance, and Arizona's restricting benefits to citizens and longtime resident aliens. First, the special public interest doctrine was heavily grounded on the notion that "[w]hatever is a privilege, rather than a right, may be made dependent upon citizenship." *People* v. *Crane,* 214 N. Y., at 164, 108 N. E., at 430. But this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or as a "privilege." *Sherbert* v. *Verner,* 374 U. S. 398, 404 (1963); *Shapiro* v. *Thompson,* 394 U. S., at 627 n. 6; *Goldberg* v. *Kelly,* 397 U. S. 254, 262 (1970); *Bell* v. *Burson,* 402 U. S. 535, 539 (1971). Second, as the Court recognized in *Shapiro:*

> "[A] State has a valid interest in preserving the fiscal integrity of its programs It may legitimately attempt to limit its expenditures, whether for public

> assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. . . . The saving of welfare costs cannot justify an otherwise invidious classification." 394 U. S., at 633.

Since an alien as well as a citizen is a "person" for equal protection purposes, a concern for fiscal integrity is no more compelling a justification for the questioned classification in these cases than it was in *Shapiro*.

Appellants, however, would narrow the application of *Shapiro* to citizens by arguing that the right to travel, relied upon in that decision, extends only to citizens and not to aliens. While many of the Court's opinions do speak in terms of the right of "citizens" to travel,[10] the source of the constitutional right to travel has never been ascribed to any particular constitutional provision. See *Shapiro* v. *Thompson,* 394 U. S., at 630 n. 8; *United States* v. *Guest,* 383 U. S. 745, 757–758 (1966). The Court has never decided whether the right applies specifically to aliens, and it is unnecessary to reach that question here. It is enough to say that the classification involved in *Shapiro* was subjected to strict scrutiny under the compelling state interest test, not because it was based on any suspect criterion such as race, nationality, or alienage, but because it impinged upon the fundamental right of interstate movement. As was said there, "The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from State

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[10] *E. g., Passenger Cases,* 7 How. 283, 492 (1849); *Crandall* v. *Nevada,* 6 Wall. 35, 48–49 (1868); *Twining* v. *New Jersey,* 211 U. S. 78, 97 (1908); *Edwards* v. *California,* 314 U. S. 160, 178–181 (DOUGLAS, J., concurring), 183–185 (Jackson, J., concurring) (1941); *Shapiro* v. *Thompson,* 394 U. S., at 629; *Oregon* v. *Mitchell,* 400 U. S. 112, 285 (opinion of STEWART, J.) (1970).

to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." 394 U. S., at 634. The classifications involved in the instant cases, on the other hand, are inherently suspect and are therefore subject to strict judicial scrutiny whether or not a fundamental right is impaired. Appellants' attempted reliance on *Dandridge* v. *Williams,* 397 U. S. 471 (1970), is also misplaced, since the classification involved in that case (family size) neither impinged upon a fundamental constitutional right nor employed an inherently suspect criterion.

We agree with the three-judge court in the Pennsylvania case that the "justification of limiting expenses is particularly inappropriate and unreasonable when the discriminated class consists of aliens. Aliens like citizens pay taxes and may be called into the armed forces. Unlike the short-term residents in *Shapiro,* aliens may live within a state for many years, work in the state and contribute to the economic growth of the state." 321 F. Supp., at 253. See also *Purdy & Fitzpatrick* v. *California,* 71 Cal. 2d 566, 581–582, 456 P. 2d 645, 656 (1969). There can be no "special public interest" in tax revenues to which aliens have contributed on an equal basis with the residents of the State.

Accordingly, we hold that a state statute that denies welfare benefits to resident aliens and one that denies them to aliens who have not resided in the United States for a specified number of years violate the Equal Protection Clause.

III

An additional reason why the state statutes at issue in these cases do not withstand constitutional scrutiny

emerges from the area of federal-state relations. The National Government has "broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization." *Takahashi* v. *Fish & Game Comm'n,* 334 U. S., at 419; *Hines* v. *Davidowitz,* 312 U. S. 52, 66 (1941); see also *Chinese Exclusion Case,* 130 U. S. 581 (1889); *United States ex rel. Turner* v. *Williams,* 194 U. S. 279 (1904); *Fong Yue Ting* v. *United States,* 149 U. S. 698 (1893); *Harisiades* v. *Shaughnessy,* 342 U. S. 580 (1952). Pursuant to that power, Congress has provided, as part of a comprehensive plan for the regulation of immigration and naturalization, that "[a]liens who are paupers, professional beggars, or vagrants" or aliens who "are likely at any time to become public charges" shall be excluded from admission into the United States, 8 U. S. C. §§ 1182 (a)(8) and 1182 (a)(15), and that any alien lawfully admitted shall be deported who "has within five years after entry become a public charge from causes not affirmatively shown to have arisen after entry . . . ." 8 U. S. C. § 1251 (a)(8). Admission of aliens likely to become public charges may be conditioned upon the posting of a bond or cash deposit. 8 U. S. C. § 1183. But Congress has not seen fit to impose any burden or restriction on aliens who become indigent after their entry into the United States. Rather, it has broadly declared: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ." 42 U. S. C. § 1981. The protection of this statute has been held to extend to aliens as well as to citizens. *Takahashi,* 334 U. S., at 419 n. 7. Moreover, this Court has made it clear that, whatever may be the

scope of the constitutional right of interstate travel, aliens lawfully within this country have a right to enter and abide in any State in the Union "on an equality of legal privileges with all citizens under non-discriminatory laws." *Takahashi,* 334 U. S., at 420.

State laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with these overriding national policies in an area constitutionally entrusted to the Federal Government. In *Hines* v. *Davidowitz,* 312 U. S., at 66–67, where this Court struck down a Pennsylvania alien registration statute (enacted in 1939, as was the statute under challenge in No. 727) on grounds of federal pre-emption, it was observed that "where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation . . . states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." And in *Takahashi* it was said that the States

> "can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid." 334 U. S., at 419.

Congress has broadly declared as federal policy that lawfully admitted resident aliens who become public charges for causes arising after their entry are not subject to deportation, and that as long as they are here they are entitled to the full and equal benefit of all state laws for the security of persons and property. The state stat-

utes at issue in the instant cases impose auxiliary burdens upon the entrance or residence of aliens who suffer the distress, after entry, of economic dependency on public assistance. Alien residency requirements for welfare benefits necessarily operate, as did the residency requirements in *Shapiro,* to discourage entry into or continued residency in the State. Indeed, in No. 727 the parties stipulated that this was so.

In *Truax* the Court considered the "reasonableness" of a state restriction on the employment of aliens in terms of its effect on the right of a lawfully admitted alien to live where he chooses:

> "It must also be said that reasonable classification implies action consistent with the legitimate interests of the State, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power. The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. . . . The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality." 239 U. S., at 42.

The same is true here, for in the ordinary case an alien, becoming indigent and unable to work, will be unable to live where, because of discriminatory denial of public

assistance, he cannot "secure the necessities of life, including food, clothing and shelter." State alien residency requirements that either deny welfare benefits to noncitizens or condition them on longtime residency, equate with the assertion of a right, inconsistent with federal policy, to deny entrance and abode. Since such laws encroach upon exclusive federal power, they are constitutionally impermissible.

IV

Arizona suggests, finally, that its 15-year durational residency requirement for aliens is actually authorized by federal law. Reliance is placed on § 1402 (b) of the Social Security Act of 1935, added by the Act of Aug. 28, 1950, § 351, 64 Stat. 556, as amended, 42 U. S. C. § 1352 (b). That section provides:

> "The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes, as a condition of eligibility for aid to the permanently and totally disabled under the plan—
>
> . . . . .
>
> "(2) Any citizenship requirement which excludes any citizen of the United States." [11]

[11] Pursuant to his rulemaking power under the Social Security Act, 42 U. S. C. § 1302, the Secretary of Health, Education, and Welfare adopted the following regulations, upon which Arizona also relies:

"3720. *Requirements for State Plans*

"A State plan under titles I, X, XIV, and XVI may not impose, as a condition of eligibility, any citizenship requirement which excludes any citizen of the United States."

"3730. *Interpretation of Requirement*

"State plans need not contain a citizenship requirement. The purpose of IV–3720 is to ensure that where such a requirement is imposed, an otherwise eligible citizen of the United States, regardless of how (by birth or naturalization) or when citizenship was obtained,

The meaning of this provision is not entirely clear. On its face, the statute does not affirmatively authorize, much less command, the States to adopt durational residency requirements or other eligibility restrictions applicable to aliens; it merely directs the Secretary not to approve state-submitted plans that exclude citizens of the United States from eligibility. Cf. *Shapiro* v. *Thompson,* 394 U. S., at 638–641.

We have been unable to find in the legislative history of the 1950 amendments any clear indication of congressional intent in enacting § 1402 (b).[12] The provision appears to have its roots in identical language of the old-age assistance and aid-to-the-blind sections of the Social Security Act of 1935 as originally enacted. 49 Stat. 620, 42 U. S. C. § 302 (b); 49 Stat. 645, 42 U. S. C. § 1202 (b). The House and Senate Committee Reports expressly state, with reference to old-age assistance, that:

> "A person shall not be denied assistance on the ground that he has not been a United States citizen for a number of years, if in fact, when he receives assistance, he is a United States citizen. This means that a State may, if it wishes, assist only those who are citizens, but must not insist on their having been born citizens or on their having been naturalized citizens for a specified period of time." [13]

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shall not be disqualified from receiving aid or assistance under titles I, X, XIV, and XVI.

"Where there is an eligibility requirement applicable to noncitizens, State plans may, as an alternative to excluding all noncitizens, provide for qualifying noncitizens, otherwise eligible, who have resided in the United States for a specific number of years." HEW Handbook of Public Assistance Administration, pt. IV.

[12] H. R. Rep. No. 1300, 81st Cong., 1st Sess., 53, 153–154; S. Rep. No. 1669, 81st Cong., 2d Sess.; H. R. Conf. Rep. No. 2771, 81st Cong., 2d Sess., 118–119.

[13] H. R. Rep. No. 615, 74th Cong., 1st Sess., 18; S. Rep. No. 628, 74th Cong., 1st Sess., 29.

It is apparent from this that Congress' principal concern in 1935 was to prevent the States from distinguishing between native-born American citizens and naturalized citizens in the distribution of welfare benefits. It may be assumed that Congress was motivated by a similar concern in 1950 when it enacted § 1402 (b). As for the indication in the 1935 Committee Reports that the States, in their discretion, could withhold benefits from noncitizens, certain members of Congress simply may have been expressing their understanding of the law only insofar as it had then developed, that is, before *Takahashi* was decided. But if § 1402 (b), as well as the identical provisions for old-age assistance and aid to the blind, were to be read so as to authorize discriminatory treatment of aliens at the option of the States, *Takahashi* demonstrates that serious constitutional questions are presented. Although the Federal Government admittedly has broad constitutional power to determine what aliens shall be admitted to the United States, the period they may remain, and the terms and conditions of their naturalization, Congress does not have the power to authorize the individual States to violate the Equal Protection Clause. *Shapiro* v. *Thompson,* 394 U. S., at 641. Under Art. I, § 8, cl. 4, of the Constitution, Congress' power is to "establish an uniform Rule of Naturalization." A congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene this explicit constitutional requirement of uniformity.[14] Since "statutes should be construed whenever possible so as to uphold

[14] We have no occasion to decide whether Congress, in the exercise of the immigration and naturalization power, could itself enact a statute imposing on aliens a uniform nationwide residency requirement as a condition of federally funded welfare benefits.

their constitutionality," *United States* v. *Vuitch,* 402 U. S. 62, 70 (1971), we conclude that § 1402 (b) does not authorize the Arizona 15-year national residency requirement.

The judgments appealed from are affirmed.

It is so ordered.

MR. JUSTICE HARLAN joins in Parts III and IV of the Court's opinion, and in the judgment of the Court.

SIMPSON *v.* FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

No. 1267. Decided June 14, 1971

A store manager and a customer were robbed by two armed men. Petitioner was tried and convicted of robbing the manager, but on retrial after reversal he was acquitted. He was then charged with robbing the customer, his motion to quash the information on double jeopardy grounds was overruled, and he was found guilty. Each jury verdict was a general one. The District Court of Appeal, after the decision in *Ashe* v. *Swenson,* 397 U. S. 436, held as a matter of law that, while the acquittal at the second trial entitled petitioner to invoke collateral estoppel, his conviction at the first trial gave rise to a "double collateral estoppel," allowing the State to rely on the finding of the jury at the first trial that he was a participant in the robbery. The State Supreme Court denied review. *Held:* As stated in *Ashe, supra,* "mutuality" is not an ingredient of the collateral estoppel rule imposed on the States by the Fifth and Fourteenth Amendments; and unless the jury verdict in the second trial "could have [been] grounded . . . upon an issue other than that which the defendant seeks to foreclose from consideration" the double jeopardy provision vitiates petitioner's conviction.

Certiorari granted; 237 So. 2d 341, vacated and remanded.

PER CURIAM.

On November 9, 1966, two armed men entered a store in Jacksonville, Florida, and robbed the manager and a customer. During 1967 petitioner was tried and convicted in the state courts, after a jury trial, of the armed robbery of the manager, but the conviction was reversed on appeal because the trial judge neglected to instruct the jury on the lesser-included offense of larceny. *Griffin* v. *State,* 202 So. 2d 602 (Fla. Dist. Ct. App. 1967). In 1968 petitioner was retried on the same charge and acquitted. Subsequently, he was charged with robbing the customer. His motion to quash the information on

double jeopardy grounds was overruled and a jury found petitioner guilty of armed robbery. Each of the three jury verdicts here involved was a general one. The trial court imposed a 30-year sentence and petitioner appealed to the District Court of Appeal.

Prior to the adjudication of petitioner's appeal, this Court rendered its decision in *Ashe* v. *Swenson,* 397 U. S. 436. We there held that the principle of collateral estoppel, which "bars relitigation between the same parties of issues actually determined at a previous trial," *id.,* at 442, is "embodied in the Fifth Amendment guarantee against double jeopardy," *id.,* at 445, and is fully applicable to the States, by force of the Fourteenth Amendment, in light of *Benton* v. *Maryland,* 395 U. S. 784.

The factual situation presented in *Ashe* remarkably parallels that of the instant case. There three or four men had interrupted a poker game and robbed all six participants. Petitioner had been acquitted by a general jury verdict on a charge of robbing one of the poker players, but was later tried and convicted of robbing a second. He contended that the prohibition against double jeopardy operated as a bar to the second prosecution because the only issue in each trial was the identity of the robbers. We held in *Ashe* that:

> "Where a previous judgment of acquittal was based upon a general verdict . . . [the rule of collateral estoppel] requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'" *Ashe, supra,* at 444.

Here, as in *Ashe,* petitioner contends that his identity as one of the robbers was the sole disputed issue at each of his trials. The District Court of Appeal, however,

declined to examine the record of the second trial, but simply held instead, as a matter of law, that while petitioner's acquittal at the second trial entitled him to invoke collateral estoppel, his conviction at the first trial (where the sufficiency of the evidence was not disputed on appeal) gave rise to a "double collateral estoppel in that by application of this doctrine, appellant is estopped from contending without further proof that the State failed to prove the issue of his identity as one of the robbers on . . . the second trial inasmuch as on the first trial a jury had found above and beyond a reasonable doubt that appellant was a participant in the robbery." *Simpson* v. *State,* 237 So. 2d 341, 342 (Fla. App. 1970).

The Supreme Court of Florida, by a divided vote, declined review, and petitioner filed a timely petition for a writ of certiorari with this Court. We grant the writ and we vacate the judgment.

The ground upon which the state court resolved petitioner's contention is plainly not tenable. Indeed, in *Ashe* itself, we specifically noted that "mutuality" was not an ingredient of the collateral estoppel rule imposed by the Fifth and Fourteenth Amendments upon the States. *Ashe, supra,* at 443. It is clear that Florida could not have retried petitioner a third time on the charge of robbing the store manager simply because it had previously secured a jury verdict of guilty as well as one of acquittal. And, had the second trial never occurred, the prosecutor could not, while trying the case under review, have laid the first jury verdict before the trial judge and demanded an instruction to the jury that, as a matter of law, petitioner was one of the armed robbers in the store that night. It must, therefore, be equally clear that unless the jury verdict in the second trial "could have [been] grounded . . . upon an issue other than that which the defendant seeks to foreclose

from consideration" the constitutional guarantee against being twice put in jeopardy for the same offense vitiates petitioner's conviction.

The judgment of the Florida District Court of Appeal is vacated and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the decision of this case.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS joins.

The robbery of the manager and the robbery of the customer grew out of one criminal episode. I agree with the Court's disposition but, for the reasons stated in my concurring opinion in *Ashe* v. *Swenson,* 397 U. S. 436, 448 (1970), I would also hold that on the facts of this case the Double Jeopardy Clause prohibited Florida from prosecuting petitioner for the robbery of the customer.

The CHIEF JUSTICE and MR. JUSTICE BLACKMUN dissent for the reasons given in the dissenting opinion of THE CHIEF JUSTICE in *Ashe* v. *Swenson,* 397 U. S. 436, 460.

BIVENS *v.* SIX UNKNOWN NAMED AGENTS OF FEDERAL BUREAU OF NARCOTICS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 301. Argued January 12, 1971—Decided June 21, 1971

Petitioner's complaint alleged that respondent agents of the Federal Bureau of Narcotics, acting under color of federal authority, made a warrantless entry of his apartment, searched the apartment, and arrested him on narcotics charges. All of the acts were alleged to have been done without probable cause. Petitioner's suit to recover damages from the agents was dismissed by the District Court on the alternative grounds (1) that it failed to state a federal cause of action and (2) that respondents were immune from suit by virtue of their official position. The Court of Appeals affirmed on the first ground alone. *Held:*

1. Petitioner's complaint states a federal cause of action under the Fourth Amendment for which damages are recoverable upon proof of injuries resulting from the federal agents' violation of that Amendment. Pp. 390–397.

2. The Court does not reach the immunity question, which was not passed on by the Court of Appeals. Pp. 397–398.

409 F. 2d 718, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, WHITE, and MARSHALL, JJ., joined. HARLAN, J., filed an opinion concurring in the judgment, *post,* p. 398. BURGER, C. J., *post,* p. 411, BLACK, J., *post,* p. 427, and BLACKMUN, J., *post,* p. 430, filed dissenting opinions.

Stephen A. Grant argued the cause and filed a brief for petitioner.

Jerome Feit argued the cause for respondents. On the brief were *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Robert V. Zener.*

Melvin L. Wulf filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The Fourth Amendment provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

In *Bell* v. *Hood,* 327 U. S. 678 (1946), we reserved the question whether violation of that command by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct. Today we hold that it does.

This case has its origin in an arrest and search carried out on the morning of November 26, 1965. Petitioner's complaint alleged that on that day respondents, agents of the Federal Bureau of Narcotics acting under claim of federal authority, entered his apartment and arrested him for alleged narcotics violations. The agents manacled petitioner in front of his wife and children, and threatened to arrest the entire family. They searched the apartment from stem to stern. Thereafter, petitioner was taken to the federal courthouse in Brooklyn, where he was interrogated, booked, and subjected to a visual strip search.

On July 7, 1967, petitioner brought suit in Federal District Court. In addition to the allegations above, his complaint asserted that the arrest and search were effected without a warrant, and that unreasonable force was employed in making the arrest; fairly read, it alleges as well that the arrest was made without probable cause.[1] Petitioner claimed to have suffered great humili-

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[1] Petitioner's complaint does not explicitly state that the agents had no probable cause for his arrest, but it does allege that the arrest was "done unlawfully, unreasonably and contrary to law." App. 2. Petitioner's affidavit in support of his motion for summary

ation, embarrassment, and mental suffering as a result of the agents' unlawful conduct, and sought $15,000 damages from each of them. The District Court, on respondents' motion, dismissed the complaint on the ground, *inter alia,* that it failed to state a cause of action.[2] 276 F. Supp. 12 (EDNY 1967). The Court of Appeals, one judge concurring specially,[3] affirmed on that basis. 409 F. 2d 718 (CA2 1969). We granted certiorari. 399 U. S. 905 (1970). We reverse.

I

Respondents do not argue that petitioner should be entirely without remedy for an unconstitutional invasion of his rights by federal agents. In respondents' view, however, the rights that petitioner asserts—primarily rights of privacy—are creations of state and not of federal law. Accordingly, they argue, petitioner may obtain money damages to redress invasion of these rights only by an action in tort, under state law, in the state courts. In this scheme the Fourth Amendment would serve merely to limit the extent to which the agents could de-

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judgment swears that the search was "without cause, consent or warrant," and that the arrest was "without cause, reason or warrant." App. 28.

[2] The agents were not named in petitioner's complaint, and the District Court ordered that the complaint be served upon "those federal agents who it is indicated by the records of the United States Attorney participated in the November 25, 1965, arrest of the [petitioner]." App. 3. Five agents were ultimately served.

[3] Judge Waterman, concurring, expressed the thought that "the federal courts can . . . entertain this cause of action irrespective of whether a statute exists specifically authorizing a federal suit against federal officers for damages" for acts such as those alleged. In his view, however, the critical point was recognition that some cause of action existed, albeit a state-created one, and in consequence he was willing *"as of now"* to concur in the holding of the Court of Appeals. 409 F. 2d, at 726 (emphasis in original).

fend the state law tort suit by asserting that their actions were a valid exercise of federal power: if the agents were shown to have violated the Fourth Amendment, such a defense would be lost to them and they would stand before the state law merely as private individuals. Candidly admitting that it is the policy of the Department of Justice to remove all such suits from the state to the federal courts for decision,[4] respondents nevertheless urge that we uphold dismissal of petitioner's complaint in federal court, and remit him to filing an action in the state courts in order that the case may properly be removed to the federal court for decision on the basis of state law.

We think that respondents' thesis rests upon an unduly restrictive view of the Fourth Amendment's protection against unreasonable searches and seizures by federal agents, a view that has consistently been rejected by this Court. Respondents seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relation-

[4] "[S]ince it is the present policy of the Department of Justice to remove to the federal courts all suits in state courts against federal officers for trespass or false imprisonment, a claim for relief, whether based on state common law or directly on the Fourth Amendment, will ultimately be heard in a federal court." Brief for Respondents 13 (citations omitted); see 28 U. S. C. § 1442 (a); *Willingham* v. *Morgan,* 395 U. S. 402 (1969). In light of this, it is difficult to understand our Brother BLACKMUN'S complaint that our holding today "opens the door for another avalanche of new federal cases." *Post,* at 430. In estimating the magnitude of any such "avalanche," it is worth noting that a survey of comparable actions against state officers under 42 U. S. C. § 1983 found only 53 reported cases in 17 years (1951–1967) that survived a motion to dismiss. Ginger & Bell, Police Misconduct Litigation—Plaintiff's Remedies, 15 Am. Jur. Trials 555, 580–590 (1968). Increasing this figure by 900% to allow for increases in rate and unreported cases, every federal district judge could expect to try one such case every 13 years.

ship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own. Cf. *Amos* v. *United States,* 255 U. S. 313, 317 (1921); *United States* v. *Classic,* 313 U. S. 299, 326 (1941). Accordingly, as our cases make clear, the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen. It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell* v. *Hood,* 327 U. S., at 684 (footnote omitted); see *Bemis Bros. Bag Co.* v. *United States,* 289 U. S. 28, 36 (1933) (Cardozo, J.); *The Western Maid,* 257 U. S. 419, 433 (1922) (Holmes, J.).

First. Our cases have long since rejected the notion that the Fourth Amendment proscribes only such conduct as would, if engaged in by private persons, be condemned by state law. Thus in *Gambino* v. *United States,* 275 U. S. 310 (1927), petitioners were convicted of conspiracy to violate the National Prohibition Act on the basis of evidence seized by state police officers incident to petitioners' arrest by those officers solely for the purpose of enforcing federal law. *Id.,* at 314. Notwithstanding the lack of probable cause for the arrest, *id.,* at 313, it would have been permissible under state law if effected

by private individuals.[5] It appears, moreover, that the officers were under direction from the Governor to aid in the enforcement of federal law. *Id.*, at 315–317. Accordingly, if the Fourth Amendment reached only to conduct impermissible under the law of the State, the Amendment would have had no application to the case. Yet this Court held the Fourth Amendment applicable and reversed petitioners' convictions as having been based upon evidence obtained through an unconstitutional search and seizure. Similarly, in *Byars* v. *United States,* 273 U. S. 28 (1927), the petitioner was convicted on the basis of evidence seized under a warrant issued, without probable cause under the Fourth Amendment, by a state court judge for a state law offense. At the invitation of state law enforcement officers, a federal prohibition agent participated in the search. This Court explicitly refused to inquire whether the warrant was "good under the state law . . . since in no event could it constitute the basis for a *federal* search and seizure." *Id.*, at 29 (emphasis added).[6] And our recent decisions regarding electronic surveillance have made it clear beyond peradventure that the Fourth Amendment is not tied to the

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[5] New York at that time followed the common-law rule that a private person may arrest another if the latter has in fact committed a felony, and that if such is the case the presence or absence of probable cause is irrelevant to the legality of the arrest. See *McLoughlin* v. *New York Edison Co.,* 252 N. Y. 202, 169 N. E. 277 (1929); cf. N. Y. Code Crim. Proc. § 183 (1958) for codification of the rule. Conspiracy to commit a federal crime was at the time a felony. Act of March 4, 1909, § 37, 35 Stat. 1096.

[6] Conversely, we have in some instances rejected Fourth Amendment claims despite facts demonstrating that federal agents were acting in violation of local law. *McGuire* v. *United States,* 273 U. S. 95 (1927) (trespass *ab initio*); *Hester* v. *United States,* 265 U. S. 57 (1924) ("open fields" doctrine); cf. *Burdeau* v. *McDowell,* 256 U. S. 465 (1921) (possession of stolen property).

niceties of local trespass laws. *Katz* v. *United States,* 389 U. S. 347 (1967); *Berger* v. *New York,* 388 U. S. 41 (1967); *Silverman* v. *United States,* 365 U. S. 505, 511 (1961). In light of these cases, respondents' argument that the Fourth Amendment serves only as a limitation on federal defenses to a state law claim, and not as an independent limitation upon the exercise of federal power, must be rejected.

Second. The interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile. Thus, we may bar the door against an unwelcome private intruder, or call the police if he persists in seeking entrance. The availability of such alternative means for the protection of privacy may lead the State to restrict imposition of liability for any consequent trespass. A private citizen, asserting no authority other than his own, will not normally be liable in trespass if he demands, and is granted, admission to another's house. See W. Prosser, The Law of Torts § 18, pp. 109–110 (3d ed. 1964); 1 F. Harper & F. James, The Law of Torts § 1.11 (1956). But one who demands admission under a claim of federal authority stands in a far different position. Cf. *Amos* v. *United States,* 255 U. S. 313, 317 (1921). The mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest by resort to the local police; and a claim of authority to enter is likely to unlock the door as well. See *Weeks* v. *United States,* 232 U. S. 383, 386 (1914); *Amos* v. *United States, supra.*[7] "In such cases there is no safety for the citizen,

[7] Similarly, although the Fourth Amendment confines an officer executing a search warrant strictly within the bounds set by the warrant, *Marron* v. *United States,* 275 U. S. 192, 196 (1927); see *Stanley* v. *Georgia,* 394 U. S. 557, 570–572 (1969) (STEWART, J.,

except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime." *United States* v. *Lee,* 106 U. S. 196, 219 (1882).[8] Nor is it adequate to answer that state law may take into account the different status of one clothed with the authority of the Federal Government. For just as state law may not authorize federal agents to violate the Fourth Amendment, *Byars* v. *United States, supra; Weeks* v. *United States, supra; In re Ayers,* 123 U. S. 443, 507 (1887), neither may state law undertake to limit the extent to which federal authority can be exercised. *In re Neagle,* 135 U. S. 1 (1890). The inevitable consequence of this dual limitation on state power is that the federal question becomes not merely a possible defense to the state law action, but an independent claim both necessary and sufficient to make out the plaintiff's cause of action. Cf. *Boilermakers* v. *Hardeman,* 401 U. S. 233, 241 (1971).

Third. That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty. See *Nixon* v. *Condon,* 286 U. S. 73 (1932);

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concurring in result), a private individual lawfully in the home of another will not normally be liable for trespass beyond the bounds of his invitation absent clear notice to that effect. See 1 F. Harper & F. James, The Law of Torts § 1.11 (1956).

[8] Although no State has undertaken to limit the common-law doctrine that one may use reasonable force to resist an unlawful arrest by a private person, at least two States have outlawed resistance to an unlawful arrest sought to be made by a person known to be an officer of the law. R. I. Gen. Laws § 12–7–10 (1969); *State* v. *Koonce,* 89 N. J. Super. 169, 180–184, 214 A. 2d 428, 433–436 (1965).

Nixon v. *Herndon,* 273 U. S. 536, 540 (1927); *Swafford* v. *Templeton,* 185 U. S. 487 (1902); *Wiley* v. *Sinkler,* 179 U. S. 58 (1900); J. Landynski, Search and Seizure and the Supreme Court 28 *et seq.* (1966); N. Lasson, History and Development of the Fourth Amendment to the United States Constitution 43 *et seq.* (1937); Katz, The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in *Bell* v. *Hood,* 117 U. Pa. L. Rev. 1, 8–33 (1968); cf. *West* v. *Cabell,* 153 U. S. 78 (1894); *Lammon* v. *Feusier,* 111 U. S. 17 (1884). Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But "it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell* v. *Hood,* 327 U. S., at 684 (footnote omitted). The present case involves no special factors counselling hesitation in the absence of affirmative action by Congress. We are not dealing with a question of "federal fiscal policy," as in *United States* v. *Standard Oil Co.,* 332 U. S. 301, 311 (1947). In that case we refused to infer from the Government-soldier relationship that the United States could recover damages from one who negligently injured a soldier and thereby caused the Government to pay his medical expenses and lose his services during the course of his hospitalization. Noting that Congress was normally quite solicitous where the federal purse was involved, we pointed out that "the United States [was] the party plaintiff to the suit. And the United States has power at any time to create the liability." *Id.,* at 316; see *United States* v. *Gilman,* 347 U. S. 507 (1954). Nor are we asked in this case to impose liability upon a congressional employee for actions contrary to no constitu-

tional prohibition, but merely said to be in excess of the authority delegated to him by the Congress. *Wheeldin* v. *Wheeler,* 373 U. S. 647 (1963). Finally, we cannot accept respondents' formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment. For we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress. The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts. Cf. *J. I. Case Co.* v. *Borak,* 377 U. S. 426, 433 (1964); *Jacobs* v. *United States,* 290 U. S. 13, 16 (1933). "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury* v. *Madison,* 1 Cranch 137, 163 (1803). Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment, *supra,* at 390–395, we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment.

II

In addition to holding that petitioner's complaint had failed to state facts making out a cause of action, the District Court ruled that in any event respondents were immune from liability by virtue of their official position. 276 F. Supp., at 15. This question was not passed upon by the Court of Appeals, and accordingly we do not con-

sider it here. The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE HARLAN, concurring in the judgment.

My initial view of this case was that the Court of Appeals was correct in dismissing the complaint, but for reasons stated in this opinion I am now persuaded to the contrary. Accordingly, I join in the judgment of reversal.

Petitioner alleged, in his suit in the District Court for the Eastern District of New York, that the defendants, federal agents acting under color of federal law, subjected him to a search and seizure contravening the requirements of the Fourth Amendment. He sought damages in the amount of $15,000 from each of the agents. Federal jurisdiction was claimed, *inter alia*,[1] under 28 U. S. C. § 1331 (a) which provides:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

The District Court dismissed the complaint for lack of federal jurisdiction under 28 U. S. C. § 1331 (a) and failure to state a claim for which relief may be granted. 276 F. Supp 12 (EDNY 1967). On appeal, the Court of Appeals concluded, on the basis of this Court's decision in *Bell* v. *Hood*, 327 U. S. 678 (1946), that petitioner's claim for damages did "[arise] under the Constitution"

[1] Petitioner also asserted federal jurisdiction under 42 U. S. C. § 1983 and 28 U. S. C. § 1343 (3), and 28 U. S. C. § 1343 (4). Neither will support federal jurisdiction over the claim. See *Bivens* v. *Six Unknown Named Agents*, 409 F. 2d 718, 720 n. 1 (CA2 1969).

within the meaning of 28 U. S. C. § 1331 (a); but the District Court's judgment was affirmed on the ground that the complaint failed to state a claim for which relief can be granted. 409 F. 2d 718 (CA2 1969).

In so concluding, Chief Judge Lumbard's opinion reasoned, in essence, that: (1) the framers of the Fourth Amendment did not appear to contemplate a "wholly new federal cause of action founded directly on the Fourth Amendment," *id.*, at 721, and (2) while the federal courts had power under a general grant of jurisdiction to imply a federal remedy for the enforcement of a constitutional right, they should do so only when the absence of alternative remedies renders the constitutional command a "mere 'form of words.'" *Id.*, at 723. The Government takes essentially the same position here. Brief for Respondents 4–5. And two members of the Court add the contention that we lack the constitutional power to accord Bivens a remedy for damages in the absence of congressional action creating "a federal cause of action for damages for an unreasonable search in violation of the Fourth Amendment." Opinion of MR. JUSTICE BLACK, *post,* at 427; see also opinion of THE CHIEF JUSTICE, *post,* at 418, 422.

For the reasons set forth below, I am of the opinion that federal courts do have the power to award damages for violation of "constitutionally protected interests" and I agree with the Court that a traditional judicial remedy such as damages is appropriate to the vindication of the personal interests protected by the Fourth Amendment.

I

I turn first to the contention that the constitutional power of federal courts to accord Bivens damages for his claim depends on the passage of a statute creating a "federal cause of action." Although the point is not

entirely free of ambiguity,[2] I do not understand either the Government or my dissenting Brothers to maintain that Bivens' contention that he is entitled to be free from the type of official conduct prohibited by the Fourth Amendment depends on a decision by the State in which he resides to accord him a remedy. Such a position would be incompatible with the presumed availability of federal equitable relief, if a proper showing can be made in terms of the ordinary principles governing equitable remedies. See *Bell* v. *Hood,* 327 U. S. 678, 684 (1946). However broad a federal court's discretion concerning equitable remedies, it is absolutely clear—at least after *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 (1938)—that in a nondiversity suit a federal court's power to grant even equitable relief depends on the presence of a substantive right derived from federal law. Compare *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 105–107 (1945), with *Holmberg* v. *Armbrecht,* 327 U. S. 392, 395 (1946). See also H. Hart & H. Wechsler, The Federal Courts and the Federal System 818–819 (1953).

Thus the interest which Bivens claims—to be free from official conduct in contravention of the Fourth Amendment—is a federally protected interest. See generally Katz, The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in *Bell* v. *Hood,* 117 U. Pa. L. Rev. 1, 33–34 (1968).[3] Therefore, the question

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[2] See n. 3, *infra.*

[3] The Government appears not quite ready to concede this point. Certain points in the Government's argument seem to suggest that the "state-created right—federal defense" model reaches not only the question of the power to accord a federal damages remedy, but also the claim to any judicial remedy in any court. Thus, we are pointed to Lasson's observation concerning Madison's version of the Fourth Amendment as introduced into the House:

"The observation may be made that the language of the proposal did not purport to *create* the right to be secure from unreasonable

of judicial *power* to grant Bivens damages is not a problem of the "source" of the "right"; instead, the question is whether the power to authorize damages as a judicial

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search and seizures but merely stated it as a right which already existed."

N. Lasson, History and Development of the Fourth Amendment to the United States Constitution 100 n. 77 (1937), quoted in Brief for Respondents 11 n. 7. And, on the problem of federal equitable vindication of constitutional rights without regard to the presence of a "state-created right," see Hart, The Relations Between State and Federal Law, 54 Col. L. Rev. 489, 523–524 (1954), quoted in Brief for Respondents 17.

On this point, the choice of phraseology in the Fourth Amendment itself is singularly unpersuasive. The leading argument against a "Bill of Rights" was the fear that individual liberties not specified expressly would be taken as excluded. See generally, Lasson, *supra,* at 79–105. This circumstance alone might well explain why the authors of the Bill of Rights would opt for language which presumes the existence of a fundamental interest in liberty, albeit originally derived from the common law. See *Entick* v. *Carrington,* 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (1765).

In truth, the legislative record as a whole behind the Bill of Rights is silent on the rather refined doctrinal question whether the framers considered the rights therein enumerated as dependent in the first instance on the decision of a State to accord legal status to the personal interests at stake. That is understandable since the Government itself points out that general federal-question jurisdiction was not extended to the federal district courts until 1875. Act of March 3, 1875, § 1, 18 Stat. 470. The most that can be drawn from this historical fact is that the authors of the Bill of Rights assumed the adequacy of common-law remedies to vindicate the federally protected interest. One must first combine this assumption with contemporary modes of jurisprudential thought which appeared to link "rights" and "remedies" in a 1:1 correlation, cf. *Marbury* v. *Madison,* 1 Cranch 137, 163 (1803), before reaching the conclusion that the framers are to be understood today as having created no federally protected interests. And, of course, that would simply require the conclusion that federal equitable relief would not lie to protect those interests guarded by the Fourth Amendment.

Professor Hart's observations concerning the "imperceptible steps"

remedy for the vindication of a federal constitutional right is placed by the Constitution itself exclusively in Congress' hands.

II

The contention that the federal courts are powerless to accord a litigant damages for a claimed invasion of his federal constitutional rights until Congress explicitly authorizes the remedy cannot rest on the notion that the decision to grant compensatory relief involves a resolution of policy considerations not susceptible of judicial discernment. Thus, in suits for damages based on violations of federal statutes lacking any express authorization of a damage remedy, this Court has authorized such relief where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute. *J. I. Case Co.* v. *Borak,* 377 U. S. 426 (1964); *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen,* 323 U. S. 210, 213 (1944). Cf. *Wyandotte Transportation Co.* v. *United States,* 389 U. S. 191, 201–204 (1967).[4]

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between *In re Ayers,* 123 U. S. 443 (1887), and *Ex parte Young,* 209 U. S. 123 (1908), see Hart, *supra,* fail to persuade me that the source of the legal interest asserted here is other than the Federal Constitution itself. *In re Ayers* concerned the precise question whether the Eleventh Amendment barred suit in a federal court for an injunction compelling a state officer to perform a contract to which the State was a party. Having concluded that the suit was inescapably a suit against the State under the Eleventh Amendment, the Court spoke of the presence of state-created rights as a distinguishing factor supporting the exercise of federal jurisdiction in other contract clause cases. The absence of a state-created right in *In re Ayers* served to distinguish that case from the perspective of the State's immunity to suit; *Ayers* simply does not speak to the analytically distinct question whether the Constitution is in the relevant sense a source of legal protection for the "rights" enumerated therein.

[4] The *Borak* case is an especially clear example of the exercise of federal judicial power to accord damages as an appropriate remedy in the absence of any express statutory authorization of a federal

If it is not the nature of the remedy which is thought to render a judgment as to the appropriateness of damages inherently "legislative," then it must be the nature of the legal interest offered as an occasion for invoking otherwise appropriate judicial relief. But I do not think that the fact that the interest is protected by the Constitution rather than statute or common law justifies the assertion that federal courts are powerless to grant damages in the absence of explicit congressional action authorizing the remedy. Initially, I note that it would be at least anomalous to conclude that the federal judiciary—while competent to choose among the range of traditional judicial remedies to implement statutory and common-law policies, and even to generate substantive rules governing primary behavior in furtherance of broadly formulated policies articulated by statute or Constitution, see *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448 (1957); *United States* v. *Standard Oil Co.,* 332 U. S. 301, 304–311 (1947); *Clearfield Trust Co.* v. *United States,* 318 U. S. 363 (1943)—is powerless to accord a damages

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cause of action. There we "implied"—from what can only be characterized as an "exclusively procedural provision" affording access to a federal forum, cf. *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448, 462–463 (1957) (Frankfurter, J., dissenting)—a private cause of action for damages for violation of § 14 (a) of the Securities Exchange Act of 1934, 48 Stat. 895, 15 U. S. C. § 78n (a). See § 27, 48 Stat. 902, 15 U. S. C. § 78aa. We did so in an area where federal regulation has been singularly comprehensive and elaborate administrative enforcement machinery had been provided. The exercise of judicial power involved in *Borak* simply cannot be justified in terms of statutory construction, see Hill, Constitutional Remedies, 69 Col. L. Rev. 1109, 1120–1121 (1969); nor did the *Borak* Court purport to do so. See *Borak, supra,* at 432–434. The notion of "implying" a remedy, therefore, as applied to cases like *Borak,* can only refer to a process whereby the federal judiciary exercises a choice among *traditionally available* judicial remedies according to reasons related to the substantive social policy embodied in an act of positive law. See *ibid.,* and *Bell* v. *Hood, supra,* at 684.

remedy to vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of the popular will.

More importantly, the presumed availability of federal equitable relief against threatened invasions of constitutional interests appears entirely to negate the contention that the status of an interest as constitutionally protected divests federal courts of the power to grant damages absent express congressional authorization. Congress provided specially for the exercise of equitable remedial powers by federal courts, see Act of May 8, 1792, § 2, 1 Stat. 276; C. Wright, Law of Federal Courts 257 (2d ed., 1970), in part because of the limited availability of equitable remedies in state courts in the early days of the Republic. See *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 104–105 (1945). And this Court's decisions make clear that, at least absent congressional restrictions, the scope of equitable remedial discretion is to be determined according to the distinctive historical traditions of equity as an institution, *Holmberg* v. *Armbrecht,* 327 U. S. 392, 395–396 (1946); *Sprague* v. *Ticonic National Bank,* 307 U. S. 161, 165–166 (1939). The reach of a federal district court's "inherent equitable powers," *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448, 460 (Burton, J., concurring in result), is broad indeed, *e. g., Swann* v. *Charlotte-Mecklenburg Board of Education,* 401 U. S. 1 (1971); nonetheless, the federal judiciary is not empowered to grant equitable relief in the absence of congressional action extending jurisdiction over the subject matter of the suit. See *Textile Workers* v. *Lincoln Mills, supra,* at 460 (Burton, J., concurring in result); Katz, 117 U. Pa. L. Rev., at 43.[5]

[5] With regard to a court's authority to grant an equitable remedy, the line between "subject matter" jurisdiction and remedial powers has undoubtedly been obscured by the fact that historically the

If explicit congressional authorization is an absolute prerequisite to the power of a federal court to accord compensatory relief regardless of the necessity or appropriateness of damages as a remedy simply because of the status of a legal interest as constitutionally protected, then it seems to me that explicit congressional authorization is similarly prerequisite to the exercise of equitable remedial discretion in favor of constitutionally protected interests. Conversely, if a general grant of jurisdiction to the federal courts by Congress is thought adequate to empower a federal court to grant equitable relief for all areas of subject-matter jurisdiction enumerated therein, see 28 U. S. C. § 1331 (a), then it seems to me that the same statute is sufficient to empower a federal court to grant a traditional remedy at law.[6] Of course, the special historical traditions governing the federal equity system, see *Sprague* v. *Ticonic National Bank,* 307 U. S. 161

"system of equity 'derived its doctrines, as well as its powers, from its mode of giving relief.'" See *Guaranty Trust Co.* v. *York, supra,* at 105, quoting C. Langdell, Summary of Equity Pleading xxvii (1877). Perhaps this fact alone accounts for the suggestion sometimes made that a court's power to enjoin invasion of constitutionally protected interests derives directly from the Constitution. See *Bell* v. *Hood,* 71 F. Supp. 813, 819 (SD Cal. 1947).

[6] Chief Judge Lumbard's opinion for the Court of Appeals in the instant case is, as I have noted, in accord with this conclusion:

"Thus, even if the Constitution itself does not give rise to an inherent injunctive power to prevent its violation by governmental officials there are strong reasons for inferring the existence of this power under any general grant of jurisdiction to the federal courts by Congress." 409 F. 2d, at 723.

The description of the remedy as "inferred" cannot, of course, be intended to assimilate the judicial decision to accord such a remedy to any process of statutory construction. Rather, as with the cases concerning remedies, implied from statutory schemes, see n. 4, *supra,* the description of the remedy as "inferred" can only bear on the reasons offered to explain a judicial decision to accord or not to accord a particular remedy.

(1939), might still bear on the comparative appropriateness of granting equitable relief as opposed to money damages. That possibility, however, relates, not to whether the federal courts have the power to afford one type of remedy as opposed to the other, but rather to the criteria which should govern the exercise of our power. To that question, I now pass.

III

The major thrust of the Government's position is that, where Congress has not expressly authorized a particular remedy, a federal court should exercise its power to accord a traditional form of judicial relief at the behest of a litigant, who claims a constitutionally protected interest has been invaded, only where the remedy is "essential," or "indispensable for vindicating constitutional rights." Brief for Respondents 19, 24. While this "essentiality" test is most clearly articulated with respect to damages remedies, apparently the Government believes the same test explains the exercise of equitable remedial powers. *Id.*, at 17–18. It is argued that historically the Court has rarely exercised the power to accord such relief in the absence of an express congressional authorization and that "[i]f Congress had thought that federal officers should be subject to a law different than state law, it would have had no difficulty in saying so, as it did with respect to state officers . . . ." *Id.*, at 20–21; see 42 U. S. C. § 1983. Although conceding that the standard of determining whether a damage remedy should be utilized to effectuate statutory policies is one of "necessity" or "appropriateness," see *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 432 (1964); *United States* v. *Standard Oil Co.*, 332 U. S. 301, 307 (1947), the Government contends that questions concerning congressional discretion to modify judicial remedies relating to constitutionally protected interests warrant a more stringent constraint on

the exercise of judicial power with respect to this class of legally protected interests. Brief for Respondents 21–22.

These arguments for a more stringent test to govern the grant of damages in constitutional cases [7] seem to be adequately answered by the point that the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment. To be sure, "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, Kansas & Texas R. Co.* v. *May*, 194 U. S. 267, 270 (1904). But it must also be recognized that the Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities; at the very least, it strikes me as no more appropriate to await express congressional authorization of traditional judicial relief with regard to these legal interests than with respect to interests protected by federal statutes.

The question then, is, as I see it, whether compensatory relief is "necessary" or "appropriate" to the vindication of the interest asserted. Cf. *J. I. Case Co.* v. *Borak*, *supra*, at 432; *United States* v. *Standard Oil Co.*, *supra*, at 307; Hill, Constitutional Remedies, 69 Col. L. Rev. 1109, 1155 (1969); Katz, 117 U. Pa. L. Rev., at 72. In resolving that question, it seems to me that the range of policy considerations we may take into account is at least as broad as the range of those a legislature would consider with respect to an express statutory authorization of a traditional remedy. In this regard I agree with the Court that the appropriateness of according Bivens

[7] I express no view on the Government's suggestion that congressional authority to simply discard the remedy the Court today authorizes might be in doubt; nor do I understand the Court's opinion today to express any view on that particular question.

compensatory relief does not turn simply on the deterrent effect liability will have on federal official conduct.[8] Damages as a traditional form of compensation for invasion of a legally protected interest may be entirely appropriate even if no substantial deterrent effects on future official lawlessness might be thought to result. Bivens, after all, has invoked judicial processes claiming entitlement to compensation for injuries resulting from allegedly lawless official behavior, if those injuries are properly compensable in money damages. I do not think a court of law—vested with the power to accord a remedy—should deny him his relief simply because he cannot show that future lawless conduct will thereby be deterred.

And I think it is clear that Bivens advances a claim of the sort that, if proved, would be properly compensable in damages. The personal interests protected by the Fourth Amendment are those we attempt to capture by the notion of "privacy"; while the Court today properly points out that the type of harm which officials can inflict when they invade protected zones of an individual's life

[8] And I think it follows from this point that today's decision has little, if indeed any, bearing on the question whether a federal court may properly devise remedies—other than traditionally available forms of judicial relief—for the purpose of enforcing substantive social policies embodied in constitutional or statutory policies. Compare today's decision with *Mapp* v. *Ohio,* 367 U. S. 643 (1961), and *Weeks* v. *United States,* 232 U. S. 383 (1914). The Court today simply recognizes what has long been implicit in our decisions concerning equitable relief and remedies implied from statutory schemes; *i. e.,* that a court of law vested with jurisdiction over the subject matter of a suit has the power—and therefore the duty—to make principled choices among traditional judicial remedies. Whether special prophylactic measures—which at least arguably the exclusionary rule exemplifies, see Hill, The Bill of Rights and the Supervisory Power, 69 Col. L. Rev. 181, 182–185 (1969)—are supportable on grounds other than a court's competence to select among traditional judicial remedies to make good the wrong done, cf. *Bell* v. *Hood, supra,* at 684, is a separate question.

are different from the types of harm private citizens inflict on one another, the experience of judges in dealing with private trespass and false imprisonment claims supports the conclusion that courts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of Fourth Amendment rights.[9]

On the other hand, the limitations on state remedies for violation of common-law rights by private citizens argue in favor of a federal damages remedy. The injuries inflicted by officials acting under color of law, while no less compensable in damages than those inflicted by private parties, are substantially different in kind, as the Court's opinion today discusses in detail. See *Monroe* v. *Pape,* 365 U. S. 167, 195 (1961) (HARLAN, J., concurring). It seems to me entirely proper that these injuries be compensable according to uniform rules of federal law, especially in light of the very large element of federal law which must in any event control the scope of official defenses to liability. See *Wheeldin* v. *Wheeler,* 373 U. S. 647, 652 (1963); *Monroe* v. *Pape, supra,* at 194–195 (HARLAN, J., concurring); *Howard* v. *Lyons,* 360 U. S. 593 (1959). Certainly, there is very little to be gained from the standpoint of federalism by preserving different rules of liability for federal officers dependent on the State where the injury occurs. Cf. *United States* v. *Standard Oil Co.,* 332 U. S. 301, 305–311 (1947).

Putting aside the desirability of leaving the problem of federal official liability to the vagaries of common-law actions, it is apparent that some form of damages is the only possible remedy for someone in Bivens' alleged

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[9] The same, of course, may not be true with respect to other types of constitutionally protected interests, and therefore the appropriateness of money damages may well vary with the nature of the personal interest asserted. See *Monroe* v. *Pape,* 365 U. S. 167, 196 n. 5 (HARLAN, J., concurring).

position. It will be a rare case indeed in which an individual in Bivens' position will be able to obviate the harm by securing injunctive relief from any court. However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit. Finally, assuming Bivens' innocence of the crime charged, the "exclusionary rule" is simply irrelevant. For people in Bivens' shoes, it is damages or nothing.

The only substantial policy consideration advanced against recognition of a federal cause of action for violation of Fourth Amendment rights by federal officials is the incremental expenditure of judicial resources that will be necessitated by this class of litigation. There is, however, something ultimately self-defeating about this argument. For if, as the Government contends, damages will rarely be realized by plaintiffs in these cases because of jury hostility, the limited resources of the official concerned, etc., then I am not ready to assume that there will be a significant increase in the expenditure of judicial resources on these claims. Few responsible lawyers and plaintiffs are likely to choose the course of litigation if the statistical chances of success are truly *de minimis*. And I simply cannot agree with my Brother BLACK that the possibility of "frivolous" claims—if defined simply as claims with no legal merit—warrants closing the courthouse doors to people in Bivens' situation. There are other ways, short of that, of coping with frivolous lawsuits.

On the other hand, if—as I believe is the case with respect, at least, to the most flagrant abuses of official power—damages to some degree will be available when the option of litigation is chosen, then the question appears to be how Fourth Amendment interests rank on a scale of social values compared with, for example, the interests of stockholders defrauded by misleading proxies.

See *J. I. Case Co.* v. *Borak, supra.* Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.

Of course, for a variety of reasons, the remedy may not often be sought. See generally Foote, Tort Remedies for Police Violations of Individual Rights, 39 Minn. L. Rev. 493 (1955). And the countervailing interests in efficient law enforcement of course argue for a protective zone with respect to many types of Fourth Amendment violations. Cf. *Barr* v. *Matteo,* 360 U. S. 564 (1959) (opinion of HARLAN, J.). But, while I express no view on the immunity defense offered in the instant case, I deem it proper to venture the thought that at the very least such a remedy would be available for the most flagrant and patently unjustified sorts of police conduct. Although litigants may not often choose to seek relief, it is important, in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy in these circumstances. It goes without saying that I intimate no view on the merits of petitioner's underlying claim.

For these reasons, I concur in the judgment of the Court.

MR. CHIEF JUSTICE BURGER, dissenting.

I dissent from today's holding which judicially creates a damage remedy not provided for by the Constitution and not enacted by Congress. We would more surely preserve the important values of the doctrine of separa-

tion of powers—and perhaps get a better result—by recommending a solution to the Congress as the branch of government in which the Constitution has vested the legislative power. Legislation is the business of the Congress, and it has the facilities and competence for that task—as we do not. Professor Thayer, speaking of the limits on judicial power, albeit in another context, had this to say: [1]

> "And if it be true that the holders of legislative power are careless or evil, yet the constitutional duty of the court remains untouched; it cannot rightly attempt to protect the people, by undertaking a function not its own. On the other hand, by adhering rigidly to its own duty, the court will help, as nothing else can, to fix the spot where responsibility lies, and to bring down on that precise locality the thunderbolt of popular condemnation. . . . For that course—the true course of judicial duty always—will powerfully help to bring the people and their representatives to a sense of their own responsibility."

This case has significance far beyond its facts and its holding. For more than 55 years this Court has enforced a rule under which evidence of undoubted reliability and probative value has been suppressed and excluded from criminal cases whenever it was obtained in violation of the Fourth Amendment. *Weeks* v. *United States,* 232 U. S. 383 (1914); *Boyd* v. *United States,* 116 U. S. 616, 633 (1886) (dictum). This rule was extended to the States in *Mapp* v. *Ohio,* 367 U. S. 643 (1961).[2]

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[1] J. Thayer, O. Holmes, & F. Frankfurter, John Marshall 88 (Phoenix ed. 1967).

[2] The Court reached the issue of applying the *Weeks* doctrine to the States *sua sponte.*

The rule has rested on a theory that suppression of evidence in these circumstances was imperative to deter law enforcement authorities from using improper methods to obtain evidence.

The deterrence theory underlying the suppression doctrine, or exclusionary rule, has a certain appeal in spite of the high price society pays for such a drastic remedy. Notwithstanding its plausibility, many judges and lawyers and some of our most distinguished legal scholars have never quite been able to escape the force of Cardozo's statement of the doctrine's anomalous result:

> "The criminal is to go free because the constable has blundered. . . . A room is searched against the law, and the body of a murdered man is found. . . . The privacy of the home has been infringed, and the murderer goes free." *People* v. *Defore,* 242 N. Y. 13, 21, 23–24, 150 N. E. 585, 587, 588 (1926).[3]

The plurality opinion in *Irvine* v. *California,* 347 U. S. 128, 136 (1954), catalogued the doctrine's defects:

> "Rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant. It deprives society of its remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches."

From time to time members of the Court, recognizing the validity of these protests, have articulated varying

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[3] What Cardozo suggested as an example of the potentially far-reaching consequences of the suppression doctrine was almost realized in *Killough* v. *United States,* 114 U. S. App. D. C. 305, 315 F. 2d 241 (1962).

alternative justifications for the suppression of important evidence in a criminal trial. Under one of these alternative theories the rule's foundation is shifted to the "sporting contest" thesis that the government must "play the game fairly" and cannot be allowed to profit from its own illegal acts. *Olmstead* v. *United States,* 277 U. S. 438, 469, 471 (1928) (dissenting opinions); see *Terry* v. *Ohio,* 392 U. S. 1, 13 (1968). But the exclusionary rule does not ineluctably flow from a desire to ensure that government plays the "game" according to the rules. If an effective alternative remedy is available, concern for official observance of the law does not require adherence to the exclusionary rule. Nor is it easy to understand how a court can be thought to endorse a violation of the Fourth Amendment by allowing illegally seized evidence to be introduced against a defendant if an effective remedy is provided against the government.

The exclusionary rule has also been justified on the theory that the relationship between the Self-Incrimination Clause of the Fifth Amendment and the Fourth Amendment requires the suppression of evidence seized in violation of the latter. *Boyd* v. *United States, supra,* at 633 (dictum); *Wolf* v. *Colorado,* 338 U. S. 25, 47, 48 (1949) (Rutledge, J., dissenting); *Mapp* v. *Ohio, supra,* at 661–666 (BLACK, J., concurring).

Even ignoring, however, the decisions of this Court that have held that the Fifth Amendment applies only to "testimonial" disclosures, *United States* v. *Wade,* 388 U. S. 218, 221–223 (1967); *Schmerber* v. *California,* 384 U. S. 757, 764 and n. 8 (1966), it seems clear that the Self-Incrimination Clause does not protect a person from the seizure of evidence that is incriminating. It protects a person only from being the conduit by which the police acquire evidence. Mr. Justice Holmes once put it succinctly, "A party is privileged from producing the

evidence but not from its production." *Johnson* v. *United States*, 228 U. S. 457, 458 (1913).

It is clear, however, that neither of these theories undergirds the decided cases in this Court. Rather the exclusionary rule has rested on the deterrent rationale—the hope that law enforcement officials would be deterred from unlawful searches and seizures if the illegally seized, albeit trustworthy, evidence was suppressed often enough and the courts persistently enough deprived them of any benefits they might have gained from their illegal conduct.

This evidentiary rule is unique to American jurisprudence. Although the English and Canadian legal systems are highly regarded, neither has adopted our rule. See Martin, The Exclusionary Rule Under Foreign Law—Canada, 52 J. Crim. L. C. & P. S. 271, 272 (1961); Williams, The Exclusionary Rule Under Foreign Law—England, 52 J. Crim. L. C. & P. S. 272 (1961).

I do not question the need for some remedy to give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials. Without some effective sanction, these protections would constitute little more than rhetoric. Beyond doubt the conduct of some officials requires sanctions as cases like *Irvine* indicate. But the hope that this objective could be accomplished by the exclusion of reliable evidence from criminal trials was hardly more than a wistful dream. Although I would hesitate to abandon it until some meaningful substitute is developed, the history of the suppression doctrine demonstrates that it is both conceptually sterile and practically ineffective in accomplishing its stated objective. This is illustrated by the paradox that an unlawful act against a totally innocent person—such as petitioner claims to be—has been left without an effective remedy, and hence the Court finds

it necessary now—55 years later—to construct a remedy of its own.

Some clear demonstration of the benefits and effectiveness of the exclusionary rule is required to justify it in view of the high price it extracts from society—the release of countless guilty criminals. See Allen, Federalism and the Fourth Amendment: A Requiem for Wolf, 1961 Sup. Ct. Rev. 1, 33 n. 172. But there is no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 667 (1970).

There are several reasons for this failure. The rule does not apply any direct sanction to the individual official whose illegal conduct results in the exclusion of evidence in a criminal trial. With rare exceptions law enforcement agencies do not impose direct sanctions on the individual officer responsible for a particular judicial application of the suppression doctrine. *Id.*, at 710. Thus there is virtually nothing done to bring about a change in his practices. The immediate sanction triggered by the application of the rule is visited upon the prosecutor whose case against a criminal is either weakened or destroyed. The doctrine deprives the police in no real sense; except that apprehending wrongdoers is their business, police have no more stake in successful prosecutions than prosecutors or the public.

The suppression doctrine vaguely assumes that law enforcement is a monolithic governmental enterprise. For example, the dissenters in *Wolf* v. *Colorado, supra,* at 44, argued that:

> "Only by exclusion can we impress upon the zealous *prosecutor* that violation of the Constitution will do him no good. And only when that point is driven home can the *prosecutor* be expected to emphasize

> the importance of observing the constitutional demands in *his instructions to the police.*" (Emphasis added.)

But the prosecutor who loses his case because of police misconduct is not an official in the police department; he can rarely set in motion any corrective action or administrative penalties. Moreover, he does not have control or direction over police procedures or police actions that lead to the exclusion of evidence. It is the rare exception when a prosecutor takes part in arrests, searches, or seizures so that he can guide police action.

Whatever educational effect the rule conceivably might have in theory is greatly diminished in fact by the realities of law enforcement work. Policemen do not have the time, inclination, or training to read and grasp the nuances of the appellate opinions that ultimately define the standards of conduct they are to follow. The issues that these decisions resolve often admit of neither easy nor obvious answers, as sharply divided courts on what is or is not "reasonable" amply demonstrate.[4] Nor can judges, in all candor, forget that opinions sometimes lack helpful clarity.

The presumed educational effect of judicial opinions is also reduced by the long time lapse—often several years—between the original police action and its final judicial evaluation. Given a policeman's pressing responsibilities, it would be surprising if he ever becomes aware of the final result after such a delay. Finally, the exclu-

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[4] For example, in a case arising under *Mapp, supra,* state judges at every level of the state judiciary may find the police conduct proper. On federal habeas corpus a district judge and a court of appeals might agree. Yet, in these circumstances, this Court, reviewing the case as much as 10 years later, might reverse by a narrow margin. In these circumstances it is difficult to conclude that the policeman has violated some rule that he should have known was a restriction on his authority.

sionary rule's deterrent impact is diluted by the fact that there are large areas of police activity that do not result in criminal prosecutions—hence the rule has virtually no applicability and no effect in such situations. Oaks, *supra,* at 720–724.

Today's holding seeks to fill one of the gaps of the suppression doctrine—at the price of impinging on the legislative and policy functions that the Constitution vests in Congress. Nevertheless, the holding serves the useful purpose of exposing the fundamental weaknesses of the suppression doctrine. Suppressing unchallenged truth has set guilty criminals free but demonstrably has neither deterred deliberate violations of the Fourth Amendment nor decreased those errors in judgment that will inevitably occur given the pressures inherent in police work having to do with serious crimes.

Although unfortunately ineffective, the exclusionary rule has increasingly been characterized by a single, monolithic, and drastic judicial response to all official violations of legal norms. Inadvertent errors of judgment that do not work any grave injustice will inevitably occur under the pressure of police work. These honest mistakes have been treated in the same way as deliberate and flagrant *Irvine*-type violations of the Fourth Amendment. For example, in *Miller* v. *United States,* 357 U. S. 301, 309–310 (1958), reliable evidence was suppressed because of a police officer's failure to say a "few more words" during the arrest and search of a known narcotics peddler.

This Court's decision announced today in *Coolidge* v. *New Hampshire, post,* p. 443, dramatically illustrates the extent to which the doctrine represents a mechanically inflexible response to widely varying degrees of police error and the resulting high price that society pays. I dissented in *Coolidge* primarily because I do not believe the Fourth Amendment had been violated. Even on the Court's contrary premise, however, whatever violation

occurred was surely insufficient in nature and extent to justify the drastic result dictated by the suppression doctrine. A fair trial by jury has resolved doubts as to Coolidge's guilt. But now his conviction on retrial is placed in serious question by the remand for a new trial—years after the crime—in which evidence that the New Hampshire courts found relevant and reliable will be withheld from the jury's consideration. It is hardly surprising that such results are viewed with incomprehension by nonlawyers in this country and lawyers, judges, and legal scholars the world over.

Freeing either a tiger or a mouse in a schoolroom is an illegal act, but no rational person would suggest that these two acts should be punished in the same way. From time to time judges have occasion to pass on regulations governing police procedures. I wonder what would be the judicial response to a police order authorizing "shoot to kill" with respect to every fugitive. It is easy to predict our collective wrath and outrage. We, in common with all rational minds, would say that the police response must relate to the gravity and need; that a "shoot" order might conceivably be tolerable to prevent the escape of a convicted killer but surely not for a car thief, a pickpocket or a shoplifter.

I submit that society has at least as much right to expect rationally graded responses from judges in place of the universal "capital punishment" we inflict on all evidence when police error is shown in its acquisition. See ALI, Model Code of Pre-Arraignment Procedure § SS 8.02 (2), p. 23 (Tent. Draft No. 4, 1971), reprinted in the Appendix to this opinion. Yet for over 55 years, and with increasing scope and intensity as today's *Coolidge* holding shows, our legal system has treated vastly dissimilar cases as if they were the same. Our adherence to the exclusionary rule, our resistance to change, and our refusal even to acknowledge the need

for effective enforcement mechanisms bring to mind Holmes' well-known statement:

> "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897).

In characterizing the suppression doctrine as an anomalous and ineffective mechanism with which to regulate law enforcement, I intend no reflection on the motivation of those members of this Court who hoped it would be a means of enforcing the Fourth Amendment. Judges cannot be faulted for being offended by arrests, searches, and seizures that violate the Bill of Rights or statutes intended to regulate public officials. But we can and should be faulted for clinging to an unworkable and irrational concept of law. My criticism is that we have taken so long to find better ways to accomplish these desired objectives. And there are better ways.

Instead of continuing to enforce the suppression doctrine inflexibly, rigidly, and mechanically, we should view it as one of the experimental steps in the great tradition of the common law and acknowledge its shortcomings. But in the same spirit we should be prepared to discontinue what the experience of over half a century has shown neither deters errant officers nor affords a remedy to the totally innocent victims of official misconduct.

I do not propose, however, that we abandon the suppression doctrine until some meaningful alternative can be developed. In a sense our legal system has become the captive of its own creation. To overrule *Weeks* and *Mapp,* even assuming the Court was now prepared to

take that step, could raise yet new problems. Obviously the public interest would be poorly served if law enforcement officials were suddenly to gain the impression, however erroneous, that all constitutional restraints on police had somehow been removed—that an open season on "criminals" had been declared. I am concerned lest some such mistaken impression might be fostered by a flat overruling of the suppression doctrine cases. For years we have relied upon it as the exclusive remedy for unlawful official conduct; in a sense we are in a situation akin to the narcotics addict whose dependence on drugs precludes any drastic or immediate withdrawal of the supposed prop, regardless of how futile its continued use may be.

Reasonable and effective substitutes can be formulated if Congress would take the lead, as it did for example in 1946 in the Federal Tort Claims Act. I see no insuperable obstacle to the elimination of the suppression doctrine if Congress would provide some meaningful and effective remedy against unlawful conduct by government officials.

The problems of both error and deliberate misconduct by law enforcement officials call for a workable remedy. Private damage actions against individual police officers concededly have not adequately met this requirement, and it would be fallacious to assume today's work of the Court in creating a remedy will really accomplish its stated objective. There is some validity to the claims that juries will not return verdicts against individual officers except in those unusual cases where the violation has been flagrant or where the error has been complete, as in the arrest of the wrong person or the search of the wrong house. There is surely serious doubt, for example, that a drug peddler caught packaging his wares will be able to arouse much sympathy in a jury on the ground that the police officer did not announce his identity and

purpose fully or because he failed to utter a "few more words." See *Miller* v. *United States, supra.* Jurors may well refuse to penalize a police officer at the behest of a person they believe to be a "criminal" and probably will not punish an officer for honest errors of judgment. In any event an actual recovery depends on finding non-exempt assets of the police officer from which a judgment can be satisfied.

I conclude, therefore, that an entirely different remedy is necessary but it is one that in my view is as much beyond judicial power as the step the Court takes today. Congress should develop an administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated. The venerable doctrine of *respondeat superior* in our tort law provides an entirely appropriate conceptual basis for this remedy. If, for example, a security guard privately employed by a department store commits an assault or other tort on a customer such as an improper search, the victim has a simple and obvious remedy—an action for money damages against the guard's employer, the department store. W. Prosser, The Law of Torts § 68, pp. 470–480 (3d ed. 1964).[5] Such a statutory scheme would have the added advantage of providing some remedy to the completely innocent persons who are sometimes the victims of illegal police conduct—something that the suppression doctrine, of course, can never accomplish.

A simple structure would suffice.[6] For example, Congress could enact a statute along the following lines:

(a) a waiver of sovereign immunity as to the illegal

[5] Damage verdicts for such acts are often sufficient in size to provide an effective deterrent and stimulate employers to corrective action.

[6] Electronic eavesdropping presents special problems. See 18 U. S. C. §§ 2510–2520 (1964 ed., Supp. V).

acts of law enforcement officials committed in the performance of assigned duties;

(b) the creation of a cause of action for damages sustained by any person aggrieved by conduct of governmental agents in violation of the Fourth Amendment or statutes regulating official conduct;

(c) the creation of a tribunal, quasi-judicial in nature or perhaps patterned after the United States Court of Claims, to adjudicate all claims under the statute;

(d) a provision that this statutory remedy is in lieu of the exclusion of evidence secured for use in criminal cases in violation of the Fourth Amendment; and

(e) a provision directing that no evidence, otherwise admissible, shall be excluded from any criminal proceeding because of violation of the Fourth Amendment.

I doubt that lawyers serving on such a tribunal would be swayed either by undue sympathy for officers or by the prejudice against "criminals" that has sometimes moved lay jurors to deny claims. In addition to awarding damages, the record of the police conduct that is condemned would undoubtedly become a relevant part of an officer's personnel file so that the need for additional training or disciplinary action could be identified or his future usefulness as a public official evaluated. Finally, appellate judicial review could be made available on much the same basis that it is now provided as to district courts and regulatory agencies. This would leave to the courts the ultimate responsibility for determining and articulating standards.

Once the constitutional validity of such a statute is established,[7] it can reasonably be assumed that the States

[7] Any such legislation should emphasize the interdependence between the waiver of sovereign immunity and the elimination of the judicially created exclusionary rule so that if the legislative determination to repudiate the exclusionary rule falls, the entire statutory scheme would fall.

would develop their own remedial systems on the federal model. Indeed there is nothing to prevent a State from enacting a comparable statutory scheme without waiting for the Congress. Steps along these lines would move our system toward more responsible law enforcement on the one hand and away from the irrational and drastic results of the suppression doctrine on the other. Independent of the alternative embraced in this dissenting opinion, I believe the time has come to re-examine the scope of the exclusionary rule and consider at least some narrowing of its thrust so as to eliminate the anomalies it has produced.

In a country that prides itself on innovation, inventive genius, and willingness to experiment, it is a paradox that we should cling for more than a half century to a legal mechanism that was poorly designed and never really worked. I can only hope now that the Congress will manifest a willingness to view realistically the hard evidence of the half-century history of the suppression doctrine revealing thousands of cases in which the criminal was set free because the constable blundered and virtually no evidence that innocent victims of police error—such as petitioner claims to be—have been afforded meaningful redress.

APPENDIX TO OPINION OF BURGER, C. J., DISSENTING

It is interesting to note that studies over a period of years led the American Law Institute to propose the following in its tentative draft of a model pre-arraignment code:

> "(2) *Determination.* Unless otherwise required by the Constitution of the United States or of this State, a motion to suppress evidence based upon a

violation of any of the provisions of this code shall be granted *only if the court finds that such violation was substantial.* In determining whether a violation is substantial the court shall consider all the circumstances, including:

"(a) the importance of the particular interest violated;

"(b) the extent of deviation from lawful conduct;

"(c) the extent to which the violation was willful;

"(d) the extent to which privacy was invaded;

"(e) the extent to which exclusion will tend to prevent violations of this Code;

"(f) whether, but for the violation, the things seized would have been discovered; and

"(g) the extent to which the violation prejudiced the moving party's ability to support his motion, or to defend himself in the proceeding in which the things seized are sought to be offered in evidence against him.

"(3) *Fruits of Prior Unlawful Search.* If a search or seizure is carried out in such a manner that things seized in the course of the search would be subject to a motion to suppress under subsection (1), and if as a result of such search or seizure other evidence is discovered subsequently and offered against a defendant, such evidence shall be subject to a motion to suppress unless the prosecution establishes that such evidence would probably have been discovered by law enforcement authorities irrespective of such search or seizure, and the court finds that exclusion of such evidence is not necessary to deter violations of this Code."

ALI, Model Code of Pre-Arraignment Procedure §§ SS 8.02 (2), (3), pp. 23–24 (Tent. Draft No. 4, 1971) (emphasis supplied).

The Reporters' views on the exclusionary rule are also reflected in their comment on the proposed section:

> "The Reporters wish to emphasize that they are not, as a matter of policy, wedded to the exclusionary rule as the sole or best means of enforcing the Fourth Amendment. See Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. of Chi. L. Rev. 665 (1970). Paragraph (2) embodies what the Reporters hope is a more flexible approach to the problem, subject of course to constitutional requirements." *Id.,* comment, at 26–27.

This is but one of many expressions of disenchantment with the exclusionary rule; see also:

1. Barrett, Exclusion of Evidence Obtained by Illegal Searches—A Comment on People vs. Cahan, 43 Calif. L. Rev. 565 (1955).

2. Burns, *Mapp* v. *Ohio:* An All-American Mistake, 19 DePaul L. Rev. 80 (1969).

3. Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L. Rev. 929, 951–954 (1965).

4. F. Inbau, J. Thompson, & C. Sowle, Cases and Comments on Criminal Justice: Criminal Law Administration 1–84 (3d ed. 1968).

5. LaFave, Improving Police Performance Through the Exclusionary Rule (pts. 1 & 2), 30 Mo. L. Rev. 391, 566 (1965).

6. LaFave & Remington, Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions, 63 Mich. L. Rev. 987 (1965).

7. N. Morris & G. Hawkins, The Honest Politician's Guide to Crime Control 101 (1970).

8. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665 (1970).

9. Plumb, Illegal Enforcement of the Law, 24 Cornell L. Q. 337 (1939).

10. Schaefer, The Fourteenth Amendment and Sanctity of the Person, 64 Nw. U. L. Rev. 1 (1969).

11. Waite, Judges and the Crime Burden, 54 Mich. L. Rev. 169 (1955).

12. Waite, Evidence—Police Regulation by Rules of Evidence, 42 Mich. L. Rev. 679 (1944).

13. Wigmore, Using Evidence Obtained by Illegal Search and Seizure, 8 A. B. A. J. 479 (1922).

14. 8 J. Wigmore, Evidence § 2184a (McNaughton rev. 1961).

MR. JUSTICE BLACK, dissenting.

In my opinion for the Court in *Bell* v. *Hood,* 327 U. S. 678 (1946), we did as the Court states, reserve the question whether an unreasonable search made by a federal officer in violation of the Fourth Amendment gives the subject of the search a federal cause of action for damages against the officers making the search. There can be no doubt that Congress could create a federal cause of action for damages for an unreasonable search in violation of the Fourth Amendment. Although Congress has created such a federal cause of action against *state* officials acting under color of state law,* it has never created such a cause of action against federal officials. If it wanted to do so, Congress could, of course, create a remedy against

* "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Rev. Stat. § 1979, 42 U. S. C. § 1983.

federal officials who violate the Fourth Amendment in the performance of their duties. But the point of this case and the fatal weakness in the Court's judgment is that neither Congress nor the State of New York has enacted legislation creating such a right of action. For us to do so is, in my judgment, an exercise of power that the Constitution does not give us.

Even if we had the legislative power to create a remedy, there are many reasons why we should decline to create a cause of action where none has existed since the formation of our Government. The courts of the United States as well as those of the States are choked with lawsuits. The number of cases on the docket of this Court have reached an unprecedented volume in recent years. A majority of these cases are brought by citizens with substantial complaints—persons who are physically or economically injured by torts or frauds or governmental infringement of their rights; persons who have been unjustly deprived of their liberty or their property; and persons who have not yet received the equal opportunity in education, employment, and pursuit of happiness that was the dream of our forefathers. Unfortunately, there have also been a growing number of frivolous lawsuits, particularly actions for damages against law enforcement officers whose conduct has been judicially sanctioned by state trial and appellate courts and in many instances even by this Court. My fellow Justices on this Court and our brethren throughout the federal judiciary know only too well the time-consuming task of conscientiously poring over hundreds of thousands of pages of factual allegations of misconduct by police, judicial, and corrections officials. Of course, there are instances of legitimate grievances, but legislators might well desire to devote judicial resources to other problems of a more serious nature.

We sit at the top of a judicial system accused by some of nearing the point of collapse. Many criminal defendants do not receive speedy trials and neither society nor the accused are assured of justice when inordinate delays occur. Citizens must wait years to litigate their private civil suits. Substantial changes in correctional and parole systems demand the attention of the lawmakers and the judiciary. If I were a legislator I might well find these and other needs so pressing as to make me believe that the resources of lawyers and judges should be devoted to them rather than to civil damage actions against officers who generally strive to perform within constitutional bounds. There is also a real danger that such suits might deter officials from the *proper* and honest performance of their duties.

All of these considerations make imperative careful study and weighing of the arguments both for and against the creation of such a remedy under the Fourth Amendment. I would have great difficulty for myself in resolving the competing policies, goals, and priorities in the use of resources, if I thought it were my job to resolve those questions. But that is not my task. The task of evaluating the pros and cons of creating judicial remedies for particular wrongs is a matter for Congress and the legislatures of the States. Congress has not provided that any federal court can entertain a suit against a federal officer for violations of Fourth Amendment rights occurring in the performance of his duties. A strong inference can be drawn from creation of such actions against state officials that Congress does not desire to permit such suits against federal officials. Should the time come when Congress desires such lawsuits, it has before it a model of valid legislation, 42 U. S. C. § 1983, to create a damage remedy against federal officers. Cases could be cited to support the legal proposition which

I assert, but it seems to me to be a matter of common understanding that the business of the judiciary is to interpret the laws and not to make them.

I dissent.

MR. JUSTICE BLACKMUN, dissenting.

I, too, dissent. I do so largely for the reasons expressed in Chief Judge Lumbard's thoughtful and scholarly opinion for the Court of Appeals. But I also feel that the judicial legislation, which the Court by its opinion today concededly is effectuating, opens the door for another avalanche of new federal cases. Whenever a suspect imagines, or chooses to assert, that a Fourth Amendment right has been violated, he will now immediately sue the federal officer in federal court. This will tend to stultify proper law enforcement and to make the day's labor for the honest and conscientious officer even more onerous and more critical. Why the Court moves in this direction at this time of our history, I do not know. The Fourth Amendment was adopted in 1791, and in all the intervening years neither the Congress nor the Court has seen fit to take this step. I had thought that for the truly aggrieved person other quite adequate remedies have always been available. If not, it is the Congress and not this Court that should act.

Syllabus

JENNESS ET AL. *v.* FORTSON, SECRETARY OF STATE OF GEORGIA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

No. 5714. Argued March 1, 1971—Decided June 21, 1971

Georgia law provides that any political organization whose candidate received 20% or more of the vote at the most recent gubernatorial or presidential election is a "political party." Any other political organization is a "political body." "Political parties" conduct primary elections, and the name of the winning candidate for each office is printed on the ballot. A nominee of a "political body" or an independent candidate may have his name on the ballot if he files a nominating petition signed by not less than 5% of those eligible to vote at the last election for the office he is seeking. The time for circulating the petition is 180 days, and it must meet the same deadline as a candidate in a party primary. Electors who sign a nominating petition are not restricted in any way, and there is no limitation on write-in votes on ballots. *Held:* The challenge of appellants, prospective candidates and registered voters, to this election procedure was properly rejected as it does not abridge the rights of free speech and association secured by the First and Fourteenth Amendments and is not violative of the Fourteenth Amendment's Equal Protection Clause. *Williams* v. *Rhodes,* 393 U. S. 23, distinguished. Pp. 434–442.

315 F. Supp. 1035, affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. BLACK and HARLAN, JJ., concurred in the result.

Peter E. Rindskopf argued the cause for appellants. With him on the brief was *Howard Moore, Jr.*

Robert J. Castellani, Assistant Attorney General of Georgia, argued the cause for appellee. With him on the brief were *Arthur K. Bolton,* Attorney General, and *Harold N. Hill, Jr.,* Executive Assistant Attorney General.

MR. JUSTICE STEWART delivered the opinion of the Court.

Under Georgia law a candidate for elective public office who does not enter and win a political party's primary election can have his name printed on the ballot at the general election only if he has filed a nominating petition signed by at least 5% of the number of registered voters at the last general election for the office in question.[1] Georgia law also provides that a candidate for elective public office must pay a filing fee equal to 5% of the annual salary of the office he is seeking.[2] This litigation arose when the appellants, who were prospective candidates and registered voters,[3] filed a class action in the United States District Court for the Northern District of Georgia, attacking the constitutionality of these provisions of the Georgia Election Code, and seeking declaratory and injunctive relief.

A three-judge court was convened pursuant to 28 U. S. C. §§ 2281 and 2284. Thereafter the appellants filed a motion for summary judgment based upon a stipulation as to the relevant facts. The District Court granted the motion and entered an injunction with respect to the filing-fee requirement, holding that this requirement operates to deny equal protection of the laws as applied to those prospective candidates who cannot afford to pay the fees. No appeal was taken from that injunctive order. With respect to the nominating-peti-

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[1] Ga. Code Ann. § 34–1010 (1970).

[2] Ga. Code Ann. § 34–1013.

[3] One of the appellants was the nominee of the Georgia Socialist Workers Party for Governor in 1970, two others were nominees of that organization for the House of Representatives, and two others were registered voters who sued on behalf of themselves, and "all other registered voters in the State of Georgia desirous of having an opportunity to consider persons on the ballot other than nominees of the Democratic and Republican parties."

tion requirement, the District Court denied the motion and refused to enter an injunction, holding that this statutory provision is constitutionally valid.[4] From that refusal a direct appeal was brought here under 28 U. S. C. § 1253, and we noted probable jurisdiction.[5]

The basic structure of the pertinent provisions of the Georgia Election Code is relatively uncomplicated. Any political organization whose candidate received 20% or more of the vote at the most recent gubernatorial or presidential election is a "political party." [6] Any other political organization is a "political body." [7] "Political parties" conduct primary elections, regulated in detail by state law, and only the name of the candidate for each office who wins this primary election is printed on the ballot at the subsequent general election, as his party's nominee for the office in question.[8] A nominee of a "political body" or an independent candidate, on the other hand, may have his name printed on the ballot at the general election by filing a nominating petition.[9] This petition must be signed by "a number of electors of not less than five per cent. of the total number of electors eligible to vote in the last election for the filling of the office the candidate is seeking . . . ." [10] The total time allowed for circulating a nominating petition is 180 days,[11] and it must be filed on the second Wednesday in

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[4] *Georgia Socialist Workers Party* v. *Fortson,* 315 F. Supp. 1035.

[5] 400 U. S. 877.

[6] Ga. Code Ann. § 34–103 (u).

[7] Ga. Code Ann. § 34–103 (s).

[8] See, *e. g.,* Ga. Code Ann. §§ 34–1004 to 34–1006, 34–1008, 34–1009, 34–1014, 34–1015, 34–1102, 34–1301 to 34–1303, 34–1308, 34–1507, 34–1513.

[9] Ga. Code Ann. § 34–1001.

[10] Ga. Code Ann. § 34–1010 (b).

[11] Ga. Code Ann. § 34–1010 (e).

June, the same deadline that a candidate filing in a party primary must meet.[12]

It is to be noted that these procedures relate only to the right to have the name of a candidate or the nominee of a "political body" printed on the ballot. There is no limitation whatever, procedural or substantive, on the right of a voter to write in on the ballot the name of the candidate of his choice and to have that write-in vote counted.

In this litigation the appellants have mounted their attack upon Georgia's nominating-petition requirement on two different but related constitutional fronts. First, they say that to require a nonparty candidate to secure the signatures of a certain number of voters before his name may be printed on the ballot is to abridge the freedoms of speech and association guaranteed to that candidate and his supporters by the First and Fourteenth Amendments. Secondly, they say that when Georgia requires a nonparty candidate to secure the signatures of 5% of the voters before printing his name on the ballot, yet prints the names of those candidates who have won nomination in party primaries, it violates the Fourteenth Amendment by denying the nonparty candidate the equal protection of the laws. Since both arguments are primarily based upon this Court's decision in *Williams* v. *Rhodes,* 393 U. S. 23, it becomes necessary to examine that case in some detail.

In the *Williams* case the Court was confronted with a state electoral structure that favored "two particular parties—the Republicans and the Democrats—and in effect tend[ed] to give them a complete monopoly." *Id.,* at 32. The Court held unconstitutional the election laws of Ohio insofar as in combination they made it "vir-

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[12] Compare Ga. Code Ann. § 34–1002 (b) with Ga. Code Ann. § 34–1005 (b).

tually impossible for a new political party, even though it ha[d] hundreds of thousands of members, or an old party, which ha[d] a very small number of members, to be placed on the state ballot" in the 1968 presidential election. *Id.*, at 24. The state laws made "no provision for ballot position for independent candidates as distinguished from political parties," *id.*, at 26, and a new political party, in order to be placed on the ballot, had "to obtain petitions signed by qualified electors totaling 15% of the number of ballots cast in the last preceding gubernatorial election." *Id.*, at 24–25. But this requirement was only a preliminary. For, although the Ohio American Independent Party in the first six months of 1968 had obtained more than 450,000 signatures—well over the 15% requirement—Ohio had nonetheless denied the party a place on the ballot, by reason of other statutory "burdensome procedures, requiring extensive organization and other election activities by a very early date," *id.*, at 33—"including the early deadline for filing petitions [February 7, 1968] and the requirement of a primary election conforming to detailed and rigorous standards . . . ." *Id.*, at 27.[13]

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[13] In describing these burdens, the Court quoted the description contained in the dissenting opinion of a member of the three-judge District Court from which the appeal in the *Williams* case had come:

"Judge Kinneary describes, in his dissenting opinion below, the legal obstacles placed before a would-be third party even after the 15% signature requirement has been fulfilled:

" '*First,* at the primary election, the new party, or any political party, is required to elect a state central committee consisting of two members from each congressional district and county central committees for each county in Ohio. [Ohio Rev. Code §§ 3517.02–3517.04.] *Second,* at the primary election the new party must elect delegates and alternates to a national convention. [Ohio Rev. Code § 3505.10.] Since Section 3513.19.1, Ohio Rev. Code, prohibits a candidate from seeking the office of delegate to the national convention or committeeman if he voted as a member of a different party at a primary election in the preceding four year period, the

In a separate opinion MR. JUSTICE DOUGLAS described the then structure of Ohio's network of election laws in accurate detail:

> "Ohio, through an entangling web of election laws, has effectively foreclosed its presidential ballot to all but Republicans and Democrats. It has done so initially by abolishing write-in votes so as to restrict candidacy to names on the ballot; it has eliminated all independent candidates through a requirement that nominees enjoy the endorsement of a political party; it has defined 'political party' in such a way as to exclude virtually all but the two major parties.
>
> "A candidate who seeks a place on the Ohio presidential ballot must first compile signatures of qualified voters who total at least 15% of those voting in the last gubernatorial election. In this election year, 1968, a candidate would need 433,100 such signatures. Moreover, he must succeed in gathering them long before the general election, since a nominating petition must be filed with the Secretary of State in February. That is not all: having compiled those signatures, the candidate must further show that he

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new party would be required to have over twelve hundred members who had not previously voted in another party's primary, and who would be willing to serve as committeemen and delegates. *Third,* the candidates for nomination in the primary would have to file petitions signed by qualified electors. [Ohio Rev. Code § 3513.05.] The term "qualified electors" is not adequately defined in the Ohio Revised Code [§ 3501.01 (H)], but a related section [§ 3513.19], provides that a qualified elector at a primary election of a political party is one who, (1) voted for a majority of that party's candidates at the last election, or, (2) has never voted in any election before. Since neither of the political party plaintiffs had any candidates at the last preceding regular state election, they would, of necessity, have to seek out members who had never voted before to sign the nominating petitions, and it would be only these persons who could vote in the primary election of the new party.'" 393 U. S., at 25 n. 1.

has received the nomination of a group which qualifies as a 'political party' within the meaning of Ohio law. It is not enough to be an independent candidate for President with wide popular support; one must trace his support to a political party.

"To qualify as a party, a group of electors must participate in the state primary, electing one of its members from each county ward or precinct to a county central committee; two of its members from each congressional district to a state central committee; and some of its members as delegates and alternates to a national convention. Moreover, those of its members who seek a place on the primary ballot as candidates for positions as central committeemen and national convention delegates must demonstrate that they did not vote in any other party primary during the preceding four years; and must present petitions of endorsement on their behalf by anywhere from five to 1,000 voters who likewise failed to vote for any other party in the last preceding primary. Thus, to qualify as a third party, a group must first erect elaborate political machinery, and then rest it upon the ranks of those who have proved both unwilling and unable to vote." 393 U. S., at 35–37.

The Court's decision with respect to this "entangling web of election laws" was unambiguous and positive. It held that "the totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause." *Id.*, at 34.[14]

[14] Mr. Justice Douglas, while joining the opinion of the Court, filed a separate opinion giving emphasis to the First Amendment values involved. *Id.*, at 35. Mr. Justice Harlan filed an opinion concurring in the judgment, explaining why he would have rested

But the *Williams* case, it is clear, presented a statutory scheme vastly different from the one before us here. Unlike Ohio, Georgia freely provides for write-in votes. Unlike Ohio, Georgia does not require every candidate to be the nominee of a political party, but fully recognizes independent candidacies. Unlike Ohio, Georgia does not fix an unreasonably early filing deadline for candidates not endorsed by established parties. Unlike Ohio, Georgia does not impose upon a small party or a new party the Procrustean requirement of establishing elaborate primary election machinery. Finally, and in sum, Georgia's election laws, unlike Ohio's, do not operate to freeze the political status quo. In this setting we cannot say that Georgia's 5% petition requirement violates the Constitution.

Anyone who wishes, and who is otherwise eligible, may be an independent candidate for any office in Georgia. Any political organization, however new or however small, is free to endorse any otherwise eligible person as its candidate for whatever elective public office it chooses. So far as the Georgia election laws are concerned, independent candidates and members of small or newly formed political organizations are wholly free to associate, to proselytize, to speak, to write, and to organize campaigns for any school of thought they wish. They may confine themselves to an appeal for write-in votes. Or they may seek, over a six months' period, the signatures of 5% of the eligible electorate for the office in question. If they choose the latter course, the way is open. For Georgia imposes no suffocating restrictions whatever upon the free circulation of nominating petitions. A voter may sign a petition even though he

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decision "entirely on the proposition that Ohio's statutory scheme violates the basic right of political association assured by the First Amendment which is protected against state infringement under the Due Process Clause of the Fourteenth Amendment." *Id.*, at 41.

has signed others,[15] and a voter who has signed the petition of a nonparty candidate is free thereafter to participate in a party primary.[16] The signer of a petition is not required to state that he intends to vote for that candidate at the election.[17] A person who has previously voted in a party primary is fully eligible to sign a petition,[18] and so, on the other hand, is a person who was not even registered at the time of the previous election.[19] No signature on a nominating petition need be notarized.[20]

The open quality of the Georgia system is far from merely theoretical. For the stipulation of facts in this record informs us that a candidate for Governor in 1966 [21] and a candidate for President in 1968,[22] gained ballot designation by nominating petitions, and each went on to win a plurality of the votes cast at the general election.[23]

In a word, Georgia in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life. Thus, any political body that wins as much as 20% support at an election becomes a "political party" with its attendant ballot position rights and primary election obligations, and any "political party" whose support at the polls falls below that figure reverts to the status of a "political body" with its attendant

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[15] Contrast, *e. g.,* La. Rev. Stat. Ann. § 18:624 (A) (1969); N. Y. Election Law § 138 (6) (1964).

[16] Contrast, *e. g.,* R. I. Gen. Laws Ann. § 17–16–8 (1969).

[17] Contrast, *e. g.,* N. Y. Election Law § 138 (2) (1964).

[18] Contrast, *e. g.,* Cal. Elections Code § 6830 (c) (1961); Colo. Rev. Stat. Ann. § 49–7–1 (4) (Supp. 1967).

[19] Contrast, *e. g.,* N. Y. Election Law § 138 (2) (1964).

[20] Contrast, *e. g.,* Colo. Rev. Stat. Ann. § 49–7–1 (4) (Supp. 1967).

[21] See *Fortson* v. *Morris,* 385 U. S. 231.

[22] This was the candidate whose party Ohio had kept off the ballot in *Williams* v. *Rhodes,* 393 U. S. 23.

[23] As a result, the political bodies that endorsed these two candidates have now presumably acquired the status of political parties.

nominating petition responsibilities and freedom from primary election duties. We can find in this system nothing that abridges the rights of free speech and association secured by the First and Fourteenth Amendments.

The appellants' claim under the Equal Protection Clause of the Fourteenth Amendment fares no better. This claim is necessarily bottomed upon the premise that it is inherently more burdensome for a candidate to gather the signatures of 5% of the total eligible electorate than it is to win the votes of a majority in a party primary.[24] That is a premise that cannot be uncritically accepted. Although the number of candidates in a party primary election for any particular office will, of course, vary from election to election, the appellee's brief advises us that in the most recent election year there were 12 candidates for the nomination for the office of Governor in the two party primaries. Only two of these 12, of course, won their party primaries and had their names printed on the ballot at the general election. Surely an argument could as well be made on behalf of the 10 who lost, that it is *they* who were denied equal protection *vis-à-vis* a candidate who could have had his name printed on the ballot simply by filing a nominating petition signed by 5% of the total electorate.

The fact is, of course, that from the point of view of one who aspires to elective public office in Georgia, alternative routes are available to getting his name printed on the ballot. He may enter the primary of a political party, or he may circulate nominating petitions either as an independent candidate or under the sponsorship of a political organization.[25] We cannot see how

[24] Georgia provides for a second "run-off" primary election in the event no candidate receives a majority of the votes cast at the original primary election. See Ga. Code Ann. § 34–1513 (a).

[25] The argument that the first alternative route is not realistically open to a candidate with unorthodox or "radical" views is hardly valid in the light of American political history. Time after time

Georgia has violated the Equal Protection Clause of the Fourteenth Amendment by making available these two alternative paths, neither of which can be assumed to be inherently more burdensome than the other.

Insofar as we deal here with the claims of a "political body," as contrasted with those of an individual aspirant for public office or an individual voter,[26] the situation is somewhat different. For it is true that a "political party" in Georgia is assured of having the name of its nominee—the primary election winner—printed on the ballot, whereas the name of the nominee of a "political body" will be printed only if nominating petitions have been filed that contain the requisite number of signatures. But we can hardly suppose that a small or a new political organization could seriously urge that its interests would be advanced if it were forced by the State to establish all of the elaborate statewide, county-by-county, organizational paraphernalia required of a "political party" as a condition for conducting a primary election.[27] Indeed, a large reason for the Court's invalidation of the Ohio election laws in *Williams* v. *Rhodes, supra,* was precisely that Ohio *did* impose just such requirements on small and new political organizations.

The fact is that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. Georgia has not been guilty of invidious discrimination

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established political parties, at local, state, and national levels, have, while retaining their old labels, changed their ideological direction because of the influence and leadership of those with unorthodox or "radical" views.

[26] The Georgia Socialist Workers Party was one of the plaintiffs in the District Court, but is not an appellant here. We may assume, however, without deciding, that the individual appellants can properly assert the interests of that "political body."

[27] See, *e. g.,* Ga. Code Ann. § 34–1004.

in recognizing these differences and providing different routes to the printed ballot. Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike, a truism well illustrated in *Williams* v. *Rhodes, supra.*

There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election. The 5% figure is, to be sure, apparently somewhat higher than the percentage of support required to be shown in many States as a condition for ballot position,[28] but this is balanced by the fact that Georgia has imposed no arbitrary restrictions whatever upon the eligibility of any registered voter to sign as many nominating petitions as he wishes. Georgia in this case has insulated not a single potential voter from the appeal of new political voices within its borders.

The judgment is affirmed.

MR. JUSTICE BLACK and MR. JUSTICE HARLAN concur in the result.

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[28] See *Williams* v. *Rhodes,* 393 U. S., at 47 n. 10 (HARLAN, J., concurring in result).

Syllabus

COOLIDGE *v.* NEW HAMPSHIRE

CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

No. 323. Argued January 12, 1971—Decided June 21, 1971

Police went to petitioner's home on January 28, 1964, to question him about a murder. In the course of their inquiry he showed them three guns; and he agreed to take a lie-detector test on February 2. The test was inconclusive on the murder but during its course petitioner admitted a theft. In petitioner's absence, two other policemen came to the house and questioned petitioner's wife to check petitioner's story and corroborate his admission of the theft. Unaware of the visit of the other officers who had been shown the guns and knowing little about the murder weapon, the police asked about any guns there might be in the house and were shown four by petitioner's wife which she offered to let them take. After one policeman first declined the offer, they took the guns, along with various articles of petitioner's clothing his wife made available to them. On February 19, petitioner was arrested in his house for the murder and on that date a warrant to search petitioner's automobile was applied for by the police chief and issued by the Attorney General (who had assumed charge of the investigation and was later the chief prosecutor at the trial), acting as a justice of the peace. The car, which at the time of the arrest was parked in petitioner's driveway, was subsequently towed to the police station, where on February 21 and on two occasions the next year it was searched. Vacuum sweepings from the car as well as from the clothing were used as evidence at the trial, along with one of the guns made available by petitioner's wife. Following the overruling of pretrial motions to suppress that evidence, petitioner was convicted, and the State Supreme Court affirmed. *Held:*

1. The warrant for the search and seizure of petitioner's automobile did not satisfy the requirements of the Fourth Amendment as made applicable to the States by the Fourteenth because it was not issued by a "neutral and detached magistrate." *Johnson* v. *United States,* 333 U. S. 10, 14. Pp. 449–453.

2. The basic constitutional rule is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-

defined exceptions," and, on the facts of this case, a warrantless search and seizure of the car cannot be justified under those exceptions. Pp. 453–482.

(a) The seizure of the car in the driveway cannot be justified as incidental to the arrest which took place inside the house. Even assuming, *arguendo,* that the police could properly have made a warrantless search of the car in the driveway when they arrested petitioner, they could not have done so at their leisure after its removal. Pp. 455–457.

(b) Under the circumstances present here—where the police for some time had known of the probable role of the car in the crime, petitioner had had ample opportunity to destroy incriminating evidence, the house was guarded at the time of arrest and petitioner had no access to the car—there were no exigent circumstances justifying the warrantless search even had it been made before the car was taken to the police station, and the special exceptions for automobile searches in *Carroll* v. *United States,* 267 U. S. 132, and *Chambers* v. *Maroney,* 399 U. S. 42, are clearly inapplicable. Cf. *Dyke* v. *Taylor Implement Mfg. Co.,* 391 U. S. 216. Pp. 458–464.

(c) Under certain circumstances the police may without a warrant seize evidence in "plain view," though not for that reason alone and only when the discovery of the evidence is inadvertent. That exception is inapplicable to the facts of the instant case, where the police had ample opportunity to obtain a valid warrant, knew in advance the car's description and location, intended to seize it when they entered on petitioner's property, and no contraband or dangerous objects were involved. Pp. 464–473.

3. No search and seizure were implicated in the February 2 visit when the police obtained the guns and clothing from petitioner's wife, and hence they needed no warrant. The police, who exerted no effort to coerce or dominate her, were not obligated to refuse her offer for them to take the guns, and in making these and the other items available to the police, she was not acting as the instrument or agent of the police. Pp. 484–490.

109 N. H. 403, 260 A. 2d 547, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J. (as to Part III), and HARLAN (as to Parts I, II-D, and III), DOUGLAS, BRENNAN, and MARSHALL, JJ., joined. HARLAN, J., filed a concurring opinion, *post,* p. 490. BURGER, C. J., filed a concurring and dissenting opinion, *post,* p. 492. BLACK, J., filed a concurring

and dissenting opinion, in a portion of Part I and in Parts II and III of which BURGER, C. J., and BLACKMUN, J., joined, *post,* p. 493. WHITE, J., filed a concurring and dissenting opinion, in which BURGER, C. J., joined, *post,* p. 510.

Archibald Cox, by appointment of the Court, 400 U. S. 814, argued the cause for petitioner. With him on the briefs were *Matthias J. Reynolds, John A. Graf,* and *Robert L. Chiesa.*

Alexander J. Kalinski argued the cause for respondent. With him on the brief was *Warren B. Rudman,* Attorney General of New Hampshire.

MR. JUSTICE STEWART delivered the opinion of the Court.*

We are called upon in this case to decide issues under the Fourth and Fourteenth Amendments arising in the context of a state criminal trial for the commission of a particularly brutal murder. As in every case, our single duty is to determine the issues presented in accord with the Constitution and the law.

Pamela Mason, a 14-year-old girl, left her home in Manchester, New Hampshire, on the evening of January 13, 1964, during a heavy snowstorm, apparently in response to a man's telephone call for a babysitter. Eight days later, after a thaw, her body was found by the side of a major north-south highway several miles away. She had been murdered. The event created great alarm in the area, and the police immediately began a massive investigation.

On January 28, having learned from a neighbor that the petitioner, Edward Coolidge, had been away from home on the evening of the girl's disappearance, the police went to his house to question him. They asked

*Parts II-A, II-B, and II-C of this opinion are joined only by MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL.

him, among other things, if he owned any guns, and he produced three, two shotguns and a rifle. They also asked whether he would take a lie-detector test concerning his account of his activities on the night of the disappearance. He agreed to do so on the following Sunday, his day off. The police later described his attitude on the occasion of this visit as fully "cooperative." His wife was in the house throughout the interview.

On the following Sunday, a policeman called Coolidge early in the morning and asked him to come down to the police station for the trip to Concord, New Hampshire, where the lie-detector test was to be administered. That evening, two plainclothes policemen arrived at the Coolidge house, where Mrs. Coolidge was waiting with her mother-in-law for her husband's return. These two policemen were not the two who had visited the house earlier in the week, and they apparently did not know that Coolidge had displayed three guns for inspection during the earlier visit. The plainclothesmen told Mrs. Coolidge that her husband was in "serious trouble" and probably would not be home that night. They asked Coolidge's mother to leave, and proceeded to question Mrs. Coolidge. During the course of the interview they obtained from her four guns belonging to Coolidge, and some clothes that Mrs. Coolidge thought her husband might have been wearing on the evening of Pamela Mason's disappearance.

Coolidge was held in jail on an unrelated charge that night, but he was released the next day.[1] During the ensuing two and a half weeks, the State accumulated a quantity of evidence to support the theory that it was he who had killed Pamela Mason. On February 19, the results of the investigation were presented at a meeting between the police officers working on the case and the

[1] During the lie-detector test, Coolidge had confessed to a theft of money from his employer. See III-A of text, *infra*.

State Attorney General, who had personally taken charge of all police activities relating to the murder, and was later to serve as chief prosecutor at the trial. At this meeting, it was decided that there was enough evidence to justify the arrest of Coolidge on the murder charge and a search of his house and two cars. At the conclusion of the meeting, the Manchester police chief made formal application, under oath, for the arrest and search warrants. The complaint supporting the warrant for a search of Coolidge's Pontiac automobile, the only warrant that concerns us here, stated that the affiant "has probable cause to suspect and believe, and does suspect and believe, and herewith offers satisfactory evidence, that there are certain objects and things used in the Commission of said offense, now kept, and concealed in or upon a certain vehicle, to wit: 1951 Pontiac two-door sedan . . . ." The warrants were then signed and issued by the Attorney General himself, acting as a justice of the peace. Under New Hampshire law in force at that time, all justices of the peace were authorized to issue search warrants. N. H. Rev. Stat. Ann. § 595:1 (repealed 1969).

The police arrested Coolidge in his house on the day the warrant issued. Mrs. Coolidge asked whether she might remain in the house with her small child, but was told that she must stay elsewhere, apparently in part because the police believed that she would be harassed by reporters if she were accessible to them. When she asked whether she might take her car, she was told that both cars had been "impounded," and that the police would provide transportation for her. Some time later, the police called a towing company, and about two and a half hours after Coolidge had been taken into custody the cars were towed to the police station. It appears that at the time of the arrest the cars were parked in the Coolidge driveway, and that although dark had fallen

they were plainly visible both from the street and from inside the house where Coolidge was actually arrested. The 1951 Pontiac was searched and vacuumed on February 21, two days after it was seized, again a year later, in January 1965, and a third time in April 1965.

At Coolidge's subsequent jury trial on the charge of murder, vacuum sweepings, including particles of gun powder, taken from the Pontiac were introduced in evidence against him, as part of an attempt by the State to show by microscopic analysis that it was highly probable that Pamela Mason had been in Coolidge's car.[2] Also introduced in evidence was one of the guns taken by the police on their Sunday evening visit to the Coolidge house—a .22-caliber Mossberg rifle, which the prosecution claimed was the murder weapon. Conflicting ballistics testimony was offered on the question whether the bullets found in Pamela Mason's body had been fired from this rifle. Finally, the prosecution introduced vacuum sweepings of the clothes taken from the Coolidge house that same Sunday evening, and attempted to show through microscopic analysis that there was a high probability that the clothes had been in contact with Pamela Mason's body. Pretrial motions to suppress all this evidence were referred by the trial judge to the New Hampshire Supreme Court, which ruled the evidence admissible. 106 N. H. 186, 208 A. 2d 322. The jury found Coolidge guilty and he was sentenced to life imprisonment. The New Hampshire Supreme Court affirmed the judgment of conviction, 109 N. H. 403, 260 A. 2d 547, and we granted certiorari to consider the constitutional questions raised by the admission of this evidence against Coolidge at his trial. 399 U. S. 926.

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[2] For a very strong argument that this evidence should have been excluded because altogether lacking in probative value, see Tribe, Trial by Mathematics: Precision and Ritual in the Legal Process, 84 Harv. L. Rev. 1329, 1342 n. 40 (1971).

I

The petitioner's first claim is that the warrant authorizing the seizure and subsequent search of his 1951 Pontiac automobile was invalid because not issued by a "neutral and detached magistrate." Since we agree with the petitioner that the warrant was invalid for this reason, we need not consider his further argument that the allegations under oath supporting the issuance of the warrant were so conclusory as to violate relevant constitutional standards. Cf. *Giordenello* v. *United States,* 357 U. S. 480; *Aguilar* v. *Texas,* 378 U. S. 108.

The classic statement of the policy underlying the warrant requirement of the Fourth Amendment is that of Mr. Justice Jackson, writing for the Court in *Johnson* v. *United States,* 333 U. S. 10, 13–14:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

Cf. *United States* v. *Lefkowitz,* 285 U. S. 452, 464; *Giordenello* v. *United States, supra,* at 486. *Wong Sun* v.

United States, 371 U. S. 471, 481–482; *Katz* v. *United States,* 389 U. S. 347, 356–357.

In this case, the determination of probable cause was made by the chief "government enforcement agent" of the State—the Attorney General—who was actively in charge of the investigation and later was to be chief prosecutor at the trial. To be sure, the determination was formalized here by a writing bearing the title "Search Warrant," whereas in *Johnson* there was no piece of paper involved, but the State has not attempted to uphold the warrant on any such artificial basis. Rather, the State argues that the Attorney General, who was unquestionably authorized as a justice of the peace to issue warrants under then-existing state law, did in fact act as a "neutral and detached magistrate." Further, the State claims that *any* magistrate, confronted with the showing of probable cause made by the Manchester chief of police, would have issued the warrant in question. To the first proposition it is enough to answer that there could hardly be a more appropriate setting than this for a *per se* rule of disqualification rather than a case-by-case evaluation of all the circumstances. Without disrespect to the state law enforcement agent here involved, the whole point of the basic rule so well expressed by Mr. Justice Jackson is that prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations—the "competitive enterprise" that must rightly engage their single-minded attention.[3] Cf. *Mancusi* v. *DeForte,* 392 U. S. 364, 371. As for the proposition that the existence of probable cause renders noncompliance with the warrant procedure an irrelevance,

[3] After hearing the Attorney General's testimony on the issuance of the warrants, the trial judge said:

"I found that an impartial Magistrate would have done the same as you did. I don't think, in all sincerity, that I would expect that you could wear two pairs of shoes."

it is enough to cite *Agnello* v. *United States,* 269 U. S. 20, 33, decided in 1925:

> "Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause."

See also *Jones* v. *United States,* 357 U. S. 493, 497–498; *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392. ("[T]he rights . . . against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way.")

But the New Hampshire Supreme Court, in upholding the conviction, relied upon the theory that even if the warrant procedure here in issue would clearly violate the standards imposed on the Federal Government by the Fourth Amendment, it is not forbidden the States under the Fourteenth. This position was premised on a passage from the opinion of this Court in *Ker* v. *California,* 374 U. S. 23, 31:

> "Preliminary to our examination of the search and seizures involved here, it might be helpful for us to indicate what was not decided in *Mapp* [v. *Ohio,* 367 U. S. 643]. First, it must be recognized that the 'principles governing the admissibility of evidence in federal criminal trials have not been restricted . . . to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts . . . this Court has . . . formulated rules of evidence to be applied in federal criminal prosecutions.' *McNabb* v. *United States,* 318 U. S. 332, 341 . . . *Mapp,* however, established no assumption by this Court of supervisory authority over state courts . . . and, consequently, it implied no total

> obliteration of state laws relating to arrests and searches in favor of federal law. *Mapp* sounded no death knell for our federalism; rather, it echoed the sentiment of *Elkins* v. *United States, supra,* at 221, that 'a healthy federalism depends upon the avoidance of needless conflict between state and federal courts' by itself urging that '[f]ederal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect *the same fundamental criteria* in their approaches.' 367 U. S., at 658." (Emphasis in *Ker.*)

It is urged that the New Hampshire statutes which at the time of the searches here involved permitted a law enforcement officer himself to issue a warrant was one of those "workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States," *id.,* at 34, authorized by *Ker.*

That such a procedure was indeed workable from the point of view of the police is evident from testimony at the trial in this case:

> "The Court: You mean that another police officer issues these [search warrants]?
>
> "The Witness: Yes. Captain Couture and Captain Shea and Captain Loveren are J. P.'s.
>
> "The Court: Well, let me ask you, Chief, your answer is to the effect that you never go out of the department for the Justice of the Peace?
>
> "The Witness: It hasn't been our—policy to go out of the department.
>
> "Q. Right. Your policy and experience, is to have a fellow police officer take the warrant in the capacity of Justice of the Peace?
>
> "A. That has been our practice."

But it is too plain for extensive discussion that this now abandoned New Hampshire method of issuing "search warrants" violated a fundamental premise of both the Fourth and Fourteenth Amendments—a premise fully developed and articulated long before this Court's decisions in *Ker* v. *California, supra,* and *Mapp* v. *Ohio,* 367 U. S. 643. As Mr. Justice Frankfurter put it in *Wolf* v. *Colorado,* 338 U. S. 25, 27–28:

> "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned . . . ."

We find no escape from the conclusion that the seizure and search of the Pontiac automobile cannot constitutionally rest upon the warrant issued by the state official who was the chief investigator and prosecutor in this case. Since he was not the neutral and detached magistrate required by the Constitution, the search stands on no firmer ground than if there had been no warrant at all. If the seizure and search are to be justified, they must, therefore, be justified on some other theory.

II

The State proposes three distinct theories to bring the facts of this case within one or another of the exceptions to the warrant requirement. In considering them, we must not lose sight of the Fourth Amendment's fundamental guarantee. Mr. Justice Bradley's admonition in his opinion for the Court almost a century ago in *Boyd*

v. *United States,* 116 U. S. 616, 635, is worth repeating here:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." [4]

Thus the most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se*

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[4] See also *Gouled* v. *United States,* 255 U. S. 298, 303–304 (1921):

"It would not be possible to add to the emphasis with which the framers of our Constitution and this court . . . have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two Amendments [the Fourth and Fifth]. The effect of the decisions cited is: that such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen,—the right, to trial by jury, to the writ of *habeas corpus* and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers."

See also *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, 357.

unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." [5] The exceptions are "jealously and carefully drawn," [6] and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative." [7] "[T]he burden is on those seeking the exemption to show the need for it." [8] In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or "extravagant" to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won—by legal and constitutional means in England,[9] and by revolution on this continent—a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important.[10]

A

The State's first theory is that the seizure on February 19 and subsequent search of Coolidge's Pontiac were "incident" to a valid arrest. We assume that the arrest of Coolidge inside his house was valid, so that the first condition of a warrantless "search incident" is met. *Whiteley* v. *Warden,* 401 U. S. 560, 567 n. 11. And since the events in issue took place in 1964, we assess the State's argu-

[5] *Katz* v. *United States,* 389 U. S. 347, 357.

[6] *Jones* v. *United States,* 357 U. S. 493, 499.

[7] *McDonald* v. *United States,* 335 U. S. 451, 456.

[8] *United States* v. *Jeffers,* 342 U. S. 48, 51.

[9] See *Entick* v. *Carrington,* 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (1765), and *Wilkes* v. *Wood,* 19 How. St. Tr. 1153, 98 Eng. Rep. 489 (1763).

[10] See *Elkins* v. *United States,* 364 U. S. 206.

ment in terms of the law as it existed before *Chimel* v. *California,* 395 U. S. 752, which substantially restricted the "search incident" exception to the warrant requirement, but did so only prospectively. *Williams* v. *United States,* 401 U. S. 646. But even under pre-*Chimel* law, the State's position is untenable.

The leading case in the area before *Chimel* was *United States* v. *Rabinowitz,* 339 U. S. 56, which was taken to stand "for the proposition, *inter alia,* that a warrantless search 'incident to a lawful arrest' may generally extend to the area that is considered to be in the 'possession' or under the 'control' of the person arrested." *Chimel, supra,* at 760. In this case, Coolidge was arrested inside his house; his car was outside in the driveway. The car was not touched until Coolidge had been removed from the scene. It was then seized and taken to the station, but it was not actually searched until two days later.

First, it is doubtful whether the police could have carried out a contemporaneous search of the car under *Rabinowitz* standards. For this Court has repeatedly held that, even under *Rabinowitz,* "[a] search may be incident to an arrest ' "only if it is substantially contemporaneous with the arrest and is confined to the *immediate* vicinity of the arrest. . . ." ' " *Vale* v. *Louisiana,* 399 U. S. 30, 33, quoting from *Shipley* v. *California,* 395 U. S. 818, 819, quoting from *Stoner* v. *California,* 376 U. S. 483, 486. (Emphasis in *Shipley.*) Cf. *Agnello* v. *United States,* 269 U. S., at 30–31; *James* v. *Louisiana,* 382 U. S. 36. These cases make it clear beyond any question that a lawful pre-*Chimel* arrest of a suspect outside his house could never by itself justify a warrantless search inside the house. There is nothing in search-incident doctrine (as opposed to the special rules for automobiles and evidence in "plain view," to be considered below) that suggests

a different result where the arrest is made inside the house and the search outside and at some distance away.[11]

Even assuming, *arguendo,* that the police might have searched the Pontiac in the driveway when they arrested Coolidge in the house, *Preston* v. *United States,* 376 U. S. 364, makes plain that they could not legally seize the car, remove it, and search it at their leisure without a warrant. In circumstances virtually identical to those here, MR. JUSTICE BLACK'S opinion for a unanimous Court held that "[o]nce an accused is under arrest and in custody, then a search [of his car] made at another place, without a warrant, is simply not incident to the arrest." *Id.,* at 367. *Dyke* v. *Taylor Implement Mfg. Co.,* 391 U. S. 216. Cf. *Chambers* v. *Maroney,* 399 U. S. 42, 47. Search-incident doctrine, in short, has no applicability to this case.[12]

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[11] The suggestion in Part III-A of the concurring and dissenting opinion of MR. JUSTICE BLACK that this represents the formulation of "a *per se* rule reaching far beyond" *Chimel* v. *California,* 395 U. S. 752, *post,* at 503, is mistaken. The question discussed here is whether under pre-*Chimel* law the police could, contemporaneously with the arrest of Coolidge inside his house, make a search of his car for evidence—*i. e.,* the particles later introduced at his trial. There can be no question that after *Chimel,* such a search could not be justified as "incident" to the arrest, since *Chimel* held that a search so justified can extend only to the "arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." 395 U. S., at 763. The quite distinct question whether the police were entitled to seize the automobile as evidence in plain view is discussed in Part II-C below. Cf. n. 24, *infra.*

[12] *Cooper* v. *California,* 386 U. S. 58, is not in point, since there the State did not rely on the theory of a search incident to arrest, but sought to justify the search on other grounds. *Id.,* at 60. MR. JUSTICE BLACK'S opinion for the Court in *Cooper* reaffirmed *Preston* v. *United States,* 376 U. S. 364.

B

The second theory put forward by the State to justify a warrantless seizure and search of the Pontiac car is that under *Carroll* v. *United States,* 267 U. S. 132, the police may make a warrantless search of an automobile whenever they have probable cause to do so, and, under our decision last Term in *Chambers* v. *Maroney,* 399 U. S. 42, whenever the police may make a legal contemporaneous search under *Carroll,* they may also seize the car, take it to the police station, and search it there. But even granting that the police had probable cause to search the car, the application of the *Carroll* case to these facts would extend it far beyond its original rationale.

Carroll did indeed hold that "contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant," [13] provided that "the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported." [14] Such searches had been explicitly authorized by Congress, and, as we have pointed out elsewhere,[15] in the conditions of the time "[a]n automobile . . . was an almost indispensable instrumentality in large-scale violation of the National Prohibition Act, and the car itself therefore was treated somewhat as an offender and became contraband." In two later cases,[16] each involving an occupied automobile stopped on the open highway and searched for contra-

[13] 267 U. S., at 153.

[14] *Id.,* at 156.

[15] *United States* v. *Di Re,* 332 U. S. 581, 586.

[16] *Husty* v. *United States,* 282 U. S. 694; *Brinegar* v. *United States,* 338 U. S. 160.

band liquor, the Court followed and reaffirmed *Carroll.*[17] And last Term in *Chambers, supra,* we did so again.

The underlying rationale of *Carroll* and of all the cases that have followed it is that there is

> "a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or auto-

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[17] A third case that has sometimes been cited as an application of *Carroll* v. *United States,* 267 U. S. 132, is *Scher* v. *United States,* 305 U. S. 251. There, the police were following an automobile that they had probable cause to believe contained a large quantity of contraband liquor. The facts were as follows:

The driver "turned into a garage a few feet back of his residence and within the curtilage. One of the pursuing officers left their car and followed. As petitioner was getting out of his car this officer approached, announced his official character, and stated he was informed that the car was hauling bootleg liquor. Petitioner replied, 'just a little for a party.' Asked whether the liquor was tax paid, he replied that it was Canadian whiskey; also, he said it was in the trunk at the rear of the car. The officer opened the trunk and found . . . ." 305 U. S., at 253.

The Court held:

"Considering the doctrine of *Carroll* v. *United States,* 267 U. S. 132 . . . and the application of this to the facts there disclosed, it seems plain enough that just before he entered the garage the following officers properly could have stopped petitioner's car, made search and put him under arrest. So much was not seriously controverted at the argument.

"Passage of the car into the open garage closely followed by the observing officer did not destroy this right. No search was made of the garage. Examination of the automobile accompanied an arrest, without objection and upon admission of probable guilt. The officers did nothing either unreasonable or oppressive. *Agnello* v. *United States,* 269 U. S. 20, 30; *Wisniewski* v. *United States,* 47 F. 2d 825, 826 [CA6 1931]." 305 U. S., at 254–255.

Both *Agnello,* at the page cited, and *Wisniewski* dealt with the admissibility of evidence seized during a *search incident to a lawful arrest.*

> mobile, for contraband goods, where *it is not practicable to secure a warrant* because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." 267 U. S., at 153. (Emphasis supplied.)

As we said in *Chambers, supra,* at 51, "exigent circumstances" justify the warrantless search of "an automobile *stopped on the highway,*" where there is probable cause, because the car is "movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained." "[T]he opportunity to search is fleeting . . . ." (Emphasis supplied.)

In this case, the police had known for some time of the probable role of the Pontiac car in the crime. Coolidge was aware that he was a suspect in the Mason murder, but he had been extremely cooperative throughout the investigation, and there was no indication that he meant to flee. He had already had ample opportunity to destroy any evidence he thought incriminating. There is no suggestion that, on the night in question, the car was being used for any illegal purpose, and it was regularly parked in the driveway of his house. The opportunity for search was thus hardly "fleeting." The objects that the police are assumed to have had probable cause to search for in the car were neither stolen nor contraband nor dangerous.

When the police arrived at the Coolidge house to arrest him, two officers were sent to guard the back door while the main party approached from the front. Coolidge was arrested inside the house, without resistance of any kind on his part, after he had voluntarily admitted the officers at both front and back doors. There was no way in which he could conceivably have gained access to the automobile after the police arrived on his property. When Coolidge had been taken away, the police informed Mrs. Coolidge, the only other adult occupant of the

house, that she and her baby had to spend the night elsewhere and that she could not use either of the Coolidge cars. Two police officers then drove her in a police car to the house of a relative in another town, and they stayed with her there until around midnight, long after the police had had the Pontiac towed to the station house. The Coolidge premises were guarded throughout the night by two policemen.[18]

The word "automobile" is not a talisman in whose presence the Fourth Amendment fades away and dis-

[18] It is frequently said that occupied automobiles stopped on the open highway may be searched without a warrant because they are "mobile," or "movable." No other basis appears for MR. JUSTICE WHITE's suggestion in his dissenting opinion that we should "treat searches of automobiles as we do the arrest of a person." *Post,* at 527. In this case, it is, of course, true that even though Coolidge was in jail, his wife was miles away in the company of two plainclothesmen, and the Coolidge property was under the guard of two other officers, the automobile was in a literal sense "mobile." A person who had the keys and could slip by the guard could drive it away. We attach no constitutional significance to this sort of mobility.

First, a good number of the containers that the police might discover on a person's property and want to search are equally movable, *e. g.,* trunks, suitcases, boxes, briefcases, and bags. How are such objects to be distinguished from an unoccupied automobile—not then being used for any illegal purpose—sitting on the owner's property? It is true that the automobile has wheels and its own locomotive power. But given the virtually universal availability of automobiles in our society there is little difference between driving the container itself away and driving it away in a vehicle brought to the scene for that purpose. Of course, if there is a criminal suspect close enough to the automobile so that he might get a weapon from it or destroy evidence within it, the police may make a search of appropriately limited scope. *Chimel* v. *California,* 395 U. S. 752. See II-A of the text, *supra.* But if *Carroll* v. *United States,* 267 U. S. 132, permits a warrantless search of an unoccupied vehicle, on private property and beyond the scope of a valid search incident to an arrest, then it would permit as well a warrantless search of a suitcase or a box. We have found no case that suggests such an extension of *Carroll.* See nn. 16, 17, *supra.*

appears. And surely there is nothing in this case to invoke the meaning and purpose of the rule of *Carroll* v. *United States*—no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, no contraband or stolen goods or weapons, no confederates waiting to move the evidence, not even the inconvenience of a special police detail to guard the immobilized automobile. In short, by no possible stretch of the legal imagination can this be made into a case where "it is not practicable to secure a warrant," *Carroll, supra,* at 153, and the "automobile exception," despite its label, is simply irrelevant.[19]

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[19] Cf. *United States* v. *Payne,* 429 F. 2d 169 (CA9 1970). In that case, two couples were camping in an individually allotted campsite in Yosemite National Park. During the evening, an off-duty policeman camping with his family in an adjoining site observed the two couples smoking a substance he believed to be marihuana and also observed them making what he thought "furtive" movements to remove objects he thought to be drugs from the glove compartment of a car parked nearby. He summoned a park ranger, and the two entered the campsite. They found that one of the couples was preparing to bed down for the night, while the couple to whom the car belonged were visiting in another campsite. The officers searched the unoccupied parked automobile, found 12 Seconal capsules, and arrested the couple who had stayed behind. The Government attempted to uphold the search under *Carroll, supra,* and *Brinegar, supra.* The Court of Appeals answered:

"While it is true that the Supreme Court has enunciated slightly different rules concerning a search of an automobile without a warrant, the rationale is apparently based upon the fact that a 'vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.' Chimel v. California, 395 U. S. 752, 764 . . . . In the instant case the search of the Volkswagen cannot be justified upon this reasoning. There is no indication in the record that the appellant or any of his party were preparing to leave, and quite to the contrary it is clear that appellant was bedding down for the evening and that there was ample time to secure the necessary warrant for the search of the car had [the Park Ranger] believed there was probable cause to seek one." 429 F. 2d, at 171–172.

Since *Carroll* would not have justified a warrantless search of the Pontiac at the time Coolidge was arrested, the later search at the station house was plainly illegal, at least so far as the automobile exception is concerned. *Chambers, supra,* is of no help to the State, since that case held only that, where the police may stop and search an automobile under *Carroll,* they may also seize it and search it later at the police station.[20] Rather, this case is controlled by *Dyke* v. *Taylor Implement Mfg. Co., supra.* There the police lacked probable cause to seize or search the defendant's automobile at the time of his

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[20] Part III-B of the concurring and dissenting opinion of MR. JUSTICE BLACK argues with vehemence that this case must somehow be controlled by *Chambers* v. *Maroney,* 399 U. S. 42, yet the precise applicability of *Chambers* is never made clear. On its face, *Chambers* purports to deal *only* with situations in which the police may legitimately make a warrantless search under *Carroll* v. *United States,* 267 U. S. 132. Since the *Carroll* rule does not apply in the circumstances of this case, the police could not have searched the car without a warrant when they arrested Coolidge. Thus MR. JUSTICE BLACK's argument must be that *Chambers* somehow operated *sub silentio* to extend the basic doctrine of *Carroll.* It is true that the actual search of the automobile in *Chambers* was made at the police station many hours after the car had been stopped on the highway, when the car was no longer movable, any "exigent circumstances" had passed, and, for all the record shows, there was a magistrate easily available. Nonetheless, the analogy to this case is misleading. The rationale of *Chambers* is that *given* a justified initial intrusion, there is little difference between a search on the open highway and a later search at the station. Here, we deal with the prior question of *whether* the initial intrusion is justified. For this purpose, it seems abundantly clear that there is a significant constitutional difference between stopping, seizing, and searching a car on the open highway, and entering private property to seize and search an unoccupied, parked vehicle not then being used for any illegal purpose. That the police may have been legally on the property in order to arrest Coolidge is, of course, immaterial, since, as shown in II-A of the text, *supra,* that purpose could not authorize search of the car even under *United States* v. *Rabinowitz,* 339 U. S. 56.

arrest, and this was enough by itself to condemn the subsequent search at the station house. Here there was probable cause, but no exigent circumstances justified the police in proceeding without a warrant. As in *Dyke,* the later search at the station house was therefore illegal.[21]

C

The State's third theory in support of the warrantless seizure and search of the Pontiac car is that the car itself was an "instrumentality of the crime," and as such might be seized by the police on Coolidge's property because it was in plain view. Supposing the seizure to be thus lawful, the case of *Cooper* v. *California,* 386 U. S. 58, is said to support a subsequent warrantless search at the station house, with or without probable cause. Of course, the distinction between an "instrumentality of crime" and "mere evidence" was done away with by *Warden* v. *Hayden,* 387 U. S. 294, and we may assume that the police had probable cause to seize the automobile.[22] But, for the reasons that follow, we hold that the "plain view" exception to the warrant requirement is inapplicable to this case. Since the seizure was therefore

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[21] *Cooper* v. *California,* 386 U. S. 58, is no more in point here than in the context of a search incident to a lawful arrest. See n. 12, *supra.* In *Cooper,* the seizure of the petitioner's car was mandated by California statute, and its legality was not questioned. The case stands for the proposition that, given an unquestionably legal seizure, there are special circumstances that may validate a subsequent warrantless search. Cf. *Chambers, supra.* The case certainly should not be read as holding that the police can do without a warrant at the police station what they are forbidden to do without a warrant at the place of seizure.

[22] Coolidge had admitted that on the night of Pamela Mason's disappearance he had stopped his Pontiac on the side of the highway opposite the place where the body was found. He claimed the car was stuck in the snow. Two witnesses, who had stopped and asked him if he needed help, testified that his car was not stuck.

illegal, it is unnecessary to consider the applicability of *Cooper, supra,* to the subsequent search.[23]

It is well established that under certain circumstances the police may seize evidence in plain view without a warrant. But it is important to keep in mind that, in the vast majority of cases, *any* evidence seized by the police will be in plain view, at least at the moment of seizure. The problem with the "plain view" doctrine has been to identify the circumstances in which plain view has legal significance rather than being simply the normal concomitant of any search, legal or illegal.

An example of the applicability of the "plain view" doctrine is the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character. Cf. *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, 358; *United States* v. *Lefkowitz,* 285 U. S. 452, 465; *Steele* v. *United States,* 267 U. S. 498; *Stanley* v. *Georgia,* 394 U. S. 557, 571 (STEWART, J., concurring in result). Where the initial intrusion that brings the police within plain view of such an article is supported, not by a warrant, but by one of the recognized exceptions to the warrant requirement, the seizure is also legitimate. Thus the police may inadvertently come across evidence while in "hot pursuit" of a fleeing suspect. *Warden* v. *Hayden, supra;* cf. *Hester* v. *United States,* 265 U. S. 57. And an object that comes into view during a search incident to arrest that is appropriately limited in scope under existing law may be seized without a warrant.[24] *Chimel* v. *California,* 395

[23] See nn. 12 and 21, *supra.*

[24] The "plain view" exception to the warrant requirement is not in conflict with the law of search incident to a valid arrest expressed in *Chimel* v. *California,* 395 U. S. 752. The Court there held that "[t]here is ample justification . . . for a search of the arrestee's person and the area 'within his immediate control'—construing that

U. S., at 762–763. Finally, the "plain view" doctrine has been applied where a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object. *Harris* v. *United States,* 390 U. S. 234; *Frazier* v. *Cupp,* 394 U. S. 731; *Ker* v. *California,* 374 U. S., at 43. Cf. *Lewis* v. *United States,* 385 U. S. 206.

What the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.

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phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Id.,* at 763. The "plain view" doctrine would normally justify as well the seizure of other evidence that came to light during such an appropriately limited search. The Court in *Chimel* went on to hold that "[t]here is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant." *Ibid.* Where, however, the arresting officer inadvertently comes within plain view of a piece of evidence, not concealed, although outside of the area under the immediate control of the arrestee, the officer may seize it, so long as the plain view was obtained in the course of an appropriately limited search of the arrestee.

Cf. *Stanley* v. *Georgia, supra,* at 571–572 (STEWART, J., concurring in result).

The rationale for the "plain view" exception is evident if we keep in mind the two distinct constitutional protections served by the warrant requirement. First, the magistrate's scrutiny is intended to eliminate altogether searches not based on probable cause. The premise here is that *any* intrusion in the way of search or seizure is an evil, so that no intrusion at all is justified without a careful prior determination of necessity. See, *e. g., McDonald* v. *United States,* 335 U. S. 451; *Warden* v. *Hayden,* 387 U. S. 294; *Katz* v. *United States,* 389 U. S. 347; *Chimel* v. *California,* 395 U. S., at 761–762. The second, distinct objective is that those searches deemed necessary should be as limited as possible. Here, the specific evil is the "general warrant" abhorred by the colonists, and the problem is not that of intrusion *per se,* but of a general, exploratory rummaging in a person's belongings. See, *e. g., Boyd* v. *United States,* 116 U. S., at 624–630; *Marron* v. *United States,* 275 U. S. 192, 195–196; *Stanford* v. *Texas,* 379 U. S. 476. The warrant accomplishes this second objective by requiring a "particular description" of the things to be seized.

The "plain view" doctrine is not in conflict with the first objective because plain view does not occur until a search is in progress. In each case, this initial intrusion is justified by a warrant or by an exception such as "hot pursuit" or search incident to a lawful arrest, or by an extraneous valid reason for the officer's presence. And, given the initial intrusion, the seizure of an object in plain view is consistent with the second objective, since it does not convert the search into a general or exploratory one. As against the minor peril to Fourth Amendment protections, there is a major gain in effective law enforcement. Where, once an otherwise lawful search is in progress, the police inadvertently come upon

a piece of evidence, it would often be a needless inconvenience, and sometimes dangerous—to the evidence or to the police themselves—to require them to ignore it until they have obtained a warrant particularly describing it.

The limits on the doctrine are implicit in the statement of its rationale. The first of these is that plain view *alone* is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle discussed above, that no amount of probable cause can justify a warrantless search or seizure absent "exigent circumstances." Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure. *Taylor* v. *United States,* 286 U. S. 1; *Johnson* v. *United States,* 333 U. S. 10; *McDonald* v. *United States,* 335 U. S. 451; *Jones* v. *United States,* 357 U. S. 493, 497–498; *Chapman* v. *United States,* 365 U. S. 610; *Trupiano* v. *United States,* 334 U. S. 699.[25]

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[25] *Trupiano* v. *United States, supra,* applied the principle in circumstances somewhat similar to those here. Federal law enforcement officers had infiltrated an agent into a group engaged in manufacturing illegal liquor. The agent had given them the fullest possible description of the layout and equipment of the illegal distillery. Although they had ample opportunity to do so, the investigators failed to procure search or arrest warrants. Instead, they staged a warrantless nighttime raid on the premises. After entering the property, one of the officers looked through the doorway of a shed, and saw one of the criminals standing beside an illegal distillery. The officer entered, made a legal arrest, and seized the still. This Court held it inadmissible at trial, rejecting the Government's argument based on "the long line of cases recognizing that an arresting officer may look around at the time of the arrest and

The second limitation is that the discovery of evidence in plain view must be inadvertent.[26] The rationale of the exception to the warrant requirement, as just stated,

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seize those fruits and evidences of crime or those contraband articles which are in plain sight and in his immediate and discernible presence." 334 U. S., at 704. The Court reasoned that there was no excuse whatever for the failure of the agents to obtain a warrant before entering the property, and that the mere fact that a suspect was arrested in the proximity of the still provided no "exigent circumstance" to validate a warrantless seizure. The scope of the intrusion permitted to make the valid arrest did not include a warrantless search for and seizure of a still whose exact location and illegal use were known well in advance. The fact that at the time of the arrest the still was in plain view and nearby was therefore irrelevant. The agents were in exactly the same position as the policemen in *Taylor* v. *United States,* 286 U. S. 1, who had unmistakable evidence of sight and smell that contraband liquor was stored in a garage, but nonetheless violated the Fourth Amendment when they entered and seized it without a warrant.

Trupiano, to be sure, did not long remain undisturbed. The extremely restrictive view taken there of the allowable extent of a search and seizure incident to lawful arrest was rejected in *United States* v. *Rabinowitz,* 339 U. S. 56. See *Chimel* v. *California,* 395 U. S. 752. The case demonstrates, however, the operation of the general principle that "plain view" alone can never justify a warrantless seizure. Cf. n. 24, *supra.*

[26] None of the cases cited in Part III-C of the concurring and dissenting opinion of MR. JUSTICE BLACK casts any doubt upon this conclusion. In *Steele* v. *United States,* 267 U. S. 498, agents observed cases marked "Whiskey" being taken into a building from a truck. On this basis, they obtained a warrant to search the premises for contraband liquor. In the course of the search, they came upon a great deal of whiskey and gin—not that they had seen unloaded—and various bottling equipment, and seized all they found.

In *Warden* v. *Hayden,* 387 U. S. 294, the police entered and searched a house in hot pursuit of a fleeing armed robber. The Court pointed out that "[s]peed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape." 387 U. S., at 299. The Court then established

is that a plain-view seizure will not turn an initially valid (and therefore limited) search into a "general" one, while the inconvenience of procuring a warrant to cover an inadvertent discovery is great. But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as "*per se*

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with painstaking care that the various articles of clothing seized were discovered during a search directed at the robber and his weapons. *Id.*, at 299–300.

In *United States* v. *Lee*, 274 U. S. 559, a Coast Guard patrol approached a boat on the high seas at night. A searchlight was turned on the boat and revealed cases of contraband. The liquor subsequently seized was never introduced in evidence, but the seizing officers were allowed to testify to what they had seen. As the Court put it: "A later trespass by the officers, if any, did not render inadmissible in evidence knowledge legally obtained." 274 U. S., at 563.

In *Marron* v. *United States*, 275 U. S. 192, officers raided a speakeasy with a warrant to search for and seize contraband liquor. They arrested the bartender and seized a number of bills and other papers in plain view on the bar. While searching a closet for liquor they came across a ledger kept in the operation of the illegal business, which they also seized. There is no showing whatever that these seizures outside the warrant were planned in advance. The *Marron* Court upheld them as "incident" to the arrest. The "plain view" aspect of the case was later emphasized in order to avoid the implication that arresting officers are entitled to make an exploratory search of the premises where the arrest occurs. See *Go-Bart Importing Co.* v. *United States*, 282 U. S., at 358; *United States* v. *Lefkowitz*, 285 U. S. 452, 465; *United States* v. *Rabinowitz*, 339 U. S., at 78 (Frankfurter, J., dissenting). Thus *Marron*, like *Steele*, *supra*, *Warden*, *supra*, and *Lee*, *supra*, can hardly be cited for the proposition that the police may justify a planned warrantless seizure by maneuvering themselves within "plain view" of the object they want.

Finally, *Ker* v. *California*, 374 U. S. 23, is fully discussed in n. 28, *infra*.

unreasonable" in the absence of "exigent circumstances."

If the initial intrusion is bottomed upon a warrant that fails to mention a particular object, though the police know its location and intend to seize it, then there is a violation of the express constitutional requirement of "Warrants . . . particularly describing . . . [the] things to be seized." The initial intrusion may, of course, be legitimated not by a warrant but by one of the exceptions to the warrant requirement, such as hot pursuit or search incident to lawful arrest. But to extend the scope of such an intrusion to the seizure of objects—not contraband nor stolen nor dangerous in themselves—which the police know in advance they will find in plain view and intend to seize, would fly in the face of the basic rule that no amount of probable cause can justify a warrantless seizure.[27]

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[27] MR. JUSTICE BLACK laments that the Court today "abolishes seizure incident to arrest" (but see n. 24, *supra*), while MR. JUSTICE WHITE no less forcefully asserts that the Court's "new rule" will "accomplish nothing." In assessing these claims, it is well to keep in mind that we deal here with a *planned* warrantless seizure. This Court has never permitted the legitimation of a planned warrantless seizure on plain-view grounds, see n. 26, *supra,* and to do so here would be flatly inconsistent with the existing body of Fourth Amendment law. A long line of cases, of which those cited in the text, at n. 25, *supra,* are only a sample, make it clear beyond doubt that the mere fact that the police have legitimately obtained a plain view of a piece of incriminating evidence is not enough to justify a warrantless seizure. Although MR. JUSTICE BLACK and MR. JUSTICE WHITE appear to hold contrasting views of the import of today's decision, they are in agreement that this warrant requirement should be ignored whenever the seizing officers are able to arrange to make an arrest within sight of the object they are after. "The exceptions cannot be enthroned into the rule." *United States* v. *Rabinowitz,* 339 U. S., at 80 (Frankfurter, J., dissenting). We recognized the dangers of allowing the extent of Fourth Amendment protections to turn on the location of the arrestee in *Chimel* v. *California,* 395 U. S., at 767, noting that under the law of search inci-

In the light of what has been said, it is apparent that the "plain view" exception cannot justify the police seizure of the Pontiac car in this case. The police had ample opportunity to obtain a valid warrant; they knew the automobile's exact description and location well in advance; they intended to seize it when they came upon Coolidge's property. And this is not a case involving contraband or stolen goods or objects dangerous in themselves.[28]

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dent to arrest as enunciated prior to *Chimel*, "law enforcement officials [had] the opportunity to engage in searches not justified by probable cause, by the simple expedient of arranging to arrest suspects at home rather than elsewhere." Cf. *Trupiano* v. *United States, supra,* n. 25, where the Court held:

"As we have seen, the existence of [the illegal still] and the desirability of seizing it *were known to the agents long before the seizure and formed one of the main purposes of the raid.* Likewise, the arrest of Antoniole [the person found in the shed with the still] . . . was a foreseeable event motivating the raid. But the precise location of the petitioners at the time of their arrest had no relation to the foreseeability or necessity of the seizure. The practicability of obtaining a search warrant did not turn upon whether Antoniole and the others were within the distillery building when arrested or upon whether they were then engaged in operating the illicit equipment. . . . Antoniole might well have been outside the building at that particular time. If that had been the case and he had been arrested in the farmyard, the entire argument advanced by the Government in support of the seizure without warrant would collapse. We do not believe that the applicability of the Fourth Amendment to the facts of this case depends upon such a fortuitous factor as the precise location of Antoniole at the time of the raid." 334 U. S., at 707–708. (Emphasis supplied.)

[28] *Ker* v. *California,* 374 U. S. 23, is not to the contrary. In that case, the police had probable cause to enter Ker's apartment and arrest him, and they made an entry for that purpose. They did not have a search warrant, but the Court held that "time . . . was of the essence," so that a warrant was unnecessary. As the police entered the living room, Ker's wife emerged from the adjacent kitchen. One of the officers moved to the door of the kitchen, looked in, and observed a brick of marihuana in plain view on

The seizure was therefore unconstitutional, and so was the subsequent search at the station house. Since evidence obtained in the course of the search was admitted at Coolidge's trial, the judgment must be reversed and the case remanded to the New Hampshire Supreme Court. *Mapp* v. *Ohio,* 367 U. S. 643.

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In his dissenting opinion today, MR. JUSTICE WHITE marshals the arguments that can be made against our interpretation of the "automobile" and "plain view" exceptions to the warrant requirement. Beyond the

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a table. The officer brought Ker and his wife into the kitchen, questioned them, and, when they failed to explain the marihuana, arrested them, and seized the contraband. The police then searched the whole apartment and found various other incriminating evidence. The Court held that the general exploratory search of the whole apartment "was well within the limits upheld in *Harris* v. *United States* [331 U. S. 145]" for a search incident to a lawful arrest. The Court also rejected Ker's claim that the seizure of the brick of marihuana in the kitchen was illegal because the police had "searched" for it (by going to the door of the kitchen and looking in) before making any arrest. The Court reasoned that when Mrs. Ker emerged from the kitchen it was reasonable for the officer to go to the door and look in, and that when he saw the brick of marihuana he was not engaged in any "search" at all. Once he had arrested the Kers, the actual seizure of the brick was lawful because "incident" to the arrest. 374 U. S., at 42–43.

Ker is distinguishable from the present case on at least the following grounds: in *Ker,* the Court found that "the officers entered the apartment for the purpose of arresting George Ker," rather than for purposes of seizure or search, 374 U. S., at 42–43; exigent circumstances justified the failure to obtain a search warrant; the discovery of the brick of marihuana was fortuitous; the marihuana was contraband easily destroyed; and it was in the immediate proximity of the Kers at the moment of their arrest so that the seizure was unquestionably lawful under the search-incident law of the time, and might be lawful under the more restrictive standard of *Chimel* v. *California,* 395 U. S. 752. Not one of these elements was present in the case before us.

unstartling proposition that when a line is drawn there is often not a great deal of difference between the situations closest to it on either side, there is a single theme that runs through what he has to say about the two exceptions. Since that theme is a recurring one in controversies over the proper meaning and scope of the Fourth Amendment, it seems appropriate to treat his views in this separate section, rather than piecemeal.

Much the most important part of the conflict that has been so notable in this Court's attempts over a hundred years to develop a coherent body of Fourth Amendment law has been caused by disagreement over the importance of requiring law enforcement officers to secure warrants. Some have argued that a determination by a magistrate of probable cause as a precondition of any search or seizure is so essential that the Fourth Amendment is violated whenever the police might reasonably have obtained a warrant but failed to do so. Others have argued with equal force that a test of reasonableness, applied after the fact of search or seizure when the police attempt to introduce the fruits in evidence, affords ample safeguard for the rights in question, so that "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." [29]

Both sides to the controversy appear to recognize a distinction between searches and seizures that take place on a man's property—his home or office—and those carried out elsewhere. It is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the

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[29] *United States* v. *Rabinowitz, supra,* at 66.

presence of "exigent circumstances." [30] As to other kinds of intrusions, however, there has been disagreement about the basic rules to be applied, as our cases concerning automobile searches, electronic surveillance, street searches and administrative searches make clear.[31]

With respect to searches and seizures carried out on a suspect's premises, the conflict has been over the question of what qualifies as an "exigent circumstance." It might appear that the difficult inquiry would be when it is that the police can enter upon a person's property to seize his "person . . . papers, and effects," without prior judicial approval. The question of the scope of search and seizure once the police are on the premises would appear to be subsidiary to the basic issue of when intrusion is permissible. But the law has not developed in this fashion.

The most common situation in which Fourth Amendment issues have arisen has been that in which the police enter the suspect's premises, arrest him, and then carry out a warrantless search and seizure of evidence. Where there is a warrant for the suspect's arrest, the evidence seized may later be challenged either on the ground that the warrant was improperly issued because there was not probable cause,[32] or on the ground that the police search and seizure went beyond that which they could carry out as an incident to the execution of the arrest warrant.[33] Where the police act without an

[30] See the cases cited in nn. 5–8, *supra,* and in the text at n. 25, *supra.*

[31] See *Carroll* v. *United States, supra,* and cases discussed in Part II–B above (automobiles); *Katz* v. *United States, supra* (electronic surveillance); *Terry* v. *Ohio,* 392 U. S. 1; *Sibron* v. *New York,* 392 U. S. 40 (street searches); *Camara* v. *Municipal Court,* 387 U. S. 523; *See* v. *Seattle,* 387 U. S. 541 (administrative searches).

[32] *E. g., Giordenello* v. *United States,* 357 U. S. 480.

[33] *E. g., Marron* v. *United States, supra; United States* v. *Rabinowitz, supra.*

arrest warrant, the suspect may argue that an arrest warrant was necessary, that there was no probable cause to arrest,[34] or that even if the arrest was valid, the search and seizure went beyond permissible limits.[35] Perhaps because each of these lines of attack offers a plethora of litigable issues, the more fundamental question of when the police may arrest a man in his house without a warrant has been little considered in the federal courts. This Court has chosen on a number of occasions to assume the validity of an arrest and decide the case before it on the issue of the scope of permissible warrantless search. *E. g., Chimel* v. *California, supra.* The more common inquiry has therefore been: "Assuming a valid police entry for purposes of arrest, what searches and seizures may the police carry out without prior authorization by a magistrate?"

Two very broad, and sharply contrasting answers to this question have been assayed by this Court in the past. The answer of *Trupiano* v. *United States, supra,* was that *no* searches and seizures could be legitimated by the mere fact of valid entry for purposes of arrest, so long as there was no showing of special difficulties in obtaining a warrant for search and seizure. The contrasting answer in *Harris* v. *United States,* 331 U. S. 145, and *United States* v. *Rabinowitz, supra,* was that a valid entry for purposes of arrest served to legitimate warrantless searches and seizures throughout the premises where the arrest occurred, however spacious those premises might be.

The approach taken in *Harris* and *Rabinowitz* was open to the criticism that it made it so easy for the police to arrange to search a man's premises without a warrant

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[34] *E. g., Wong Sun* v. *United States,* 371 U. S. 471.

[35] *E. g., Trupiano* v. *United States, supra; Warden* v. *Hayden, supra; Ker* v. *California, supra.*

that the Constitution's protection of a man's "effects" became a dead letter. The approach taken in *Trupiano,* on the other hand, was open to the criticism that it was absurd to permit the police to make an entry in the dead of night for purposes of seizing the "person" by main force, and then refuse them permission to seize objects lying around in plain sight. It is arguable that if the very substantial intrusion implied in the entry and arrest are "reasonable" in Fourth Amendment terms, then the less intrusive search incident to arrest must also be reasonable.

This argument against the *Trupiano* approach is of little force so long as it is assumed that the police must, in the absence of one of a number of defined exceptions based on "exigent circumstances," obtain an arrest warrant before entering a man's house to seize his person. If the Fourth Amendment requires a warrant to enter and seize the person, then it makes sense as well to require a warrant to seize other items that may be on the premises. The situation is different, however, if the police are under no circumstances required to obtain an arrest warrant before entering to arrest a person they have probable cause to believe has committed a felony. If no warrant is ever required to legitimate the extremely serious intrusion of a midnight entry to seize the person, then it can be argued plausibly that a warrant should never be required to legitimate a very sweeping search incident to such an entry and arrest. If the arrest without a warrant is *per se* reasonable under the Fourth Amendment, then it is difficult to perceive why a search incident in the style of *Harris* and *Rabinowitz* is not *per se* reasonable as well.

It is clear, then, that the notion that the warrantless entry of a man's house in order to arrest him on probable cause is *per se* legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that

searches and seizures inside a man's house without warrant are *per se* unreasonable in the absence of some one of a number of well defined "exigent circumstances." This conflict came to the fore in *Chimel* v. *California, supra.* The Court there applied the basic rule that the "search incident to arrest" is an exception to the warrant requirement and that its scope must therefore be strictly defined in terms of the justifying "exigent circumstances." The exigency in question arises from the dangers of harm to the arresting officer and of destruction of evidence within the reach of the arrestee. Neither exigency can conceivably justify the far-ranging searches authorized under *Harris* and *Rabinowitz.* The answer of the dissenting opinion of MR. JUSTICE WHITE in *Chimel,* supported by no decision of this Court, was that a warrantless entry for the purpose of arrest on probable cause is legitimate and reasonable no matter what the circumstances. 395 U. S., at 776–780. From this it was said to follow that the full-scale search incident to arrest was also reasonable since it was a lesser intrusion. 395 U. S., at 772–775.

The same conflict arises in this case. Since the police knew of the presence of the automobile and planned all along to seize it, there was no "exigent circumstance" to justify their failure to obtain a warrant. The application of the basic rule of Fourth Amendment law therefore requires that the fruits of the warrantless seizure be suppressed. MR. JUSTICE WHITE'S dissenting opinion, however, argues once again that so long as the police could reasonably make a warrantless nighttime entry onto Coolidge's property in order to arrest him, with no showing at all of an emergency, then it is absurd to prevent them from seizing his automobile as evidence of the crime.

MR. JUSTICE WHITE takes a basically similar approach to the question whether the search of the automobile in

this case can be justified under *Carroll* v. *United States, supra,* and *Chambers* v. *Maroney, supra. Carroll,* on its face, appears to be a classic example of the doctrine that warrantless searches are *per se* unreasonable in the absence of exigent circumstances. Every word in the opinion indicates the Court's adherence to the underlying rule and its care in delineating a limited exception. Read thus, the case quite evidently does not extend to the situation at bar. Yet if we take the viewpoint of a judge called on only to decide in the abstract, after the fact, whether the police have behaved "reasonably" under all the circumstances—in short if we simply ignore the warrant requirement—*Carroll* comes to stand for something more. The stopping of a vehicle on the open highway and a subsequent search amount to a major interference in the lives of the occupants. *Carroll* held such an interference to be reasonable without a warrant, given probable cause. It may be thought to follow *a fortiori* that the seizure and search here—where there was no stopping and the vehicle was unoccupied—were also reasonable, since the intrusion was less substantial, although there were no exigent circumstances whatever. Using reasoning of this sort, it is but a short step to the position that it is *never* necessary for the police to obtain a warrant before searching and seizing an automobile, provided that they have probable cause. And MR. JUSTICE WHITE appears to adopt exactly this view when he proposes that the Court should "treat searches of automobiles as we do the arrest of a person."

If we were to accept MR. JUSTICE WHITE's view that warrantless entry for purposes of arrest and warrantless seizure and search of automobiles are *per se* reasonable, so long as the police have probable cause, it would be difficult to see the basis for distinguishing searches of houses and seizures of effects. If it is reasonable for the police to make a warrantless nighttime entry for the pur-

pose of arresting a person in his bed, then surely it must be reasonable as well to make a warrantless entry to search for and seize vital evidence of a serious crime. If the police may, without a warrant, seize and search an unoccupied vehicle parked on the owner's private property, not being used for any illegal purpose, then it is hard to see why they need a warrant to seize and search a suitcase, a trunk, a shopping bag, or any other portable container in a house, garage, or back yard.

The fundamental objection, then, to the line of argument adopted by MR. JUSTICE WHITE in his dissent in this case and in *Chimel* v. *California, supra,* is that it proves too much. If we were to agree with MR. JUSTICE WHITE that the police may, whenever they have probable cause, make a warrantless entry for the purpose of making an arrest, and that seizures and searches of automobiles are likewise *per se* reasonable given probable cause, then by the same logic *any* search or seizure could be carried out without a warrant, and we would simply have read the Fourth Amendment out of the Constitution. Indeed, if MR. JUSTICE WHITE is correct that it has generally been assumed that the Fourth Amendment is not violated by the warrantless entry of a man's house for purposes of arrest, it might be wise to re-examine the assumption. Such a re-examination "would confront us with a grave constitutional question, namely, whether the forceful nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment." *Jones* v. *United States,* 357 U. S., at 499–500.

None of the cases cited by MR. JUSTICE WHITE disposes of this "grave constitutional question." The case of *Warden* v. *Hayden, supra,* where the Court elaborated

a "hot pursuit" justification for the police entry into the defendant's house without a warrant for his arrest, certainly stands by negative implication for the proposition that an arrest warrant is required in the absence of exigent circumstances. See also *Davis* v. *Mississippi,* 394 U. S. 721, 728; *Wong Sun* v. *United States,* 371 U. S., at 481–482. The Court of Appeals for the District of Columbia Circuit, sitting *en banc,* has unanimously reached the same conclusion.[36] But we find it unnecessary to decide the question in this case. The rule that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions," [37] is not so frail that its continuing vitality depends on the fate of a supposed doctrine of warrantless arrest. The warrant requirement has been a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over this country. It is not an inconvenience to be somehow "weighed" against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the "well-intentioned but mistakenly over-zealous executive officers" [38] who are a part of any system of law enforcement. If it is to be a true guide to constitutional police action, rather than just a pious phrase, then "[t]he exceptions cannot be enthroned into the rule." *United States* v. *Rabinowitz, supra,* at 80 (Frankfurter, J., dissenting). The confinement of the exceptions to their appropriate scope was the function of *Chimel* v. *California, supra,* where we dealt with the

[36] *Dorman* v. *United States,* 140 U. S. App. D. C. 313, 435 F. 2d 385 (1970).

[37] *Katz* v. *United States, supra,* at 357.

[38] *Gouled* v. *United States,* 255 U. S., at 304.

assumption that a search "incident" to a lawful arrest may encompass all of the premises where the arrest occurs, however spacious. The "plain view" exception is intimately linked with the search-incident exception, as the cases discussed in Part C above have repeatedly shown. To permit warrantless plain-view seizures without limit would be to undo much of what was decided in *Chimel,* as the similar arguments put forward in dissent in the two cases indicate clearly enough.

Finally, a word about *Trupiano* v. *United States, supra.* Our discussion of "plain view" in Part C above corresponds with that given in *Trupiano.* Here, as in *Trupiano,* the determining factors are advance police knowledge of the existence and location of the evidence, police intention to seize it, and the ample opportunity for obtaining a warrant. See 334 U. S., at 707–708 and n. 27, *supra.* However, we do not "reinstate" *Trupiano,* since we cannot adopt all its implications. To begin with, in *Chimel* v. *California, supra,* we held that a search of the person of an arrestee and of the area under his immediate control could be carried out without a warrant. We did not indicate there, and do not suggest here, that the police must obtain a warrant if they anticipate that they will find specific evidence during the course of such a search. See n. 24, *supra.* And as to the automobile exception, we do not question the decisions of the Court in *Cooper* v. *California,* 386 U. S. 58, and *Chambers* v. *Maroney, supra,* although both are arguably inconsistent with *Trupiano.*

Mr. Justice White's dissent characterizes the coexistence of *Chimel, Cooper, Chambers,* and this case as "punitive," "extravagant," "inconsistent," "without apparent reason," "unexplained," and "inexplicable." *Post,* at 517, 519, 521. It is urged upon us that we have here a "ready opportunity, one way or another,

to bring clarity and certainty to a body of law that lower courts and law enforcement officials often find confusing." *Post,* at 521. Presumably one of the ways in which MR. JUSTICE WHITE believes we might achieve clarity and certainty would be the adoption of his proposal that we treat entry for purposes of arrest and seizure of an automobile alike as *per se* reasonable on probable cause. Such an approach might dispose of this case clearly and certainly enough, but, as we have tried to show above, it would cast into limbo the whole notion of a Fourth Amendment warrant requirement. And it is difficult to take seriously MR. JUSTICE WHITE's alternative suggestion that clarity and certainty, as well as coherence and credibility, might also be achieved by modifying *Chimel* and overruling *Chambers* and *Cooper.* Surely, quite apart from his strong disagreement on the merits, he would take vehement exception to any such cavalier treatment of this Court's decisions.

Of course, it would be nonsense to pretend that our decision today reduces Fourth Amendment law to complete order and harmony. The decisions of the Court over the years point in differing directions and differ in emphasis. No trick of logic will make them all perfectly consistent. But it is no less nonsense to suggest, as does MR. JUSTICE WHITE, *post,* at 521, 520, that we cease today "to strive for clarity and consistency of analysis," or that we have "abandoned any attempt" to find reasoned distinctions in this area. The time is long past when men believed that development of the law must always proceed by the smooth incorporation of new situations into a single coherent analytical framework. We need accept neither the "clarity and certainty" of a Fourth Amendment without a warrant requirement nor the facile consistency obtained by wholesale overruling of recently decided cases. A remark by

MR. JUSTICE HARLAN concerning the Fifth Amendment is applicable as well to the Fourth:

> "There are those, I suppose, who would put the 'liberal construction' approach of cases like *Miranda* [v. *Arizona,* 384 U. S. 436,] and *Boyd* v. *United States,* 116 U. S. 616 (1886), side-by-side with the balancing approach of *Schmerber* [v. *California,* 384 U. S. 757,] and perceive nothing more subtle than a set of constructional antinomies to be utilized as convenient bootstraps to one result or another. But I perceive in these cases the essential tension that springs from the uncertain mandate which this provision of the Constitution gives to this Court." *California* v. *Byers,* 402 U. S. 424, 449–450 (concurring in judgment).

We are convinced that the result reached in this case is correct, and that the principle it reflects—that the police must obtain a warrant when they intend to seize an object outside the scope of a valid search incident to arrest—can be easily understood and applied by courts and law enforcement officers alike. It is a principle that should work to protect the citizen without overburdening the police, and a principle that preserves and protects the guarantees of the Fourth Amendment.

III

Because of the prospect of a new trial, the efficient administration of justice counsels consideration of the second substantial question under the Fourth and Fourteenth Amendments presented by this case. The petitioner contends that when the police obtained a rifle and articles of his clothing from his home on the night of Sunday, February 2, 1964, while he was being interrogated at the police station, they engaged in a search and seizure violative of the Constitution. In order to

understand this contention, it is necessary to review in some detail the circumstances of the February 2 episode.

A

The lie-detector test administered to Coolidge in Concord on the afternoon of the 2d was inconclusive as to his activities on the night of Pamela Mason's disappearance, but during the course of the test Coolidge confessed to stealing $375 from his employer. After the group returned from Concord to Manchester, the interrogation about Coolidge's movements on the night of the disappearance continued, and Coolidge apparently made a number of statements which the police immediately checked out as best they could. The decision to send two officers to the Coolidge house to speak with Mrs. Coolidge was apparently motivated in part by a desire to check his story against whatever she might say, and in part by the need for some corroboration of his admission to the theft from his employer. The trial judge found as a fact, and the record supports him, that at the time of the visit the police knew very little about the weapon that had killed Pamela Mason. The bullet that had been retrieved was of small caliber, but the police were unsure whether the weapon was a rifle or a pistol. During the extensive investigation following the discovery of the body, the police had made it a practice to ask all those questioned whether they owned any guns, and to ask the owners for permission to run tests on those that met the very general description of the murder weapon. The trial judge found as a fact that when the police visited Mrs. Coolidge on the night of the 2d, they were unaware of the previous visit during which Coolidge had shown other officers three guns, and that they were not motivated by a desire to find the murder weapon.

The two plainclothesmen asked Mrs. Coolidge whether her husband had been at home on the night of the murder victim's disappearance, and she replied that he had not. They then asked her if her husband owned any guns. According to her testimony at the pretrial suppression hearing, she replied, "Yes, I will get them in the bedroom." One of the officers replied, "We will come with you." The three went into the bedroom where Mrs. Coolidge took all four guns out of the closet. Her account continued:

> "A. I believe I asked if they wanted the guns. One gentleman said, 'No'; then the other gentleman turned around and said, 'We might as well take them.' I said, 'If you would like them, you may take them.'
>
> "Q. Did you go further and say, 'We have nothing to hide.'?
>
> "A. I can't recall if I said that then or before. I don't recall.
>
> "Q. But at some time you indicated to them that as far as you were concerned you had nothing to hide, and they might take what they wanted?
>
> "A. That was it.
>
> . . . . .
>
> "Q. Did you feel at that time that you had something to hide?
>
> "A. No."

The two policemen also asked Mrs. Coolidge what her husband had been wearing on the night of the disappearance. She then produced four pairs of trousers and indicated that her husband had probably worn either of two of them on that evening. She also brought out a hunting jacket. The police gave her a receipt for the guns and the clothing, and, after a search of the Coolidge cars not here in issue, took the various articles to the police station.

B

The first branch of the petitioner's argument is that when Mrs. Coolidge brought out the guns and clothing, and then handed them over to the police, she was acting as an "instrument" of the officials, complying with a "demand" made by them. Consequently, it is argued, Coolidge was the victim of a search and seizure within the constitutional meaning of those terms. Since we cannot accept this interpretation of the facts, we need not consider the petitioner's further argument that Mrs. Coolidge could not or did not "waive" her husband's constitutional protection against unreasonable searches and seizures.

Had Mrs. Coolidge, wholly on her own initiative, sought out her husband's guns and clothing and then taken them to the police station to be used as evidence against him, there can be no doubt under existing law that the articles would later have been admissible in evidence. Cf. *Burdeau* v. *McDowell,* 256 U. S. 465. The question presented here is whether the conduct of the police officers at the Coolidge house was such as to make her actions their actions for purposes of the Fourth and Fourteenth Amendments and their attendant exclusionary rules. The test, as the petitioner's argument suggests, is whether Mrs. Coolidge, in light of all the circumstances of the case, must be regarded as having acted as an "instrument" or agent of the state when she produced her husband's belongings. Cf. *United States* v. *Goldberg,* 330 F. 2d 30 (CA3), cert. denied, 377 U. S. 953 (1964); *People* v. *Tarantino,* 45 Cal. 2d 590, 290 P. 2d 505 (1955); see *Byars* v. *United States,* 273 U. S. 28; *Gambino* v. *United States,* 275 U. S. 310.

In a situation like the one before us there no doubt always exist forces pushing the spouse to cooperate with

the police. Among these are the simple but often powerful convention of openness and honesty, the fear that secretive behavior will intensify suspicion, and uncertainty as to what course is most likely to be helpful to the absent spouse. But there is nothing constitutionally suspect in the existence, without more, of these incentives to full disclosure or active cooperation with the police. The exclusionary rules were fashioned "to prevent, not to repair," and their target is official misconduct. They are "to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins* v. *United States,* 364 U. S. 206, 217. But it is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals. If, then, the exclusionary rule is properly applicable to the evidence taken from the Coolidge house on the night of February 2, it must be upon the basis that some type of unconstitutional police conduct occurred.

Yet it cannot be said that the police should have obtained a warrant for the guns and clothing before they set out to visit Mrs. Coolidge, since they had no intention of rummaging around among Coolidge's effects or of dispossessing him of any of his property. Nor can it be said that they should have obtained Coolidge's permission for a seizure they did not intend to make. There was nothing to compel them to announce to the suspect that they intended to question his wife about his movements on the night of the disappearance or about the theft from his employer. Once Mrs. Coolidge had admitted them, the policemen were surely acting normally and properly when they asked her, as they had asked those questioned earlier in the investigation, including Coolidge himself, about any guns there might be in the house. The ques-

tion concerning the clothes Coolidge had been wearing on the night of the disappearance was logical and in no way coercive. Indeed, one might doubt the competence of the officers involved had they not asked exactly the questions they did ask. And surely when Mrs. Coolidge of her own accord produced the guns and clothes for inspection, rather than simply describing them, it was not incumbent on the police to stop her or avert their eyes.

The crux of the petitioner's argument must be that when Mrs. Coolidge asked the policemen whether they wanted the guns, they should have replied that they could not take them, or have first telephoned Coolidge at the police station and asked his permission to take them, or have asked her whether she had been authorized by her husband to release them. Instead, after one policeman had declined the offer, the other turned and said, "We might as well take them," to which Mrs. Coolidge replied, "If you would like them, you may take them."

In assessing the claim that this course of conduct amounted to a search and seizure, it is well to keep in mind that Mrs. Coolidge described her own motive as that of clearing her husband, and that she believed that she had nothing to hide. She had seen her husband himself produce his guns for two other policemen earlier in the week, and there is nothing to indicate that she realized that he had offered only three of them for inspection on that occasion. The two officers who questioned her behaved, as her own testimony shows, with perfect courtesy. There is not the slightest implication of an attempt on their part to coerce or dominate her, or, for that matter, to direct her actions by the more subtle techniques of suggestion that are available to officials in circumstances like these. To hold that the conduct of the police here was a search and seizure would be to hold, in effect, that a criminal suspect has constitutional protection against

the adverse consequences of a spontaneous, good-faith effort by his wife to clear him of suspicion.[39]

The judgment is reversed and the case is remanded to the Supreme Court of New Hampshire for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE HARLAN, concurring.

From the several opinions that have been filed in this case it is apparent that the law of search and seizure is due for an overhauling. State and federal law enforcement officers and prosecutorial authorities must find quite intolerable the present state of uncertainty, which extends even to such an everyday question as the circumstances under which police may enter a man's property to arrest him and seize a vehicle believed to have been used during the commission of a crime.

I would begin this process of re-evaluation by overruling *Mapp* v. *Ohio,* 367 U. S. 643 (1961), and *Ker* v. *California,* 374 U. S. 23 (1963). The former of these cases made the federal "exclusionary rule" applicable to the States. The latter forced the States to follow all the ins and outs of this Court's Fourth Amendment decisions, handed down in federal cases.

In combination *Mapp* and *Ker* have been primarily responsible for bringing about serious distortions and incongruities in this field of constitutional law. Basically these have had two aspects, as I believe an examination of our more recent opinions and certiorari docket will show. First, the States have been put in a federal mold with respect to this aspect of criminal law enforcement, thus depriving the country of the opportunity to observe

[39] Cf. Recent Cases, 79 Harv. L. Rev. 1513, 1519 (1966); Note, Seizures by Private Parties: Exclusion in Criminal Cases, 19 Stan. L. Rev. 608 (1967).

the effects of different procedures in similar settings. See, *e. g.,* Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665 (1970), suggesting that the assumed "deterrent value" of the exclusionary rule has never been adequately demonstrated or disproved, and pointing out that because of *Mapp* all comparative statistics are 10 years old and no new ones can be obtained. Second, in order to leave some room for the States to cope with their own diverse problems, there has been generated a tendency to relax federal requirements under the Fourth Amendment, which now govern state procedures as well. For an illustration of that tendency in another constitutional field, again resulting from the infelicitous "incorporation" doctrine, see *Williams* v. *Florida,* 399 U. S. 78 (1970). Until we face up to the basic constitutional mistakes of *Mapp* and *Ker,* no solid progress in setting things straight in search and seizure law will, in my opinion, occur.

But for *Mapp* and *Ker,* I would have little difficulty in voting to sustain this conviction, for I do not think that anything the State did in this case could be said to offend those values which are "at the core of the Fourth Amendment." *Wolf* v. *Colorado,* 338 U. S. 25, 27 (1949); cf. *Irvine* v. *California,* 347 U. S. 128 (1954); *Rochin* v. *California,* 342 U. S. 165 (1952).

Because of *Mapp* and *Ker,* however, this case must be judged in terms of federal standards, and on that basis I concur, although not without difficulty, in Parts I, II–D, and III of the Court's opinion and in the judgment of the Court.* It must be recognized that the case is a close one. The reason I am tipped in favor of MR. JUS-

*Because of my views as to the retroactivity of *Chimel* v. *California,* 395 U. S. 752 (1969), I do not believe the seizure of the Pontiac can be upheld as incident to Coolidge's arrest. See my separate opinion in *Mackey* v. *United States,* 401 U. S. 667, 675 (1971).

TICE STEWART's position is that a contrary result in this case would, I fear, go far toward relegating the warrant requirement of the Fourth Amendment to a position of little consequence in federal search and seizure law, a course which seems to me opposite to the one we took in *Chimel* v. *California,* 395 U. S. 752 (1969), two Terms ago.

Recent scholarship has suggested that in emphasizing the warrant requirement over the reasonableness of the search the Court has "stood the fourth amendment on its head" from a historical standpoint. T. Taylor, Two Studies in Constitutional Interpretation 23–24 (1969). This issue is perhaps most clearly presented in the case of a warrantless entry into a man's home to arrest him on probable cause. The validity of such entry was left open in *Jones* v. *United States,* 357 U. S. 493, 499–500 (1958), and although my Brothers WHITE and STEWART both feel that their contrary assumptions on this point are at the root of their disagreement in this case, *ante,* at 477–479; *post,* at 510–512, 521, the Court again leaves the issue open. *Ante,* at 481. In my opinion it does well to do so. This matter should not be decided in a state case not squarely presenting the issue and where it was not fully briefed and argued. I intimate no view on this subject, but until it is ripe for decision, I hope in a federal case, I am unwilling to lend my support to setting back the trend of our recent decisions.

MR. CHIEF JUSTICE BURGER, dissenting in part and concurring in part.

I join the dissenting opinion of MR. JUSTICE WHITE and in Parts II and III of MR. JUSTICE BLACK'S concurring and dissenting opinion. I also agree with most of what is said in Part I of MR. JUSTICE BLACK'S opinion, but I am not prepared to accept the proposition that the Fifth Amendment requires the exclusion of evidence

seized in violation of the Fourth Amendment. I join in Part III of MR. JUSTICE STEWART'S opinion.

This case illustrates graphically the monstrous price we pay for the exclusionary rule in which we seem to have imprisoned ourselves. See my dissent in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics, ante,* p. 411.

On the merits of the case I find not the slightest basis in the record to reverse this conviction. Here again the Court reaches out, strains, and distorts rules that were showing some signs of stabilizing, and directs a new trial which will be held more than seven years after the criminal acts charged.

Mr. Justice Stone, of the Minnesota Supreme Court, called the kind of judicial functioning in which the Court indulges today "bifurcating elements too infinitesimal to be split."

MR. JUSTICE BLACK, concurring and dissenting.

After a jury trial in a New Hampshire state court, petitioner was convicted of murder and sentenced to life imprisonment. Holding that certain evidence introduced by the State was seized during an "unreasonable" search and that the evidence was inadmissible under the judicially created exclusionary rule of the Fourth Amendment, the majority reverses that conviction. Believing that the search and seizure here was reasonable and that the Fourth Amendment properly construed contains no such exclusionary rule, I dissent.

The relevant facts are these. Pamela Mason, a 14-year-old school girl, lived with her mother and younger brother in Manchester, New Hampshire. She occasionally worked after school as a babysitter and sought such work by posting a notice on a bulletin board in a local laundromat. On January 13, 1964, she arrived home from school about 4:15 p. m. Pamela's mother told her

that a man had called seeking a babysitter for that evening and said that he would call again later. About 4:30 p. m., after Pamela's mother had left for her job as a waitress at a nearby restaurant, Pamela received a phone call. Her younger brother, who answered the call but did not overhear the conversation, later reported that the caller was a man. After the call, Pamela prepared dinner for her brother and herself, then left the house about 6 p. m. Her family never again saw her alive. Eight days later, on January 21, 1964, Pamela's frozen body was discovered in a snowdrift beside an interstate highway a few miles from her home. Her throat had been slashed and she had been shot in the head. Medical evidence showed that she died some time between 8 and 10 p. m. on January 13, the night she left home.

A manhunt ensued. Two witnesses informed the police that about 9:30 p. m. on the night of the murder they had stopped to offer assistance to a man in a 1951 Pontiac automobile which was parked beside the interstate highway near the point where the little girl's dead body was later found. Petitioner came under suspicion seven days after the body was discovered when one of his neighbors reported to the police that petitioner had been absent from his home between 5 and 11 p. m. on January 13, the night of the murder. Petitioner owned a 1951 Pontiac automobile that matched the description of the car which the two witnesses reported seeing parked where the girl's body had been found. The police first talked with petitioner at his home on the evening of January 28, fifteen days after the girl was killed, and arranged for him to come to the police station the following Sunday, February 2, 1964. He went to the station that Sunday and answered questions concerning his activities on the night of the murder, telling the police that he had been shopping in a neighboring town at the

time the murder was committed. During questioning, petitioner confessed to having committed an unrelated larceny from his employer and was held overnight at the police station in connection with that offense. On the next day, he was permitted to go home.

While petitioner was being questioned at the police station on February 2, two policemen went to petitioner's home to talk with his wife. They asked what firearms the petitioner owned and his wife produced two shotguns and two rifles which she voluntarily offered to the police. Upon examination the University of Rhode Island Criminal Investigation Laboratory concluded that one of the firearms, a Mossberg .22-caliber rifle, had fired the bullet found in the murdered girl's brain.

Petitioner admitted that he was a frequent visitor to the laundromat where Pamela posted her babysitting notice and that he had been there on the night of the murder. The following day a knife belonging to petitioner, which could have inflicted the murdered girl's knife wounds, was found near that laundromat. The police also learned that petitioner had unsuccessfully contacted four different persons before the girl's body had been discovered in an attempt to fabricate an alibi for the night of January 13.

On February 19, 1964, all this evidence was presented to the state attorney general who was authorized under New Hampshire law to issue arrest and search warrants. The attorney general considered the evidence and issued a warrant for petitioner's arrest and four search warrants including a warrant for the seizure and search of petitioner's Pontiac automobile.

On the day the warrants issued, the police went to the petitioner's residence and placed him under arrest. They took charge of his 1951 Pontiac which was parked in plain view in the driveway in front of the house, and, two hours later, towed the car to the police station.

During the search of the automobile at the station, the police obtained vacuum sweepings of dirt and other fine particles which matched like sweepings taken from the clothes of the murdered girl. Based on the similarity between the sweepings taken from petitioner's automobile and those taken from the girl's clothes, experts who testified at trial concluded that Pamela had been in the petitioner's car. The rifle given to the police by petitioner's wife was also received in evidence.

Petitioner challenges his conviction on the ground that the rifle obtained from his wife and the vacuum sweepings taken from his car were seized in violation of the Fourth Amendment and were improperly admitted at trial. With respect to the rifle voluntarily given to the police by petitioner's wife, the majority holds that it was properly received in evidence. I agree. But the Court reverses petitioner's conviction on the ground that the sweepings taken from his car were seized during an illegal search and for this reason the admission of the sweepings into evidence violated the Fourth Amendment. I dissent.

I

The Fourth Amendment prohibits unreasonable searches and seizures. The Amendment says nothing about consequences. It certainly nowhere provides for the exclusion of evidence as the remedy for violation. The Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." No examination of that text can find an exclusionary rule by a mere process of construction. Apparently the first suggestion that the Fourth Amendment somehow embodied a rule of evidence came

in Justice Bradley's majority opinion in *Boyd* v. *United States,* 116 U. S. 616 (1886). The holding in that case was that ordinarily a person may not be compelled to produce his private books and papers for use against him as proof of crime. That decision was a sound application of accepted principles of common law and the command of the Fifth Amendment that no person shall be compelled to be a witness against himself. But Justice Bradley apparently preferred to formulate a new exclusionary rule from the Fourth Amendment rather than rely on the already existing exclusionary rule contained in the language of the Fifth Amendment. His opinion indicated that compulsory production of such evidence at trial violated the Fourth Amendment. Mr. Justice Miller, with whom Chief Justice Waite joined, concurred solely on the basis of the Fifth Amendment, and explicitly refused to go along with Justice Bradley's novel reading of the Fourth Amendment. It was not until 1914, some 28 years after *Boyd* and when no member of the *Boyd* Court remained, that the Court in *Weeks* v. *United States,* 232 U. S. 383, stated that the Fourth Amendment itself barred the admission of evidence seized in violation of the Fourth Amendment. The *Weeks* opinion made no express confession of a break with the past. But if it was merely a proper reading of the Fourth Amendment, it seems strange that it took this Court nearly 125 years to discover the true meaning of those words. The truth is that the source of the exclusionary rule simply cannot be found in the Fourth Amendment. That Amendment did not when adopted, and does not now, contain any constitutional rule barring the admission of illegally seized evidence.

In striking contrast to the Fourth Amendment, the Fifth Amendment states in express, unambiguous terms that no person "shall be compelled in any criminal case

to be a witness against himself." The Fifth Amendment in and of itself directly and explicitly commands its own exclusionary rule—a defendant cannot be compelled to give evidence against himself. Absent congressional action taken pursuant to the Fourth Amendment, if evidence is to be excluded, it must be under the Fifth Amendment, not the Fourth. That was the point so ably made in the concurring opinion of Justice Miller, joined by Chief Justice Waite, in *Boyd* v. *United States, supra,* and that was the thrust of my concurring opinion in *Mapp* v. *Ohio,* 367 U. S. 643, 661 (1961).

The evidence seized by breaking into Mrs. Mapp's house and the search of all her possessions, was excluded from evidence, not by the Fourth Amendment which contains no exclusionary rule, but by the Fifth Amendment which does. The introduction of such evidence compels a man to be a witness against himself, and evidence so compelled must be excluded under the Fifth Amendment, not because the Court says so, but because the Fifth Amendment commands it.

The Fourth Amendment provides a constitutional means by which the Government can act to obtain evidence to be used in criminal prosecutions. The people are obliged to yield to a proper exercise of authority under that Amendment.[1] Evidence properly seized under the Fourth Amendment, of course, is admissible at trial. But nothing in the Fourth Amendment provides that evidence seized in violation of that Amendment must be excluded.

The majority holds that evidence it views as improperly seized in violation of its ever changing concept of the Fourth Amendment is inadmissible. The majority

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[1] There are of course certain searches which constitutionally cannot be authorized even with a search warrant or subpoena. See, *e. g., Boyd* v. *United States,* 116 U. S. 616 (1886); *Rochin* v. *California,* 342 U. S. 165, 174 (1952) (BLACK, J., concurring); *Schmerber* v. *California,* 384 U. S. 757, 773 (1966) (BLACK, J., dissenting).

treats the exclusionary rule as a judge-made rule of evidence designed and utilized to enforce the majority's own notions of proper police conduct. The Court today announces its new rules of police procedure in the name of the Fourth Amendment, then holds that evidence seized in violation of the new "guidelines" is automatically inadmissible at trial. The majority does not purport to rely on the Fifth Amendment to exclude the evidence in this case. Indeed, it could not. The majority prefers instead to rely on "changing times" and the Court's role as it sees it, as the administrator in charge of regulating the contacts of officials with citizens. The majority states that in the absence of a better means of regulation, it applies a court-created rule of evidence.

I readily concede that there is much recent precedent for the majority's present announcement of yet another new set of police operating procedures. By invoking this rulemaking power found not in the words but somewhere in the "spirit" of the Fourth Amendment, the Court has expanded that Amendment beyond recognition. And each new step is justified as merely a logical extension of the step before.

It is difficult for me to believe the Framers of the Bill of Rights intended that the police be required to prove a defendant's guilt in a "little trial" before the issuance of a search warrant. But see *Aguilar* v. *Texas,* 378 U. S. 108 (1964); *Spinelli* v. *United States,* 393 U. S. 410 (1969). No such proceeding was required before or after the adoption of the Fourth Amendment, until this Court decided *Aguilar* and *Spinelli.* Likewise, eavesdroppers were deemed to be competent witnesses in both English and American courts up until this Court in its Fourth Amendment "rulemaking" capacity undertook to lay down rules for electronic surveillance. *Berger* v. *New York,* 388 U. S. 41, 70 (1967) (BLACK, J., dissenting); *Katz* v. *United States,* 389 U. S. 347, 364 (1967) (BLACK, J., dis-

senting). The reasonableness of a search incident to an arrest, extending to areas under the control of the defendant and areas where evidence may be found, was an established tenet of English common law, and American constitutional law after adoption of the Fourth Amendment—that is, until *Chimel* v. *California,* 395 U. S. 752 (1969). The broad, abstract, and ambiguous concept of "privacy" is now unjustifiably urged as a comprehensive substitute for the Fourth Amendment's guarantee against "unreasonable searches and seizures." *Griswold* v. *Connecticut,* 381 U. S. 479 (1965).

Our Government is founded upon a written Constitution. The draftsmen expressed themselves in careful and measured terms corresponding with the immense importance of the powers delegated to them. The Framers of the Constitution, and the people who adopted it, must be understood to have used words in their natural meaning, and to have intended what they said. The Constitution itself contains the standards by which the seizure of evidence challenged in the present case and the admissibility of that evidence at trial is to be measured in the absence of congressional legislation. It is my conclusion that both the seizure of the rifle offered by petitioner's wife and the seizure of the automobile at the time of petitioner's arrest were consistent with the Fourth Amendment and that the evidence so obtained under the circumstances shown in the record in this case could not be excluded under the Fifth Amendment.

II

The majority holds that the warrant authorizing the seizure and search of petitioner's automobile was constitutionally defective and void. With respect to search warrants, the Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place

to be searched, and the persons or things to be seized." The majority concedes that the police did show probable cause for the issuance of the warrant. The majority does not contest that the warrant particularly described the place to be searched, and the thing to be seized.

But compliance with state law and the requirements of the Fourth Amendment apparently is not enough. The majority holds that the state attorney general's connection with the investigation automatically rendered the search warrant invalid. In the first place, there is no language in the Fourth Amendment which provides any basis for the disqualification of the state attorney general to act as a magistrate. He is a state official of high office. The Fourth Amendment does not indicate that his position of authority over state law enforcement renders him ineligible to issue warrants upon a showing of probable cause supported by oath or affirmation. The majority's argument proceeds on the "little trial" theory that the magistrate is to sit as a judge and weigh the evidence and practically determine guilt or innocence before issuing a warrant. There is nothing in the Fourth Amendment to support such a magnified view of the magistrate's authority. The state attorney general was not barred by the Fourth Amendment or any other constitutional provision from issuing the warrant.

In the second place, the New Hampshire Supreme Court held in effect that the state attorney general's participation in the investigation of the case at the time he issued the search warrant was "harmless error" if it was error at all. I agree. It is difficult to imagine a clearer showing of probable cause. There was no possibility of prejudice because there was no room for discretion. Indeed, it could be said that a refusal to issue a warrant on the showing of probable cause made in this case would have been an abuse of discretion. In light

of the showing made by the police, there is no reasonable possibility that the state attorney general's own knowledge of the investigation contributed to the issuance of the warrant. I see no error in the state attorney general's action. But even if there was error, it was harmless beyond reasonable doubt. See *Harrington* v. *California,* 395 U. S. 250 (1969); *Chapman* v. *California,* 386 U. S. 18 (1967).

Therefore, it is my conclusion that the warrant authorizing the seizure and search of petitioner's automobile was constitutional under the Fourth Amendment, and that the evidence obtained during that search cannot be excluded under the Fifth Amendment. Moreover, I am of the view that, even if the search warrant had not issued, the search in this case nonetheless would have been constitutional under all three of the principles considered and rejected by the majority.

III

It is important to point out that the automobile itself was evidence and was seized as such. Prior to the seizure the police had been informed by two witnesses that on the night of the murder they had seen an automobile parked near the point where the little girl's dead body was later discovered. Their description of the parked automobile matched petitioner's car. At the time of the seizure the identification of petitioner's automobile by the witnesses as the car they had seen on the night of the murder was yet to be made. The police had good reason to believe that the identification would be an important element of the case against the petitioner. Preservation of the automobile itself as evidence was a reasonable motivation for its seizure. Considered in light of the information in the hands of the New Hampshire police at the time of the seizure, I conclude that the seizure and search were constitutional, even had there been no search warrant, for the following among other reasons.

A

First, the seizure of petitioner's automobile was valid as incident to a lawful arrest. The majority concedes that there was probable cause for petitioner's arrest. Upon arriving at petitioner's residence to make that arrest, the police saw petitioner's automobile which they knew fitted the description of the car observed by two witnesses at the place where the murdered girl's body had been found. The police arrested the petitioner and seized the automobile. The majority holds that because the police had to go into petitioner's residence in order to place petitioner under arrest, the contemporaneous seizure of the automobile outside the house was not incident to that arrest. I cannot accept this elevation of form over reason.

After stating that *Chimel* v. *California,* 395 U. S. 752 (1969), is inapplicable to this case, the majority goes on to formulate and apply a *per se* rule reaching far beyond *Chimel.* To do so, the majority employs a classic *non sequitur.* Because this Court has held that police arresting a defendant on the street in front of his house cannot go into that house and make a general search, it follows, says the majority, that the police having entered a house to make an arrest cannot step outside the house to seize clearly visible evidence. Even though the police, upon entering a doorway to make a valid arrest, would be authorized under the pre-*Chimel* law the majority purports to apply, to make a five-hour search of a four-room apartment, see *Harris* v. *United States,* 331 U. S. 145 (1947), the majority holds that the police could not step outside the doorway to seize evidence they passed on their way in. The majority reasons that as the doorway locks the policeman out, once entered, it must lock him in.

The test of reasonableness cannot be governed by such arbitrary rules. Each case must be judged on its

own particular facts. Here, there was no general exploration, only a direct seizure of important evidence in plain view from both inside as well as outside the house. On the facts of this case, it is my opinion that the seizure of petitioner's automobile was incident to his arrest and was reasonable under the terms of the Fourth Amendment.

B

Moreover, under our decision last Term in *Chambers* v. *Maroney,* 399 U. S. 42 (1970), the police were entitled not only to seize petitioner's car but also to search the car after it had been taken to the police station. The police had probable cause to believe that the car had been used in the commission of the murder and that it contained evidence of the crime. Under *Carroll* v. *United States,* 267 U. S. 132 (1925), and *Chambers* v. *Maroney, supra,* such belief was sufficient justification for the seizure and the search of petitioner's automobile.

The majority reasons that the *Chambers* and *Carroll* rationale, based on the mobility of automobiles, is inapplicable here because the petitioner's car could have been placed under guard and, thereby, rendered immobile. But this Court explicitly rejected such reasoning in *Chambers:* "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. . . . The probable-cause factor still obtained at the station house and so did the mobility of the car . . . ." 399 U. S., at 52. This Court held there that the delayed search at the station house, as well as an immediate search at the time of seizure, was reasonable under the Fourth Amendment.

As a second argument for holding that the *Chambers* decision does not apply to this case, the majority reasons that the evidence could not have been altered or the car

moved because petitioner was in custody and his wife was accompanied by police, at least until the police towed the car to the station. But the majority's reasoning depends on two assumptions: first, that the police should, or even could, continue to keep petitioner's wife effectively under house arrest; and, second, that no one else had any motivation to alter or remove the car. I cannot accept the first assumption, nor do I believe that the police acted unreasonably in refusing to accept the second.[2]

C

I believe the seizure of petitioner's automobile was valid under the well-established right of the police to seize evidence in plain view at the time and place of arrest. The majority concedes that the police were rightfully at petitioner's residence to make a valid arrest at

[2] The majority attempts to rely on *Preston* v. *United States,* 376 U. S. 364 (1964), to support its holding that the police could not search petitioner's automobile at the station house. But this case is not *Preston,* nor is it controlled by *Preston.* The police arrested Preston for vagrancy. No claim was made that the police had any authority to hold his car in connection with that charge. The fact that the police had custody of Preston's car was totally unrelated to the vagrancy charge for which they arrested him; so was their subsequent search of the car. Here the officers arrested petitioner for murder. They seized petitioner's car as evidence of the crime for which he was arrested. Their subsequent search of the car was directly related to the reason petitioner was arrested and the reason his car had been seized and, therefore, was valid under this Court's decision in *Cooper* v. *California,* 386 U. S. 58 (1967).

My Brother WHITE points out that the police in the present case not only searched the car immediately upon taking it to the station house, but also searched it 11 months and 14 months after seizure. We held in *Cooper,* where the search occurred one week after seizure, that the Fourth Amendment is not violated by the examination or search of a car validly held by officers for use as evidence in a pending trial. In my view the police are entitled to search a car whether detained for a week or for a year where that car is being properly held as relevant evidence of the crime charged.

the time of the seizure. To use the majority's words, the "initial intrusion" which brought the police within plain view of the automobile was legitimate. The majority also concedes that the automobile was "plainly visible both from the street and from inside the house where Coolidge was actually arrested," *ante,* at 448, and that the automobile itself was evidence which the police had probable cause to seize. *Ante,* at 464. Indeed, the majority appears to concede that the seizure of petitioner's automobile was valid under the doctrine upholding seizures of evidence in plain view at the scene of arrest, at least as it stood before today. *Ante,* at 465–466, n. 24.

However, even after conceding that petitioner's automobile itself was evidence of the crime, that the police had probable cause to seize it as such, and that the automobile was in plain view at the time and place of arrest, the majority holds the seizure to be a violation of the Fourth Amendment because the discovery of the automobile was not "inadvertent." The majority confidently states: "What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused." But the prior holdings of this Court not only fail to support the majority's statement, they flatly contradict it. One need look no further than the cases cited in the majority opinion to discover the invalidity of that assertion.

In one of these cases, *Ker* v. *California,* 374 U. S. 23 (1963), the police observed the defendant's participation in an illegal marihuana transaction, then went to his apartment to arrest him. After entering the apartment, the police saw and seized a block of marihuana as they placed the defendant under arrest. This Court upheld that seizure on the ground that the police were justifiably

in the defendant's apartment to make a valid arrest, there was no search because the evidence was in plain view, and the seizure of such evidence was authorized when incident to a lawful arrest. The discovery of the marihuana there could hardly be described as "inadvertent." [3]

In *Marron* v. *United States,* 275 U. S. 192 (1927), also cited by the majority, the Court upheld the seizure of business records as being incident to a valid arrest for operating an illegal retail whiskey enterprise. The records were discovered in plain view. I cannot say that the seizure of business records from a place of business during the course of an arrest for operating an illegal business was "inadvertent." [4]

The majority confuses the historically justified right of the police to seize visible evidence of the crime in open view at the scene of arrest with the "plain view" excep-

[3] The facts in *Ker* undermine the majority's attempt to distinguish it from the instant case. The arresting officer there learned from other policemen that Ker had been observed meeting with a known marihuana supplier. The arresting officer had received information at various times over an eight-month period that Ker was selling marihuana from his apartment and that he was securing this marihuana from the known supplier. The arresting officer had a "mug" photograph of Ker at the time of the arrest and testified that for at least two months he had received information as to Ker's marihuana activities from a named informant who had previously given information leading to three other arrests and whose information was believed to be reliable. The arresting officer did not know whether Ker would be present at his apartment on the night of arrest. The officer had neither an arrest nor a search warrant. He entered Ker's apartment, placed Ker under arrest, and seized the block of marihuana in plain view in the adjoining room. This Court held that the seizure was reasonable and therefore valid under the Fourth Amendment.

[4] The majority correctly notes, *ante,* at 464, that this Court in *Warden* v. *Hayden,* 387 U. S. 294 (1967), flatly rejected the distinction for purposes of the Fourth Amendment between "mere evidence" and contraband, a distinction which the majority appears to me to reinstate at another point in its opinion, *ante,* at 471 and 472.

tion to the requirement of particular description in search warrants. The majority apparently reasons that unless the seizure made pursuant to authority conferred by a warrant is limited to the particularly described object of seizure, the warrant will become a general writ of assistance. Evidently, as a check on the requirement of particular description in search warrants, the majority announces a new rule that items not named in a warrant cannot be seized unless their discovery was unanticipated or "inadvertent." [5] The majority's concern is with the

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[5] The cases cited by the majority simply do not support the majority's new rule. For instance, when the police in *Steele* v. *United States,* 267 U. S. 498 (1925), entered a warehouse under the authority of a search warrant issued on a showing of probable cause that the Prohibition Act was being violated and naming "cases of whiskey" as the objects of search, it can scarcely be said that their discovery and seizure of barrels of whiskey and bottles and bottling equipment in plain view were "inadvertent."

The majority states that the seizure in *Warden* v. *Hayden, supra,* was justified because the police "inadvertently" came across the evidence while in hot pursuit of a fleeing suspect. In that case the police answered the call of two witnesses who stated that an armed robber had just held up a business. The witnesses described the robber and the clothes he was wearing. They had followed the robber to a particular house. The police searched the house and seized (1) a shotgun and a pistol found in a toilet on the second floor; (2) ammunition for the pistol and a cap like the one worn by the robber, both found beneath the mattress in the defendant's bedroom; and (3) a jacket and trousers of the type the fleeing man was said to have worn, found in a washing machine in the basement. It is quite difficult for me to accept the majority's characterization of these discoveries as "inadvertent."

See also *United States* v. *Lee,* 274 U. S. 559 (1927), another case cited by the majority, where Coast Guard officers, with probable cause to believe that a boat was being used to violate the Prohibition Act, shined a searchlight across the deck and discovered illicit whiskey. The admission of testimony regarding that discovery was upheld by this Court against a Fourth Amendment challenge, although the discovery could hardly be termed "inadvertent."

scope of the intrusion authorized by a warrant. But the right to seize items properly subject to seizure because in open view at the time of arrest is quite independent of any power to search for such items pursuant to a warrant. The entry in the present case did not depend for its authority on a search warrant but was concededly authorized by probable cause to effect a valid arrest. The intrusion did not exceed that authority. The intrusion was limited in scope to the circumstances which justified the entry in the first place—the arrest of petitioner. There was no general search; indeed, there was no search at all. The automobile itself was evidence properly subject to seizure and was in open view at the time and place of arrest.[6]

Only rarely can it be said that evidence seized incident to an arrest is truly unexpected or inadvertent. Indeed, if the police officer had no expectation of discovering weapons, contraband, or other evidence, he would make no search. It appears to me that the rule adopted by the Court today, for all practical purposes, abolishes seizure incident to arrest. The majority rejects the test of reasonableness provided in the Fourth Amendment and substitutes a *per se* rule—if the police could have obtained a warrant and did not, the seizure, no matter how reasonable, is void. But the Fourth Amendment does not require that every search be made pursuant to a warrant. It prohibits only "unreasonable searches and seizures." The relevant test is not the reasonableness of the opportunity to procure a warrant, but the reasonableness of the seizure under all the circumstances. The

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[6] Moreover, what a person knowingly exposes to the public is not a subject of Fourth Amendment protection. See *Lewis* v. *United States,* 385 U. S. 206, 210 (1966); *United States* v. *Lee,* 274 U. S. 559, 563 (1927); *Hester* v. *United States,* 265 U. S. 57 (1924).

test of reasonableness cannot be fixed by *per se* rules; each case must be decided on its own facts.

For all the reasons stated above, I believe the seizure and search of petitioner's car was reasonable and, therefore, authorized by the Fourth Amendment. The evidence so obtained violated neither the Fifth Amendment which does contain an exclusionary rule, nor the Fourth Amendment which does not. The jury of petitioner's peers, as conscious as we of the awesome gravity of their decision, heard that evidence and found the petitioner guilty of murder. I cannot in good conscience upset that verdict.

MR. JUSTICE BLACKMUN joins MR. JUSTICE BLACK in Parts II and III of this opinion and in that portion of Part I thereof which is to the effect that the Fourth Amendment supports no exclusionary rule.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, concurring and dissenting.

I would affirm the judgment. In my view, Coolidge's Pontiac was lawfully seized as evidence of the crime in plain sight and thereafter was lawfully searched under *Cooper* v. *California,* 386 U. S. 58 (1967). I am therefore in substantial disagreement with Parts II–C and II–D of the Court's opinion. Neither do I agree with Part II–B, and I can concur only in the result as to Part III.

I

The Fourth Amendment commands that the public shall be secure in their "persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." As to persons, the overwhelming weight of authority is that a police officer may make an arrest without a warrant when he has probable cause to believe the suspect

has committed a felony.[1] The general rule also is that upon the lawful arrest of a person, he and the area under his immediate control may be searched and contraband or

[1] This was the common-law rule. 1 J. Stephen, A History of Criminal Law of England 193 (1883); 2 M. Hale, Historia Placitorum Coronae 72–104 (new ed. 1800). It is also the constitutional rule. In *Carroll* v. *United States,* 267 U. S. 132 (1925), the Court said that "[t]he usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony . . . ." *Id.,* at 156. There in September 1921, officers had probable cause to believe the two defendants were unlawfully transporting bootleg liquor, but they had neither effected an immediate arrest nor sought a warrant. Several months later they observed the two men driving on a public highway, stopped, and searched the car and arrested the men, and this Court sustained both the search and the arrest. So also in *Trupiano* v. *United States,* 334 U. S. 699 (1948), officers were amply forewarned of criminal activities and had time to seek a warrant but did not do so. Instead, some time later they entered on property where Trupiano had a still and found exactly what they expected to find—one of the defendants engaged in the distillation of bootleg liquor. His arrest without a warrant was sustained, the Court saying that "[t]he absence of a warrant of arrest, even though there was sufficient time to obtain one, [did] not destroy the validity of an arrest" in the circumstances of the case. *Id.,* at 705.

The judgment of Congress also is that federal law enforcement officers may reasonably make warrantless arrests upon probable cause. It has authorized such arrests by United States Marshals, agents of the Federal Bureau of Investigation and of the Secret Service, and narcotics law enforcement officers. See Act of June 15, 1935, § 2, 49 Stat. 378, as amended, 18 U. S. C. § 3053; Act of June 18, 1934, 48 Stat. 1008, as amended, 18 U. S. C. § 3052; Act of Sept. 29, 1965, 79 Stat. 890, as amended, 18 U. S. C. § 3056 (1964 ed., Supp. V); Act of July 18, 1956, Tit. I, § 104 (a), 70 Stat. 570, as amended, 26 U. S. C. § 7607 (2). And, in 1951, Congress expressly deleted from the authority to make warrantless arrests a pre-existing statutory restriction barring them in the absence of a likelihood that the person would escape before a warrant could be obtained. See Act of Jan. 10, 1951, § 1, 64 Stat. 1239; S. Rep. No. 2464, 81st Cong., 2d Sess., 2 (1950); H. R. Rep. No. 3228, 81st Cong., 2d Sess., 2 (1950);

evidence seized without a warrant. The right "to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime . . . has been uniformly maintained in many cases." *Weeks* v. *United States,* 232 U. S. 383, 392 (1914). Accord, *Chimel* v. *California,* 395 U. S. 752 (1969).

With respect to houses and other private places, the general rule is otherwise: a search is invalid unless made on probable cause and under the authority of a warrant specifying the area to be searched and the objects to be seized. There are various exceptions to the rule, however, permitting warrantless entries and limited searches, the most recurring being the arrest without a warrant.

The case before us concerns the protection offered by the Fourth Amendment to "effects" other than personal

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Chimel v. *California,* 395 U. S. 752, 776–780 (1969) (dissenting opinion).

The majority now suggests that warrantless, probable-cause arrests may not be made in the home absent exigent circumstances. *Jones* v. *United States,* 357 U. S. 493 (1958), invalidated a forcible nighttime entry to effect a search without a warrant and suggested also that the particular circumstances of the entry would have posed a serious Fourth Amendment issue if the purpose of the entry had been to make an arrest. But, as a constitutional matter, the Court has never held or intimated that all probable-cause arrests without a warrant in the home must be justified by exigent circumstances other than the necessity for arresting a felon, or that, if the elapsed time between the accrual of probable cause and the making of the arrest proves sufficient to have obtained a warrant, the arrest is invalid. On the contrary, many cases in this Court have proceeded on the assumption that ordinarily warrantless arrests on probable cause may be effected even in the home. See *Sabbath* v. *United States,* 391 U. S. 585 (1968); *Miller* v. *United States,* 357 U. S. 301, 305–308 (1958); *United States* v. *Rabinowitz,* 339 U. S. 56, 60 (1950) (dictum); *Trupiano* v. *United States, supra; Johnson* v. *United States,* 333 U. S. 10, 15 (1948) (dictum). Of course, this is not to say that the time and method of entry could never pose serious constitutional questions under the Fourth Amendment.

papers or documents. It is clear that effects may not be seized without probable cause but the law as to when a warrant is required to validate their seizure is confused and confusing. Part of the difficulty derives from the fact that effects enjoy derivative protection when located in a house or other area within reach of the Fourth Amendment. Under existing doctrine, effects seized in warrantless, illegal searches of houses are fruits of a constitutional violation and may not be received in evidence. But is a warrant required to seize contraband or criminal evidence when it is found by officers at a place where they are legally entitled to be at the time? Before a person is deprived of his possession or right to possession of his effects, must a magistrate confirm that what the officer has legally seen (and would be permitted to testify about, if relevant and material) is actually contraband or criminal evidence?

The issue arises in different contexts. First, the effects may be found on public property. Suppose police are informed that important evidence has been secreted in a public park. A search is made and the evidence found. Although the evidence was hidden rather than abandoned, I had not thought a search warrant was required for officers to make a seizure, see *United States* v. *Lee,* 274 U. S. 559 (1927) (boat seized on public waters);[2] *Hester* v. *United States,* 265 U. S. 57 (1924) (liquor seized in open field); any more than a warrant is needed to seize an automobile which is itself evidence of crime and which is found on a public street or in a parking lot. See *Cooper* v. *California, supra.*

Second, the items may be found on the premises of a third party who gives consent for an official search

[2] *Lee* permitted the revenue officers who seized the boat to take and chemically analyze bootleg liquor found aboard it and then to testify as to the results of their analysis.

but who has no authority to consent to seizure of another person's effects. *Frazier* v. *Cupp,* 394 U. S. 731 (1969), would seem to settle the validity of the seizure without a warrant as long as the search itself involves no Fourth Amendment violation.

Third, the police may arrest a suspect in his home and in the course of a properly limited search discover evidence of crime. The line of cases from *Weeks* v. *United States, supra,* to *Harris* v. *United States,* 331 U. S. 145 (1947), had recognized the rule that upon arrest searches of the person and of adjacent areas were reasonable, and *Harris* had approved an incidental search of broad scope. In the next Term, however, *Trupiano* v. *United States,* 334 U. S. 699 (1948), departed from the *Harris* approach. In *Trupiano,* officers, with probable cause to arrest, entered property and arrested the defendant while he was operating an illegal still. The still was seized. Time and circumstance would have permitted the officers to secure both arrest and search warrants, but they had obtained neither. The Court did not disturb seizure of the person without warrant but invalidated seizure of the still since the officers could have had a warrant but did not. *United States* v. *Rabinowitz,* 339 U. S. 56 (1950), however, returned to the rule that the validity of searches incident to arrest does not depend on the practicability of securing a warrant. And, while *Chimel* v. *California, supra,* narrowed the permissible scope of incident searches to the person and the immediate area within reach of the defendant, it did not purport to re-establish the *Trupiano* rule that searches accompanying arrests are invalid if there is opportunity to get a warrant.

Finally, officers may be on a suspect's premises executing a search warrant and in the course of the authorized search discover evidence of crime not covered by the warrant. *Marron* v. *United States,* 275 U. S. 192

(1927), flatly held that legal presence under a warrant did not itself justify the seizure of such evidence. However, seizure of the same evidence was permitted because it was found in plain sight in the course of making an arrest and an accompanying search. It is at least odd to me to permit plain-sight seizures arising in connection with warrantless arrests, as the long line of cases ending with *Chimel* has done, or arising in the course of a hot-pursuit search for a felon, *Warden* v. *Hayden,* 387 U. S. 294 (1967); *Hester* v. *United States, supra;* and yet forbid the warrantless seizure of evidence in plain sight when officers enter a house under a search warrant that is perfectly valid but does not cover the items actually seized. I have my doubts that this aspect of *Marron* can survive later cases in this Court, particularly *Zap* v. *United States,* 328 U. S. 624 (1946), vacated on other grounds, 330 U. S. 800 (1947), where federal investigators seized a cancelled check evidencing a crime that had been observed during the course of an otherwise lawful search. See also *Stanley* v. *Georgia,* 394 U. S. 557, 569 (1969) (STEWART, J., concurring in result). Cf. *Chimel* v. *California, supra; Warden* v. *Hayden, supra; Frazier* v. *Cupp, supra.* Apparently the majority agrees, for it lumps plain-sight seizures in such circumstances along with other situations where seizures are made after a legal entry.

In all of these situations, it is apparent that seizure of evidence without a warrant is not itself an invasion either of personal privacy or of property rights beyond that already authorized by law. Only the possessory interest of a defendant in his effects is implicated. And in these various circumstances, at least where the discovery of evidence is "inadvertent," the Court would permit the seizure because, it is said, "the minor peril to Fourth Amendment protections" is overridden by the "major gain in effective law enforcement" inherent in

avoiding the "needless inconvenience" of procuring a warrant. *Ante,* at 467, 468. I take this to mean that both the possessory interest of the defendant and the importance of having a magistrate confirm that what the officer saw with his own eyes is in fact contraband or evidence of crime are not substantial constitutional considerations. Officers in these circumstances need neither guard nor ignore the evidence while a warrant is sought. Immediate seizure is justified and reasonable under the Fourth Amendment.

The Court would interpose in some or all of these situations, however, a condition that the discovery of the disputed evidence be "inadvertent." If it is "anticipated," that is if "the police know in advance the location of the evidence and intend to seize it," the seizure is invalid. *Id.,* at 470.

I have great difficulty with this approach. Let us suppose officers secure a warrant to search a house for a rifle. While staying well within the range of a rifle search, they discover two photographs of the murder victim, both in plain sight in the bedroom. Assume also that the discovery of the one photograph was inadvertent but finding the other was anticipated. The Court would permit the seizure of only one of the photographs. But in terms of the "minor" peril to Fourth Amendment values there is surely no difference between these two photographs: the interference with possession is the same in each case and the officers' appraisal of the photograph they expected to see is no less reliable than their judgment about the other. And in both situations the actual inconvenience and danger to evidence remain identical if the officers must depart and secure a warrant. The Court, however, states that the State will suffer no constitutionally cognizable inconvenience from invalidating anticipated seizures since it had probable cause to search

for the items seized and could have included them in a warrant.

This seems a punitive and extravagant application of the exclusionary rule. If the police have probable cause to search for a photograph as well as a rifle and they proceed to seek a warrant, they could have no possible motive for deliberately including the rifle but omitting the photograph. Quite the contrary is true. Only oversight or careless mistake would explain the omission in the warrant application if the police were convinced they had probable cause to search for the photograph. Of course, they may misjudge the facts and not realize they have probable cause for the picture, or the magistrate may find against them and not issue a warrant for it. In either event the officers may validly seize the photograph for which they had no probable cause to search but the other photograph is excluded from evidence when the Court subsequently determines that the officers, after all, had probable cause to search for it.

More important, the inadvertence rule is unnecessary to further any Fourth Amendment ends and will accomplish nothing. Police with a warrant for a rifle may search only places where rifles might be and must terminate the search once the rifle is found; the inadvertence rule will in no way reduce the number of places into which they may lawfully look. So, too, the areas of permissible search incident to arrest are strictly circumscribed by *Chimel*. Excluding evidence seen from within those areas can hardly be effective to operate to prevent wider, unauthorized searches. If the police stray outside the scope of an authorized *Chimel* search they are already in violation of the Fourth Amendment, and evidence so seized will be excluded; adding a second reason for excluding evidence hardly seems worth the candle. Perhaps the Court is concerned that officers, having the

right to intrude upon private property to make arrests, will use that right as a pretext to obtain entry to search for objects in plain sight, cf. *Chimel* v. *California, supra,* at 767, but, if so, such a concern is unfounded. The reason is that under *Chimel* the police can enter only into those portions of the property into which entry is necessary to effect the arrest. Given the restrictions of *Chimel,* the police face a substantial risk that in effecting an arrest and a search incident thereto they will never enter into those portions of the property from which they can plainly see the objects for which they are searching and that, if they do not, those objects will be destroyed before they can return and conduct a search of the entire premises pursuant to a warrant. If the police in fact possess probable cause to believe that weapons, contraband, or evidence of crime is in plain view on the premises, it will be far safer to obtain a search warrant than to take a chance that in making an arrest they will come into plain view of the object they are seeking. It is only when they lack probable cause for a search—when, that is, discovery of objects in plain view from a lawful vantage point is inadvertent—that entry to make an arrest might, as a practical matter, assist the police in discovering an object for which they could not have obtained a warrant. But the majority in that circumstance would uphold their authority to seize what they see. I thus doubt that the Court's new rule will have any measurable effect on police conduct. It will merely attach undue consequences to what will most often be an unintended mistake or a misapprehension of some of this Court's probable-cause decisions, a failing which, I am afraid, we all have.

By invalidating otherwise valid, plain-sight seizures where officers have probable cause and presumably, although the Court does not say so, opportunity to secure a warrant, the Court seems to turn in the direction of

the *Trupiano* rule, rejected in *Rabinowitz* and not revived in *Chimel.* But it seems unsure of its own rule.

It is careful to note that Coolidge's car is not contraband, stolen, or in itself dangerous. Apparently, contraband, stolen, or dangerous materials may be seized when discovered in the course of an otherwise authorized search even if the discovery is fully anticipated and a warrant could have been obtained. The distinction the Court draws between contraband and mere evidence of crime is reminiscent of the confusing and unworkable approach that I thought *Warden* v. *Hayden, supra,* had firmly put aside.

Neither does the Court in so many words limit *Chimel;* on the contrary, it indicates that warrantless *Chimel*-type searches will not be disturbed, even if the police "anticipate that they will find specific evidence during the course of such a search." *Ante,* at 482. The Court also concedes that, when an arresting officer "comes within plain view of a piece of evidence, not concealed, although outside of the area under the immediate control of the arrestee, the officer may seize it, so long as the plain view was obtained in the course of an appropriately limited search of the arrestee." *Id.,* at 466 n. 24. Yet today's decision is a limitation on *Chimel,* for in the latter example, the Court would permit seizure only if the plain view was inadvertently obtained. If the police, that is, fully anticipate that, when they arrest a suspect as he is entering the front door of his home, they will find a credit card in his pocket and a picture in plain sight on the wall opposite the door, both of which will implicate him in a crime, they may under today's decision seize the credit card but not the picture. This is a distinction that I find to be without basis and that the Court makes no attempt to explain. I can therefore conclude only that *Chimel* and today's holding are squarely inconsistent and that the Court, unable to per-

ceive any reasoned distinction, has abandoned any attempt to find one.

The Court also fails to mention searches carried out with third-party consent. Assume for the moment that authorities are reliably informed that a suspect, subject to arrest, but not yet apprehended, has concealed specified evidence of his crime in the house of a friend. The friend freely consents to a search of his house and accompanies the officers in the process. The evidence is found precisely where the officers were told they would find it, and the officers proceed to seize it, aware, however, that the friend lacks authority from the suspect to confer possession on them. The suspect's interest in not having his possession forcibly interfered with in the absence of a warrant from a magistrate is identical to the interest of Coolidge, and one would accordingly expect the Court to deal with the question. *Frazier* v. *Cupp, supra,* indicates that a seizure in these circumstances would be lawful, and the Court today neither overrules nor distinguishes *Frazier;* in fact, Part III of the Court's opinion, which discusses the officers' receipt of Coolidge's clothing and weapons from Mrs. Coolidge, implicitly approves *Frazier.*

Neither does the Court indicate whether it would apply the inadvertence requirement to searches made in public places, although one might infer from its approval of *United States* v. *Lee, supra,* which held admissible a chemical analysis of bootleg liquor observed by revenue officers in plain sight, that it would not.

Aware of these inconsistencies, the Court admits that "it would be nonsense to pretend that our decision today reduces Fourth Amendment law to complete order and harmony." *Ante,* at 483. But it concludes that logical consistency cannot be attained in constitutional law and ultimately comes to rest upon its belief "that the result reached in this case is correct. . . ." *Id.,* at 484. It

may be that constitutional law cannot be fully coherent and that constitutional principles ought not always be spun out to their logical limits, but this does not mean that we should cease to strive for clarity and consistency of analysis. Here the Court has a ready opportunity, one way or another, to bring clarity and certainty to a body of law that lower courts and law enforcement officials often find confusing. Instead, without apparent reason, it only increases their confusion by clinging to distinctions that are both unexplained and inexplicable.

II

In the case before us, the officers had probable cause both to arrest Coolidge and to seize his car. In order to effect his arrest, they went to his home—perhaps the most obvious place in which to look for him. They also may have hoped to find his car at home and, in fact, when they arrived on the property to make the arrest, they did find the 1951 Pontiac there. Thus, even assuming that the Fourth Amendment protects against warrantless seizures outside the house, but see *Hester* v. *United States, supra,* at 59, the fact remains that the officers had legally entered Coolidge's property to effect an arrest and that they seized the car only after they observed it in plain view before them. The Court, however, would invalidate this seizure on the premise that officers should not be permitted to seize effects in plain sight when they have anticipated they will see them.

Even accepting this premise of the Court, seizure of the car was not invalid. The majority makes an assumption that, when the police went to Coolidge's house to arrest him, they anticipated that they would also find the 1951 Pontiac there. In my own reading of the record, however, I have found no evidence to support this assumption. For all the record shows, the police, although they may have hoped to find the Pontiac at

Coolidge's home, did not know its exact location when they went to make the arrest, and their observation of it in Coolidge's driveway was truly inadvertent. Of course, they did have probable cause to seize the car, and, if they had had a valid warrant as well, they would have been justified in looking for it in Coolidge's driveway—a likely place for it to be. But if the fact of probable cause bars this seizure, it would also bar seizures not only of cars found at a house, but also of cars parked in a parking lot, hidden in some secluded spot, or delivered to the police by a third party at the police station. This would simply be a rule that the existence of probable cause bars all warrantless seizures.

It is evident on the facts of this case that Coolidge's Pontiac was subject to seizure if proper procedures were employed. It is also apparent that the Pontiac was in plain view of the officers who had legally entered Coolidge's property to effect his arrest. I am satisfied that it was properly seized whether or not the officers expected that it would be found where it was. And, since the Pontiac was legally seized as evidence of the crime for which Coolidge was arrested, *Cooper* v. *California, supra,* authorizes its warrantless search while in lawful custody of the police. "It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their own protection, to search it. It is no answer to say that the police could have obtained a search warrant, for '[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.' . . . Under the circumstances of this case, we cannot hold unreasonable under the Fourth Amendment the examination or search of a car validly held by officers for use as evidence . . . ." *Cooper* v. *California, supra,* at 61–62.

III

Given the foregoing views, it is perhaps unnecessary to deal with the other grounds offered to sustain the search of Coolidge's car. Nonetheless, it may be helpful to explain my reasons for relying on the plain-sight rule rather than on *Chambers* v. *Maroney,* 399 U. S. 42 (1970), to validate this search.

Chambers upheld the seizure and subsequent search of automobiles at the station house rather than requiring the police to search cars immediately at the places where they are found. But *Chambers* did not authorize indefinite detention of automobiles so seized; it contemplated some expedition in completing the searches so that automobiles could be released and returned to their owners. In the present case, however, Coolidge's Pontiac was not released quickly but was retained in police custody for more than a year and was searched not only immediately after seizure but also on two other occasions: one of them 11 months and the other 14 months after seizure. Since fruits of the later searches as well as the earlier one were apparently introduced in evidence, I cannot look to *Chambers* and would invalidate the later searches but for the fact that the police had a right to seize and detain the car not because it was a car, but because it was itself evidence of crime. It is only because of the long detention of the car that I find *Chambers* inapplicable, however, and I disagree strongly with the majority's reasoning for refusing to apply it.

As recounted earlier, arrest and search of the person on probable cause but without a warrant is the prevailing constitutional and legislative rule, without regard to whether on the particular facts there was opportunity to secure a warrant. Apparently, exigent circumstances are so often present in arrest situations that it has been

deemed improvident to litigate the issue in every case.

In similar fashion, "practically since the beginning of the Government," Congress and the Court have recognized "a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Carroll* v. *United States,* 267 U. S. 132, 153 (1925). As in the case of an arrest and accompanying search of a person, searches of vehicles on probable cause but without a warrant have been deemed reasonable within the meaning of the Fourth Amendment without requiring proof of exigent circumstances beyond the fact that a movable vehicle is involved. The rule has been consistently recognized, see *Cooper* v. *California, supra; Brinegar* v. *United States,* 338 U. S. 160 (1949); *Harris* v. *United States, supra,* at 168 (dissenting opinion); *Davis* v. *United States,* 328 U. S. 582, 609 (1946) (dissenting opinion); *Scher* v. *United States,* 305 U. S. 251 (1938); *Husty* v. *United States,* 282 U. S. 694 (1931); *United States* v. *Lee, supra;* and was reaffirmed less than a year ago in *Chambers* v. *Maroney, supra,* where a vehicle was stopped on the highway but was searched at the police station, there being probable cause but no warrant.

The majority now approves warrantless searches of vehicles in motion when seized. On the other hand, warrantless, probable-cause searches of parked but movable vehicles in some situations would be valid only upon proof of exigent circumstances justifying the search. Although I am not sure, it would seem that, when police discover a parked car that they have probable cause to search, they may not immediately search but must seek

a warrant. But if before the warrant arrives, the car is put in motion by its owner or others, it may be stopped and searched on the spot or elsewhere. In the case before us, Coolidge's car, parked at his house, could not be searched without a valid warrant, although if Coolidge had been arrested as he drove away from his home, immediate seizure and subsequent search of the car would have been reasonable under the Fourth Amendment.

I find nothing in the language or the underlying rationale of the line of cases from *Carroll* to *Chambers* limiting vehicle searches as the Court now limits them in situations such as the one before us. Although each of those cases may, as the Court argues, have involved vehicles or vessels in motion prior to their being stopped and searched, each of them approved the search of a vehicle that was no longer moving and, with the occupants in custody, no more likely to move than the unattended but movable vehicle parked on the street or in the driveway of a person's house. In both situations the probability of movement at the instance of family or friends is equally real, and hence the result should be the same whether the car is at rest or in motion when it is discovered.

In *Husty* v. *United States, supra,* the police had learned from a reliable informant that Husty had two loads of liquor in automobiles of particular make and description parked at described locations. The officers found one of the cars parked and unattended at the indicated spot. Later, as officers watched, Husty and others entered and started to drive away. The car was stopped after having moved no more than a foot or two; immediate search of the car produced contraband. Husty was then arrested. The Court, in a unanimous opinion, sustained denial of a motion to suppress the fruits of the search, saying that "[t]he Fourth Amendment does not prohibit the search, without warrant, of an automobile, for liquor illegally

transported or possessed, if the search is upon probable cause . . . ." *Id.*, at 700. Further, "[t]he search was not unreasonable because, as petitioners argue, sufficient time elapsed between the receipt by the officer of the information and the search of the car to have enabled him to procure a search warrant. He could not know when Husty would come to the car or how soon it would be removed. In such circumstances we do not think the officers should be required to speculate upon the chances of successfully carrying out the search, after the delay and withdrawal from the scene of one or more officers which would have been necessary to procure a warrant. The search was, therefore, on probable cause, and not unreasonable . . . ." *Id.*, at 701.

The Court apparently cites *Husty* with approval as involving a car in motion on the highway. But it was obviously irrelevant to the Court that the officers could have obtained a warrant before Husty attempted to drive the car away. Equally immaterial was the fact that the car had moved one or two feet at the time it was stopped. The search would have been approved even if it had occurred before Husty's arrival or after his arrival but before he had put the car in motion. The Court's attempt to distinguish *Husty* on the basis of the car's negligible movement prior to its being stopped is without force.

The Court states flatly, however, that this case is not ruled by the *Carroll-Chambers* line of cases but by *Dyke* v. *Taylor Implement Mfg. Co.,* 391 U. S. 216 (1968). There the car was properly stopped and the occupants arrested for reckless driving, but the subsequent search at the station house could not be justified as incident to the arrest. See *Preston* v. *United States,* 376 U. S. 364 (1964). Nor could the car itself be seized and later searched, as it was, absent probable cause to believe it contained evidence of crime. In *Dyke,* it was pointed out

that probable cause did not exist at the time of the search, and we expressly rested our holding on this fact, noting that "[s]ince the search was not shown to have been based upon sufficient cause," it was not necessary to reach other grounds urged for invalidating it. 391 U. S., at 222. Given probable cause, however, we would have upheld the search in *Dyke*.

For Fourth Amendment purposes, the difference between a moving and movable vehicle is tenuous at best. It is a metaphysical distinction without roots in the commonsense standard of reasonableness governing search and seizure cases. Distinguishing the case before us from the *Carroll-Chambers* line of cases further enmeshes Fourth Amendment law in litigation breeding refinements having little relation to reality. I suggest that in the interest of coherence and credibility we either overrule our prior cases and treat automobiles precisely as we do houses or apply those cases to readily movable as well as moving vehicles and thus treat searches of automobiles as we do the arrest of a person. By either course we might bring some modicum of certainty to Fourth Amendment law and give the law enforcement officers some slight guidance in how they are to conduct themselves.

I accordingly dissent from Parts II–B, II–C, and II–D of the Court's opinion. I concur, however, in the result reached in Part III of the opinion. I would therefore affirm the judgment of the New Hampshire Supreme Court.

McKEIVER ET AL. *v.* PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

No. 322. Argued December 10, 1970—Decided June 21, 1971*

The requests of appellants in No. 322 for a jury trial were denied, and they were adjudged juvenile delinquents under Pennsylvania law. The State Supreme Court, while recognizing the applicability to juveniles of certain due process procedural safeguards, held that there is no constitutional right to a jury trial in juvenile court. Appellants argue for a right to a jury trial because they were tried in proceedings "substantially similar to a criminal trial," and note that the press is generally present at the trial and that members of the public also enter the courtroom. Petitioners in No. 128 were adjudged juvenile delinquents in North Carolina, where their jury trial requests were denied and in proceedings where the general public was excluded. *Held:* A trial by jury is not constitutionally required in the adjudicative phase of a state juvenile court delinquency proceeding. Pp. 540–551, 553–556.

No. 322, 438 Pa. 339, 265 A. 2d 350, and No. 128, 275 N. C. 517, 169 S. E. 2d 879, affirmed.

MR. JUSTICE BLACKMUN, joined by THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE WHITE, concluded that:

1. The applicable due process standard in juvenile proceedings is fundamental fairness, as developed by *In re Gault,* 387 U. S. 1, and *In re Winship,* 397 U. S. 358, which emphasized factfinding procedures, but in our legal system the jury is not a necessary component of accurate factfinding. P. 543.

2. Despite disappointments, failures, and shortcomings in the juvenile court procedure, a jury trial is not constitutionally required in a juvenile court's adjudicative stage. Pp. 545–550.

(a) The Court has not heretofore ruled that all rights constitutionally assured to an adult accused are to be imposed in a juvenile proceeding. P. 545.

(b) Compelling a jury trial might remake the proceeding into a fully adversary process and effectively end the idealistic prospect of an intimate, informal protective proceeding. P. 545.

(c) Imposing a jury trial on the juvenile court system would not remedy the system's defects and would not greatly strengthen the factfinding function. P. 547.

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*Together with No. 128, *In re Burrus et al.,* on certiorari to the Supreme Court of North Carolina, argued December 9–10, 1970.

(d) The States should be free to experiment to achieve the high promise of the juvenile court concept, and they may install a jury system; or a juvenile court judge may use an advisory jury in a particular case. P. 547.

(e) Many States by statute or judicial decision deny a juvenile a right to jury trial, and the great majority that have faced that issue since *Gault, supra,* and *Duncan* v. *Louisiana,* 391 U. S. 145, have concluded that the considerations involved in those cases do not compel trial by jury in juvenile court. Pp. 548–549.

(f) Jury trial would entail delay, formality, and clamor of the adversary system, and possibly a public trial. P. 550.

(g) Equating the adjudicative phase of the juvenile proceeding with a criminal trial ignores the aspects of fairness, concern, sympathy, and paternal attention inherent in the juvenile court system. P. 550.

MR. JUSTICE BRENNAN concluded that:

Due process in juvenile delinquency proceedings, which are not "criminal prosecutions," does not require the States to provide jury trials on demand so long as some other aspect of the process adequately protects the interests that Sixth Amendment jury trials are intended to serve. In the juvenile context, those interests may be adequately protected by allowing accused individuals to bring the community's attention to bear upon their trials. Since Pennsylvania has no statutory bar to public juvenile trials, and since no claim is made that members of the public were excluded over appellants' objections, the judgment in No. 322 should be affirmed. Pp. 553–556.

MR. JUSTICE HARLAN concurred in the judgments in these cases on the ground that criminal jury trials are not constitutionally required of the States, either by the Sixth Amendment or by due process. P. 557.

BLACKMUN, J., announced the Court's judgments and delivered an opinion in which BURGER, C. J., and STEWART and WHITE, JJ., joined. WHITE, J., filed a concurring opinion, *post,* p. 551. BRENNAN, J., filed an opinion concurring in the judgment in No. 322 and dissenting in No. 128, *post,* p. 553. HARLAN, J., filed an opinion concurring in the judgments, *post,* p. 557. DOUGLAS, J., filed a dissenting opinion, in which BLACK and MARSHALL, JJ., joined, *post,* p. 557.

Daniel E. Farmer argued the cause for appellants in No. 322. With him on the brief were *John S. Roberts,*

Jr., Peter W. Brown, Harvey N. Schmidt, and *James O. Freedman.*

Michael Meltsner argued the cause for petitioners in No. 128. With him on the briefs were *Jack Greenberg, Julius L. Chambers, James E. Ferguson II,* and *Anthony Amsterdam.*

Arlen Specter argued the cause for appellee in No. 322. With him on the brief was *James D. Crawford.*

Robert Morgan, Attorney General, argued the cause for respondent, the State of North Carolina, in No. 128. With him on the brief were *Ralph Moody,* Deputy Attorney General, and *Andrew A. Vanore, Jr.,* Assistant Attorney General.

Alfred L. Scanlan argued the cause for the National Council of Juvenile Court Judges as *amicus curiae* urging affirmance in No. 128. With him on the brief was *Martin J. Flynn.*

Briefs of *amici curiae* in No. 128 were filed by *John J. Droney* for the Commonwealth of Massachusetts; by *Thomas C. Lynch,* Attorney General, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Derald E. Granberg* and *Gloria F. DeHart,* Deputy Attorneys General, for the State of California; and by *Norman Lefstein* for the Public Defender Service for the District of Columbia et al.

MR. JUSTICE BLACKMUN announced the judgments of the Court and an opinion in which THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE WHITE join.

These cases present the narrow but precise issue whether the Due Process Clause of the Fourteenth Amendment assures the right to trial by jury in the adjudicative phase of a state juvenile court delinquency proceeding.

I

The issue arises understandably, for the Court in a series of cases already has emphasized due process factors protective of the juvenile:

1. *Haley* v. *Ohio,* 332 U. S. 596 (1948), concerned the admissibility of a confession taken from a 15-year-old boy on trial for first-degree murder. It was held that, upon the facts there developed, the Due Process Clause barred the use of the confession. MR. JUSTICE DOUGLAS, in an opinion in which three other Justices joined, said, "Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law." 332 U. S., at 601.

2. *Gallegos* v. *Colorado,* 370 U. S. 49 (1962), where a 14-year-old was on trial, is to the same effect.

3. *Kent* v. *United States,* 383 U. S. 541 (1966), concerned a 16-year-old charged with housebreaking, robbery, and rape in the District of Columbia. The issue was the propriety of the juvenile court's waiver of jurisdiction "after full investigation," as permitted by the applicable statute. It was emphasized that the latitude the court possessed within which to determine whether it should retain or waive jurisdiction "assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a 'full investigation.' " 383 U. S., at 553.

4. *In re Gault,* 387 U. S. 1 (1967), concerned a 15-year-old, already on probation, committed in Arizona as a delinquent after being apprehended upon a complaint of lewd remarks by telephone. Mr. Justice Fortas, in writing for the Court, reviewed the cases just cited and observed,

> "Accordingly, while these cases relate only to restricted aspects of the subject, they unmistakably

indicate that, whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." 387 U. S., at 13.

The Court focused on "the proceedings by which a determination is made as to whether a juvenile is a 'delinquent' as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution" and, as to this, said that "there appears to be little current dissent from the proposition that the Due Process Clause has a role to play." *Ibid.* *Kent* was adhered to: "We reiterate this view, here in connection with a juvenile court adjudication of 'delinquency,' as a requirement which is part of the Due Process Clause of the Fourteenth Amendment of our Constitution." *Id.*, at 30–31. Due process, in that proceeding, was held to embrace adequate written notice; advice as to the right to counsel, retained or appointed; confrontation; and cross-examination. The privilege against self-incrimination was also held available to the juvenile. The Court refrained from deciding whether a State must provide appellate review in juvenile cases or a transcript or recording of the hearings.

5. *DeBacker* v. *Brainard,* 396 U. S. 28 (1969), presented, by state habeas corpus, a challenge to a Nebraska statute providing that juvenile court hearings "shall be conducted by the judge without a jury in an informal manner." However, because that appellant's hearing had antedated the decisions in *Duncan* v. *Louisiana,* 391 U. S. 145 (1968), and *Bloom* v. *Illinois,* 391 U. S. 194 (1968), and because *Duncan* and *Bloom* had been given only prospective application by *DeStefano* v. *Woods,* 392 U. S. 631 (1968), DeBacker's case was deemed an inappropriate one for resolution of the jury trial issue. His appeal was therefore dismissed. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, in separate dissents, took the position that a juvenile is entitled to a jury trial at

the adjudicative stage. MR. JUSTICE BLACK described this as "a right which is surely one of the fundamental aspects of criminal justice in the English-speaking world," 396 U. S., at 34, and MR. JUSTICE DOUGLAS described it as a right required by the Sixth and Fourteenth Amendments "where the delinquency charged is an offense that, if the person were an adult, would be a crime triable by jury." 396 U. S., at 35.

6. *In re Winship,* 397 U. S. 358 (1970), concerned a 12-year-old charged with delinquency for having taken money from a woman's purse. The Court held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged," 397 U. S., at 364, and then went on to hold, at 368, that this standard was applicable, too, "during the adjudicatory stage of a delinquency proceeding."

From these six cases—*Haley, Gallegos, Kent, Gault, DeBacker,* and *Winship*—it is apparent that:

1. Some of the constitutional requirements attendant upon the state criminal trial have equal application to that part of the state juvenile proceeding that is adjudicative in nature. Among these are the rights to appropriate notice, to counsel, to confrontation and to cross-examination, and the privilege against self-incrimination. Included, also, is the standard of proof beyond a reasonable doubt.

2. The Court, however, has not yet said that *all* rights constitutionally assured to an adult accused of crime also are to be enforced or made available to the juvenile in his delinquency proceeding. Indeed, the Court specifically has refrained from going that far:

> "We do not mean by this to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual admin-

istrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment." *Kent,* 383 U. S., at 562; *Gault,* 387 U. S., at 30.

3. The Court, although recognizing the high hopes and aspirations of Judge Julian Mack, the leaders of the Jane Addams School [1] and the other supporters of the juvenile court concept, has also noted the disappointments of the system's performance and experience and the resulting widespread disaffection. *Kent,* 383 U. S., at 555–556; *Gault,* 387 U. S., at 17–19. There have been, at one and the same time, both an appreciation for the juvenile court judge who is devoted, sympathetic, and conscientious, and a disturbed concern about the judge who is untrained and less than fully imbued with an understanding approach to the complex problems of childhood and adolescence. There has been praise for the system and its purposes, and there has been alarm over its defects.

4. The Court has insisted that these successive decisions do not spell the doom of the juvenile court system or even deprive it of its "informality, flexibility, or speed." *Winship,* 397 U. S., at 366. On the other hand, a concern precisely to the opposite effect was expressed by two dissenters in *Winship. Id.,* at 375–376.

II

With this substantial background already developed, we turn to the facts of the present cases:

No. 322. Joseph McKeiver, then age 16, in May 1968 was charged with robbery, larceny, and receiving stolen goods (felonies under Pennsylvania law, Pa. Stat. Ann., Tit. 18, §§ 4704, 4807, and 4817 (1963)) as acts of juve-

[1] See Mr. Justice Fortas' article, Equal Rights—For Whom?, 42 N. Y. U. L. Rev. 401, 406 (1967).

nile delinquency. At the time of the adjudication hearing he was represented by counsel.[2] His request for a jury trial was denied and his case was heard by Judge Theodore S. Gutowicz of the Court of Common Pleas, Family Division, Juvenile Branch, of Philadelphia County, Pennsylvania. McKeiver was adjudged a delinquent upon findings that he had violated a law of the Commonwealth. Pa. Stat. Ann., Tit. 11, § 243 (4) (a) (1965). He was placed on probation. On appeal, the Superior Court affirmed without opinion. *In re McKeiver,* 215 Pa. Super. 760, 255 A. 2d 921 (1969).

Edward Terry, then age 15, in January 1969 was charged with assault and battery on a police officer and conspiracy (misdemeanors under Pennsylvania law, Pa. Stat. Ann., Tit. 18, §§ 4708 and 4302 (1963)) as acts of juvenile delinquency. His counsel's request for a jury trial was denied and his case was heard by Judge Joseph C. Bruno of the same Juvenile Branch of the Court of Common Pleas of Philadelphia County. Terry was adjudged a delinquent on the charges. This followed an adjudication and commitment in the preceding week for an assault on a teacher. He was committed, as he had been on the earlier charge, to the Youth Development Center at Cornwells Heights. On appeal, the Superior Court affirmed without opinion. *In re Terry,* 215 Pa. Super. 762, 255 A. 2d 922 (1969).

The Supreme Court of Pennsylvania granted leave to appeal in both cases and consolidated them. The single question considered, as phrased by the court, was "whether there is a constitutional right to a jury trial in juvenile court." The answer, one justice dissenting, was

[2] At McKeiver's hearing his counsel advised the court that he had never seen McKeiver before and "was just in the middle of interviewing" him. The court allowed him five minutes for the interview. Counsel's office, Community Legal Services, however, had been appointed to represent McKeiver five months earlier. App. 2.

in the negative. *In re Terry,* 438 Pa. 339, 265 A. 2d 350 (1970). We noted probable jurisdiction. 399 U. S. 925 (1970).

The details of the McKeiver and Terry offenses are set forth in Justice Roberts' opinion for the Pennsylvania court, 438 Pa., at 341–342, nn. 1 and 2, 265 A. 2d, at 351 nn. 1 and 2, and need not be repeated at any length here. It suffices to say that McKeiver's offense was his participating with 20 or 30 youths who pursued three young teenagers and took 25 cents from them; that McKeiver never before had been arrested and had a record of gainful employment; that the testimony of two of the victims was described by the court as somewhat inconsistent and as "weak"; and that Terry's offense consisted of hitting a police officer with his fists and with a stick when the officer broke up a boys' fight Terry and others were watching.

No. 128. Barbara Burrus and approximately 45 other black children, ranging in age from 11 to 15 years,[3] were the subjects of juvenile court summonses issued in Hyde County, North Carolina, in January 1969.

The charges arose out of a series of demonstrations in the county in late 1968 by black adults and children protesting school assignments and a school consolidation plan. Petitions were filed by North Carolina state highway patrolmen. Except for one relating to James Lambert Howard, the petitions charged the respective juveniles with wilfully impeding traffic. The charge against Howard was that he wilfully made riotous noise and was disorderly in the O. A. Peay School in Swan Quarter; interrupted and disturbed the school during its regular sessions; and defaced school furniture. The acts so

[3] In North Carolina juvenile court procedures are provided only for persons under the age of 16. N. C. Gen. Stat. §§ 7A–277 and 7A–278 (1) (1969).

charged are misdemeanors under North Carolina law. N. C. Gen. Stat. §§ 20–174.1 (1965 and Supp. 1969), 14–132 (a), 14–273 (1969).

The several cases were consolidated into groups for hearing before District Judge Hallett S. Ward, sitting as a juvenile court. The same lawyer appeared for all the juveniles. Over counsel's objection, made in all except two of the cases, the general public was excluded. A request for a jury trial in each case was denied.

The evidence as to the juveniles other than Howard consisted solely of testimony of highway patrolmen. No juvenile took the stand or offered any witness. The testimony was to the effect that on various occasions the juveniles and adults were observed walking along Highway 64 singing, shouting, clapping, and playing basketball. As a result, there was interference with traffic. The marchers were asked to leave the paved portion of the highway and they were warned that they were committing a statutory offense. They either refused or left the roadway and immediately returned. The juveniles and participating adults were taken into custody. Juvenile petitions were then filed with respect to those under the age of 16.

The evidence as to Howard was that on the morning of December 5, he was in the office of the principal of the O. A. Peay School with 15 other persons while school was in session and was moving furniture around; that the office was in disarray; that as a result the school closed before noon; and that neither he nor any of the others was a student at the school or authorized to enter the principal's office.

In each case the court found that the juvenile had committed "an act for which an adult may be punished by law." A custody order was entered declaring the juvenile a delinquent "in need of more suitable guardianship" and committing him to the custody of the County

Department of Public Welfare for placement in a suitable institution "until such time as the Board of Juvenile Correction or the Superintendent of said institution may determine, not inconsistent with the laws of this State." The court, however, suspended these commitments and placed each juvenile on probation for either one or two years conditioned upon his violating none of the State's laws, upon his reporting monthly to the County Department of Welfare, upon his being home by 11 p. m. each evening, and upon his attending a school approved by the Welfare Director. None of the juveniles has been confined on these charges.

On appeal, the cases were consolidated into two groups. The North Carolina Court of Appeals affirmed. *In re Burrus,* 4 N. C. App. 523, 167 S. E. 2d 454 (1969); *In re Shelton,* 5 N. C. App. 487, 168 S. E. 2d 695 (1969). In its turn the Supreme Court of North Carolina deleted that portion of the order in each case relating to commitment, but otherwise affirmed. *In re Burrus,* 275 N. C. 517, 169 S. E. 2d 879 (1969). Two justices dissented without opinion. We granted certiorari. 397 U. S. 1036 (1970).

III

It is instructive to review, as an illustration, the substance of Justice Roberts' opinion for the Pennsylvania court. He observes, 438 Pa., at 343, 265 A. 2d, at 352, that "[f]or over sixty-five years the Supreme Court gave no consideration at all to the constitutional problems involved in the juvenile court area"; that *Gault* "is somewhat of a paradox, being both broad and narrow at the same time"; that it "is broad in that it evidences a fundamental and far-reaching disillusionment with the anticipated benefits of the juvenile court system"; that it is narrow because the court enumerated four due process rights which it held applicable in juvenile proceedings, but declined to rule on two other claimed rights, *id.,* at

344–345, 265 A. 2d, at 353; that as a consequence the Pennsylvania court was "confronted with a sweeping rationale and a carefully tailored holding," *id.*, at 345, 265 A. 2d, at 353; that the procedural safeguards "*Gault* specifically made applicable to juvenile courts have already caused a significant 'constitutional domestication' of juvenile court proceedings," *id.*, at 346, 265 A. 2d, at 354; that those safeguards and other rights, including the reasonable-doubt standard established by *Winship*, "insure that the juvenile court will operate in an atmosphere which is orderly enough to impress the juvenile with the gravity of the situation and the impartiality of the tribunal and at the same time informal enough to permit the benefits of the juvenile system to operate" (footnote omitted), *id.*, at 347, 265 A. 2d, at 354; that the "proper inquiry, then, is whether the right to a trial by jury is 'fundamental' within the meaning of *Duncan*, in the context of a juvenile court which operates with *all* of the above constitutional safeguards," *id.*, at 348, 265 A. 2d, at 354; and that his court's inquiry turned "upon whether there are elements in the juvenile process which render the right to a trial by jury less essential to the protection of an accused's rights in the juvenile system than in the normal criminal process." *Ibid.*

Justice Roberts then concluded that such factors do inhere in the Pennsylvania juvenile system: (1) Although realizing that "faith in the quality of the juvenile bench is not an entirely satisfactory substitute for due process," *id.*, at 348, 265 A. 2d, at 355, the judges in the juvenile courts "do take a different view of their role than that taken by their counterparts in the criminal courts." *Id.*, at 348, 265 A. 2d, at 354–355. (2) While one regrets its inadequacies, "the juvenile system has available and utilizes much more fully various diagnostic and rehabilitative services" that are "far superior to those available in the regular criminal process." *Id.*, at 348–

349, 265 A. 2d, at 355. (3) Although conceding that the post-adjudication process "has in many respects fallen far short of its goals, and its reality is far harsher than its theory," the end result of a declaration of delinquency "*is* significantly different from and less onerous than a finding of criminal guilt" and "we are not yet convinced that the current practices do not contain the seeds from which a truly appropriate system can be brought forth." (4) Finally, "of all the possible due process rights which could be applied in the juvenile courts, the right to trial by jury is the one which would most likely be disruptive of the unique nature of the juvenile process." It is the jury trial that "would probably require substantial alteration of the traditional practices." The other procedural rights held applicable to the juvenile process "will give the juveniles sufficient protection" and the addition of the trial by jury "might well destroy the traditional character of juvenile proceedings." *Id.*, at 349–350, 265 A. 2d, at 355.

The court concluded, *id.*, at 350, 265 A. 2d, at 356, that it was confident "that a properly structured and fairly administered juvenile court system can serve our present societal needs without infringing on individual freedoms."

IV

The right to an impartial jury "[i]n all criminal prosecutions" under federal law is guaranteed by the Sixth Amendment. Through the Fourteenth Amendment that requirement has now been imposed upon the States "in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee." This is because the Court has said it believes "that trial by jury in criminal cases is fundamental to the American scheme of justice." *Duncan* v. *Louisiana*, 391 U. S. 145, 149 (1968); *Bloom* v. *Illinois*, 391 U. S. 194, 210–211 (1968).

This, of course, does not automatically provide the answer to the present jury trial issue, if for no other reason than that the juvenile court proceeding has not yet been held to be a "criminal prosecution," within the meaning and reach of the Sixth Amendment, and also has not yet been regarded as devoid of criminal aspects merely because it usually has been given the civil label. *Kent,* 383 U. S., at 554; *Gault,* 387 U. S., at 17, 49–50; *Winship,* 397 U. S., at 365–366.

Little, indeed, is to be gained by any attempt simplistically to call the juvenile court proceeding either "civil" or "criminal." The Court carefully has avoided this wooden approach. Before *Gault* was decided in 1967, the Fifth Amendment's guarantee against self-incrimination had been imposed upon the state criminal trial. *Malloy* v. *Hogan,* 378 U. S. 1 (1964). So, too, had the Sixth Amendment's rights of confrontation and cross-examination. *Pointer* v. *Texas,* 380 U. S. 400 (1965), and *Douglas* v. *Alabama,* 380 U. S. 415 (1965). Yet the Court did not automatically and peremptorily apply those rights to the juvenile proceeding. A reading of *Gault* reveals the opposite. And the same separate approach to the standard-of-proof issue is evident from the carefully separated application of the standard, first to the criminal trial, and then to the juvenile proceeding, displayed in *Winship.* 397 U. S., at 361 and 365.

Thus, accepting "the proposition that the Due Process Clause has a role to play," *Gault,* 387 U. S., at 13, our task here with respect to trial by jury, as it was in *Gault* with respect to other claimed rights, "is to ascertain the precise impact of the due process requirement." *Id.,* at 13–14.

V

The Pennsylvania juveniles' basic argument is that they were tried in proceedings "substantially similar to a criminal trial." They say that a delinquency proceed-

ing in their State is initiated by a petition charging a penal code violation in the conclusory language of an indictment; that a juvenile detained prior to trial is held in a building substantially similar to an adult prison; that in Philadelphia juveniles over 16 are, in fact, held in the cells of a prison; that counsel and the prosecution engage in plea bargaining; that motions to suppress are routinely heard and decided; that the usual rules of evidence are applied; that the customary common-law defenses are available; that the press is generally admitted in the Philadelphia juvenile courtrooms; that members of the public enter the room; that arrest and prior record may be reported by the press (from police sources, however, rather than from the juvenile court records); that, once adjudged delinquent, a juvenile may be confined until his majority in what amounts to a prison (see *In re Bethea,* 215 Pa. Super. 75, 76, 257 A. 2d 368, 369 (1969), describing the state correctional institution at Camp Hill as a "maximum security prison for adjudged delinquents and youthful criminal offenders"); and that the stigma attached upon delinquency adjudication approximates that resulting from conviction in an adult criminal proceeding.

The North Carolina juveniles particularly urge that the requirement of a jury trial would not operate to deny the supposed benefits of the juvenile court system; that the system's primary benefits are its discretionary intake procedure permitting disposition short of adjudication, and its flexible sentencing permitting emphasis on rehabilitation; that realization of these benefits does not depend upon dispensing with the jury; that adjudication of factual issues on the one hand and disposition of the case on the other are very different matters with very different purposes; that the purpose of the former is indistinguishable from that of the criminal trial; that the jury trial provides an independent protective factor; that

experience has shown that jury trials in juvenile courts are manageable; that no reason exists why protection traditionally accorded in criminal proceedings should be denied young people subject to involuntary incarceration for lengthy periods; and that the juvenile courts deserve healthy public scrutiny.

VI

All the litigants here agree that the applicable due process standard in juvenile proceedings, as developed by *Gault* and *Winship,* is fundamental fairness. As that standard was applied in those two cases, we have an emphasis on factfinding procedures. The requirements of notice, counsel, confrontation, cross-examination, and standard of proof naturally flowed from this emphasis. But one cannot say that in our legal system the jury is a necessary component of accurate factfinding. There is much to be said for it, to be sure, but we have been content to pursue other ways for determining facts. Juries are not required, and have not been, for example, in equity cases, in workmen's compensation, in probate, or in deportation cases. Neither have they been generally used in military trials. In *Duncan* the Court stated, "We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury." 391 U. S., at 158. In *DeStefano,* for this reason and others, the Court refrained from retrospective application of *Duncan,* an action it surely would have not taken had it felt that the integrity of the result was seriously at issue. And in *Williams* v. *Florida,* 399 U. S. 78 (1970), the Court saw no particular magic in a 12-man jury for a criminal case, thus revealing that even jury concepts themselves are not inflexible.

We must recognize, as the Court has recognized before, that the fond and idealistic hopes of the juvenile court

proponents and early reformers of three generations ago have not been realized. The devastating commentary upon the system's failures as a whole, contained in the President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime 7–9 (1967), reveals the depth of disappointment in what has been accomplished. Too often the juvenile court judge falls far short of that stalwart, protective, and communicating figure the system envisaged.[4] The community's unwillingness to provide people and facilities and to be concerned, the insufficiency of time devoted, the scarcity of professional help, the inadequacy of dispositional alternatives, and our general lack of knowledge all contribute to dissatisfaction with the experiment.[5]

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[4] "A recent study of juvenile court judges . . . revealed that half had not received undergraduate degrees; a fifth had received no college education at all; a fifth were not members of the bar." Task Force Report 7.

[5] "What emerges, then, is this: In theory the juvenile court was to be helpful and rehabilitative rather than punitive. In fact the distinction often disappears, not only because of the absence of facilities and personnel but also because of the limits of knowledge and technique. In theory the court's action was to affix no stigmatizing label. In fact a delinquent is generally viewed by employers, schools, the armed services—by society generally—as a criminal. In theory the court was to treat children guilty of criminal acts in noncriminal ways. In fact it labels truants and runaways as junior criminals.

"In theory the court's operations could justifiably be informal, its findings and decisions made without observing ordinary procedural safeguards, because it would act only in the best interest of the child. In fact it frequently does nothing more nor less than deprive a child of liberty without due process of law—knowing not what else to do and needing, whether admittedly or not, to act in the community's interest even more imperatively than the child's. In theory it was to exercise its protective powers to bring an errant child back into the fold. In fact there is increasing reason to believe that its intervention reinforces the juvenile's unlawful impulses. In theory it

The Task Force Report, however, also said, *id.*, at 7, "To say that juvenile courts have failed to achieve their goals is to say no more than what is true of criminal courts in the United States. But failure is most striking when hopes are highest."

Despite all these disappointments, all these failures, and all these shortcomings, we conclude that trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement. We so conclude for a number of reasons:

1. The Court has refrained, in the cases heretofore decided, from taking the easy way with a flat holding that all rights constitutionally assured for the adult accused are to be imposed upon the state juvenile proceeding. What was done in *Gault* and in *Winship* is aptly described in *Commonwealth* v. *Johnson*, 211 Pa. Super. 62, 74, 234 A. 2d 9, 15 (1967):

> "It is clear to us that the Supreme Court has properly attempted to strike a judicious balance by injecting procedural orderliness into the juvenile court system. It is seeking to reverse the trend [pointed out in *Kent*, 383 U.S., at 556] whereby 'the child receives the worst of both worlds . . . .'"

2. There is a possibility, at least, that the jury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding.

3. The Task Force Report, although concededly pre-*Gault*, is notable for its not making any recommendation

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was to concentrate on each case the best of current social science learning. In fact it has often become a vested interest in its turn, loathe to cooperate with innovative programs or avail itself of forward-looking methods." Task Force Report 9.

that the jury trial be imposed upon the juvenile court system. This is so despite its vivid description of the system's deficiencies and disappointments. Had the Commission deemed this vital to the integrity of the juvenile process, or to the handling of juveniles, surely a recommendation or suggestion to this effect would have appeared. The intimations, instead, are quite the other way. Task Force Report 38. Further, it expressly recommends against abandonment of the system and against the return of the juvenile to the criminal courts.[6]

[6] "Nevertheless, study of the juvenile courts does not necessarily lead to the conclusion that the time has come to jettison the experiment and remand the disposition of children charged with crime to the criminal courts of the country. As trying as are the problems of the juvenile courts, the problems of the criminal courts, particularly those of the lower courts, which would fall heir to much of the juvenile court jurisdiction, are even graver; and the ideal of separate treatment of children is still worth pursuing. What is required is rather a revised philosophy of the juvenile court based on the recognition that in the past our reach exceeded our grasp. The spirit that animated the juvenile court movement was fed in part by a humanitarian compassion for offenders who were children. That willingness to understand and treat people who threaten public safety and security should be nurtured, not turned aside as hopeless sentimentality, both because it is civilized and because social protection itself demands constant search for alternatives to the crude and limited expedient of condemnation and punishment. But neither should it be allowed to outrun reality. The juvenile court is a court of law, charged like other agencies of criminal justice with protecting the community against threatening conduct. Rehabilitating offenders through individualized handling is one way of providing protection, and appropriately the primary way in dealing with children. But the guiding consideration for a court of law that deals with threatening conduct is nonetheless protection of the community. The juvenile court, like other courts, is therefore obliged to employ all the means at hand, not excluding incapacitation, for achieving that protection. What should distinguish the juvenile from the criminal courts is greater emphasis on rehabilitation, not exclusive preoccupation with it." Task Force Report 9.

4. The Court specifically has recognized by dictum that a jury is not a necessary part even of every criminal process that is fair and equitable. *Duncan* v. *Louisiana,* 391 U. S., at 149–150, n. 14, and 158.

5. The imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the factfinding function, and would, contrarily, provide an attrition of the juvenile court's assumed ability to function in a unique manner. It would not remedy the defects of the system. Meager as has been the hoped-for advance in the juvenile field, the alternative would be regressive, would lose what has been gained, and would tend once again to place the juvenile squarely in the routine of the criminal process.

6. The juvenile concept held high promise. We are reluctant to say that, despite disappointments of grave dimensions, it still does not hold promise, and we are particularly reluctant to say, as do the Pennsylvania appellants here, that the system cannot accomplish its rehabilitative goals. So much depends on the availability of resources, on the interest and commitment of the public, on willingness to learn, and on understanding as to cause and effect and cure. In this field, as in so many others, one perhaps learns best by doing. We are reluctant to disallow the States to experiment further and to seek in new and different ways the elusive answers to the problems of the young, and we feel that we would be impeding that experimentation by imposing the jury trial. The States, indeed, must go forward. If, in its wisdom, any State feels the jury trial is desirable in all cases, or in certain kinds, there appears to be no impediment to its installing a system embracing that feature. That, however, is the State's privilege and not its obligation.

7. Of course there have been abuses. The Task Force Report has noted them. We refrain from saying at this

point that those abuses are of constitutional dimension. They relate to the lack of resources and of dedication rather than to inherent unfairness.

8. There is, of course, nothing to prevent a juvenile court judge, in a particular case where he feels the need, or when the need is demonstrated, from using an advisory jury.

9. "The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Snyder* v. *Massachusetts,* 291 U. S. 97, 105 (1934)." *Leland* v. *Oregon,* 343 U. S. 790, 798 (1952). It therefore is of more than passing interest that at least 29 States and the District of Columbia by statute deny the juvenile a right to a jury trial in cases such as these.[7] The same result is achieved in other

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[7] Ala. Code, Tit. 13, § 369 (1958); Alaska Stat. § 47.10.070 (Supp. 1970); Ariz. Rev. Stat. Ann. § 8–229 (1956), see Ariz. Laws, c. 223 (May 19, 1970); Ark. Stat. Ann. § 45–206 (1964); Del. Code Ann., Tit. 10, § 1175 (Supp. 1970); Fla. Stat. § 39.09 (2) (1965); Ga. Code Ann. § 24–2420 (Supp. 1970); Hawaii Rev. Stat. § 571–41 (1968); Idaho Code § 16–1813 (Supp. 1969); Ind. Ann. Stat. § 9–3215 (Supp. 1970); Iowa Code § 232.27 (1971); Ky. Rev. Stat. § 208.060 (1962); La. Rev. Stat. § 13:1579 (Supp. 1962); Minn. Stat. § 260.155 subd. 1 (1969); Miss. Code Ann. § 7185–08 (1942); Mo. Rev. Stat. § 211.171 (6) (1969) (equity practice controls); Neb. Rev. Stat. § 43–206.03 (2) (1968); Nev. Rev. Stat. § 62.190 (3) (1968); N. J. Stat. Ann. § 2A:4–35 (1952); N. Y. Family Court Act §§ 164 and 165 and Civ. Prac. Law and Rules § 4101; N. C. Gen. Stat. § 7A–285 (1969); N. D. Cent. Code § 27–16–18 (1960); Ohio Rev. Code Ann. § 2151.35 (Supp. 1970); Ore. Rev. Stat. § 419.498 (1) (1968); Pa. Stat. Ann., Tit. 11, § 247 (1965); S. C. Code Ann. § 15–1095.19 (Supp. 1970); Utah Code Ann. § 55–10–94 (Supp. 1969); Vt. Stat. Ann., Tit. 33, § 651 (a) (Supp. 1970); Wash. Rev. Code Ann. § 13.04.030; D. C. Code § 16–2316 (a) (Supp. 1971).

States by judicial decision.[8] In 10 States statutes provide for a jury trial under certain circumstances.[9]

10. Since *Gault* and since *Duncan* the great majority of States, in addition to Pennsylvania and North Carolina, that have faced the issue have concluded that the considerations that led to the result in those two cases do not compel trial by jury in the juvenile court. *In re Fucini,* 44 Ill. 2d 305, 255 N. E. 2d 380 (1970); *Bible* v. *State,* — Ind. —, 254 N. E. 2d 319 (1970); *Dryden* v. *Commonwealth,* 435 S. W. 2d 457 (Ky. 1968); *In re Johnson,* 254 Md. 517, 255 A. 2d 419 (1969); *Hopkins* v. *Youth Court,* 227 So. 2d 282 (Miss. 1969); *In re J. W.,* 106 N. J. Super. 129, 254 A. 2d 334 (1969); *In re D.,* 27 N. Y. 2d 90, 261 N. E. 2d 627 (1970); *In re Agler,* 19 Ohio St. 2d 70, 249 N. E. 2d 808 (1969); *State* v. *Turner,* 253 Ore. 235, 453 P. 2d 910 (1969). See *In re Estes* v. *Hopp,* 73 Wash. 2d 263, 438 P. 2d 205 (1968); *McMullen* v. *Geiger,* 184 Neb. 581, 169 N. W. 2d 431 (1969). To the contrary are *Peyton* v. *Nord,* 78 N. M. 717, 437 P. 2d 716 (1968), and, *semble, Nieves* v. *United States,* 280 F. Supp. 994 (SDNY 1968).

11. Stopping short of proposing the jury trial for juvenile proceedings are the Uniform Juvenile Court Act, § 24 (a), approved in July 1968 by the National Conference of Commissioners on Uniform State Laws;

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[8] *In re Daedler,* 194 Cal. 320, 228 P. 467 (1924); *Cinque* v. *Boyd,* 99 Conn. 70, 121 A. 678 (1923); *In re Fletcher,* 251 Md. 520, 248 A. 2d 364 (1968); *Commonwealth* v. *Page,* 339 Mass. 313, 316, 159 N. E. 2d 82, 85 (1959); *In re Perham,* 104 N. H. 276, 184 A. 2d 449 (1962).

[9] Colo. Rev. Stat. Ann. § 37–19–24 (Supp. 1965); Kan. Stat. Ann. § 38–808 (Supp. 1969); Mich. Comp. Laws § 712A.17 (1948); Mont. Rev. Codes Ann. § 10–604.1 (Supp. 1969); Okla. Stat. Ann., Tit. 10, § 1110 (Supp. 1970); S. D. Comp. Laws § 26–8–31 (1967); Tex. Civ. Stat., Art. 2338–1, § 13 (b) (Supp. 1970); W. Va. Code Ann. § 49–5–6 (1966); Wis. Stat. Ann. § 48.25 (2) (Supp. 1971); Wyo. Stat. Ann. § 14–115.24 (Supp. 1971).

the Standard Juvenile Court Act, Art. V, § 19, proposed by the National Council on Crime and Delinquency (see W. Sheridan, Standards for Juvenile and Family Courts 73, Dept. of H. E. W., Children's Bureau Pub. No. 437–1966); and the Legislative Guide for Drafting Family and Juvenile Court Acts § 29 (a) (Dept. of H. E. W., Children's Bureau Pub. No. 472–1969).

12. If the jury trial were to be injected into the juvenile court system as a matter of right, it would bring with it into that system the traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial. It is of interest that these very factors were stressed by the District Committee of the Senate when, through Senator Tydings, it recommended, and Congress then approved, as a provision in the District of Columbia Crime Bill, the abolition of the jury trial in the juvenile court. S. Rep. No. 91–620, pp. 13–14 (1969).

13. Finally, the arguments advanced by the juveniles here are, of course, the identical arguments that underlie the demand for the jury trial for criminal proceedings. The arguments necessarily equate the juvenile proceeding—or at least the adjudicative phase of it—with the criminal trial. Whether they should be so equated is our issue. Concern about the inapplicability of exclusionary and other rules of evidence, about the juvenile court judge's possible awareness of the juvenile's prior record and of the contents of the social file; about repeated appearances of the same familiar witnesses in the persons of juvenile and probation officers and social workers—all to the effect that this will create the likelihood of pre-judgment—chooses to ignore, it seems to us, every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates.

If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it.

Affirmed.

MR. JUSTICE WHITE, concurring.

Although the function of the jury is to find facts, that body is not necessarily or even probably better at the job than the conscientious judge. Nevertheless, the consequences of criminal guilt are so severe that the Constitution mandates a jury to prevent abuses of official power by insuring, where demanded, community participation in imposing serious deprivations of liberty and to provide a hedge against corrupt, biased, or political justice. We have not, however, considered the juvenile case a criminal proceeding within the meaning of the Sixth Amendment and hence automatically subject to all of the restrictions normally applicable in criminal cases. The question here is one of due process of law and I join the plurality opinion concluding that the States are not required by that clause to afford jury trials in juvenile courts where juveniles are charged with improper acts.

The criminal law proceeds on the theory that defendants have a will and are responsible for their actions. A finding of guilt establishes that they have chosen to engage in conduct so reprehensible and injurious to others that they must be punished to deter them and others from crime. Guilty defendants are considered blameworthy; they are branded and treated as such, however much the State also pursues rehabilitative ends in the criminal justice system.

For the most part, the juvenile justice system rests on more deterministic assumptions. Reprehensible acts by

juveniles are not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) or of other forces beyond their control. Hence the state legislative judgment not to stigmatize the juvenile delinquent by branding him a criminal; his conduct is not deemed so blameworthy that punishment is required to deter him or others. Coercive measures, where employed, are considered neither retribution nor punishment. Supervision or confinement is aimed at rehabilitation, not at convincing the juvenile of his error simply by imposing pains and penalties. Nor is the purpose to make the juvenile delinquent an object lesson for others, whatever his own merits or demerits may be. A typical disposition in the juvenile court where delinquency is established may authorize confinement until age 21, but it will last no longer and within that period will last only so long as his behavior demonstrates that he remains an unacceptable risk if returned to his family. Nor is the authorization for custody until 21 any measure of the seriousness of the particular act that the juvenile has performed.

Against this background and in light of the distinctive purpose of requiring juries in criminal cases, I am satisfied with the Court's holding. To the extent that the jury is a buffer to the corrupt or overzealous prosecutor in the criminal law system, the distinctive intake policies and procedures of the juvenile court system to a great extent obviate this important function of the jury. As for the necessity to guard against judicial bias, a system eschewing blameworthiness and punishment for evil choice is itself an operative force against prejudice and short-tempered justice. Nor where juveniles are involved is there the same opportunity for corruption to the juvenile's detriment or the same temptation to use the courts for political ends.

Not only are those risks that mandate juries in criminal cases of lesser magnitude in juvenile court adjudications, but the consequences of adjudication are less severe than those flowing from verdicts of criminal guilt. This is plainly so in theory, and in practice there remains a substantial gulf between criminal guilt and delinquency, whatever the failings of the juvenile court in practice may be. Moreover, to the extent that current unhappiness with juvenile court performance rests on dissatisfaction with the vague and overbroad grounds for delinquency adjudications, with faulty judicial choice as to disposition after adjudication, or with the record of rehabilitative custody, whether institutional or probationary, these shortcomings are in no way mitigated by providing a jury at the adjudicative stage.

For me there remain differences of substance between criminal and juvenile courts. They are quite enough for me to hold that a jury is not required in the latter. Of course, there are strong arguments that juries are desirable when dealing with the young, and States are free to use juries if they choose. They are also free, if they extend criminal court safeguards to juvenile court adjudications, frankly to embrace condemnation, punishment, and deterrence as permissible and desirable attributes of the juvenile justice system. But the Due Process Clause neither compels nor invites them to do so.

MR. JUSTICE BRENNAN, concurring in the judgment in No. 322 and dissenting in No. 128.

I agree with the plurality opinion's conclusion that the proceedings below in these cases were not "criminal prosecutions" within the meaning of the Sixth Amendment. For me, therefore, the question in these cases is whether jury trial is among the "essentials of due process and fair treatment," *In re Gault*, 387 U. S. 1, 30 (1967), required during the adjudication of a charge of delinquency based

upon acts that would constitute a crime if engaged in by an adult. See *In re Winship,* 397 U. S. 358, 359 and n. 1 (1970). This does not, however, mean that the interests protected by the Sixth Amendment's guarantee of jury trial in all "criminal prosecutions" are of no importance in the context of these cases. The Sixth Amendment, where applicable, commands that these interests be protected by a particular procedure, that is, trial by jury. The Due Process Clause commands, not a particular procedure, but only a result: in my Brother BLACKMUN'S words, "fundamental fairness . . . [in] factfinding." In the context of these and similar juvenile delinquency proceedings, what this means is that the States are not bound to provide jury trials on demand so long as some other aspect of the process adequately protects the interests that Sixth Amendment jury trials are intended to serve.[1]

In my view, therefore, the due process question cannot be decided upon the basis of general characteristics of juvenile proceedings, but only in terms of the adequacy of a particular state procedure to "protect the [juvenile] from oppression by the Government," *Singer* v. *United States,* 380 U. S. 24, 31 (1965), and to protect him against "the compliant, biased, or eccentric judge." *Duncan* v. *Louisiana,* 391 U. S. 145, 156 (1968).

Examined in this light, I find no defect in the Pennsylvania cases before us. The availability of trial by jury allows an accused to protect himself against possible oppression by what is in essence an appeal to the community conscience, as embodied in the jury that hears

[1] "A criminal process which was fair and equitable but used no juries is easy to imagine. It would make use of alternative guarantees and protections which would serve the purposes that the jury serves in the English and American systems." *Duncan* v. *Louisiana,* 391 U. S. 145, 150 n. 14 (1968). This conclusion is, of course, inescapable in light of our decisions that petty criminal offenses may be tried without a jury notwithstanding the defendant's request. *E. g., District of Columbia* v. *Clawans,* 300 U. S. 617 (1937).

his case. To some extent, however, a similar protection may be obtained when an accused may in essence appeal to the community at large, by focusing public attention upon the facts of his trial, exposing improper judicial behavior to public view, and obtaining, if necessary, executive redress through the medium of public indignation. Of course, the Constitution, in the context of adult criminal trials, has rejected the notion that public trial is an adequate substitute for trial by jury in serious cases. But in the context of juvenile delinquency proceedings, I cannot say that it is beyond the competence of a State to conclude that juveniles who fear that delinquency proceedings will mask judicial oppression may obtain adequate protection by focusing community attention upon the trial of their cases. For, however much the juvenile system may have failed in practice, its very existence as an ostensibly beneficent and noncriminal process for the care and guidance of young persons demonstrates the existence of the community's sympathy and concern for the young. Juveniles able to bring the community's attention to bear upon their trials may therefore draw upon a reservoir of public concern unavailable to the adult criminal defendant. In the Pennsylvania cases before us, there appears to be no statutory ban upon admission of the public to juvenile trials.[2] Appellants themselves, without contradiction, assert that "the press is generally admitted" to juvenile delinquency proceedings in Philadelphia.[3] Most important, the record in these

[2] The generally applicable statute, Pa. Stat. Ann., Tit. 11, § 245 (1965), merely provides that juvenile proceedings shall be "separate" from regular court business. Pa. Stat. Ann., Tit. 11, § 269–402 (1965), requiring exclusion of the general public from juvenile hearings, applies only to Allegheny County. Both of the instant cases were tried in Philadelphia County.

[3] "The judges of the Philadelphia Juvenile Court exercise varying degrees of control over admission to the courtroom, but the press is generally admitted . . . ." Brief for Appellants 9 n. 9.

cases is bare of any indication that any person whom appellants sought to have admitted to the courtroom was excluded. In these circumstances, I agree that the judgment in No. 322 must be affirmed.

The North Carolina cases, however, present a different situation. North Carolina law either permits or requires exclusion of the general public from juvenile trials.[4] In the cases before us, the trial judge "ordered the general public excluded from the hearing room and stated that only officers of the court, the juveniles, their parents or guardians, their attorney and witnesses would be present for the hearing," *In re Burrus,* 4 N. C. App. 523, 525, 167 S. E. 2d 454, 456 (1969), notwithstanding petitioners' repeated demand for a public hearing. The cases themselves, which arise out of a series of demonstrations by black adults and juveniles who believed that the Hyde County, North Carolina, school system unlawfully discriminated against black schoolchildren, present a paradigm of the circumstances in which there may be a substantial "temptation to use the courts for political ends." Opinion of MR. JUSTICE WHITE, *ante,* at 552. And finally, neither the opinions supporting the judgment nor the respondent in No. 128 has pointed to any feature of North Carolina's juvenile proceedings that could substitute for public or jury trial in protecting the petitioners against misuse of the judicial process. Cf. *Duncan* v. *Louisiana,* 391 U. S. 145, 188, 193 (1968) (HARLAN, J., dissenting) (availability of resort to "the political proc-

[4] N. C. Gen. Stat. § 110–24 (1966), in force at the time of these trials, appears on its face to permit but not require such exclusion, as does identical language in the present statute, N. C. Gen. Stat. § 7A–285 (1969). The North Carolina Supreme Court in the present cases has read these statutes as a legislative determination "that a public hearing is [not] in the best interest of the youthful offender." *In re Burrus,* 275 N. C. 517, 530, 169 S. E. 2d 879, 887 (1969).

ess" is an alternative permitting States to dispense with jury trials). Accordingly, I would reverse the judgment in No. 128.

MR. JUSTICE HARLAN, concurring in the judgments.

If I felt myself constrained to follow *Duncan* v. *Louisiana,* 391 U. S. 145 (1968), which extended the Sixth Amendment right of jury trial to the States, I would have great difficulty, upon the premise seemingly accepted in my Brother BLACKMUN'S opinion, in holding that the jury trial right does not extend to state juvenile proceedings. That premise is that juvenile delinquency proceedings have in practice actually become in many, if not all, respects criminal trials. But see my concurring and dissenting opinion in *In re Gault,* 387 U. S. 1, 65 (1967). If that premise be correct, then I do not see why, given *Duncan,* juveniles as well as adults would not be constitutionally entitled to jury trials, so long as juvenile delinquency systems are not restructured to fit their original purpose. When that time comes I would have no difficulty in agreeing with my Brother BLACKMUN, and indeed with my Brother WHITE, the author of *Duncan,* that juvenile delinquency proceedings are beyond the pale of *Duncan.*

I concur in the judgments in these cases, however, on the ground that criminal jury trials are not constitutionally required of the States, either as a matter of Sixth Amendment law or due process. See my concurring and dissenting opinion in *Duncan* and my separate opinion in *Williams* v. *Florida,* 399 U. S. 78, 118–119 (1970).

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE MARSHALL concur, dissenting.

These cases from Pennsylvania and North Carolina present the issue of the right to a jury trial for offenders charged in juvenile court and facing a possible incarcer-

ation until they reach their majority. I believe the guarantees of the Bill of Rights, made applicable to the States by the Fourteenth Amendment, require a jury trial.

In the Pennsylvania cases one of the appellants was charged with robbery (Pa. Stat. Ann., Tit. 18, § 4704 (1963)), larceny (Pa. Stat. Ann., Tit. 18, § 4807), and receiving stolen goods (Pa. Stat. Ann., Tit. 18, § 4817) as acts of juvenile delinquency. Pa. Stat. Ann., Tit. 11, § 246 (1965). He was found a delinquent and placed on probation. The other appellant was charged with assault and battery on a police officer (Pa. Stat. Ann., Tit. 18, § 4708) and conspiracy (Pa. Stat. Ann., Tit. 18, § 4302) as acts of juvenile delinquency. On a finding of delinquency he was committed to a youth center. Despite the fact that the two appellants, aged 15 and 16, would face potential incarceration until their majority, Pa. Stat. Ann., Tit. 11, § 250, they were denied a jury trial.

In the North Carolina cases petitioners are students, from 11 to 15 years of age, who were charged under one of three criminal statutes: (1) "disorderly conduct" in a public building, N. C. Gen. Stat. § 14–132 (1969); (2) "wilful" interruption or disturbance of a public or private school, N. C. Gen. Stat. § 14–273; or (3) obstructing the flow of traffic on a highway or street, N. C. Gen. Stat. § 20–174.1 (1965 and Supp. 1969).

Conviction of each of these crimes would subject a person, whether juvenile or adult, to imprisonment in a state institution. In the case of these students the possible term was six to 10 years; it would be computed for the period until an individual reached the age of 21. Each asked for a jury trial which was denied. The trial judge stated that the hearings were juvenile hearings, not criminal trials. But the issue in each case was whether

they had violated a state criminal law. The trial judge found in each case that the juvenile had committed "an act for which an adult may be punished by law" and held in each case that the acts of the juvenile violated one of the criminal statutes cited above. The trial judge thereupon ordered each juvenile to be committed to the state institution for the care of delinquents and then placed each on probation for terms from 12 to 24 months.

We held in *In re Gault,* 387 U. S. 1, 13, that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." As we noted in that case, the Juvenile Court movement was designed to avoid procedures to ascertain whether the child was "guilty" or "innocent" but to bring to bear on these problems a "clinical" approach. *Id.,* at 15, 16. It is, of course, not our task to determine as a matter of policy whether a "clinical" or "punitive" approach to these problems should be taken by the States. But where a State uses its juvenile court proceedings to prosecute a juvenile for a criminal act and to order "confinement" until the child reaches 21 years of age or where the child at the threshold of the proceedings faces that prospect, then he is entitled to the same procedural protection as an adult. As MR. JUSTICE BLACK said in *In re Gault, supra,* at 61 (concurring):

> "Where a person, infant or adult, can be seized by the State, charged, and convicted for violating a state criminal law, and then ordered by the State to be confined for six years, I think the Constitution requires that he be tried in accordance with the guarantees of all the provisions of the Bill of Rights made applicable to the States by the Fourteenth Amendment. Undoubtedly this would be true of an adult defendant, and it would be a plain denial of equal protection of the laws—an invidious dis-

> crimination—to hold that others subject to heavier punishments could, because they are children, be denied these same constitutional safeguards."

Just as courts have sometimes confused delinquency with crime, so have law enforcement officials treated juveniles not as delinquents but as criminals. As noted in the President's Crime Commission Report:

> "In 1965, over 100,000 juveniles were confined in adult institutions. Presumably most of them were there because no separate juvenile detention facilities existed. Nonetheless, it is clearly undesirable that juveniles be confined with adults." President's Commission on Law Enforcement and Administration of Justice, Challenge of Crime in a Free Society 179 (1967).

Even when juveniles are not incarcerated with adults the situation may be no better. One Pennsylvania correctional institution for juveniles is a brick building with barred windows, locked steel doors, a cyclone fence topped with barbed wire, and guard towers. A former juvenile judge described it as "a maximum security prison for adjudged delinquents." *In re Bethea,* 215 Pa. Super. 75, 76, 257 A. 2d 368, 369.

In the present cases imprisonment or confinement up to 10 years was possible for one child and each faced at least a possible five-year incarceration. No adult could be denied a jury trial in those circumstances. *Duncan* v. *Louisiana,* 391 U. S. 145, 162. The Fourteenth Amendment, which makes trial by jury provided in the Sixth Amendment applicable to the States, speaks of denial of rights to "any person," not denial of rights to "any adult person"; and we have held indeed that where a juvenile is charged with an act that would constitute a crime if committed by an adult, he is entitled to be tried under a standard of proof beyond a reasonable doubt. *In re Winship,* 397 U. S. 358.

In *DeBacker* v. *Brainard,* 396 U. S. 28, 33, 35, MR. JUSTICE BLACK and I dissented from a refusal to grant a juvenile, who was charged with forgery, a jury trial merely because the case was tried before *Duncan* v. *Louisiana,* 391 U. S. 145, was decided. MR. JUSTICE BLACK, after noting that a juvenile being charged with a criminal act was entitled to certain constitutional safeguards, *viz.,* notice of the issues, benefit of counsel, protection against compulsory self-incrimination, and confrontation of the witnesses against him, added:

> "I can see no basis whatsoever in the language of the Constitution for allowing persons like appellant the benefit of those rights and yet denying them a jury trial, a right which is surely one of the fundamental aspects of criminal justice in the English-speaking world." 396 U. S., at 34.

I added that by reason of the Sixth and Fourteenth Amendments the juvenile is entitled to a jury trial

> "as a matter of right where the delinquency charged is an offense that, if the person were an adult, would be a crime triable by jury. Such is this case, for behind the facade of delinquency is the crime of forgery." *Id.,* at 35.

Practical aspects of these problems are urged against allowing a jury trial in these cases.* They have been

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*The Public Defender Service for the District of Columbia and the Neighborhood Legal Services Program of Washington, D. C., have filed a brief *amicus* in which the results of a survey of jury trials in delinquency cases in the 10 States requiring jury trials plus the District of Columbia are set forth. The cities selected were mostly large metropolitan areas. Thirty juvenile courts processing about 75,000 juvenile cases a year were canvassed:

"[W]e discovered that during the past five and a half years, in 22 out of 26 courts surveyed, cumulative requests for jury trials totaled 15 or less. In the remaining five courts in our sample, statistics were unavailable. During the same period, in 26 out of 29

answered by Judge De Ciantis of the Family Court of Providence, Rhode Island, in a case entitled *In the Matter of McCloud,* decided January 15, 1971. A juvenile was charged with the rape of a 17-year-old female and Judge De Ciantis granted a motion for a jury trial in an opinion, a part of which I have attached as an appendix to this dissent. He there concludes that "the real traumatic" experience of incarceration without due process is "the feeling of being deprived of basic rights." He adds:

> "The child who feels that he has been dealt with fairly and not merely expediently or as speedily as possible will be a better prospect for rehabilitation. Many of the children who come before the court come from broken homes, from the ghettos; they often suffer from low self-esteem; and their behavior is frequently a symptom of their own feelings of inadequacy. Traumatic experiences of denial of basic rights only accentuate the past deprivation and contribute to the problem. Thus, a general societal attitude of acceptance of the juvenile as a person entitled to the same protection as an adult may be the true beginning of the rehabilitative process."

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courts the cumulative number of jury trials actually held numbered 15 or less, with statistics unavailable for two courts in our sample. For example, in Tulsa, Oklahoma, counsel is present in 100% of delinquency cases, but only one jury trial has been requested and held during the past five and one-half years. In the Juvenile Court of Fort Worth, Texas, counsel is also present in 100% of the cases, and only two jury trials have been requested since 1967. The Juvenile Court in Detroit, Michigan, reports that counsel is appointed in 70–80% of its delinquency cases, but thus far in 1970, it has had only four requests for a jury. Between 1965 and 1969 requests for juries were reported as 'very few.'

"In only four juvenile courts in our sample has there clearly been a total during the past five and one-half years of more than 15 jury trial requests and/or more than 15 such trials held."

The four courts showing more than 15 requests for jury trials were Denver, Houston, Milwaukee, and Washington, D. C.

Judge De Ciantis goes on to say that "[t]rial by jury will provide the child with a safeguard against being prejudged" by a judge who may well be prejudiced by reports already submitted to him by the police or case-workers in the case. Indeed the child, the same as the adult, is in the category of those described in the Magna Carta:

> "No freeman may be . . . imprisoned . . . except by the lawful judgment of his peers, or by the law of the land."

These cases should be remanded for trial by jury on the criminal charges filed against these youngsters.

APPENDIX TO OPINION OF DOUGLAS, J., DISSENTING

De Ciantis, J.: The defendant, who will hereinafter be referred to as a juvenile, on the sixth day of September, 1969, was charged with Rape upon a female child, seventeen years old, in violation of Title 11, Chapter 37, Section 1, of the General Laws of 1956.

. . . . .

TRAUMA

The fact is that the procedures which are now followed in juvenile cases are far more traumatic than the potential experience of a jury trial. Who can say that a boy who is arrested and handcuffed, placed in a lineup, transported in vehicles designed to convey dangerous criminals, placed in the same kind of a cell as an adult, deprived of his freedom by lodging him in an institution where he is subject to be transferred to the state's prison and in the "hole" has not undergone a traumatic experience?

The experience of a trial with or without a jury is meant to be impressive and meaningful. The fact that a juvenile realizes that his case will be decided by twelve

objective citizens would allow the court to retain its meaningfulness without causing any more trauma than a trial before a judge who perhaps has heard other cases involving the same juvenile in the past and may be influenced by those prior contacts. To agree that a jury trial would expose a juvenile to a traumatic experience is to lose sight of the real traumatic experience of incarceration without due process. The real traumatic experience is the feeling of being deprived of basic rights. [In] *In the matter of Reis,*[1] this Court indicated the inadequacies of the procedure under which our court operates. A judge who receives facts of a case from the police and approves the filing of a petition based upon those facts may be placed in the untenable position of hearing a charge which he has approved. His duty is to adjudicate on the evidence introduced at the hearing and not be involved in any pre-adjudicatory investigation.

It is contrary to the fundamental principles of due process for the court to be compelled, as it is in this state, to act as a one-man grand jury, then sit in judgment on its own determination arising out of the facts and proceedings which he conducted. This responsibility belongs with a jury.

BACKLOG

An argument has been made that to allow jury trials would cause a great backlog of cases and, ultimately, would impair the functioning of the juvenile court. The fact however is that there is no meaningful evidence that granting the right to jury trials will impair the function of the court. Some states permit jury trials in *all* juvenile court cases; few juries have been demanded, and there is no suggestion from these courts that jury trials have impeded the system of juvenile justice.

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[1] Reis, 7 CrL 2151 (1970).

In Colorado, where jury trials have been permitted by statute, Judge Theodore Rubin of the Denver Juvenile Court has indicated that jury trials are an important safeguard and that they have not impaired the functioning of the Denver Juvenile Courts. For example, during the first seven months of 1970, the two divisions of the Denver Juvenile Court have had fewer than two dozen jury trials, in both delinquency and dependency-neglect cases. In Michigan, where juveniles are also entitled to a jury trial, Judge Lincoln of the Detroit Juvenile Court indicates that his court has had less than five jury trials in the year 1969 to 1970.

The recent Supreme Court decision of *Williams* vs *Florida,* [399 U. S. 78] (June 22, 1970), which held that the constitutional right to trial by jury in criminal cases does not require a twelve-member jury, could be implemented to facilitate the transition to jury trials. A jury of less than twelve members would be less cumbersome, less "formal," and less expensive than the regular twelve-member jury, and yet would provide the accused with objective fact-finders.

In fact the very argument of expediency, suggesting "supermarket" or "assembly-line" justice is one of the most forceful arguments in favor of granting jury trials. By granting the juvenile the right to a jury trial, we would, in fact, be protecting the accused from the judge who is under pressure to move the cases, the judge with too many cases and not enough time. It will provide a safeguard against the judge who may be prejudiced against a minority group or who may be prejudiced against the juvenile brought before him because of some past occurrence which was heard by the same judge.

There have been criticisms that juvenile court judges, because of their hearing caseload, do not carefully weigh the evidence in the adjudicatory phase of the proceedings.

It is during this phase that the judge must determine whether in fact the evidence has been established beyond a reasonable doubt that the accused committed the acts alleged in the petition. Regardless of the merit of these criticisms, they have impaired the belief of the juveniles, of the bar and of the public as to the opportunity for justice in the juvenile court. Granting the juvenile the right to demand that the facts be determined by a jury will strengthen the faith of all concerned parties in the juvenile system.

. . . . .

It is important to note, at this time, a definite side benefit of granting jury trials, *i. e.*, an aid to rehabilitation. The child who feels that he has been dealt with fairly and not merely expediently or as speedily as possible will be a better prospect for rehabilitation. Many of the children who come before the court come from broken homes, from the ghettos; they often suffer from low self-esteem; and their behavior is frequently a symptom of their own feelings of inadequacy. Traumatic experiences of denial of basic rights only accentuate the past deprivation and contribute to the problem. Thus, a general societal attitude of acceptance of the juvenile as a person entitled to the same protection as an adult may be the true beginning of the rehabilitative process.

PUBLIC TRIAL

Public trial in the judgment of this Court does not affect the juvenile court philosophy.

[In] *In re Oliver*[2] Mr. Justice Black reviews the history of the public trial. Its origins are obscure, but it seems to have evolved along with the jury trial guarantee in English common law and was then adopted as a pro-

[2] 333 U. S. 257.

vision of the Federal Constitution as well as by most state constitutions. Among the benefits of a public trial are the following:

> 1. "Public trials come to the attention of key witnesses unknown to the parties. These witnesses may then voluntarily come forward and give important testimony."
>
> 2. "The spectators learn about their government and acquire confidence in their judicial remedies."
>
> 3. "The knowledge that every *criminal* trial is subject to contemporaneous review in the [forum] of public opinion is an effective restraint on possible abuse of judicial power." (P. 270.)

Justice Black has nothing to say on the question of whether a public trial acts as a deterrent to crime, but it is clear that he believes *publicity to improve the quality of criminal justice, both theoretically and practically.*

As for the juvenile trial issue, he writes:

> "Whatever may be the classification of juvenile court proceedings, they are often conducted without admitting all the public. But it has never been the practice to wholly exclude parents, relatives, and friends, or to refuse juveniles the benefit of counsel." (P. 266.)

In fact, the juvenile proceedings as presently conducted are far from secret. Witnesses for the prosecution and for the defense, social workers, court reporters, students, police trainees, probation counselors, and sheriffs are present in the courtroom. Police, the Armed Forces, the Federal Bureau of Investigation obtain information and have access to the police files. There seems no more reason to believe that a jury trial would destroy confidentiality than would witnesses summoned to testify.

The Court also notes the report of the PRESIDENT'S COMMISSION O[N] LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 75 (1967), wherein it is stated:

> "A juvenile's adjudication record is required by the law of most jurisdictions to be private and confidential; in practice the confidentiality of those reports is often violated." Furthermore, "[s]tatutory restrictions almost invariably apply only to court records, and even as to those the evidence is that many courts routinely furnish information to the FBI and the military, and on request to government agencies and even to private employers."

JUDGE'S EXPERTISE

The Court is also aware of the argument that the juvenile court was created to develop judges who were experts in sifting out the real problems behind a juvenile's breaking the law; therefore, to place the child's fate in the hands of a jury would defeat that purpose. This will, however, continue to leave the final decision of disposition solely with the judge. The role of the jury will be only to ascertain whether the facts, which give the court jurisdiction, have been established beyond a reasonable doubt. The jury will not be concerned with social and psychological factors. These factors, along with prior record, family and educational background, will be considered by the judge during the dispositional phase.

Taking into consideration the social background and other facts, the judge, during the dispositional phase, will determine what disposition is in the best interests of the child and society. It is at this stage that a judge's expertise is most important, and the granting of a jury trial

will not prevent the judge from carrying out the basic philosophy of the juvenile court.

Trial by jury will provide the child with a safeguard against being prejudged. The jury clearly will have no business in learning of the social report or any of the other extraneous matter unless properly introduced under the rules of evidence. Due process demands that the trier of facts should not be acquainted with any of the facts of the case or have knowledge of any of the circumstances, whether through officials in his own department or records in his possession. If the accused believes that the judge has read an account of the facts submitted by the police or any other report prior to the adjudicatory hearing and that this may prove prejudicial, he can demand a jury and insure against such knowledge on the part of the trier of the facts.

WAIVER OF JURY TRIAL

Counsel also questions whether a child can waive his right to a jury trial or, in fact, whether a parent or counsel may waive.

When the waiver comes up for hearing, the Court could, at its discretion, either grant or refuse the juvenile's waiver of a jury trial, and/or appoint a guardian or legal counsel to advise the child.

My experience has shown that the greatest percentage of juveniles who appear before the court in felony cases have lived appalling lives due to parental neglect and brutality, lack of normal living conditions, and poverty. This has produced in them a maturity which is normally acquired much later in life. They are generally well aware of their rights in a court of law. However, in those cases where a child clearly needs guidance, the court-appointed guardian or attorney could explain to him the implications of a waiver. The juvenile's rights and interests would thus be protected every bit as strin-

gently as they are today before he is allowed to plead guilty or not guilty to a complaint. A guilty plea is, after all, a waiver of the right to trial altogether.

Counsel is placed with the responsibility of explaining to the juvenile the significance of guilty and *nolo contendere* pleas, of instructing the juvenile on the prerogative to take the witness stand, and is expected to advise his client in the same manner as he would an adult about to stand trial. And now counsel suggests to the Court that counsel is not capable of explaining and waiving the right to a jury trial. The Court fails to see the distinction between this waiver and the absolute waiver, to wit, a guilty plea. Counsel should act in the best interest of his client, even if this may be in conflict with the parents. On a number of occasions this Court has appointed counsel for a juvenile whose parents could not afford to retain private counsel, and where the parents' interests were in conflict with those of the child. This procedure will be continued and the Court will continue to rely on the good judgment of the bar.

The Court could easily require that a waiver of a jury trial be made in person by the juvenile in writing, in open court, with the consent and approval of the Court and the attorney representing both the juvenile and the state. The judge could ascertain as to whether the juvenile can intelligently waive his right and, if necessary, appoint counsel to advise the youth as to the implications connected with the waiver. This could be accomplished without any difficulty through means presently available to the Court.

JURY OF PEERS

One of the most interesting questions raised is that concerning the right of a juvenile to a trial by his peers. Counsel has suggested that a jury of a juvenile's peers

would be composed of other juveniles, that is, a "teenage jury." Webster's Dictionary, Second Edition, 1966, defines a peer as an equal, one of the same rank, quality, value. The word "peers" means nothing more than citizens, *In re Grilli,* 179 N. Y. S. 795, 797. The phrase "judgment of his peers" means at common law, a trial by a jury of twelve men, *State* vs *Simons,* 61 Kan. 752. "Judgment of his peers" is a term expressly borrowed from the Magna Charta, and it means a trial by jury, *Ex parte Wagner,* 58 Okl. Cr. 161. The Declaration of Independence also speaks of the equality of *all* men. Are we now to say that a juvenile is a second-class citizen, not equal to an adult? The Constitution has never been construed to say women must be tried by their peers, to wit, by all-female juries, or Negroes by all-Negro juries.

The only restriction on the makeup of the jury is that there can be no systematic exclusion of those who meet local and federal requirements, in particular, voting qualifications.

The Court notes that presently in some states 18-year-olds can vote. Presumably, if they can vote, they may also serve on juries. Our own legislature has given first passage to an amendment to the Constitution to permit 18-year-olds to vote. Thus, it is quite possible that we will have teenage jurors sitting in judgment of their so-called "peers."

CRIMINAL PROCEEDING

The argument that the adjudication of delinquency is not the equivalent of criminal process is spurious. This Court has discussed the futility of making distinctions on the basis of labels in prior decisions. Because the legislature dictates that a child who commits a felony shall be called a delinquent does not change the nature of the crime. Murder is murder; robbery is robbery—they are

both criminal offenses, not civil, regardless and independent of the age of the doer.

. . . . .

It is noteworthy that in our statute there is not an express statutory provision indicating that the proceedings are civil. Trial by jury in Rhode Island is guaranteed to *all* persons, whether in criminal cases or in civil cases. That right existed prior to the adoption of the Constitution; and certainly whether one is involved in a civil or criminal proceeding of the Family Court in which his "liberty" is to be "taken" "imprisoned" "outlawed" and "banished" he is entitled to a trial by jury. (*Henry* vs *Cherry & Webb,* 30 R. I. 13, at 30).

This Court believes that although the juvenile court was initially created as a social experiment, it has not ceased to be part of the judicial system. In view of the potential loss of liberty at stake in the proceeding, this Court is compelled to accord due process to all the litigants who come before it; and, therefore, all of the provisions of the Bill of Rights, including trial by jury, must prevail.

The Court concludes that the framers of our Constitution never intended to place the power in any one man or official, and take away the "protection of the law from the rights of an individual." It meant "to secure the blessings of liberty to themselves and posterity." The Constitution was written with the philosophy based upon a composite of all of the most liberal ideas which came down through the centuries; The Magna Charta, the Petition of Rights, the Bill of Rights and the Rules of Common Law; and the keystone is the preservation of individual liberty. All these ideas were carefully inserted in our Constitution.

The juvenile is constitutionally entitled to a jury trial.

UNITED STATES *v.* HARRIS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 30. Argued March 23, 1971—Decided June 28, 1971

Respondent was convicted of possessing nontaxpaid liquor in violation of 26 U. S. C. § 5205 (a)(2). The Court of Appeals reversed on the ground that the federal tax investigator's affidavit supporting the search warrant, the execution of which resulted in the discovery of illicit liquor, was insufficient to establish probable cause. The affidavit stated that: respondent had a reputation with the investigator for over four years as being a trafficker in nontaxpaid distilled spirits; during that time the local constable had located illicit whiskey in an abandoned house under respondent's control; on the date of the affidavit the affiant had received sworn oral information from a person whom the affiant found to be a prudent person, and who feared for his life should his name be revealed, that the informant had purchased illicit whiskey from the residence described, for a period exceeding two years, most recently within two weeks; that the informant asserted he knew of another person who bought such whiskey from the house within two days; that he had personal knowledge that such whiskey was consumed in a certain outbuilding; and that he had seen respondent go to another nearby outbuilding to obtain whiskey for other persons. The Court of Appeals relied on *Aguilar* v. *Texas,* 378 U. S. 108, in stressing that affiant had never alleged that the informant was truthful, but only prudent, and on *Spinelli* v. *United States,* 393 U. S. 410, in giving no weight to affiant's assertion concerning respondent's reputation. *Held:* The judgment is reversed. Pp. 577–585.

412 F. 2d 796, reversed.

THE CHIEF JUSTICE, joined by MR. JUSTICE BLACK, MR. JUSTICE BLACKMUN, and MR. JUSTICE STEWART (as to the first sentence of item 1) concluded that:

1. The affidavit in this case, based on a tip similar to the one held sufficient in *Jones* v. *United States,* 362 U. S. 257 (which was approved in *Aguilar, supra*), contains an ample factual foun-

dation for believing the informant which, when taken in conjunction with the affiant's knowledge of respondent's background, afforded a basis upon which a magistrate could reasonably issue a warrant. Both the affidavit here and the one in *Jones* (contrary to the situation in *Spinelli, supra*) purport to relate an unidentified informant's personal observations and recite prior events within his knowledge. While the affidavit here, unlike the *Jones* affidavit, did not aver that the informant had previously given "correct information," an averment of previous reliability is not essential when supported, as here, by other information; and *Spinelli* is not to be read as precluding a magistrate's relying on an officer's knowledge of a suspect's reputation. Pp. 577–583.

THE CHIEF JUSTICE, joined by MR. JUSTICE BLACK, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN, concluded that:

2. The fact that the informant made a statement against his own penal interest when he admitted his illicit liquor purchases provides an additional basis for crediting his tip. Pp. 583–584.

BURGER, C. J., announced the Court's judgment and delivered an opinion, in which BLACK and BLACKMUN, JJ., joined, and in Part I of which STEWART, J., and in Part III of which WHITE, J., joined. BLACK, J., filed a concurring statement, *post,* p. 585. BLACKMUN, J., filed a concurring opinion, *post,* p. 585. HARLAN, J., filed a dissenting opinion, in which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined, *post,* p. 586.

Beatrice Rosenberg argued the cause for the United States. With her on the brief were *Solicitor General Griswold, Assistant Attorney General Wilson, Richard B. Stone,* and *Mervyn Hamburg.*

Steven M. Umin, by appointment of the Court, 400 U. S. 955, argued the cause and filed a brief for respondent.

Frank G. Carrington, Jr., and *Alan S. Ganz* filed a brief for Americans for Effective Law Enforcement, Inc., as *amicus curiae* urging reversal.

MR. CHIEF JUSTICE BURGER announced the judgment of the Court and an opinion in which MR. JUSTICE BLACK and MR. JUSTICE BLACKMUN join, and in Part I of which

MR. JUSTICE STEWART joins, and in Part III of which MR. JUSTICE WHITE joins.

We granted certiorari in this case to consider the recurring question of what showing is constitutionally necessary to satisfy a magistrate that there is a substantial basis for crediting the report of an informant known to the police, but not identified to the magistrate, who purports to relate his personal knowledge of criminal activity.

In 1967 a federal tax investigator and a local constable entered the premises of respondent Harris, pursuant to a search warrant issued by a federal magistrate, and seized jugs of whiskey upon which the federal tax had not been paid. The warrant had been issued solely on the basis of the investigator's affidavit, which recited the following:

> "Roosevelt Harris has had a reputation with me for over 4 years as being a trafficker of nontaxpaid distilled spirits, and over this period I have received numerous information [*sic*] from all types of persons as to his activities. Constable Howard Johnson located a sizeable stash of illicit whiskey in an abandoned house under Harris' control during this period of time. This date, I have received information from a person who fears for their [*sic*] life and property should their name be revealed. I have interviewed this person, found this person to be a prudent person, and have, under a sworn verbal statement, gained the following information: This person has personal knowledge of and has purchased illicit whiskey from within the residence described, for a period of more than 2 years, and most recently within the past 2 weeks, has knowledge of a person who purchased illicit whiskey within the past two days from the house, has personal knowledge that the illicit whiskey is consumed by purchasers in the outbuilding known as and utilized as

> the 'dance hall,' and has seen Roosevelt Harris go to the other outbuilding, located about 50 yards from the residence, on numerous occasions, to obtain the whiskey for this person and other persons."

Respondent was subsequently charged with possession of nontaxpaid liquor, in violation of 26 U. S. C. § 5205 (a)(2). His pretrial motion to suppress the seized evidence on the ground that the affidavit was insufficient to establish probable cause was overruled, and he was convicted after a jury trial and sentenced to two years' imprisonment. The Court of Appeals for the Sixth Circuit reversed the conviction, holding that the information in the affidavit was insufficient to enable the magistrate to assess the informant's reliability and trustworthiness. 412 F. 2d 796, 797 (1969).

The Court of Appeals relied on *Aguilar* v. *Texas,* 378 U. S. 108 (1964), in which we held that an affidavit based solely on the hearsay report of an unidentified informant must set forth "some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.'" *Id.,* at 114. It concluded that the affidavit was insufficient because no information was presented to enable the magistrate to evaluate the informant's reliability or trustworthiness. The court noted the absence of any allegation that the informant was a "truthful" person, but only an allegation that the informant was "prudent." Having found the informant's tip inadequate under *Aguilar,* the Court of Appeals, relying on *Spinelli* v. *United States,* 393 U. S. 410 (1969), looked to the remaining allegations of the affidavit to determine whether they provided independent corroboration of the informant. The Court of Appeals held that the constable's prior discovery of a cache on respondent's property within the previous four years was too remote, and,

citing certain language from *Spinelli,* it gave no weight whatever to the assertion that respondent had a general reputation known to the officer as a trafficker in illegal whiskey.

For the reasons stated below, we reverse the judgment of the Court of Appeals and reinstate the judgment of conviction.

I

In evaluating the showing of probable cause necessary to support a search warrant, against the Fourth Amendment's prohibition of unreasonable searches and seizures, we would do well to heed the sound admonition of *United States* v. *Ventresca,* 380 U. S. 102 (1965):

> "[T]he Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." 380 U. S., at 108.

Aguilar in no way departed from these sound principles. There a warrant was issued on nothing more than an affidavit reciting:

> "Affiants have received reliable information from a credible person and do believe that heroin, mari-

> juana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law." 378 U. S., at 109.

The affidavit, therefore, contained none of the underlying "facts or circumstances" from which the magistrate could find probable cause. *Nathanson* v. *United States*, 290 U. S. 41, 47 (1933). On the contrary, the affidavit was a "mere affirmation of suspicion and belief" (*Nathanson, supra,* at 46) and gained nothing by the incorporation by reference of the informant's unsupported belief. See *Aguilar, supra,* at 114 n. 4.

Significantly, the Court in *Aguilar* cited with approval the affidavit upheld in *Jones* v. *United States*, 362 U. S. 257 (1960). That affidavit read in pertinent part as follows:

> "In the late afternoon of Tuesday, August 20, 1957, I, Detective Thomas Didone, Jr. received information that Cecil Jones and Earline Richardson were involved in the illicit narcotic traffic and that they kept a ready supply of heroin on hand in the above mentioned apartment. The source of information also relates that the two aforementioned persons kept these same narcotics either on their person, under a pillow, on a dresser or on a window ledge in said apartment. The source of information goes on to relate that on many occasions the source of information has gone to said apartment and purchased narcotic drugs from the above mentioned persons and that the narcotics were secreated [*sic*] in the above mentioned places. The last time being August 20, 1957." *Id.,* at 267–268, n. 2.

The substance of the tip, held sufficient in *Jones,* closely parallels that here held insufficient by the Court

of Appeals. Both recount personal and recent* observations by an unidentified informant of criminal activity, factors showing that the information had been gained in a reliable manner, and serving to distinguish both tips from that held insufficient in *Spinelli, supra,* in which the affidavit failed to explain how the informant came by his information. *Spinelli, supra,* at 416.

The Court of Appeals seems to have believed, however, that there was no substantial basis for believing that the tip was truthful. Indeed, it emphasized that the affiant had never alleged that the informant was truthful, but only "prudent," a word that "signifies that he is circumspect in the conduct of his affairs, but reveals nothing about his credibility." 412 F. 2d, at 797–798. Such a construction of the affidavit is the very sort of hypertechnicality—the "elaborate specificity once exacted under common law"—condemned by this Court in *Ventresca.* A policeman's affidavit "should not be judged as an entry in an essay contest," *Spinelli, supra,* at 438 (Fortas, J., dissenting), but, rather, must be judged by the facts it contains. While a bare statement by an affiant that he believed the informant to be truthful would not, in itself, provide a *factual* basis for crediting the report of an unnamed informant, we conclude that the affidavit in the present case contains an ample factual basis for believing the informant which, when coupled

*We reject the contention of respondent that the informant's observations were too stale to establish probable cause at the time the warrant was issued. The informant reported having purchased whiskey from respondent "within the past 2 weeks," which could well include purchases up to the date of the affidavit. Moreover, these recent purchases were part of a history of purchases over a two-year period. It was certainly reasonable for a magistrate, concerned only with a balancing of probabilities, to conclude that there was a reasonable basis for a search.

with affiant's own knowledge of the respondent's background, afforded a basis upon which a magistrate could reasonably issue a warrant. The accusation by the informant was plainly a declaration against interest since it could readily warrant a prosecution and could sustain a conviction against the informant himself. This will be developed in Part III.

II

In determining what quantum of information is necessary to support a belief that an unidentified informant's information is truthful, *Jones* v. *United States, supra,* is a suitable benchmark. The affidavit in *Jones* recounted the tip of an anonymous informant, who claimed to have recently purchased narcotics from the defendant at his apartment, and described the apartment in some detail. After reciting the substance of the tip the affiant swore as follows:

> "Both the aforementioned persons are familiar to the undersigned and other members of the Narcotic Squad. Both have admitted to the use of narcotic drugs and display needle marks as evidence of same.
>
> "This same information, regarding the illicit narcotic traffic, conducted by [the defendant] has been given to the undersigned and to other officers of the narcotic squad by other sources of information.
>
> "Because the source of information mentioned in the opening paragraph has given information to the undersigned on previous occasion and which was correct, and because this same information is given by other sources does believe that there is now illicit narcotic drugs being secreated [*sic*] in the above apartment . . . ." *Id.,* at 268 n. 2.

Mr. Justice Frankfurter, writing for the Court in *Jones,* upheld the warrant. Although the information in the affidavit was almost entirely hearsay, he concluded that

there was "substantial basis" for crediting the hearsay. The informant had previously given accurate information; his story was corroborated by "other sources" (albeit unnamed); additionally the defendant was known to the police as a user of narcotics. Justice Frankfurter emphasized the last two of these factors:

> "Corroboration through other sources of information reduced the chances of a reckless or prevaricating tale; that petitioner was a known user of narcotics made the charge against him much less subject to scepticism than would be such a charge against one without such a history." *Id.,* at 271.

Aguilar cannot be read as questioning the "substantial basis" approach of *Jones.* And unless *Jones* has somehow, without acknowledgment, been overruled by *Spinelli,* there would be no basis whatever for a holding that the affidavit in the present case is wanting. The affidavit in the present case, like that in *Jones,* contained a substantial basis for crediting the hearsay. Both affidavits purport to relate the personal observations of the informant—a factor that clearly distinguishes *Spinelli,* in which the affidavit failed to explain how the informant came by his information. Both recite prior events within the affiant's own knowledge—the needle marks in *Jones* and Constable Johnson's prior seizure in the present case—indicating that the defendant had previously trafficked in contraband. These prior events again distinguish *Spinelli,* in which no facts were supplied to support the assertion that Spinelli was "known . . . as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers." *Spinelli, supra,* at 422.

To be sure there is no averment in the present affidavit, as there was in *Jones,* that the informant had previously given "correct information," but this Court in *Jones* never suggested that an averment of previous reliability was

necessary. Indeed, when the inquiry is, as it always must be in determining probable cause, whether the informant's *present* information is truthful or reliable, it is curious, at the very least, that MR. JUSTICE HARLAN would place such stress on vague attributes of "general background, employment . . . position in the community . . . ." (*Post,* at 600.) Were it not for some language in *Spinelli,* it is doubtful that any of these reputation attributes of the informant could be said to reveal any more about his present reliability than is afforded by the support of the officer's personal knowledge of the suspect. In *Spinelli,* however, the Court rejected as entitled to no weight the "bald and unilluminating" assertion that the suspect was known to the affiant as a gambler. 393 U. S., at 414. For this proposition the Court relied on *Nathanson* v. *United States,* 290 U. S. 41 (1933). But a careful examination of *Nathanson* shows that the *Spinelli* opinion did not fully reflect the critical points of what *Nathanson* held since it was limited to holding that reputation, *standing alone,* was insufficient; it surely did not hold it irrelevant when supported by other information. This reading of *Nathanson* is confirmed by *Brinegar* v. *United States,* 338 U. S. 160 (1949), in which the Court, in sustaining a finding of probable cause for a warrantless arrest, held proper the assertion of the searching officer that he had previously arrested the defendant for a similar offense and that the defendant had a reputation for hauling liquor. Such evidence would rarely be admissible at trial, but the Court took pains to emphasize the very different functions of criminal trials and preliminary determinations of probable cause. Trials are necessarily surrounded with evidentiary rules "developed to safeguard men from dubious and unjust convictions." *Id.,* at 174. But before the trial we deal only with probabilities that "are not technical; they are the factual and practical considerations of

everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar, supra,* at 175.

We cannot conclude that a policeman's knowledge of a suspect's reputation—something that policemen frequently know and a factor that impressed such a "legal technician" as Mr. Justice Frankfurter—is not a "practical consideration of everyday life" upon which an officer (or a magistrate) may properly rely in assessing the reliability of an informant's tip. To the extent that *Spinelli* prohibits the use of such probative information, it has no support in our prior cases, logic, or experience and we decline to apply it to preclude a magistrate from relying on a law enforcement officer's knowledge of a suspect's reputation.

III

Quite apart from the affiant's own knowledge of respondent's activities, there was an additional reason for crediting the informant's tip. Here the warrant's affidavit recited extrajudicial statements of a declarant, who feared for his life and safety if his identity was revealed, that over the past two years he had many times and recently purchased "illicit whiskey." These statements were against the informant's penal interest, for he thereby admitted major elements of an offense under the Internal Revenue Code. Section 5205 (a)(2), Title 26, United States Code, proscribes the sale, purchase, or possession of unstamped liquor.

Common sense in the important daily affairs of life would induce a prudent and disinterested observer to credit these statements. People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search. That the informant may be paid or promised a "break" does

not eliminate the residual risk and opprobrium of having admitted criminal conduct. Concededly admissions of crime do not always lend credibility to contemporaneous or later accusations of another. But here the informant's admission that over a long period and currently he had been buying illicit liquor on certain premises, itself and without more, implicated that property and furnished probable cause to search.

It may be that this informant's out-of-court declarations would not be admissible at respondent's trial under *Donnelly* v. *United States,* 228 U. S. 243 (1913), or under *Bruton* v. *United States,* 391 U. S. 123 (1968). But *Donnelly*'s implication that statements against penal interest are without value and *per se* inadmissible has been widely criticized; see the dissenting opinion of Mr. Justice Holmes in *Donnelly, supra,* at 277; 5 J. Wigmore, Evidence § 1477 (3d ed. 1940), and has been partially rejected in Rule 804 of the Proposed Rules of Evidence for the District Courts and Magistrates. More important, the issue in warrant proceedings is not guilt beyond reasonable doubt but probable cause for believing the occurrence of a crime and the secreting of evidence in specific premises. See *Brinegar* v. *United States, supra,* at 173. Whether or not *Donnelly* is to survive as a rule of evidence in federal trials, it should not be extended to warrant proceedings to prevent magistrates from crediting, in all circumstances, statements of a declarant containing admissions of criminal conduct. As for *Bruton,* that case rested on the Confrontation Clause of the Sixth Amendment which seems inapposite to *ex parte* search warrant proceedings under the Fourth Amendment.

It will not do to say that warrants may not issue on uncorroborated hearsay. This only avoids the issue of whether there is reason for crediting the out-of-court statement. Nor is it especially significant that neither

the name nor the person of the informant was produced before the magistrate. The police themselves almost certainly knew his name, the truth of the affidavit is not in issue, and *McCray* v. *Illinois,* 386 U. S. 300 (1967), disposed of the claim that the informant must be produced whenever the defendant so demands.

Reversed.

MR. JUSTICE STEWART joins in Part I of THE CHIEF JUSTICE's opinion and in the judgment of the Court.

MR. JUSTICE WHITE agrees with Part III of THE CHIEF JUSTICE's opinion and has concluded that the affidavit, considered as a whole, was sufficient to support issuance of the warrant. He therefore concurs in the judgment of reversal.

MR. JUSTICE BLACK, concurring.

While I join the opinion of THE CHIEF JUSTICE which distinguishes this case from *Aguilar* v. *Texas,* 378 U. S. 108 (1964), and *Spinelli* v. *United States,* 393 U. S. 410 (1969), I would go further and overrule those two cases and wipe their holdings from the books for the reasons, among others, set forth in the dissent of Mr. Justice Clark in *Aguilar,* which I joined, and my dissent in *Spinelli.*

MR. JUSTICE BLACKMUN, concurring.

I join the opinion of THE CHIEF JUSTICE and the judgment of the Court, but I add a personal comment in order to make very clear my posture as to *Spinelli* v. *United States,* 393 U. S. 410 (1969), cited in several places in that opinion. I was a member of the 6–2 majority of the United States Court of Appeals for the Eighth Circuit in *Spinelli* v. *United States,* 382 F. 2d 871 (1967), which this Court by a 5–3 vote reversed, with the pivotal Justice concluding his con-

curring opinion, 393 U. S., at 429, by the observation that, "Pending full-scale reconsideration of that case [*Draper* v. *United States,* 358 U. S. 307 (1959)], on the one hand, or of the *Nathanson-Aguilar* cases on the other, I join the opinion of the Court and the judgment of reversal, especially since a vote to affirm would produce an evenly divided Court." Obviously, I then felt that the Court of Appeals had correctly decided the case. Nothing this Court said in *Spinelli* convinced me to the contrary. I continue to feel today that *Spinelli* at this level was wrongly decided and, like MR. JUSTICE BLACK, I would overrule it.

MR. JUSTICE HARLAN, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join, dissenting.

This case presents the question of how our decisions in *Aguilar* v. *Texas,* 378 U. S. 108 (1964), and *Spinelli* v. *United States,* 393 U. S. 410 (1969), apply where magistrates in issuing search warrants are faced with the task of assessing the probable credibility of unidentified informants who purport to describe criminal activity of which they have personal knowledge, and where it does not appear that such informants have previously supplied accurate information to law enforcement officers.

I cannot agree that the affidavit here at issue provided a sufficient basis for an independent determination, by a neutral judicial officer, that probable cause existed. Accordingly, I would affirm the judgment of the Court of Appeals. Five members of this Court, however, for four separately expressed reasons, have concluded that the judgment below must be reversed. Some of the theories employed by those voting to reverse are wholly unlike any of the grounds urged by the Government.

I

Where, as in this case, the affiant states under oath that he has been informed of the existence of certain criminal activity, but has not observed that activity himself, a magistrate in discharging his duty to make an independent assessment of probable cause can properly issue a search warrant only if he concludes that: (a) the knowledge attributed to the informant, if true, would be sufficient to establish probable cause; (b) the affiant is likely relating truthfully what the informer said; and (c) it is reasonably likely that the informer's description of criminal behavior accurately reflects reality.[1]

In the case before us, no one maintains that the magistrate's judgment as to elements (a) and (b) was not properly supported. Plainly the information set forth in the affidavit, if entitled to credit, establishes probable cause. And the magistrate was certainly entitled to rely on the agent's official status, his personal observation of the agent, and the oath administered to him by the magistrate in concluding that the affiant's assertions as to what he had been told by the informer were credible.

The final component of the probable cause equation, here involved, is that it must appear reasonably likely that the informer's claim that criminal conduct has occurred or is occurring is probably accurate. Our

[1] Of course where, as here, the affiant provides information in addition to the informant's tip, the magistrate could alternatively find probable cause, without examining the tip, if he can conclude that (a) the affiant is probably telling the truth and (b) the affidavit apart from the tip is sufficiently informative to establish probable cause. See *Spinelli* v. *United States,* 393 U. S. 410, 414 (1969). Concededly, this latter element is not present here. Government's Brief 16. Without crediting the tip, the affidavit is insufficient.

cases establish that this element is satisfied only if there is reason to believe both that the informer is a truthful person generally and that he has based his particular conclusions in the matter at hand on reliable data, *Aguilar* v. *Texas, supra; Spinelli* v. *United States, supra,* for it is not reasonable to invade another's premises on the basis of information, even if it appears quite damning when simply taken at face value, unless there is corroboration of its trustworthiness. The fact that the magistrate has determined that the agent probably truthfully reported what the informant conveyed cannot, of course, establish the credibility or reliability of the information itself. More immediately relevant here, our cases have established that where the affiant relies upon the assertions of confidants to establish probable cause, the affidavit must set forth facts which enable the magistrate to judge for himself both the probable credibility of the informant and the reliability of his information, for only if this condition is met can a reviewing court be satisfied that the magistrate has fulfilled his constitutional duty to render an independent determination that probable cause exists. *Aguilar* v. *Texas,* 378 U. S. 108 (1964); *Spinelli* v. *United States,* 393 U. S. 410 (1969). Cf. *Giordenello* v. *United States,* 357 U. S. 480 (1958); *Nathanson* v. *United States,* 290 U. S. 41 (1933); *Whiteley* v. *Warden,* 401 U. S. 560 (1971).[2]

The parties are in agreement with these principles and have not urged that they be re-examined. Indeed, I think these precepts follow ineluctably from the constitutional command that "no Warrants shall issue, but upon probable cause." Whether, in this case, either of

[2] *Giordenello* and *Whiteley* each involved an arrest warrant rather than a search warrant, but the analysis required to determine the validity of either is basically the same.

these tests of the trustworthiness of the informer's tip has been met is, however, vigorously disputed.

II

Although the Court of Appeals did not address itself to this contention, respondent claims that the affidavit is insufficient to establish the reliability of the evidence upon which the informant based his conclusions. Of course, most of these data come from alleged direct personal observation of the informant, surely a sufficient basis upon which to predicate a finding of reliability under any test. However, respondent stresses that the allegation of direct observation of the criminal activity does not necessarily purport to embrace a period less than two weeks prior to the issuance of the search warrant. Moreover, the reliability of the source of the information that a purchase was made "within the past two days" is not established and, it is argued, the other information was too stale to support the issuance of a warrant.

This argument is premised upon an overly technical view of the affidavit. The informant is said to have personally bought illegal whiskey from respondent "within the past 2 weeks," which could well include a point in time quite close to the issuance of the warrant. More importantly, the totality of the tip evidently reveals that the informer purported to describe an ongoing operation which he claimed he had personally observed over the course of two years. Giving due deference to the magistrate's determination of probable cause and reading the affidavit "in a commonsense and realistic fashion," *United States* v. *Ventresca,* 380 U. S. 102, 108 (1965), I must conclude that the affidavit sets forth sufficient data to permit a magistrate to determine that, if the informer was likely telling the truth, information adequate to support a finding of probable cause was likely obtained in a reliable fashion.

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III

I turn, then, to what the parties have treated as the crux of the controversy before us. Respondent contends, and the Court of Appeals so held, that the affidavit does not sufficiently set forth facts and circumstances from which the magistrate might properly have concluded that the informant, in purporting to detail his personal observation, was probably telling the truth. Conversely, the Government principally argues that two factors, singly or in combination, provided a factual basis for the magistrate's judgment that the tip was credible. First, the agent stated that he had "interviewed this person [and] found this person to be a prudent person." Second, the informant described the criminal activity in some detail and from his own personal knowledge.[3]

A

The Government's first contention misconceives the basic thrust of this Court's decisions in the *Nathanson, Giordenello, Aguilar, Spinelli,* and *Whiteley* cases, *supra.* The central proposition common to each of these decisions is that the determination of probable cause is to be made by the magistrate, not the affiant. That the agent-affiant determined the informer to be prudent cannot be a basis for sustaining this warrant unless magistrates are entitled to delegate their responsibilities to law enforcement officials. *Nathanson* held that an affidavit

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[3] The Government makes brief reference to the assertion that the informant's verbal statement to the affiant was "sworn." Government's Brief 13 n. 2. I do not see how this affects the case. Surely there is no reason to suspect that this indicates the confidant anticipated potential perjury proceedings if he were subsequently proved a liar. Nor does that assertion reveal, in any meaningful sense, what sort of relationship this might have reflected or created between the agent and his informer.

to the effect that the affiant "has cause to suspect and does believe" that illicit liquor was located on certain premises did not sufficiently apprise the issuing magistrate of the underlying "facts or circumstances" from which "*he* can find probable cause." 290 U. S., at 47 (emphasis added). In *Aguilar,* a sworn assertion that the informant was "a credible person" was held insufficient to enable the magistrate to assess that conclusion for himself. Only two Terms ago, we held a warrant constitutionally defective because "[t]hough the affiant swore that his confidant was 'reliable,' he offered the magistrate no reason in support of this conclusion." *Spinelli* v. *United States,* 393 U. S., at 416. Reading the assertion that the informer in this case was "prudent" in the broadest conceivable commonsense fashion, it does no more than claim he was "credible" or "reliable," *i. e.,* that he was likely telling the truth.[4] Such an assertion, however, is no more than a conclusion which the Constitution requires must be drawn independently by the magistrate. What this portion of the affidavit lacks are any of the underlying "facts or circumstances" that informed the agent's conclusion and whose presentation to the magistrate would enable him to assess the probability that this determination was sufficiently plausible to justify authorizing a search of respondent's premises.

B

Nor do I think this void is filled by the fact that the informant claimed to speak from his personal knowledge.

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[4] The Court of Appeals in reversing respondent's conviction stated that "[t]he allegation that [the informant] is a 'prudent person' signifies that he is circumspect in the conduct of his affairs, but reveals nothing about his credibility." 412 F. 2d 796, 797–798. I consider this a too restrictive construction of the affidavit and cannot accept that aspect of the reasoning of the Court of Appeals.

It is true that in *Nathanson* the Court was not dealing with the sufficiency of the allegations respecting one or more of the above-described components of probable cause, but merely with a bare overall statement of the affiant that probable cause existed. Further, as the Government notes, our chief, but not sole, emphasis in *Aguilar* was upon the absence of any evidence communicated by the affiant from which a magistrate could infer that the confidant gathered his evidence from a reliable source. From this, the Government contends that *Aguilar*'s reliability-of-the-informer test is not applicable in full force where, as here, it does seem clear that the sources of the informer's belief, if truthfully reported, were reliable. I think this argument makes too much of the circumstances of our previous cases. The central point of the discussion of probable cause in *Aguilar* is, as perhaps more precisely emphasized by our explicit twin holdings in *Spinelli,* see 393 U. S., at 416, that the two elements necessary to establish the informer's trustworthiness—namely, that the tip relayed to the magistrate be both truthful and reliable—are analytically severable. It is not possible to argue that since certain information, if true, would be trustworthy, therefore, it must be true. The possibility remains that the information might have been fabricated. This is why our cases require that there be a reasonable basis for crediting the accuracy of the observation related in the tip. In short, the requirement that the magistrate independently assess the probable credibility of the informant does not vanish where the source of the tip indicates that, if true, it is trustworthy.

This is not to say, however, that I think the fact of asserted personal observation can never play a role in determining whether that observation actually took place. I can perceive at least two ways in which, in circum-

stances similar to those of this case, that information might be taken to bear upon the informer's credibility, as well as upon the reliability of his sources of information. For example, to the extent that the informant is somehow responsible to the affiant, the fact of asserted personal observation might be of some value to a magistrate in assessing the informer's credibility. In such circumstances, perhaps a magistrate could conclude that where the confidant claimed to speak from personal knowledge it is somewhat less likely that the informant was falsifying his report because, if the search yields no fruit, when called to account he would be unable to explain this away by impugning the veracity or reliability of his sources. However, no such relationship is revealed in this case.

Additionally, it might be of significance that the informant had given a more than ordinarily detailed description of the suspect's criminal activities. Although this would be more probative of the reliability of the information, it might also permissibly lead a magistrate, in an otherwise close case, to credit the accuracy of the account as well. I do not believe, however, that in this instance the relatively meager allegations of this character are, standing alone, enough to satisfy the credibility requirement essential to the sufficiency of this probable-cause affidavit. Reading this aspect of the affidavit in a not unduly circumspect manner, the allegations are of a character that would readily occur to a person prone to fabricate. To hold that this aspect of the affidavit, without more, would enable "a man of reasonable caution," *Berger* v. *New York,* 388 U. S. 41, 55 (1967), to conclude that there was adequate reason to believe the informant credible would open the door to the acceptance of little more than florid affidavits as justifying the issuance of search warrants.

C

Some members of the Court would reverse the judgment below on the grounds that the magistrate might properly have credited the informant's assertions because they confessed to the commission of a crime. This rationale is advanced notwithstanding the Government's failure even to suggest it.

Had this argument been pressed upon us, I would find it difficult to accept. First, the analogy to the hearsay exception is quite tenuous. The federal rule, although it is often criticized, is that declarations against penal interest do not fall within this exception. *Donnelly* v. *United States,* 228 U. S. 243 (1913). Moreover, because it has been thought that such statements should be relied upon by factfinders only when necessity justifies it, the rule universally requires a showing that the declarant cannot be produced personally before the trier of fact, C. McCormick, Evidence §§ 253, 257 (1954), an element not shown to be present here. See Part V, *infra.* Finally, we have not found any instance of the application of this rule where the witness declined to reveal to the trier of fact the identity of the declarant, presumably because without this knowledge it cannot be readily assumed that the declarant might have had reason to suspect the use of the statement would do him harm. Thus, while strict rules of evidence certainly do not govern magistrates' assessments of probable cause, it would require a rather extensive relaxation of them to permit reliance on this factor. And these rules cannot be completely relaxed, of course, since the basic thrust of *Spinelli, Aguilar, Nathanson, Whiteley,* and *Giordenello, supra,* is to prohibit the issuance of warrants upon mere uncorroborated hearsay. The simple statement by an affiant that an unspecified individual told the affiant that he and another had committed a

crime, where offered to prove the complicity of the third party, is little, if any, more than that.

Secondly, the rationale for this exception to the hearsay rule is that the fact that the declaration was against the speaker's self-interest tends to indicate that its substance is accurate. 5 J. Wigmore, Evidence § 1457 (3d ed. 1940). But where the declarant is also a police informant it seems at least as plausible to assume, without further enlightenment either as to the Government's general practice or as to the particular facts of this case, that the declarant-confidant at least believed he would receive absolution from prosecution for his confessed crime in return for his statement. (This, of course, would not be an objection where the declarant is not also the informant. See *Spinelli, supra,* at 425 (WHITE, J., concurring).) Thus, some showing that the informant did not possess illusions of immunity might well be essential.

Thirdly, the effect of adopting such a rule would be to encourage the Government to prefer as informants participants in criminal enterprises rather than ordinary citizens, a goal the Government specifically eschews in its brief in this case upon the explicit premise that such persons are often less reliable than those who obey the law. Brief for the United States 14.

In short, I am inclined to the view, although I would not decide the question here, that magistrates may not properly predicate a determination that an unnamed confidant is credible upon the bare fact that by giving information he also confessed to having committed a crime. More importantly at this juncture, it seems to me quite clear that no such rule should be injected into our federal jurisprudence in the absence of any representation by the Government that the factual assumptions underlying it do, indeed, comport with reality, and in the face of the Government's apparent explicit assertion, in this very

case, that those able to supply information sufficient to establish probable cause under such a new rule would tend to be less reliable than those who cannot. The necessity for this haste to embrace such a speculative theory, without any argument from those who will be affected by it, wholly escapes me.

IV

Finally, it is argued that even if the tip plus the affiant's assertion that the informant was "prudent" did not provide a reasonable basis for the magistrate's conclusion that the confidant was credible, two other factors would have sufficed. First, at some time in the past four or more years, in an abandoned house "under Harris' control," the local constable had located "a sizeable stash of illicit whiskey." While an assertion of "prior events within the affiant's own knowledge . . . indicating that the defendant had previously trafficked in contraband," *ante,* at 581, admittedly did not appear in the affidavit held insufficient in *Spinelli,* this hardly distinguishes that case in any purposeful manner. Surely, it cannot seriously be suggested that, once an individual has been convicted of bootlegging, any anonymous phone caller who states he has just personally witnessed another illicit sale (up to four years later) by that individual provides federal agents with probable cause to search the suspect's home. I can only conclude that this argument is a makeweight, intended to avoid the necessity of calling for an outright overruling of *Spinelli.*

Secondly, the claim is made that a magistrate could conclude the confidant here was credible because the agent had "received numerous information from all types of persons as to [respondent's] activities." To rely on this factor alone, of course, is flatly inconsistent with *Spinelli,* where we held that "the allegation that Spinelli was 'known' to the affiant and to other federal and local

law enforcement officers as a gambler and an associate of gamblers is but a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision." *Spinelli, supra,* at 414. In the instant case, the affiant did not purport to "know" respondent was a dealer in illicit whiskey, nor did he identify the source of his information to that effect.

Nevertheless, the contention is advanced that this aspect of *Spinelli* had "no support in our prior cases, logic, or experience," *ante,* at 583, and thus should be discarded. However, *Nathanson* held that "[m]ere affirmance of belief or suspicion is not enough" to establish probable cause for issuance of a warrant to search a private dwelling. 290 U. S., at 47. It is argued that *Nathanson* "was limited to holding that reputation, *standing alone,* was insufficient." *Ante,* at 582. But this is the precise problem here—only the respondent's reputation has been seriously invoked to establish the credibility of the informant, an element of probable cause entirely severable from the requirement that the confidant's source be reliable. See Parts I and III of this opinion.

A narrower view of *Nathanson* is said to be confirmed by reading *Brinegar* v. *United States,* 338 U. S. 160 (1949), to have "held proper the assertion of the searching officer that he had previously arrested the defendant for a similar offense and that the defendant had a reputation for hauling liquor." *Ante,* at 582. But *Brinegar* itself was very carefully limited to situations involving the arrest of those driving moving vehicles, 338 U. S., at 174, 176–177, a problem that has typically been treated as *sui generis* by this Court. Further, the Court in *Brinegar* specifically held the arrest valid "[w]holly apart from [the agent's] knowledge that [the suspect] bore the general reputation of being engaged in liquor running." *Id.,* at 170. While it is true that *Jones* v. *United States,* 362 U. S. 257, 271 (1960), cites the fact that the in-

formant's "story was corroborated by other sources of information," the opinion nowhere suggests that this factor, standing alone, would have been sufficient to enable a magistrate to assess the confidant's reliability. At least equal emphasis was placed upon the informant's previously proved veracity and his tangible proof of actual observation of the illegal activity.

Thus, I conclude that *Spinelli* and *Nathanson,* without contradiction, stand for the proposition that the magistrate could not establish the likely veracity of the unidentified informant on the grounds that his story coincided, in unspecified particulars, with rumors circulated by unknown third parties. I am not certain what is meant by the claim that such a rule of law is illogical. It would, indeed, be illogical to argue that the agent could not have relied upon information as to respondent's reputation that he deemed credible and reliable in concluding that the informant had likely told the truth. But it was not the agent's task to determine whether a search warrant should issue. This was the magistrate's responsibility. As to the magistrate, I confess that I do not comprehend, where the issue is whether the confidant is to be believed, how the agent's assertion that he had "received numerous information from all types of persons as to [respondent's] activities," can, as a matter of logic or experience, be accurately described as other than "a bald and unilluminating assertion of suspicion." It is, at best, a conclusory statement that respondent had a deserved reputation as a dealer in illicit whiskey. The Fourth Amendment, I repeat, requires that such conclusions be drawn, from the underlying facts and circumstances, by the magistrate, not the agent.

V

The Government has earnestly protested that the result below, if permitted to stand, will seriously hamper the

enforcement of the federal criminal law. It is said that if this affidavit is insufficient to support the issuance of a search warrant, it will be extremely difficult to meet the Fourth Amendment's standards where the informer, although apparently quite credible, has never before given accurate information to law enforcement officers, especially where he, or the agent, is unwilling to have the informant's identity disclosed. It would, indeed, be anomalous if the Fourth Amendment dictated such results, for it surely was never intended as a hindrance to fair, vigorous law enforcement. Further, I think there is much truth in the Government's supporting assertion that the ordinary citizen who has never before reported a crime to the police may, in fact, be more reliable than one who supplies information on a regular basis. "The latter is likely to be someone who is himself involved in criminal activity or is, at least, someone who enjoys the confidence of criminals." Government's Brief 14.[5]

I do not, however, share the Government's concern that a judgment of affirmance would have such a constricting effect on legitimate federal law enforcement. For example, it would seem that such informers could often be brought before the magistrate where he could assess their credibility for himself. We cannot assume that the ordinary law-abiding citizen has qualms about this sort of cooperation with law enforcement officers. And I do not understand the Government to be asserting

[5] Of course, the magistrate was presented no evidence that this is, in fact, such a case. Indeed, the very allegations in the affidavit to the effect that the informant here had been a frequent purchaser from respondent would suggest that he "is, at least, someone who enjoys the confidence of criminals." The Government's argument, as I understand it, is that the affidavit in this case is typical of those that can be produced by agents who rely on first-time informers not bound up themselves in criminal activity. As I point out below, if this had been the situation here, and that fact had been communicated to the magistrate, this would be a very different case.

that effective law enforcement will often dictate that the identity of informants be kept secret from federal magistrates themselves. Moreover, it will always be open to the officer to seek corroboration of the tip.

Beyond these considerations, I do not understand why a federal agent, who has determined a confidant to be "reliable," "credible," or "prudent" cannot lay before the magistrate the grounds upon which he based that judgment. I would not hold that a magistrate's determination that an informer is "prudent" is insufficient to support the issuance of a warrant. To the contrary, I would only insist that this judgment be that of the magistrate, not the law enforcement officer who seeks the warrant. Without violating the confidences of his source, the agent surely could describe for the magistrate such things as the informer's general background, employment, personal attributes that enable him to observe and relate accurately, position in the community, reputation with others, personal connection with the suspect, any circumstances which suggest the probable absence of any motivation to falsify, the apparent motivation for supplying the information, the presence or absence of a criminal record or association with known criminals, and the like.

VI

This affidavit is barren of anything that enabled the magistrate to judge for himself of the credibility of the informant. We should not countenance the issuance of a search warrant by a federal magistrate upon no more evidence than that presented here. A person who has not been shown to possess any of the common attributes of credibility, whose name cannot be disclosed to a magistrate, and whose information has not been corroborated is precisely the sort of informant whose tip should not be the sole basis for the issuance of a warrant, if the constitutional command that "no Warrants shall issue, but

upon probable cause" is to be respected. And the assertion that such a person may be believed where he confesses that he is a criminal or where his statements dovetail with other, unspecified rumors carries its own refutation. With all respect, such an analysis bespeaks more a firm hostility to *Aguilar, Nathanson,* and *Spinelli* than a careful judgment as to the principles those cases reflect. Despite all its surface detail, this affidavit cannot be sustained without cutting deeply into the core requirement of the Fourth Amendment that search warrants cannot issue except upon the independent finding of a neutral magistrate that probable cause exists.

For these reasons, I dissent.

LEMON ET AL. *v.* KURTZMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF PENNSYLVANIA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 89. Argued March 3, 1971—Decided June 28, 1971*

Rhode Island's 1969 Salary Supplement Act provides for a 15% salary supplement to be paid to teachers in nonpublic schools at which the average per-pupil expenditure on secular education is below the average in public schools. Eligible teachers must teach only courses offered in the public schools, using only materials used in the public schools, and must agree not to teach courses in religion. A three-judge court found that about 25% of the State's elementary students attended nonpublic schools, about 95% of whom attended Roman Catholic affiliated schools, and that to date about 250 teachers at Roman Catholic schools are the sole beneficiaries under the Act. The court found that the parochial school system was "an integral part of the religious mission of the Catholic Church," and held that the Act fostered "excessive entanglement" between government and religion, thus violating the Establishment Clause. Pennsylvania's Nonpublic Elementary and Secondary Education Act, passed in 1968, authorizes the state Superintendent of Public Instruction to "purchase" certain "secular educational services" from nonpublic schools, directly reimbursing those schools solely for teachers' salaries, textbooks, and instructional materials. Reimbursement is restricted to courses in specific secular subjects, the textbooks and materials must be approved by the Superintendent, and no payment is to be made for any course containing "any subject matter expressing religious teaching, or the morals or forms of worship of any sect." Contracts were made with schools that have more than 20% of all the students in the State, most of which were affiliated with the Roman Catholic Church. The complaint challenging the constitutionality of

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*Together with No. 569, *Earley et al.* v. *DiCenso et al.*, and No. 570, *Robinson, Commissioner of Education of Rhode Island, et al.* v. *DiCenso et al.*, on appeal from the United States District Court for the District of Rhode Island.

the Act alleged that the church-affiliated schools are controlled by religious organizations, have the purpose of propagating and promoting a particular religious faith, and conduct their operations to fulfill that purpose. A three-judge court granted the State's motion to dismiss the complaint for failure to state a claim for relief, finding no violation of the Establishment or Free Exercise Clause. *Held:* Both statutes are unconstitutional under the Religion Clauses of the First Amendment, as the cumulative impact of the entire relationship arising under the statutes involves excessive entanglement between government and religion. Pp. 611–625.

(a) The entanglement in the Rhode Island program arises because of the religious activity and purpose of the church-affiliated schools, especially with respect to children of impressionable age in the primary grades, and the dangers that a teacher under religious control and discipline poses to the separation of religious from purely secular aspects of elementary education in such schools. These factors require continuing state surveillance to ensure that the statutory restrictions are obeyed and the First Amendment otherwise respected. Furthermore, under the Act the government must inspect school records to determine what part of the expenditures is attributable to secular education as opposed to religious activity, in the event a nonpublic school's expenditures per pupil exceed the comparable figures for public schools. Pp. 615–620.

(b) The entanglement in the Pennsylvania program also arises from the restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role and the state supervision of nonpublic school accounting procedures required to establish the cost of secular as distinguished from religious education. In addition, the Pennsylvania statute has the further defect of providing continuing financial aid directly to the church-related schools. Historically governmental control and surveillance measures tend to follow cash grant programs, and here the government's post-audit power to inspect the financial records of church-related schools creates an intimate and continuing relationship between church and state. Pp. 620–622.

(c) Political division along religious lines was one of the evils at which the First Amendment aimed, and in these programs, where successive and probably permanent annual appropriations that benefit relatively few religious groups are involved, political

fragmentation and divisiveness on religious lines are likely to be intensified. Pp. 622–624.

(d) Unlike the tax exemption for places of religious worship, upheld in *Walz* v. *Tax Commission,* 397 U. S. 664, which was based on a practice of 200 years, these innovative programs have self-perpetuating and self-expanding propensities which provide a warning signal against entanglement between government and religion. Pp. 624–625.

No. 89, 310 F. Supp. 35, reversed and remanded; Nos. 569 and 570, 316 F. Supp. 112, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which BLACK, DOUGLAS, HARLAN, STEWART, MARSHALL (as to Nos. 569 and 570), and BLACKMUN, JJ., joined. DOUGLAS, J., filed a concurring opinion, *post,* p. 625, in which BLACK, J., joined, and in which MARSHALL, J. (as to Nos. 569 and 570), joined, filing a separate statement, *post,* p. 642. BRENNAN, J., filed a concurring opinion, *post,* p. 642. WHITE, J., filed an opinion concurring in the judgment in No. 89 and dissenting in Nos. 569 and 570, *post,* p. 661. MARSHALL, J., took no part in the consideration or decision of No. 89.

Henry W. Sawyer III argued the cause and filed briefs for appellants in No. 89. *Edward Bennett Williams* argued the cause for appellants in No. 569. With him on the brief were *Jeremiah C. Collins* and *Richard P. McMahon. Charles F. Cottam* argued the cause for appellants in No. 570. With him on the brief were *Herbert F. DeSimone,* Attorney General of Rhode Island, and *W. Slater Allen, Jr.,* Assistant Attorney General.

J. Shane Creamer argued the cause for appellees Kurtzman et al. in No. 89. On the brief were *Fred Speaker,* Attorney General of Pennsylvania, *David W. Rutstein,* Deputy Attorney General, and *Edward Friedman. William B. Ball* argued the cause for appellee schools in No. 89. With him on the brief were *Joseph G. Skelly, James E. Gallagher, Jr., C. Clark Hodgson, Jr., Samuel Rappaport, Donald A. Semisch,* and *William D. Valente. Henry T. Reath* filed a brief for appellee Pennsylvania Association of Independent Schools in No. 89. *Leo*

Pfeffer and *Milton Stanzler* argued the cause for appellees in Nos. 569 and 570. With them on the brief were *Harold E. Adams, Jr.,* and *Allan M. Shine.*

Briefs of *amici curiae* urging reversal in No. 89 were filed by *Mr. Pfeffer* for the American Association of School Administrators et al.; by *Henry C. Clausen* for United Americans for Public Schools; by *Samuel Rabinove, Arnold Forster, George Soll, Joseph B. Robison, Paul Hartman,* and *Sol Rabkin* for the American Jewish Committee et al.; by *Franklin C. Salisbury* for Protestants and Other Americans United for Separation of Church and State; by *J. Harold Flannery* for the Center for Law and Education, Harvard University, et al.; and by *Peter L. Costas* and *Paul W. Orth* for the Connecticut State Conference of Branches of the NAACP et al.

Briefs of *amici curiae* urging affirmance in No. 89 were filed by *Acting Solicitor General Friedman, Assistant Attorney General Ruckelshaus, Robert V. Zener,* and *Donald L. Horowitz* for the United States; by *Paul W. Brown,* Attorney General of Ohio, *pro se,* and *Charles S. Lopeman,* First Assistant Attorney General, for the Attorney General of Ohio et al.; by *Levy Anderson* for the City of Philadelphia; by *Robert M. Landis* for the School District of Philadelphia; by the City of Pittsburgh; by *Bruce W. Kauffman, John M. Elliott,* and *Edward F. Mannino* for the City of Erie; by *James A. Kelly* for the School District of the City of Scranton; by *Charles M. Whelan, William R. Consedine, Alfred L. Scanlan, Arthur E. Sutherland,* and *Harmon Burns, Jr.,* for the National Catholic Educational Association et al.; by *Ethan A. Hitchcock* and *I. N. P. Stokes* for the National Association of Independent Schools, Inc.; by *Jerome H. Gerber* for the Pennsylvania State AFL–CIO; by *Thomas J. Ford, Edward J. Walsh, Jr.,* and *Theodore D. Hoffmann*

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for the Long Island Conference of Religious Elementary and Secondary School Administrators; by *Nathan Lewin* for the National Jewish Commission on Law and Public Affairs; by *Stuart Hubbell* for Citizens for Educational Freedom; and by *Edward M. Koza, Walter L. Hill, Jr., Thomas R. Balaban,* and *William J. Pinkowski* for the Polish American Congress, Inc., et al.

The National Association of Laymen filed a brief as *amicus curiae* in No. 89.

Briefs of *amici curiae* urging reversal in Nos. 569 and 570 were filed by *Acting Solicitor General Friedman, Assistant Attorney General Gray,* and *Messrs. Zener* and *Horowitz* for the United States, and by *Jesse H. Choper* and *Messrs. Consedine, Whelan,* and *Burns* for the National Catholic Educational Association et al.

Briefs of *amici curiae* urging affirmance in Nos. 569 and 570 were filed by *Messrs. Rabinove, Robison, Forster,* and *Rabkin* for the American Jewish Committee et al.; by *Mr. Salisbury* for Protestants and Other Americans United for Separation of Church and State; by *Mr. Flannery* for the Center for Law and Education, Harvard University, et al.; and by *Messrs. Costas* and *Orth* for the Connecticut State Conference of Branches of the NAACP et al.

Mr. Chief Justice Burger delivered the opinion of the Court.

These two appeals raise questions as to Pennsylvania and Rhode Island statutes providing state aid to church-related elementary and secondary schools. Both statutes are challenged as violative of the Establishment and Free Exercise Clauses of the First Amendment and the Due Process Clause of the Fourteenth Amendment.

Pennsylvania has adopted a statutory program that provides financial support to nonpublic elementary and

secondary schools by way of reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects. Rhode Island has adopted a statute under which the State pays directly to teachers in nonpublic elementary schools a supplement of 15% of their annual salary. Under each statute state aid has been given to church-related educational institutions. We hold that both statutes are unconstitutional.

I

The Rhode Island Statute

The Rhode Island Salary Supplement Act[1] was enacted in 1969. It rests on the legislative finding that the quality of education available in nonpublic elementary schools has been jeopardized by the rapidly rising salaries needed to attract competent and dedicated teachers. The Act authorizes state officials to supplement the salaries of teachers of secular subjects in nonpublic elementary schools by paying directly to a teacher an amount not in excess of 15% of his current annual salary. As supplemented, however, a nonpublic school teacher's salary cannot exceed the maximum paid to teachers in the State's public schools, and the recipient must be certified by the state board of education in substantially the same manner as public school teachers.

In order to be eligible for the Rhode Island salary supplement, the recipient must teach in a nonpublic school at which the average per-pupil expenditure on secular education is less than the average in the State's public schools during a specified period. Appellant State Commissioner of Education also requires eligible schools to submit financial data. If this information indicates a per-pupil expenditure in excess of the statutory limita-

[1] R. I. Gen. Laws Ann. § 16–51–1 *et seq.* (Supp. 1970).

tion, the records of the school in question must be examined in order to assess how much of the expenditure is attributable to secular education and how much to religious activity.[2]

The Act also requires that teachers eligible for salary supplements must teach only those subjects that are offered in the State's public schools. They must use "only teaching materials which are used in the public schools." Finally, any teacher applying for a salary supplement must first agree in writing "not to teach a course in religion for so long as or during such time as he or she receives any salary supplements" under the Act.

Appellees are citizens and taxpayers of Rhode Island. They brought this suit to have the Rhode Island Salary Supplement Act declared unconstitutional and its operation enjoined on the ground that it violates the Establishment and Free Exercise Clauses of the First Amendment. Appellants are state officials charged with administration of the Act, teachers eligible for salary supplements under the Act, and parents of children in church-related elementary schools whose teachers would receive state salary assistance.

A three-judge federal court was convened pursuant to 28 U. S. C. §§ 2281, 2284. It found that Rhode Island's nonpublic elementary schools accommodated approximately 25% of the State's pupils. About 95% of these pupils attended schools affiliated with the Roman Catholic church. To date some 250 teachers have applied for benefits under the Act. All of them are employed by Roman Catholic schools.

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[2] The District Court found only one instance in which this breakdown between religious and secular expenses was necessary. The school in question was not affiliated with the Catholic church. The court found it unlikely that such determinations would be necessary with respect to Catholic schools because their heavy reliance on nuns kept their wage costs substantially below those of the public schools.

The court held a hearing at which extensive evidence was introduced concerning the nature of the secular instruction offered in the Roman Catholic schools whose teachers would be eligible for salary assistance under the Act. Although the court found that concern for religious values does not necessarily affect the content of secular subjects, it also found that the parochial school system was "an integral part of the religious mission of the Catholic Church."

The District Court concluded that the Act violated the Establishment Clause, holding that it fostered "excessive entanglement" between government and religion. In addition two judges thought that the Act had the impermissible effect of giving "significant aid to a religious enterprise." 316 F. Supp. 112. We affirm.

The Pennsylvania Statute

Pennsylvania has adopted a program that has some but not all of the features of the Rhode Island program. The Pennsylvania Nonpublic Elementary and Secondary Education Act [3] was passed in 1968 in response to a crisis that the Pennsylvania Legislature found existed in the State's nonpublic schools due to rapidly rising costs. The statute affirmatively reflects the legislative conclusion that the State's educational goals could appropriately be fulfilled by government support of "those purely secular educational objectives achieved through nonpublic education . . . ."

The statute authorizes appellee state Superintendent of Public Instruction to "purchase" specified "secular educational services" from nonpublic schools. Under the "contracts" authorized by the statute, the State directly reimburses nonpublic schools solely for their actual expenditures for teachers' salaries, textbooks, and instructional materials. A school seeking reimbursement must

[3] Pa. Stat. Ann., Tit. 24, §§ 5601–5609 (Supp. 1971).

maintain prescribed accounting procedures that identify the "separate" cost of the "secular educational service." These accounts are subject to state audit. The funds for this program were originally derived from a new tax on horse and harness racing, but the Act is now financed by a portion of the state tax on cigarettes.

There are several significant statutory restrictions on state aid. Reimbursement is limited to courses "presented in the curricula of the public schools." It is further limited "solely" to courses in the following "secular" subjects: mathematics, modern foreign languages,[4] physical science, and physical education. Textbooks and instructional materials included in the program must be approved by the state Superintendent of Public Instruction. Finally, the statute prohibits reimbursement for any course that contains "any subject matter expressing religious teaching, or the morals or forms of worship of any sect."

The Act went into effect on July 1, 1968, and the first reimbursement payments to schools were made on September 2, 1969. It appears that some $5 million has been expended annually under the Act. The State has now entered into contracts with some 1,181 nonpublic elementary and secondary schools with a student population of some 535,215 pupils—more than 20% of the total number of students in the State. More than 96% of these pupils attend church-related schools, and most of these schools are affiliated with the Roman Catholic church.

Appellants brought this action in the District Court to challenge the constitutionality of the Pennsylvania statute. The organizational plaintiffs-appellants are associations of persons resident in Pennsylvania declaring

[4] Latin, Hebrew, and classical Greek are excluded.

belief in the separation of church and state; individual plaintiffs-appellants are citizens and taxpayers of Pennsylvania. Appellant Lemon, in addition to being a citizen and a taxpayer, is a parent of a child attending public school in Pennsylvania. Lemon also alleges that he purchased a ticket at a race track and thus had paid the specific tax that supports the expenditures under the Act. Appellees are state officials who have the responsibility for administering the Act. In addition seven church-related schools are defendants-appellees.

A three-judge federal court was convened pursuant to 28 U. S. C. §§ 2281, 2284. The District Court held that the individual plaintiffs-appellants had standing to challenge the Act, 310 F. Supp. 42. The organizational plaintiffs-appellants were denied standing under *Flast* v. *Cohen,* 392 U. S. 83, 99, 101 (1968).

The court granted appellees' motion to dismiss the complaint for failure to state a claim for relief.[5] 310 F. Supp. 35. It held that the Act violated neither the Establishment nor the Free Exercise Clause, Chief Judge Hastie dissenting. We reverse.

II

In *Everson* v. *Board of Education,* 330 U. S. 1 (1947), this Court upheld a state statute that reimbursed the parents of parochial school children for bus transportation

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[5] Plaintiffs-appellants also claimed that the Act violated the Equal Protection Clause of the Fourteenth Amendment by providing state assistance to private institutions that discriminated on racial and religious grounds in their admissions and hiring policies. The court unanimously held that no plaintiff had standing to raise this claim because the complaint did not allege that the child of any plaintiff had been denied admission to any nonpublic school on racial or religious grounds. Our decision makes it unnecessary for us to reach this issue.

expenses. There MR. JUSTICE BLACK, writing for the majority, suggested that the decision carried to "the verge" of forbidden territory under the Religion Clauses. *Id.*, at 16. Candor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.

The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be "no law *respecting* an establishment of religion." A law may be one "respecting" the forbidden objective while falling short of its total realization. A law "respecting" the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not *establish* a state religion but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.

In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz* v. *Tax Commission,* 397 U. S. 664, 668 (1970).

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education* v. *Allen,* 392 U. S. 236, 243 (1968);

finally, the statute must not foster "an excessive government entanglement with religion." *Walz, supra,* at 674.

Inquiry into the legislative purposes of the Pennsylvania and Rhode Island statutes affords no basis for a conclusion that the legislative intent was to advance religion. On the contrary, the statutes themselves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. There is no reason to believe the legislatures meant anything else. A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate. As in *Allen,* we find nothing here that undermines the stated legislative intent; it must therefore be accorded appropriate deference.

In *Allen* the Court acknowledged that secular and religious teachings were not necessarily so intertwined that secular textbooks furnished to students by the State were in fact instrumental in the teaching of religion. 392 U. S., at 248. The legislatures of Rhode Island and Pennsylvania have concluded that secular and religious education are identifiable and separable. In the abstract we have no quarrel with this conclusion.

The two legislatures, however, have also recognized that church-related elementary and secondary schools have a significant religious mission and that a substantial portion of their activities is religiously oriented. They have therefore sought to create statutory restrictions designed to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former. All these provisions are precautions taken in candid recognition that these programs approached, even if they did not intrude upon, the forbidden areas under the Religion Clauses. We need not decide whether these legislative precautions restrict the principal or primary effect of the programs to the point where they do not offend the Religion

Clauses, for we conclude that the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion.

III

In *Walz* v. *Tax Commission, supra,* the Court upheld state tax exemptions for real property owned by religious organizations and used for religious worship. That holding, however, tended to confine rather than enlarge the area of permissible state involvement with religious institutions by calling for close scrutiny of the degree of entanglement involved in the relationship. The objective is to prevent, as far as possible, the intrusion of either into the precincts of the other.

Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. *Zorach* v. *Clauson,* 343 U. S. 306, 312 (1952); *Sherbert* v. *Verner,* 374 U. S. 398, 422 (1963) (HARLAN, J., dissenting). Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts. Indeed, under the statutory exemption before us in *Walz,* the State had a continuing burden to ascertain that the exempt property was in fact being used for religious worship. Judicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.

This is not to suggest, however, that we are to engage in a legalistic minuet in which precise rules and forms must govern. A true minuet is a matter of pure form and style, the observance of which is itself the substantive end. Here we examine the form of the relationship for the light that it casts on the substance.

In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority. MR. JUSTICE HARLAN, in a separate opinion in *Walz, supra,* echoed the classic warning as to "programs, whose very nature is apt to entangle the state in details of administration . . . ." *Id.,* at 695. Here we find that both statutes foster an impermissible degree of entanglement.

(a) *Rhode Island program*

The District Court made extensive findings on the grave potential for excessive entanglement that inheres in the religious character and purpose of the Roman Catholic elementary schools of Rhode Island, to date the sole beneficiaries of the Rhode Island Salary Supplement Act.

The church schools involved in the program are located close to parish churches. This understandably permits convenient access for religous exercises since instruction in faith and morals is part of the total educational process. The school buildings contain identifying religious symbols such as crosses on the exterior and crucifixes, and religious paintings and statues either in the classrooms or hallways. Although only approximately 30 minutes a day are devoted to direct religious instruction, there are religiously oriented extracurricular activities. Approximately two-thirds of the teachers in these schools are nuns of various religious orders. Their dedicated efforts provide an atmosphere in which religious instruction and religious vocations are natural and proper parts of life in such schools. Indeed, as the District Court found, the role of teaching nuns in enhancing the religious atmosphere has led the parochial school au-

thorities to attempt to maintain a one-to-one ratio between nuns and lay teachers in all schools rather than to permit some to be staffed almost entirely by lay teachers.

On the basis of these findings the District Court concluded that the parochial schools constituted "an integral part of the religious mission of the Catholic Church." The various characteristics of the schools make them "a powerful vehicle for transmitting the Catholic faith to the next generation." This process of inculcating religious doctrine is, of course, enhanced by the impressionable age of the pupils, in primary schools particularly. In short, parochial schools involve substantial religious activity and purpose.[6]

The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid. Although the District Court found that concern for religious values did not inevitably or necessarily intrude into the content of secular subjects, the considerable religious activities of these schools led the legislature to provide for careful governmental controls and surveillance by state authorities in order to ensure that state aid supports only secular education.

The dangers and corresponding entanglements are enhanced by the particular form of aid that the Rhode Island Act provides. Our decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not

[6] See, *e. g.*, J. Fichter, Parochial School: A Sociological Study 77–108 (1958); Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development, pt. II, The Nonestablishment Principle, 81 Harv. L. Rev. 513, 574 (1968).

thought to offend the Establishment Clause. We note that the dissenters in *Allen* seemed chiefly concerned with the pragmatic difficulties involved in ensuring the truly secular content of the textbooks provided at state expense.

In *Allen* the Court refused to make assumptions, on a meager record, about the religious content of the textbooks that the State would be asked to provide. We cannot, however, refuse here to recognize that teachers have a substantially different ideological character from books. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not. We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education. The conflict of functions inheres in the situation.

In our view the record shows these dangers are present to a substantial degree. The Rhode Island Roman Catholic elementary schools are under the general supervision of the Bishop of Providence and his appointed representative, the Diocesan Superintendent of Schools. In most cases, each individual parish, however, assumes the ultimate financial responsibility for the school, with the parish priest authorizing the allocation of parish funds. With only two exceptions, school principals are nuns appointed either by the Superintendent or the Mother Provincial of the order whose members staff the school. By 1969 lay teachers constituted more than a third of all teachers in the parochial elementary schools, and their number is growing. They are first interviewed by the superintendent's office and then by the school principal. The contracts are signed by the parish priest, and he retains some discretion in negotiating salary levels. Religious authority necessarily pervades the school system.

The schools are governed by the standards set forth in a "Handbook of School Regulations," which has the force of synodal law in the diocese. It emphasizes the role and importance of the teacher in parochial schools: "The prime factor for the success or the failure of the school is the spirit and personality, as well as the professional competency, of the teacher . . . ." The Handbook also states that: "Religious formation is not confined to formal courses; nor is it restricted to a single subject area." Finally, the Handbook advises teachers to stimulate interest in religious vocations and missionary work. Given the mission of the church school, these instructions are consistent and logical.

Several teachers testified, however, that they did not inject religion into their secular classes. And the District Court found that religious values did not necessarily affect the content of the secular instruction. But what has been recounted suggests the potential if not actual hazards of this form of state aid. The teacher is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith. These controls are not lessened by the fact that most of the lay teachers are of the Catholic faith. Inevitably some of a teacher's responsibilities hover on the border between secular and religious orientation.

We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to make

a total separation between secular teaching and religious doctrine. What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion. Further difficulties are inherent in the combination of religious discipline and the possibility of disagreement between teacher and religious authorities over the meaning of the statutory restrictions.

We do not assume, however, that parochial school teachers will be unsuccessful in their attempts to segregate their religious beliefs from their secular educational responsibilities. But the potential for impermissible fostering of religion is present. The Rhode Island Legislature has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion—indeed the State here has undertaken to do so. To ensure that no trespass occurs, the State has therefore carefully conditioned its aid with pervasive restrictions. An eligible recipient must teach only those courses that are offered in the public schools and use only those texts and materials that are found in the public schools. In addition the teacher must not engage in teaching any course in religion.

A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

There is another area of entanglement in the Rhode Island program that gives concern. The statute excludes teachers employed by nonpublic schools whose average per-pupil expenditures on secular education equal or exceed the comparable figures for public schools. In the event that the total expenditures of an otherwise eligible school exceed this norm, the program requires the government to examine the school's records in order to determine how much of the total expenditures is attributable to secular education and how much to religious activity. This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches. The Court noted "the hazards of government supporting churches" in *Walz* v. *Tax Commission, supra,* at 675, and we cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses.

(b) *Pennsylvania program*

The Pennsylvania statute also provides state aid to church-related schools for teachers' salaries. The complaint describes an educational system that is very similar to the one existing in Rhode Island. According to the allegations, the church-related elementary and secondary schools are controlled by religious organizations, have the purpose of propagating and promoting a particular religious faith, and conduct their operations to fulfill that purpose. Since this complaint was dismissed for failure to state a claim for relief, we must accept these allegations as true for purposes of our review.

As we noted earlier, the very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between

church and state. The Pennsylvania statute, like that of Rhode Island, fosters this kind of relationship. Reimbursement is not only limited to courses offered in the public schools and materials approved by state officials, but the statute excludes "any subject matter expressing religious teaching, or the morals or forms of worship of any sect." In addition, schools seeking reimbursement must maintain accounting procedures that require the State to establish the cost of the secular as distinguished from the religious instruction.

The Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church-related school. This factor distinguishes both *Everson* and *Allen,* for in both those cases the Court was careful to point out that state aid was provided to the student and his parents—not to the church-related school. *Board of Education* v. *Allen, supra,* at 243–244; *Everson* v. *Board of Education, supra,* at 18. In *Walz* v. *Tax Commission, supra,* at 675, the Court warned of the dangers of direct payments to religious organizations:

> "Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards . . . ."

The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance. The government cash grants before us now provide no basis for predicting that comprehensive measures of surveillance and controls will not follow. In particular the government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and

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which are secular creates an intimate and continuing relationship between church and state.

IV

A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs. In a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.

Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. Freund, Comment, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680, 1692 (1969). The potential divisiveness of such conflict is a threat to the normal political process. *Walz* v. *Tax Commission, supra,* at 695 (separate opinion of HARLAN, J.). See also *Board of Education* v. *Allen,* 392 U. S., at 249 (HARLAN, J., concurring); *Abington School District* v. *Schempp,* 374 U. S. 203, 307 (1963) (Goldberg, J., concurring). To have States or communities divide on the issues presented by state aid to parochial schools would tend to confuse

and obscure other issues of great urgency. We have an expanding array of vexing issues, local and national, domestic and international, to debate and divide on. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government. The highways of church and state relationships are not likely to be one-way streets, and the Constitution's authors sought to protect religious worship from the pervasive power of government. The history of many countries attests to the hazards of religion's intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief.

Of course, as the Court noted in *Walz,* "[a]dherents of particular faiths and individual churches frequently take strong positions on public issues." *Walz* v. *Tax Commission, supra,* at 670. We could not expect otherwise, for religious values pervade the fabric of our national life. But in *Walz* we dealt with a status under state tax laws for the benefit of all religious groups. Here we are confronted with successive and very likely permanent annual appropriations that benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines are thus likely to be intensified.

The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow. The Rhode Island District Court found that the parochial school system's "monumental and deepening financial crisis" would "inescapably" require larger annual appropriations subsidizing greater percentages of the salaries of lay teachers. Although no facts have been developed in this respect

in the Pennsylvania case, it appears that such pressures for expanding aid have already required the state legislature to include a portion of the state revenues from cigarette taxes in the program.

V

In *Walz* it was argued that a tax exemption for places of religious worship would prove to be the first step in an inevitable progression leading to the establishment of state churches and state religion. That claim could not stand up against more than 200 years of virtually universal practice imbedded in our colonial experience and continuing into the present.

The progression argument, however, is more persuasive here. We have no long history of state aid to church-related educational institutions comparable to 200 years of tax exemption for churches. Indeed, the state programs before us today represent something of an innovation. We have already noted that modern governmental programs have self-perpetuating and self-expanding propensities. These internal pressures are only enhanced when the schemes involve institutions whose legitimate needs are growing and whose interests have substantial political support. Nor can we fail to see that in constitutional adjudication some steps, which when taken were thought to approach "the verge," have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a "downhill thrust" easily set in motion but difficult to retard or stop. Development by momentum is not invariably bad; indeed, it is the way the common law has grown, but it is a force to be recognized and reckoned with. The dangers are increased by the difficulty of perceiving in advance exactly where the "verge" of the precipice lies. As well as constituting an independent evil against which the Religion Clauses were intended to protect, involve-

ment or entanglement between government and religion serves as a warning signal.

Finally, nothing we have said can be construed to disparage the role of church-related elementary and secondary schools in our national life. Their contribution has been and is enormous. Nor do we ignore their economic plight in a period of rising costs and expanding need. Taxpayers generally have been spared vast sums by the maintenance of these educational institutions by religious organizations, largely by the gifts of faithful adherents.

The merit and benefits of these schools, however, are not the issue before us in these cases. The sole question is whether state aid to these schools can be squared with the dictates of the Religion Clauses. Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn.

The judgment of the Rhode Island District Court in No. 569 and No. 570 is affirmed. The judgment of the Pennsylvania District Court in No. 89 is reversed, and the case is remanded for further proceedings consistent with this opinion.

MR. JUSTICE MARSHALL took no part in the consideration or decision of No. 89.

MR. JUSTICE DOUGLAS, whom MR. JUSTICE BLACK joins, concurring.

While I join the opinion of the Court, I have expressed at some length my views as to the rationale of today's decision in these three cases.

They involve two different statutory schemes for providing aid to parochial schools. *Lemon* deals with the Pennsylvania Nonpublic Elementary and Secondary Education Act, Laws 1968, Act No. 109. By its terms the Pennsylvania Act allows the State to provide funds directly to private schools to purchase "secular educational service" such as teachers' salaries, textbooks, and educational materials. Pa. Stat. Ann., Tit. 24, § 5604 (Supp. 1971). Reimbursement for these services may be made only for courses in mathematics, modern foreign languages, physical science, and physical education. Reimbursement is prohibited for any course containing subject matter "expressing religious teaching, or the morals or forms of worship of any sect." § 5603 (Supp. 1971). To qualify, a school must demonstrate that its pupils achieve a satisfactory level of performance in standardized tests approved by the Superintendent of Public Instruction, and that the textbooks and other instructional materials used in these courses have been approved by the Superintendent of Public Instruction. The three-judge District Court below upheld this statute against the argument that it violates the Establishment Clause. We noted probable jurisdiction. 397 U. S. 1034.

The *DiCenso* cases involve the Rhode Island Salary Supplement Act, Laws 1969, c. 246. The Rhode Island Act authorizes supplementing the salaries of teachers of secular subjects in nonprofit private schools. The supplement is not more than 15% of an eligible teacher's current salary but cannot exceed the maximum salary paid to teachers in the State's public schools. To be eligible a teacher must teach only those subjects offered in public schools in the State, must be certified in substantially the same manner as teachers in public schools, and may use only teaching materials which are used in the public schools. Also the teacher must agree in writing

"not to teach a course in religion for so long as or during such time as he or she receives any salary supplements." R. I. Gen. Laws Ann. § 16–51–3 (Supp. 1970). The schools themselves must not be operated for profit, must meet state educational standards, and the annual per-student expenditure for secular education must not equal or exceed "the average annual per student expenditure in the public schools in the state at the same grade level in the second preceding fiscal year." § 16–51–2 (Supp. 1970). While the Rhode Island Act, unlike the Pennsylvania Act, provides for direct payments to the teacher, the three-judge District Court below found it unconstitutional because it "results in excessive government entanglement with religion." Probable jurisdiction was noted and the cases were set for oral argument with the other school cases. 400 U. S. 901.

In *Walz* v. *Tax Commission*, 397 U. S. 664, 674, the Court in approving a tax exemption for church property said:

> "Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion."

There is in my view such an entanglement here. The surveillance or supervision of the States needed to police grants involved in these three cases, if performed, puts a public investigator into every classroom and entails a pervasive monitoring of these church agencies by the secular authorities. Yet if that surveillance or supervision does not occur the zeal of religious proselytizers promises to carry the day and make a shambles of the Establishment Clause. Moreover, when taxpayers of

many faiths are required to contribute money for the propagation of one faith, the Free Exercise Clause is infringed.

The analysis of the constitutional objections to these two state systems of grants to parochial or sectarian schools must start with the admitted and obvious fact that the *raison d'être* of parochial schools is the propagation of a religious faith. They also teach secular subjects; but they came into existence in this country because Protestant groups were perverting the public schools by using them to propagate their faith. The Catholics naturally rebelled. If schools were to be used to propagate a particular creed or religion, then Catholic ideals should also be served. Hence the advent of parochial schools.

By 1840 there were 200 Catholic parish schools in the United States.[1] By 1964 there were 60 times as many.[2] Today 57% of the 9,000 Catholic parishes in the country have their church schools. "[E]very diocesan chancery has its school department, and enjoys a primacy of status."[3] The parish schools indeed consume 40% to 65% of the parish's total income.[4] The parish is so "school centered" that "[t]he school almost becomes the very reason for being."[5]

Early in the 19th century the Protestants obtained control of the New York school system and used it to promote reading and teaching of the Scriptures as revealed in the King James version of the Bible.[6] The contests

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[1] A. Stokes & L. Pfeffer, Church and State in the United States 229 (1964).

[2] *Ibid.*

[3] Deedy, Should Catholic Schools Survive?, New Republic, Mar. 13, 1971, pp. 15, 16.

[4] *Id.*, at 17.

[5] *Ibid.*

[6] Stokes & Pfeffer, *supra,* n. 1, at 231.

between Protestants and Catholics, often erupting into violence including the burning of Catholic churches, are a twice-told tale;[7] the Know-Nothing Party, which included in its platform "daily Bible reading in the schools,"[8] carried three States in 1854—Massachusetts, Pennsylvania, and Delaware.[9] Parochial schools grew, but not Catholic schools alone. Other dissenting sects established their own schools—Lutherans, Methodists, Presbyterians, and others.[10] But the major force in shaping the pattern of education in this country was the conflict between Protestants and Catholics. The Catholics logically argued that a public school was sectarian when it taught the King James version of the Bible. They therefore wanted it removed from the public schools; and in time they tried to get public funds for their own parochial schools.[11]

The constitutional right of dissenters to substitute their parochial schools for public schools was sustained by the Court in *Pierce* v. *Society of Sisters,* 268 U. S. 510.

The story of conflict and dissension is long and well known. The result was a state of so-called equilibrium where religious instruction was eliminated from public schools and the use of public funds to support religious schools was deemed to be banned.[12]

But the hydraulic pressures created by political forces and by economic stress were great and they began to

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[7] *Id.,* at 231–239.

[8] *Id.,* at 237.

[9] *Ibid.*

[10] R. Butts, The American Tradition in Religion and Education 115 (1950).

[11] *Id.,* at 118. And see R. Finney, A Brief History of the American Public School 44–45 (1924).

[12] See E. Knight, Education in the United States 3, 314 (3d rev. ed. 1951); E. Cubberley, Public Education in the United States 164 *et seq.* (1919).

change the situation. Laws were passed—state and federal—that dispensed public funds to sustain religious schools and the plea was always in the educational frame of reference: education in all sectors was needed, from languages to calculus to nuclear physics. And it was forcefully argued that a linguist or mathematician or physicist trained in religious schools was just as competent as one trained in secular schools.

And so we have gradually edged into a situation where vast amounts of public funds are supplied each year to sectarian schools.[13]

And the argument is made that the private parochial school system takes about $9 billion a year off the back of government [14]—as if that were enough to justify violating the Establishment Clause.

While the evolution of the public school system in this country marked an escape from denominational control and was therefore admirable as seen through the eyes of those who think like Madison and Jefferson, it has disadvantages. The main one is that a state system may attempt to mold all students alike according to the views of the dominant group and to discourage the emergence of individual idiosyncrasies.

Sectarian education, however, does not remedy that condition. The advantages of sectarian education relate solely to religious or doctrinal matters. They give the

[13] In 1960 the Federal Government provided $500 million to private colleges and universities. Amounts contributed by state and local governments to private schools at any level were negligible. Just one decade later federal aid to private colleges and universities had grown to $2.1 billion. State aid had begun and reached $100 million. Statistical Abstract of the United States 105 (1970). As the present cases demonstrate, we are now reaching a point where state aid is being given to private elementary and secondary schools as well as colleges and universities.

[14] Deedy, *supra,* n. 3, at 16.

church the opportunity to indoctrinate its creed delicately and indirectly, or massively through doctrinal courses.

Many nations follow that course: Moslem nations teach the Koran in their schools; Sweden vests its elementary education in the parish; Newfoundland puts its school system under three superintendents—one from the Church of England, one from the Catholic church, one from the United Church. In Ireland the public schools are under denominational managership—Catholic, Episcopalian, Presbyterian, and Hebrew.

England puts sectarian schools under the umbrella of its school system. It finances sectarian education; it exerts control by prescribing standards; it requires some free scholarships; it provides nondenominational membership on the board of directors.[15]

The British system is, in other words, one of surveillance over sectarian schools. We too have surveillance over sectarian schools but only to the extent of making sure that minimum educational standards are met, *viz.*, competent teachers, accreditation of the school for diplomas, the number of hours of work and credits allowed, and so on.

But we have never faced, until recently, the problem of policing sectarian schools. Any surveillance to date has been minor and has related only to the consistently unchallenged matters of accreditation of the sectarian school in the State's school system.[16]

The Rhode Island Act allows a supplementary salary to a teacher in a sectarian school if he or she "does not teach a course in religion."

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[15] S. Curtis, History of Education in Great Britain 316–383 (5th ed. 1963); W. Alexander, Education in England, c. II (2d ed. 1964).

[16] See *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534; *Meyer* v. *Nebraska*, 262 U. S. 390, 402.

The Pennsylvania Act provides for state financing of instruction in mathematics, modern foreign languages, physical science, and physical education, provided that the instruction in those courses "shall not include any subject matter expressing religious teaching, or the morals or forms of worship of any sect."

Public financial support of parochial schools puts those schools under disabilities with which they were not previously burdened. For, as we held in *Cooper* v. *Aaron,* 358 U. S. 1, 19, governmental activities relating to schools "must be exercised consistently with federal constitutional requirements." There we were concerned with equal protection; here we are faced with issues of Establishment of religion and its Free Exercise as those concepts are used in the First Amendment.

Where the governmental activity is the financing of the private school, the various limitations or restraints imposed by the Constitution on state governments come into play. Thus, Arkansas, as part of its attempt to avoid the consequences of *Brown* v. *Board of Education,* 347 U. S. 483, 349 U. S. 294, withdrew its financial support from some public schools and sent the funds instead to private schools. That state action was held to violate the Equal Protection Clause. *Aaron* v. *McKinley,* 173 F. Supp. 944, 952. We affirmed, *sub nom. Faubus* v. *Aaron,* 361 U. S. 197. Louisiana tried a like tactic and it too was invalidated. *Poindexter* v. *Louisiana Financial Assistance Commission,* 296 F. Supp. 686. Again we affirmed. 393 U. S. 17. Whatever might be the result in case of grants to students,[17] it is clear that once

[17] Grants to students in the context of the problems of desegregated public schools have without exception been stricken down as tools of the forbidden discrimination. See *Griffin* v. *School Bd. of Prince Edward County,* 377 U. S. 218; *Hall* v. *St. Helena Parish School Bd.,* 197 F. Supp. 649, aff'd, 368 U. S. 515; *Lee* v. *Macon County Bd.,* 267 F. Supp. 458, aff'd *sub nom. Wallace* v. *United*

one of the States finances a private school, it is duty-bound to make certain that the school stays within secular bounds and does not use the public funds to promote sectarian causes.

The government may, of course, finance a hospital though it is run by a religious order, provided it is open to people of all races and creeds. *Bradfield* v. *Roberts,* 175 U. S. 291. The government itself could enter the hospital business; and it would, of course, make no difference if its agents who ran its hospitals were Catholics, Methodists, agnostics, or whatnot. For the hospital is not indulging in religious instruction or guidance or indoctrination. As Mr. Justice Jackson said in *Everson* v. *Board of Education,* 330 U. S. 1, 26 (dissenting):

> "[Each State has] great latitude in deciding for itself, in the light of its own conditions, what shall be public purposes in its scheme of things. It may socialize utilities and economic enterprises and make taxpayers' business out of what conventionally had been private business. It may make public business of individual welfare, health, education, entertainment or security. But it cannot make public business of religious worship or instruction, or of attendance at religious institutions of any character."

The reason is that given by Madison in his Remonstrance: [18]

> "[T]he same authority which can force a citizen to contribute three pence only of his property for

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States, 389 U. S. 215; *Poindexter* v. *Louisiana Financial Assistance Commission,* 275 F. Supp. 833, aff'd, 389 U. S. 571; *Brown* v. *South Carolina State Bd.,* 296 F. Supp. 199, aff'd, 393 U. S. 222; *Coffey* v. *State Educ. Finance Commission,* 296 F. Supp. 1389; *Lee* v. *Macon County Bd.,* 231 F. Supp. 743.

[18] Remonstrance ¶ 3. The Memorial and Remonstrance Against Religious Assessments has been reproduced in appendices to the

the support of any one establishment, may force him to conform to any other establishment . . . ."

When Madison in his Remonstrance attacked a taxing measure to support religious activities, he advanced a series of reasons for opposing it. One that is extremely relevant here was phrased as follows: [19] "[I]t will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects." Intermeddling, to use Madison's word, or "entanglement," to use what was said in *Walz,* has two aspects. The intrusion of government into religious schools through grants, supervision, or surveillance may result in establishment of religion in the constitutional sense when what the State does enthrones a particular sect for overt or subtle propagation of its faith. Those activities of the State may also intrude on the Free Exercise Clause by depriving a teacher, under threats of reprisals, of the right to give sectarian construction or interpretation of, say, history and literature, or to use the teaching of such subjects to inculcate a religious creed or dogma.

Under these laws there will be vast governmental suppression, surveillance, or meddling in church affairs. As I indicated in *Tilton* v. *Richardson, post,* p. 689, decided this day, school prayers, the daily routine of parochial schools, must go if our decision in *Engel* v. *Vitale,* 370 U. S. 421, is honored. If it is not honored, then the state has established a religious sect. Elimination of prayers is only part of the problem. The curriculum presents subtle and difficult problems. The constitutional mandate can in part be carried out by censoring the curricula. What is palpably a sectarian course can be marked for

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opinion of Rutledge, J., in *Everson,* 330 U. S., at 63, and to that of DOUGLAS, J., in *Walz,* 397 U. S., at 719.

[19] Remonstrance ¶ 11.

deletion. But the problem only starts there. Sectarian instruction, in which, of course, a State may not indulge, can take place in a course on Shakespeare or in one on mathematics. No matter what the curriculum offers, the question is, what is *taught?* We deal not with evil teachers but with zealous ones who may use any opportunity to indoctrinate a class.[20]

It is well known that everything taught in most parochial schools is taught with the ultimate goal of religious education in mind. Rev. Joseph H. Fichter, S. J., stated in Parochial School: A Sociological Study 86 (1958):

> "It is a commonplace observation that in the parochial school religion permeates the whole curriculum, and is not confined to a single half-hour period of the day. Even arithmetic can be used as an instrument of pious thoughts, as in the case of the teacher who gave this problem to her class: 'If it takes forty thousand priests and a hundred and forty thousand sisters to care for forty million Catholics in the United States, how many more priests and sisters will be needed to convert and care for the hundred million non-Catholics in the United States?' "

One can imagine what a religious zealot, as contrasted to a civil libertarian, can do with the Ref-

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[20] "In the parochial schools Roman Catholic indoctrination is included in every subject. History, literature, geography, civics, and science are given a Roman Catholic slant. The whole education of the child is filled with propaganda. That, of course, is the very purpose of such schools, the very reason for going to all of the work and expense of maintaining a dual school system. Their purpose is not so much to educate, but to indoctrinate and train, not to teach Scripture truths and Americanism, but to make loyal Roman Catholics. The children are regimented, and are told what to wear, what to do, and what to think." L. Boettner, Roman Catholicism 360 (1962).

ormation or with the Inquisition. Much history can be given the gloss of a particular religion. I would think that policing these grants to detect sectarian instruction would be insufferable to religious partisans and would breed division and dissension between church and state.

This problem looms large where the church controls the hiring and firing of teachers:

> "[I]n the public school the selection of a faculty and the administration of the school usually rests with a school board which is subject to election and recall by the voters, but in the parochial school the selection of a faculty and the administration of the school is in the hands of the bishop alone, and usually is administered through the local priest. If a faculty member in the public school believes that he has been treated unjustly in being disciplined or dismissed, he can seek redress through the civil court and he is guaranteed a hearing. But if a faculty member in a parochial school is disciplined or dismissed he has no recourse whatsoever. The word of the bishop or priest is final, even without explanation if he so chooses. The tax payers have a voice in the way their money is used in the public school, but the people who support a parochial school have no voice at all in such affairs." L. Boettner, Roman Catholicism 375 (1962).

Board of Education v. *Allen,* 392 U. S. 236, dealt only with textbooks. Even so, some had difficulty giving approval. Yet books can be easily examined independently of other aspects of the teaching process. In the present cases we deal with the totality of instruction destined to be sectarian, at least in part, if the religious character of the school is to be maintained. A school which operates to commingle religion with other instruction plainly cannot completely secularize its instruction.

Parochial schools, in large measure, do not accept the assumption that secular subjects should be unrelated to religious teaching.

Lemon involves a state statute that prescribes that courses in mathematics, modern foreign languages, physical science, and physical education "shall not include any subject matter expressing religious teaching, or the morals or forms of worship of any sect." The subtleties involved in applying this standard are obvious. It places the State astride a sectarian school and gives it power to dictate what is or is not secular, what is or is not religious. I can think of no more disrupting influence apt to promote rancor and ill-will between church and state than this kind of surveillance and control. They are the very opposite of the "moderation and harmony" between church and state which Madison thought was the aim and purpose of the Establishment Clause.

The *DiCenso* cases have all the vices which are in *Lemon,* because the supplementary salary payable to the teacher is conditioned on his or her not teaching "a course in religion."

Moreover, the *DiCenso* cases reveal another, but related, knotty problem presented when church and state launch one of these educational programs. The Bishop of Rhode Island has a Handbook of School Regulations for the Diocese of Providence.[21]

The school board supervises "the education, both spiritual and secular, in the parochial schools and diocesan high schools."

The superintendent is an agent of the bishop and he interprets and makes "effective state and diocesan educational directives."

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[21] It was said on oral argument that the handbook shown as an exhibit in the record had been superseded. The provisions hereinafter quoted are from the handbook as it reads after all the deletions to which we were referred.

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The pastors visit the schools and "give their assistance in promoting spiritual and intellectual discipline."

Community supervisors "assist the teacher in the problems of instruction" and these duties are:

> "I. To become well enough acquainted with the teachers of their communities so as to be able to advise the community superiors on matters of placement and reassignment.
>
> "II. To act as liaison between the provincialate and the religious teacher in the school.
>
> "III. To cooperate with the superintendent by studying the diocesan school regulations and to encourage the teachers of their community to observe these regulations.
>
> "IV. To avoid giving any orders or directions to the teachers of their community that may be in conflict with diocesan regulations or policy regarding curriculum, testing, textbooks, method, or administrative matters.
>
> "V. To refer questions concerning school administration beyond the scope of their own authority to the proper diocesan school authorities, namely, the superintendent of schools or the pastor."

The length of the school day includes Mass:

> "A full day session for Catholic schools at the elementary level consists of five and one-half hours, exclusive of lunch and Mass,[22] but inclusive of recess for pupils in grades 1–3."

A course of study or syllabus prescribed for an elementary or secondary school is "mandatory."

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[22] "The use of school time to participate in the Holy Sacrifice of the Mass on the feasts of All Saints, Ascension, and the patronal saint of the parish or school, as well as during the 40 Hours Devotion, is proper and commendable."

Religious instruction is provided as follows:

> "A. Systematic religious instructions must be provided in all schools of the diocese.
>
> "B. Modern catechetics requires a teacher with unusual aptitudes, specialized training, and such unction of the spirit that his words possess the force of a personal call. He should be so filled with his subject that he can freely improvize in discussion, dramatization, drawing, song, and prayer. A teacher so gifted and so permeated by the message of the Gospel is rare. Perhaps no teacher in a given school attains that ideal. But some teachers come nearer it than others. If our pupils are to hear the Good News so that their minds are enlightened and their hearts respond to the love of God and His Christ, if they are to be formed into vital, twentieth-century Christians, they should receive their religious instructions only from the very best teachers.
>
> "C. Inasmuch as the textbooks employed in religious instruction above the fifth grade require a high degree of catechetical preparation, religion should be a departmentalized subject in grade six through twelve."

Religious activities are provided, through observance of specified holy days and participation in Mass.

"Religious formation" is not restricted to courses but is achieved "through the example of the faculty, the tone of the school . . . and religious activities."

No unauthorized priest may address the students.

> "Retreats and days of recollection form an integral part of our religious program in the Catholic schools."

Religious factors are used in the selection of students:

> "Although wealth should never serve as a criterion for accepting a pupil into a Catholic school, all other

> things being equal, it would seem fair to give preference to a child whose parents support the parish. Regular use of the budget, rather than the size of the contributions, would appear equitable. It indicates whether parents regularly attend Mass."

These are only highlights of the handbook. But they indicate how pervasive is the religious control over the school and how remote this type of school is from the secular school. Public funds supporting that structure are used to perpetuate a doctrine and creed in innumerable and in pervasive ways. Those who man these schools are good people, zealous people, dedicated people. But they are dedicated to ideas that the Framers of our Constitution placed beyond the reach of government.

If the government closed its eyes to the manner in which these grants are actually used it would be allowing public funds to promote sectarian education. If it did not close its eyes but undertook the surveillance needed, it would, I fear, intermeddle in parochial affairs in a way that would breed only rancor and dissension.

We have announced over and over again that the use of taxpayers' money to support parochial schools violates the First Amendment, applicable to the States by virtue of the Fourteenth.

We said in unequivocal words in *Everson* v. *Board of Education,* 330 U. S. 1, 16, "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." We reiterated the same idea in *Zorach* v. *Clauson,* 343 U. S. 306, 314, and in *McGowan* v. *Maryland,* 366 U. S. 420, 443, and in *Torcaso* v. *Watkins,* 367 U. S. 488, 493. We repeated the same idea in *McCollum* v. *Board of Education,* 333 U. S. 203, 210, and added that a State's

tax-supported public schools could not be used "for the dissemination of religious doctrines" nor could a State provide the church "pupils for their religious classes through use of the State's compulsory public school machinery." *Id.*, at 212.

Yet in spite of this long and consistent history there are those who have the courage to announce that a State may nonetheless finance the *secular* part of a sectarian school's educational program. That, however, makes a grave constitutional decision turn merely on cost accounting and bookkeeping entries. A history class, a literature class, or a science class in a parochial school is not a separate institute; it is part of the organic whole which the State subsidizes. The funds are used in these cases to pay or help pay the salaries of teachers in parochial schools; and the presence of teachers is critical to the essential purpose of the parochial school, *viz.*, to advance the religious endeavors of the particular church. It matters not that the teacher receiving taxpayers' money only teaches religion a fraction of the time. Nor does it matter that he or she teaches no religion. The school is an organism living on one budget. What the taxpayers give for salaries of those who teach only the humanities or science without any trace of proselytizing enables the school to use all of its own funds for religious training. As Judge Coffin said, 316 F. Supp. 112, 120, we would be blind to realities if we let "sophisticated bookkeeping" sanction "almost total subsidy of a religious institution by assigning the bulk of the institution's expenses to 'secular' activities." And sophisticated attempts to avoid the Constitution are just as invalid as simple-minded ones. *Lane* v. *Wilson,* 307 U. S. 268, 275.

In my view the taxpayers' forced contribution to the

parochial schools in the present cases violates the First Amendment.

MR. JUSTICE MARSHALL, who took no part in the consideration or decision of No. 89, see *ante*, p. 625, while intimating no view as to the continuing vitality of *Everson* v. *Board of Education*, 330 U. S. 1 (1947), concurs in MR. JUSTICE DOUGLAS' opinion covering Nos. 569 and 570.

MR. JUSTICE BRENNAN.*

I agree that the judgments in Nos. 569 and 570 must be affirmed. In my view the judgment in No. 89 must be reversed outright. I dissent in No. 153 insofar as the plurality opinion and the opinion of my Brother WHITE sustain the constitutionality, as applied to sectarian institutions, of the Federal Higher Education Facilities Act of 1963, as amended, 77 Stat. 363, 20 U. S. C. § 711 *et seq.* (1964 ed. and Supp. V). In my view that Act is unconstitutional insofar as it authorizes grants of federal tax monies to sectarian institutions, but is unconstitutional only to that extent. I therefore think that our remand of the case should be limited to the direction of a hearing to determine whether the four institutional appellees here are sectarian institutions.

I continue to adhere to the view that to give concrete meaning to the Establishment Clause

> "the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers. It is a line which the Court has consistently sought to mark in its decisions expounding the religious guarantees of the First

*This opinion also applies to No. 153, *Tilton et al.* v. *Richardson, Secretary of Health, Education, and Welfare, et al.*, *post*, p. 672.

> Amendment. What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice. When the secular and religious institutions become involved in such a manner, there inhere in the relationship precisely those dangers—as much to church as to state—which the Framers feared would subvert religious liberty and the strength of a system of secular government." *Abington School District* v. *Schempp,* 374 U. S. 203, 294–295 (1963) (concurring opinion); *Walz* v. *Tax Commission,* 397 U. S. 664, 680–681 (1970) (concurring opinion).

The common feature of all three statutes before us is the provision of a direct subsidy from public funds for activities carried on by sectarian educational institutions. We have sustained the reimbursement of parents for bus fares of students under a scheme applicable to both public and nonpublic schools, *Everson* v. *Board of Education,* 330 U. S. 1 (1947). We have also sustained the loan of textbooks in secular subjects to students of both public and nonpublic schools, *Board of Education* v. *Allen,* 392 U. S. 236 (1968). See also *Bradfield* v. *Roberts,* 175 U. S. 291 (1899).

The statutory schemes before us, however, have features not present in either the *Everson* or *Allen* schemes. For example, the reimbursement or the loan of books ended government involvement in *Everson* and *Allen.* In contrast each of the schemes here exacts a promise in some form that the subsidy will not be used to finance

courses in religious subjects—promises that must be and are policed to assure compliance. Again, although the federal subsidy, similar to the *Everson* and *Allen* subsidies, is available to both public and nonpublic colleges and universities, the Rhode Island and Pennsylvania subsidies are restricted to nonpublic schools, and for practical purposes to Roman Catholic parochial schools.[1] These and other features I shall mention mean for me that *Everson* and *Allen* do not control these cases. Rather, the history of public subsidy of sectarian schools, and the purposes and operation of these particular statutes must be examined to determine whether the statutes breach the Establishment Clause. *Walz* v. *Tax Commission, supra,* at 681 (concurring opinion).

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[1] At the time of trial, 95% of the elementary school children in private schools in Rhode Island attended Roman Catholic schools. Only nonpublic school teachers could receive the subsidy and then only if they taught in schools in which the average per-pupil expenditure on secular education did not equal or exceed the average for the State's public schools. Some 250 of the 342 lay teachers employed in Rhode Island Roman Catholic schools had applied for and been declared eligible for the subsidy. To receive it the teacher must (1) have a state teaching certificate; (2) teach exclusively secular subjects taught in the State's public schools; (3) use only teaching materials approved for use in the public schools; (4) not teach religion; and (5) promise in writing not to teach a course in religion while receiving the salary supplement.

Unlike the Rhode Island case, the Pennsylvania case lacks a factual record since the complaint was dismissed on motion. We must therefore decide the constitutional challenge as addressed to the face of the Pennsylvania statute. Appellants allege that the nonpublic schools are segregated in Pennsylvania by race and religion and that the Act perpetrates and promotes the segregation of races "with the ultimate result of promoting two school systems in Pennsylvania—a public school system predominantly black, poor and inferior and a private, subsidized school system predominantly white, affluent and superior." Brief for Appellants Lemon et al. 9. The District Court held that appellants lacked standing to assert this equal protection claim. In my view this was plain error.

I

In sharp contrast to the "undeviating acceptance given religious tax exemptions from our earliest days as a Nation," *ibid.*, subsidy of sectarian educational institutions became embroiled in bitter controversies very soon after the Nation was formed. Public education was, of course, virtually nonexistent when the Constitution was adopted. Colonial Massachusetts in 1647 had directed towns to establish schools, Benjamin Franklin in 1749 proposed a Philadelphia Academy, and Jefferson labored to establish a public school system in Virginia.[2] But these were the exceptions. Education in the Colonies was overwhelmingly a private enterprise, usually carried on as a denominational activity by the dominant Protestant sects. In point of fact, government generally looked to the church to provide education, and often contributed support through donations of land and money. E. Cubberley, Public Education in the United States 171 (1919).

Nor was there substantial change in the years immediately following ratification of the Constitution and the Bill of Rights. Schools continued to be local and, in the main, denominational institutions.[3] But the demand for public education soon emerged. The evolution of the struggle in New York City is illustrative.[4] In 1786, the first New York State Legislature ordered that one section in each township be set aside for the "gospel and schools." With no public schools, various private agencies and churches operated "charity schools" for the poor of New

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[2] E. Cubberley, Public Education in the United States 17 (1919); *Abington School District* v. *Schempp*, 374 U. S. 203, 238 n. 7 and authorities cited therein (BRENNAN, J., concurring).

[3] C. Antieau, A. Downey, E. Roberts, Freedom from Federal Establishment 174 (1964).

[4] B. Confrey, Secularism in American Education: Its History 127–129 (1931).

York City and received money from the state common school fund. The forerunner of the city's public schools was organized in 1805 when DeWitt Clinton founded "The Society for Establishment of a Free School in the City of New York for the Education of such poor Children as do not belong to or are not provided for by any Religious Society." The State and city aided the society, and it built many schools. Gradually, however, competition and bickering among the Free School Society and the various church schools developed over the apportionment of state school funds. As a result, in 1825, the legislature transferred to the city council the responsibility for distributing New York City's share of the state funds. The council stopped funding religious societies which operated 16 sectarian schools but continued supporting schools connected with the Protestant Orphan Asylum Society. Thereafter, in 1831, the Catholic Orphan Asylum Society demanded and received public funds to operate its schools but a request of Methodists for funds for the same purpose was denied. Nine years later, the Catholics enlarged their request for public monies to include all parochial schools, contending that the council was subsidizing sectarian books and instruction of the Public School Society, which Clinton's Free School Society had become. The city's Scotch Presbyterian and Jewish communities immediately followed with requests for funds to finance their schools. Although the Public School Society undertook to revise its texts to meet the objections, in 1842, the state legislature closed the bitter controversy by enacting a law that established a City Board of Education to set up free public schools, prohibited the distribution of public funds to sectarian schools, and prohibited the teaching of sectarian doctrine in any public school.

The Nation's rapidly developing religious heterogeneity, the tide of Jacksonian democracy, and growing

urbanization soon led to widespread demands throughout the States for secular public education. At the same time strong opposition developed to use of the States' taxing powers to support private sectarian schools.[5] Although the controversy over religious exercises in the public schools continued into this century, *Schempp,* 374 U. S., at 268–277 (BRENNAN, J., concurring), the opponents of subsidy to sectarian schools had largely won their fight by 1900. In fact, after 1840, no efforts of sectarian schools to obtain a share of public school funds succeeded. Cubberley, *supra,* at 179. Between 1840 and 1875, 19 States added provisions to their constitutions prohibiting the use of public school funds to aid sectarian schools, *id.,* at 180, and by 1900, 16 more States had added similar provisions. In fact, no State admitted to the Union after 1858, except West Virginia, omitted such provision from its first constitution. *Ibid.* Today fewer than a half-dozen States omit such provisions from their constitutions.[6]

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[5] See generally R. Butts, The American Tradition in Religion and Education 111–145 (1950); 2 A. Stokes, Church and State in the United States 47–72 (1950); Cubberley, *supra* n. 2, at 155–181.

[6] See Ala. Const., Art. XIV, § 263; Alaska Const., Art. VII, § 1; Ariz. Const., Art. II, § 12, Art. XI, §§ 7, 8; Ark. Const., Art. XIV, § 2; Calif. Const., Art. IX, § 8; Colo. Const., Art. IX, § 7; Conn. Const., Art. VIII, § 4; Del. Const., Art. X, § 3; Fla. Const., Decl. of Rights, Art. I, § 3; Ga. Const., Art. VIII, § 12, par. 1; Hawaii Const., Art. IX, § 1; Idaho Const., Art. IX, § 5; Ill. Const., Art. VIII, § 3; Ind. Const., Art. 8, § 3; Kan. Const., Art. 6, § 6 (c); Ky. Const., § 189; La. Const., Art. XII, § 13; Mass. Const., Amend. Art. XLVI, § 2; Mich. Const., Art. I, § 4; Minn. Const., Art. VIII, § 2; Miss. Const., Art. 8, § 208; Mo. Const., Art. IX, § 8; Mont. Const., Art. XI, § 8; Neb. Const., Art. VII, § 11; Nev. Const., Art. 11, § 10; N. H. Const., Pt. II, Art. 83; N. J. Const., Art. VIII, § 4, par. 2; N. Mex. Const., Art. XII, § 3; N. Y. Const., Art. XI, § 3; N. Car. Const., Art. IX, §§ 4, 12; N. Dak. Const., Art. VIII, § 152; Ohio Const., Art. VI, § 2; Okla. Const., Art. II, § 5; Ore. Const., Art. VIII, § 2; Penn. Const., Art. 3, § 15; R. I. Const., Art. XII, § 4; S. C. Const., Art. XI, § 9; S. Dak. Const., Art. VIII, § 16; Tenn.

And in 1897, Congress included in its appropriation act for the District of Columbia a statement declaring it

> "to be the policy of the Government of the United States to make no appropriation of money or property for the purpose of founding, maintaining, or aiding by payment for services, expenses, or otherwise, any church or religious denomination, or any institution or society which is under sectarian or ecclesiastical control." 29 Stat. 411.

Thus for more than a century, the consensus, enforced by legislatures and courts with substantial consistency, has been that public subsidy of sectarian schools constitutes an impermissible involvement of secular with

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Const., Art. XI, § 12; Tex. Const., Art. VII, § 5; Utah Const., Art. X, § 13; Va. Const., Art. IX, § 141; Wash. Const., Art. IX, § 4; W. Va. Const., Art. XII, § 4; Wis. Const., Art. I, § 18, Art. X, § 2; Wyo. Const., Art. 7, § 8.

The overwhelming majority of these constitutional provisions either prohibit expenditures of public funds on sectarian schools, or prohibit the expenditure of public school funds for any purpose other than support of public schools. For a discussion and categorization of the various constitutional formulations, see Note, Catholic Schools and Public Money, 50 Yale L. J. 917 (1941). Many of the constitutional provisions are collected in B. Confrey, Secularism in American Education: Its History 47–125 (1931).

Many state constitutions explicitly apply the prohibition to aid to sectarian colleges and universities. See, *e. g.*, Colo. Const., Art. IX, § 7; Idaho Const., Art. IX, § 5; Ill. Const., Art. VIII, § 3; Kan. Const., Art. 6, § 6 (c); Mass. Const., Amend. Art. XLVI, § 2; Mo. Const., Art. IX, § 8; Mont. Const., Art. XI, § 8; Neb. Const., Art. VII, § 11; N. Mex. Const., Art. XII, § 3; S. C. Const., Art. XI, § 9; Utah Const., Art. X, § 13; Wyo. Const., Art. 7, § 8. At least one judicial decision construing the word "schools" held that the word does not include colleges and universities, *Opinion of the Justices,* 214 Mass. 599, 102 N. E. 464 (1913), but that decision was overruled by constitutional amendment. Mass. Const., Amend. Art. XLVI, § 2.

religious institutions.[7] If this history is not itself compelling against the validity of the three subsidy statutes, in the sense we found in *Walz* that "undeviating acceptance" was highly significant in favor of the validity of religious tax exemption, other forms of governmental involvement that each of the three statutes requires tip the scales in my view against the validity of each of them. These are involvements that threaten "dangers—as much to church as to state—which the Framers feared would subvert religious liberty and the strength of a system of secular government." *Schempp,* 374 U. S., at 295 (BRENNAN, J., concurring). "[G]overnment and religion have discrete interests which are mutually best served when each avoids too close a proximity to the other. It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government." *Id.,* at 259 (BRENNAN, J., concurring). All three of these statutes require "too close a proximity" of government to the subsidized sectarian institutions and in my view create real dangers of "the secularization of a creed."

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[7] See, *e. g., Wright* v. *School Dist.,* 151 Kan. 485, 99 P. 2d 737 (1940); *Atchison, T. & S. F. R. Co.* v. *City of Atchison,* 47 Kan. 712, 28 P. 1000 (1892); *Williams* v. *Board of Trustees,* 173 Ky. 708, 191 S. W. 507 (1917); *Opinion of the Justices,* 214 Mass. 599, 102 N. E. 464 (1913); *Jenkins* v. *Andover,* 103 Mass. 94 (1869); *Otken* v. *Lamkin,* 56 Miss. 758 (1879); *Harfst* v. *Hoegen,* 349 Mo. 808, 163 S. W. 2d 609 (1942); *State ex rel. Public School Dist.* v. *Taylor,* 122 Neb. 454, 240 N. W. 573 (1932); *State ex rel. Nevada Orphan Asylum* v. *Hallock,* 16 Nev. 373 (1882); *Synod of Dakota* v. *State,* 2 S. D. 366, 50 N. W. 632 (1891).

II

The Rhode Island statute requires Roman Catholic teachers to surrender their right to teach religion courses and to promise not to "inject" religious teaching into their secular courses. This has led at least one teacher to stop praying with his classes,[8] a concrete testimonial to the self-censorship that inevitably accompanies state regulation of delicate First Amendment freedoms. Cf. *Smith* v. *California,* 361 U. S. 147 (1959); *Speiser* v. *Randall,* 357 U. S. 513, 526 (1958). Both the Rhode Island and Pennsylvania statutes prescribe extensive standardization of the content of secular courses, and of the teaching materials and textbooks to be used in teaching the courses. And the regulations to implement those requirements necessarily require policing of instruction in the schools. The picture of state inspectors prowling the halls of parochial schools and auditing classroom instruction surely raises more than an imagined specter of governmental "secularization of a creed."

The same dangers attend the federal subsidy even if less obviously. The Federal Government exacts a promise that no "sectarian instruction" or "religious worship" will take place in a subsidized building. The Office of Education polices the promise.[9] In one instance federal

[8] "Already the Act has restricted the role of teachers. The evidence before us indicates that some otherwise qualified teachers have stopped teaching courses in religion in order to qualify for aid under the Act. One teacher, in fact, testified that he no longer prays with his class lest he endanger his subsidy." 316 F. Supp., at 121.

[9] The Office of Education stipulated as follows:

"The Office of Education is now engaged in making a series of on-site reviews of completed projects to verify that conditions under which Federal assistance was provided are being implemented. During these visits, class schedules and course descriptions contained in the school catalog are analyzed to ascertain that nothing in the nature of sectarian instruction is scheduled in any area constructed with the

officials demanded that a college cease teaching a course entitled "The History of Methodism" in a federally assisted building, although the Establishment Clause "plainly does not foreclose teaching *about* the Holy Scriptures or about the differences between religious sects in classes in literature or history." *Schempp,* 374 U. S., at 300 (BRENNAN, J., concurring). These examples illustrate the complete incompatibility of such surveillance with the restraints barring interference with religious freedom.[10]

Policing the content of courses, the specific textbooks used, and indeed the words of teachers is far different from the legitimate policing carried on under state compulsory attendance laws or laws regulating minimum levels of educational achievement. Government's legitimate interest in ensuring certain minimum skill levels and the acquisition of certain knowledge does not carry with it power to prescribe what shall *not* be taught, or what methods of instruction shall be used, or what opinions the teacher may offer in the course of teaching.

Moreover, when a sectarian institution accepts state financial aid it becomes obligated under the Equal Protection Clause of the Fourteenth Amendment not to discriminate in admissions policies and faculty selection.

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use of Federal funds. If there is found to be an indication that a portion of academic facilities constructed with Federal assistance is used in any way for sectarian purposes, *either the questionable practice must be terminated* or the institution must assume full responsibility for the cost of constructing the area involved." App. in No. 153, p. 82 (emphasis added).

[10] The plurality opinion in No. 153 would strike down the 20-year "period of Federal interest," 20 U. S. C. § 754 (a), upon the ground that "[t]he restrictive obligations of a recipient institution under § 751 (a)(2) cannot, compatibly with the Religion Clauses, expire while the building has substantial value." *Post,* at 683. Thus the surveillance constituting the "too close a proximity" which for me offends the Establishment Clause continues for the life of the building.

The District Court in the Rhode Island case pinpointed the dilemma:

> "Applying these standards to parochial schools might well restrict their ability to discriminate in admissions policies and in the hiring and firing of teachers. At some point the school becomes 'public' for more purposes than the Church could wish. At that point, the Church may justifiably feel that its victory on the Establishment Clause has meant abandonment of the Free Exercise Clause." 316 F. Supp., at 121–122 (citations omitted).

III

In any event, I do not believe that elimination of these aspects of "too close a proximity" would save these three statutes. I expressed the view in *Walz* that "[g]eneral subsidies of religious activities would, of course, constitute impermissible state involvement with religion." 397 U. S., at 690 (concurring opinion). I do not think the subsidies under these statutes fall outside "[g]eneral subsidies of religious activities" merely because they are restricted to support of the teaching of secular subjects. In *Walz*, the passive aspect of the benefits conferred by a tax exemption, particularly since cessation of the exemptions might easily lead to impermissible involvements and conflicts, led me to conclude that exemptions were consistent with the First Amendment values. However, I contrasted direct government subsidies:

> "Tax exemptions and general subsidies, however, are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such

> transfer. It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes. In other words, '[i]n the case of direct subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches,' while '[i]n the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions.' Thus, 'the symbolism of tax exemption is significant as a manifestation that organized religion is not expected to support the state; by the same token the state is not expected to support the church.' " 397 U. S., at 690–691 (footnotes and citations omitted) (concurring opinion).

Pennsylvania, Rhode Island, and the Federal Government argue strenuously that the government monies in all these cases are not "[g]eneral subsidies of religious activities" because they are paid specifically and solely for the secular education that the sectarian institutions provide.[11]

Before turning to the decisions of this Court on which this argument is based, it is important to recall again the history of subsidies to sectarian schools. See Part

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[11] The Pennsylvania statute differs from Rhode Island's in providing the subsidy without regard to whether the sectarian school's average per-pupil expenditure on secular education equals or exceeds the average of the State's public schools. Nor is there any limitation of the subsidy to nonpublic schools that are financially embarrassed. Thus the statute on its face permits use of the state subsidy for the purpose of maintaining or attracting an audience for religious education, and also permits sectarian schools not needing the aid to apply it to exceed the quality of secular education provided in public schools. These features of the Pennsylvania scheme seem to me to invalidate it under the Establishment Clause as granting preferences to sectarian schools.

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I, *supra*. The universality of state constitutional provisions forbidding such grants, as well as the weight of judicial authority disapproving such aid as a violation of our tradition of separation of church and state, reflects a time-tested judgment that such grants do indeed constitute impermissible aid to religion. See nn. 6 and 7, *supra*. The recurrent argument, consistently rejected in the past, has been that government grants to sectarian schools ought not be viewed as impermissible subsidies "because [the schools] relieve the State of a burden, which it would otherwise be itself required to bear . . . . they will render a service to the state by performing for it its duty of educating the children of the people." *Cook County* v. *Chicago Industrial School,* 125 Ill. 540, 571, 18 N. E. 183, 197 (1888).

Nonetheless, it is argued once again in these cases that sectarian schools and universities perform two separable functions. First, they provide secular education, and second, they teach the tenets of a particular sect. Since the State has determined that the secular education provided in sectarian schools serves the legitimate state interest in the education of its citizens, it is contended that state aid solely to the secular education function does not involve the State in aid to religion. *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925), and *Board of Education* v. *Allen, supra,* are relied on as support for the argument.

Our opinion in *Allen* recognized that sectarian schools provide both a secular and a sectarian education:

> "[T]his Court has long recognized that religious schools pursue two goals, religious instruction and secular education. In the leading case of *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925), the Court held that . . . Oregon had not shown that its interest in secular education required that all children attend publicly operated schools. A premise of this

> holding was the view that the State's interest in education would be served sufficiently by reliance on the secular teaching that accompanied religious training in the schools maintained by the Society of Sisters.
>
> . . . . .
>
> "[T]he continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education." *Board of Education* v. *Allen,* 392 U. S., at 245, 247–248 (footnote omitted).

But I do not read *Pierce* or *Allen* as supporting the proposition that public subsidy of a sectarian institution's secular training is permissible state involvement. I read them as supporting the proposition that as an identifiable set of skills and an identifiable quantum of knowledge, secular education may be effectively provided either in the religious context of parochial schools, or outside the context of religion in public schools. The State's interest in secular education may be defined broadly as an interest in ensuring that all children within its boundaries acquire a minimum level of competency in certain skills, such as reading, writing, and arithmetic, as well as a minimum amount of information and knowledge in certain subjects such as history, geography, science, literature, and law. Without such skills and knowledge, an individual will be at a severe disadvantage both in participating in democratic self-government and in earning a living in a modern industrial economy. But the State has no proper interest in prescribing the precise forum in which such skills and knowledge are learned since acquisition of this

secular education is neither incompatible with religious learning, nor is it inconsistent with or inimical to religious precepts.

When the same secular educational process occurs in both public and sectarian schools, *Allen* held that the State could provide secular textbooks for use in that process to students in both public and sectarian schools. Of course, the State could not provide textbooks giving religious instruction. But since the textbooks involved in *Allen* would, at least in theory, be limited to secular education, no aid to sectarian instruction was involved.

More important, since the textbooks in *Allen* had been previously provided by the parents, and not the schools, 392 U. S., at 244 n. 6, no aid to the institution was involved. Rather, as in the case of the bus transportation in *Everson,* the general program of providing all children in the State with free secular textbooks assisted all parents in schooling their children. And as in *Everson,* there was undoubtedly the possibility that some parents might not have been able to exercise their constitutional right to send their children to parochial school if the parents were compelled themselves to pay for textbooks. However, as my Brother BLACK wrote for the Court in *Everson,*

> "[C]utting off church schools from these [general] services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." 330 U. S., at 18.

Allen, in my view, simply sustained a statute in which the State was "neutral in its relations with groups of religious believers and non-believers." The only context in which the Court in *Allen* employed the distinction between secular and religious in a parochial school was to reach its conclusion that the textbooks that the State was providing could and would be secular.[12] The present cases, however, involve direct subsidies of tax monies to the schools themselves and we cannot blink the fact that the secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined.

The District Court in the *DiCenso* case found that all the varied aspects of the parochial school's program—the nature of its faculty, its supervision, decor, program, extracurricular activities, assemblies, courses, etc.—produced an "intangible 'religious atmosphere,'" since the "diocesan school system is an integral part of the religious mission of the Catholic Church" and "a powerful vehicle for transmitting the Catholic faith to the next generation." 316 F. Supp., at 117. Quality teaching in secular subjects is an integral part of this religious enterprise. "Good secular teaching is as essential to the religious mission of the parochial schools as a roof for the school or desks for the classrooms." 316 F. Supp., at 117–118. That teaching cannot be separated from the environment in which it occurs, for its integration with the religious mission is both the theory and the strength of the religious school.

The common ingredient of the three prongs of the test

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[12] The three dissenters in *Allen* focused primarily on their disagreement with the Court that the textbooks provided would be secular. See 392 U. S., at 252–253 (BLACK, J., dissenting); *id.,* at 257 (DOUGLAS, J., dissenting); *id.,* at 270 (Fortas, J., dissenting).

set forth at the outset of this opinion is whether the statutes involve government in the "essentially religious activities" of religious institutions. My analysis of the operation, purposes, and effects of these statutes leads me inescapably to the conclusion that they do impermissibly involve the States and the Federal Government with the "essentially religious activities" of sectarian educational institutions. More specifically, for the reasons stated, I think each government uses "essentially religious means to serve governmental ends, where secular means would suffice." This Nation long ago committed itself to primary reliance upon publicly supported public education to serve its important goals in secular education. Our religious diversity gave strong impetus to that commitment.

> "[T]he American experiment in free public education available to all children has been guided in large measure by the dramatic evolution of the religious diversity among the population which our public schools serve. . . . The public schools are supported entirely, in most communities, by public funds—funds exacted not only from parents, nor alone from those who hold particular religious views, nor indeed from those who subscribe to any creed at all. It is implicit in the history and character of American public education that the public schools serve a uniquely *public* function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions. This is a heritage neither theistic nor atheistic, but simply civic and patriotic." *Schempp,* 374 U. S., at 241–242 (citation omitted) (BRENNAN, J., concurring).

I conclude that, in using sectarian institutions to further goals in secular education, the three statutes do violence to the principle that "government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice." *Schempp, supra,* at 265 (BRENNAN, J., concurring).

IV

The plurality's treatment of the issues in *Tilton,* No. 153, diverges so substantially from my own that I add these further comments. I believe that the Establishment Clause forbids the Federal Government to provide funds to sectarian universities in which the propagation and advancement of a particular religion are a function or purpose of the institution. Since the District Court made no findings whether the four institutional appellees here are sectarian, I would remand the case to the District Court with directions to determine whether the institutional appellees are "sectarian" institutions.

I reach this conclusion for the reasons I have stated: the necessarily deep involvement of government in the religious activities of such an institution through the policing of restrictions, and the fact that subsidies of tax monies directly to a sectarian institution necessarily aid the proselytizing function of the institution. The plurality argues that neither of these dangers is present.[13]

At the risk of repetition, I emphasize that a sectarian university is the equivalent in the realm of higher education of the Catholic elementary schools in Rhode Island; it is an educational institution in which the propagation

[13] Much of the plurality's argument is directed at establishing that the specific institutional appellees here, as well as most church-related colleges, are not sectarian in that they do not have a purpose or function to advance or propagate a specific religion. Those questions must await hearings and findings by the District Court.

and advancement of a particular religion are a primary function of the institution. I do not believe that construction grants to such a sectarian institution are permissible. The reason is not that religion "permeates" the secular education that is provided. Rather, it is that the secular education is provided within the environment of religion; the institution is dedicated to two goals, secular education *and* religious instruction. When aid flows directly to the institution, both functions benefit. The plurality would examine only the activities that occur within the federally assisted building and ignore the religious nature of the school of which it is a part. The "religious enterprise" aided by the construction grants involves the maintenance of an educational environment—which includes high-quality, purely secular educational courses—within which religious instruction occurs in a variety of ways.

The plurality also argues that no impermissible entanglement exists here. My Brother WHITE cogently comments upon that argument: "Why the federal program in the *Tilton* case is not embroiled in the same difficulties [as the Rhode Island program] is never adequately explained." *Post,* at 668. I do not see any significant difference in the Federal Government's telling the sectarian university not to teach any nonsecular subjects in a certain building, and Rhode Island's telling the Catholic school teacher not to teach religion. The vice is the creation through subsidy of a relationship in which the government polices the teaching practices of a religious school or university. The plurality suggests that the facts that college students are less impressionable and that college courses are less susceptible to religious permeation may lessen the need for federal policing. But the record shows that such policing has occurred and occurred in a heavy-handed way. Given the dangers of self-censorship in such a situation, I cannot agree that the dangers of

entanglement are insubstantial. Finally, the plurality suggests that the "nonideological" nature of a building, as contrasted with a teacher, reduces the need for policing. But the Federal Government imposes restrictions on every class taught in the federally assisted building. It is therefore not the "nonideological" building that is policed; rather, it is the courses given there and the teachers who teach them. Thus, the policing is precisely the same as under the state statutes, and that is what offends the Constitution.

V

I, therefore, agree that the two state statutes that focus primarily on providing public funds to sectarian schools are unconstitutional. However, the federal statute in No. 153 is a general program of construction grants to all colleges and universities, including sectarian institutions. Since I believe the statute's extension of eligibility to sectarian institutions is severable from the broad general program authorized, I would hold the Higher Education Facilities Act unconstitutional only insofar as it authorized grants of federal tax monies to sectarian institutions—institutions that have a purpose or function to propagate or advance a particular religion. Therefore, if the District Court determines that any of the four institutional appellees here are "sectarian," that court, in my view, should enjoin the other appellees from making grants to it.

MR. JUSTICE WHITE, concurring in the judgments in No. 153 (*post,* p. 672) and No. 89 and dissenting in Nos. 569 and 570.

It is our good fortune that the States of this country long ago recognized that instruction of the young and old ranks high on the scale of proper governmental func-

tions and not only undertook secular education as a public responsibility but also required compulsory attendance at school by their young. Having recognized the value of educated citizens and assumed the task of educating them, the States now before us assert a right to provide for the secular education of children whether they attend public schools or choose to enter private institutions, even when those institutions are church-related. The Federal Government also asserts that it is entitled, where requested, to contribute to the cost of secular education by furnishing buildings and facilities to all institutions of higher learning, public and private alike. Both the United States and the States urge that if parents choose to have their children receive instruction in the required secular subjects in a school where religion is also taught and a religious atmosphere may prevail, part or all of the cost of such secular instruction may be paid for by governmental grants to the religious institution conducting the school and seeking the grant. Those who challenge this position would bar official contributions to secular education where the family prefers the parochial to both the public and nonsectarian private school.

The issue is fairly joined. It is precisely the kind of issue the Constitution contemplates this Court must ultimately decide. This is true although neither affirmance nor reversal of any of these cases follows automatically from the spare language of the First Amendment, from its history, or from the cases of this Court construing it and even though reasonable men can very easily and sensibly differ over the import of that language.

But, while the decision of the Court is legitimate, it is surely quite wrong in overturning the Pennsylvania and Rhode Island statutes on the ground that they amount to an establishment of religion forbidden by the First Amendment.

No one in these cases questions the constitutional right of parents to satisfy their state-imposed obligation to educate their children by sending them to private schools, sectarian or otherwise, as long as those schools meet minimum standards established for secular instruction. The States are not only permitted, but required by the Constitution, to free students attending private schools from any public school attendance obligation. *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925). The States may also furnish transportation for students, *Everson* v. *Board of Education,* 330 U. S. 1 (1947), and books for teaching secular subjects to students attending parochial and other private as well as public schools, *Board of Education* v. *Allen,* 392 U. S. 236 (1968); we have also upheld arrangements whereby students are released from public school classes so that they may attend religious instruction. *Zorach* v. *Clauson,* 343 U. S. 306 (1952). Outside the field of education, we have upheld Sunday closing laws, *McGowan* v. *Maryland,* 366 U. S. 420 (1961), state and federal laws exempting church property and church activity from taxation, *Walz* v. *Tax Commission,* 397 U. S. 664 (1970), and governmental grants to religious organizations for the purpose of financing improvements in the facilities of hospitals managed and controlled by religious orders. *Bradfield* v. *Roberts,* 175 U. S. 291 (1899).

Our prior cases have recognized the dual role of parochial schools in American society: they perform both religious and secular functions. See *Board of Education* v. *Allen, supra,* at 248. Our cases also recognize that legislation having a secular purpose and extending governmental assistance to sectarian schools in the performance of their secular functions does not constitute "law[s] respecting an establishment of religion" forbidden by the First Amendment merely because a secular program may incidentally benefit a church in fulfilling its religious mis-

sion. That religion may indirectly benefit from governmental aid to the secular activities of churches does not convert that aid into an impermissible establishment of religion.

This much the Court squarely holds in the *Tilton* case, where it also expressly rejects the notion that payments made directly to a religious institution are, without more, forbidden by the First Amendment. In *Tilton,* the Court decides that the Federal Government may finance the separate function of secular education carried on in a parochial setting. It reaches this result although sectarian institutions undeniably will obtain substantial benefit from federal aid; without federal funding to provide adequate facilities for secular education, the student bodies of those institutions might remain stationary or even decrease in size and the institutions might ultimately have to close their doors.

It is enough for me that the States and the Federal Government are financing a separable secular function of overriding importance in order to sustain the legislation here challenged. That religion and private interests other than education may substantially benefit does not convert these laws into impermissible establishments of religion.

It is unnecessary, therefore, to urge that the Free Exercise Clause of the First Amendment at least permits government in some respects to modify and mold its secular programs out of express concern for free-exercise values. See *Walz* v. *Tax Commission, supra,* at 673 (tax exemption for religious properties; "[t]he limits of permissible state accommodation to religion are by no means coextensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself"); *Sherbert* v. *Verner,* 374 U. S. 398 (1963) (exemption of Seventh Day Adventist from eligibility requirements for

unemployment insurance not only permitted but required by the Free Exercise Clause); *Zorach* v. *Clauson, supra,* at 313–314 (students excused from regular public school routine to obtain religious instruction; "[w]hen the state encourages religious instruction . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs"). See also *Abington School District* v. *Schempp,* 374 U. S. 203, 308 (1963) (STEWART, J., dissenting); *Welsh* v. *United States,* 398 U. S. 333, 367 (1970) (WHITE, J., dissenting). The Establishment Clause, however, coexists in the First Amendment with the Free Exercise Clause and the latter is surely relevant in cases such as these. Where a state program seeks to ensure the proper education of its young, in private as well as public schools, free exercise considerations at least counsel against refusing support for students attending parochial schools simply because in that setting they are also being instructed in the tenets of the faith they are constitutionally free to practice.

I would sustain both the federal and the Rhode Island programs at issue in these cases, and I therefore concur in the judgment in No. 153 [1] and dissent from the judgments in Nos. 569 and 570. Although I would also reject the facial challenge to the Pennsylvania statute, I concur in the judgment in No. 89 for the reasons given below.

The Court strikes down the Rhode Island statute on its face. No fault is found with the secular purpose of the program; there is no suggestion that the purpose of the program was aid to religion disguised in secular attire. Nor does the Court find that the primary effect of the program is to aid religion rather than to implement secular goals. The Court nevertheless finds

[1] I accept the Court's invalidation of the provision in the federal legislation whereby the restriction on the use of buildings constructed with federal funds terminates after 20 years.

that impermissible "entanglement" will result from administration of the program. The reasoning is a curious and mystifying blend, but a critical factor appears to be an unwillingness to accept the District Court's express findings that on the evidence before it none of the teachers here involved mixed religious and secular instruction. Rather, the District Court struck down the Rhode Island statute because it concluded that activities outside the secular classroom would probably have a religious content and that support for religious education therefore necessarily resulted from the financial aid to the secular programs, since that aid generally strengthened the parochial schools and increased the number of their students.

In view of the decision in *Tilton,* however, where these same factors were found insufficient to invalidate the federal plan, the Court is forced to other considerations. Accepting the District Court's observation in *DiCenso* that education is an integral part of the religious mission of the Catholic church—an observation that should neither surprise nor alarm anyone, especially judges who have already approved substantial aid to parochial schools in various forms—the majority then interposes findings and conclusions that the District Court expressly abjured, namely, that nuns, clerics, and dedicated Catholic laymen unavoidably pose a grave risk in that they might not be able to put aside their religion in the secular classroom. Although stopping short of considering them untrustworthy, the Court concludes that for them the difficulties of avoiding teaching religion along with secular subjects would pose intolerable risks and would in any event entail an unacceptable enforcement regime. Thus, the potential for impermissible fostering of religion in secular classrooms — an untested assumption of the Court — paradoxically renders unacceptable the State's efforts at insuring that secular teachers under religious discipline successfully avoid conflicts between the religious mission

of the school and the secular purpose of the State's education program.

The difficulty with this is twofold. In the first place, it is contrary to the evidence and the District Court's findings in *DiCenso*. The Court points to nothing in this record indicating that any participating teacher had inserted religion into his secular teaching or had had any difficulty in avoiding doing so. The testimony of the teachers was quite the contrary. The District Court expressly found that "[t]his concern for religious values does not necessarily affect the content of secular subjects in diocesan schools. On the contrary, several teachers testified at trial that they did not inject religion into their secular classes, and one teacher deposed that he taught exactly as he had while employed in a public school. This testimony gains added credibility from the fact that several of the teachers were non-Catholics. Moreover, because of the restrictions of Rhode Island's textbook loan law . . . and the explicit requirement of the Salary Supplement Act, teaching materials used by applicants for aid must be approved for use in the public schools." *DiCenso* v. *Robinson*, 316 F. Supp. 112, 117 (RI 1970). Elsewhere, the District Court reiterated that the defect of the Rhode Island statute was "not that religious doctrine overtly intrudes into all instruction," *ibid.*, but factors aside from secular courses plus the fact that good secular teaching was itself essential for implementing the religious mission of the parochial school.

Secondly, the Court accepts the model for the Catholic elementary and secondary schools that was rejected for the Catholic universities or colleges in the *Tilton* case. There it was urged that the Catholic condition of higher learning was an integral part of the religious mission of the church and that these institutions did everything they could to foster the faith. The Court's response was that on the record before it none of

the involved institutions was shown to have complied with the model and that it would not purport to pass on cases not before it. Here, however, the Court strikes down this Rhode Island statute based primarily on its own model and its own suppositions and unsupported views of what is likely to happen in Rhode Island parochial school classrooms, although on this record there is no indication that entanglement difficulties will accompany the salary supplement program.

The Court thus creates an insoluble paradox for the State and the parochial schools. The State cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught—a promise the school and its teachers are quite willing and on this record able to give—and enforces it, it is then entangled in the "no entanglement" aspect of the Court's Establishment Clause jurisprudence.

Why the federal program in the *Tilton* case is not embroiled in the same difficulties is never adequately explained. Surely the notion that college students are more mature and resistant to indoctrination is a makeweight, for in *Tilton* there is careful note of the federal condition on funding and the enforcement mechanism available. If religious teaching in federally financed buildings was permitted, the powers of resistance of college students would in no way save the federal scheme. Nor can I imagine the basis for finding college clerics more reliable in keeping promises than their counterparts in elementary and secondary schools—particularly those in the Rhode Island case, since within five years the majority of teachers in Rhode Island parochial schools will be lay persons, many of them non-Catholic.

Both the District Court and this Court in *DiCenso* have seized on the Rhode Island formula for supplementing

teachers' salaries since it requires the State to verify the amount of school money spent for secular as distinguished from religious purposes. Only teachers in those schools having per-pupil expenditures for secular subjects below the state average qualify under the system, an aspect of the state scheme which is said to provoke serious "entanglement." But this is also a slender reed on which to strike down this law, for as the District Court found, only once since the inception of the program has it been necessary to segregate expenditures in this manner.

The District Court also focused on the recurring nature of payments by the State of Rhode Island; salaries must be supplemented and money appropriated every year and hence the opportunity for controversy and friction over state aid to religious schools will constantly remain before the State. The Court in *DiCenso* adopts this theme, and makes much of the fact that under the federal scheme the grant to a religious institution is a one-time matter. But this argument is without real force. It is apparent that federal interest in any grant will be a continuing one since the conditions attached to the grant must be enforced. More important, the federal grant program is an ongoing one. The same grant will not be repeated, but new ones to the same or different schools will be made year after year. Thus the same potential for recurring political controversy accompanies the federal program. Rhode Island may have the problem of appropriating money each year to supplement the salaries of teachers, but the United States must each year seek financing for the new grants it desires to make and must supervise the ones already on the record.

With respect to Pennsylvania, the Court, accepting as true the factual allegations of the complaint, as it must for purposes of a motion to dismiss, would reverse the dismissal of the complaint and invalidate the legislation.

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The critical allegations, as paraphrased by the Court, are that "the church-related elementary and secondary schools are controlled by religious organizations, have the purpose of propagating and promoting a particular religious faith, and conduct their operations to fulfill that purpose." *Ante,* at 620. From these allegations the Court concludes that forbidden entanglements would follow from enforcing compliance with the secular purpose for which the state money is being paid.

I disagree. There is no specific allegation in the complaint that sectarian teaching does or would invade secular classes supported by state funds. That the schools are operated to promote a particular religion is quite consistent with the view that secular teaching devoid of religious instruction can successfully be maintained, for good secular instruction is, as Judge Coffin wrote for the District Court in the Rhode Island case, essential to the success of the religious mission of the parochial school. I would no more here than in the Rhode Island case substitute presumption for proof that religion is or would be taught in state-financed secular courses or assume that enforcement measures would be so extensive as to border on a free exercise violation. We should not forget that the Pennsylvania statute does not compel church schools to accept state funds. I cannot hold that the First Amendment forbids an agreement between the school and the State that the state funds would be used only to teach secular subjects.

I do agree, however, that the complaint should not have been dismissed for failure to state a cause of action. Although it did not specifically allege that the schools involved mixed religious teaching with secular subjects, the complaint did allege that the schools were operated to fulfill religious purposes and one of the legal theories stated in the complaint was that the Pennsylvania Act "finances and participates in the blending of sectarian

and secular instruction." At trial under this complaint, evidence showing such a blend in a course supported by state funds would appear to be admissible and, if credited, would establish financing of religious instruction by the State. Hence, I would reverse the judgment of the District Court and remand the case for trial, thereby holding the Pennsylvania legislation valid on its face but leaving open the question of its validity as applied to the particular facts of this case.

I find it very difficult to follow the distinction between the federal and state programs in terms of their First Amendment acceptability. My difficulty is not surprising, since there is frank acknowledgment that "we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication," *Tilton* v. *Richardson, post,* at 678, and that "[j]udicial caveats against entanglement" are a "blurred, indistinct and variable barrier." *Ante,* at 614. I find it even more difficult, with these acknowledgments in mind, to understand how the Court can accept the considered judgment of Congress that its program is constitutional and yet reject the equally considered decisions of the Rhode Island and Pennsylvania legislatures that their programs represent a constitutionally acceptable accommodation between church and state.[2]

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[2] As a postscript I should note that both the federal and state cases are decided on specified Establishment Clause considerations, without reaching the questions that would be presented if the evidence in any of these cases showed that any of the involved schools restricted entry on racial or religious grounds or required all students gaining admission to receive instruction in the tenets of a particular faith. For myself, if such proof were made, the legislation would to that extent be unconstitutional.

TILTON ET AL. *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

No. 153. Argued March 2–3, 1971—Decided June 28, 1971

The Higher Education Facilities Act of 1963 provides federal construction grants for college and university facilities, excluding "any facility used or to be used for sectarian instruction or as a place for religious worship, or . . . primarily in connection with any part of the program of a school or department of divinity." The United States retains a 20-year interest in any facility constructed with funds under the Act, and if, during this period, the recipient violates the statutory conditions, the Government is entitled to recovery of funds. Four church-related colleges and universities in Connecticut received federal construction grants for five facilities. Appellants attempted to show, in a three-judge court, that the recipient institutions were "sectarian" by introducing evidence of their relations with religious authorities, the curricula content, and other indicia of religious character. Appellee colleges introduced testimony that they had fully complied with the statutory conditions and that their religious affiliations did not interfere with their secular educational functions. The court held that the Act authorized grants to church-related schools, and sustained its constitutionality, finding that the Act had neither the purpose nor the effect of promoting religion. *Held:* The Act is constitutional except for that portion providing for a 20-year limitation on the religious use of the facilities constructed with federal funds. Pp. 676–689, 661–671, 692.

312 F. Supp. 1191, vacated and remanded.

THE CHIEF JUSTICE, joined by MR. JUSTICE HARLAN, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN, concluded that:

1. The Act includes colleges and universities with religious affiliations. Pp. 676–677.

2. Congress' objective of providing more opportunity for college education is a legitimate secular goal entirely appropriate for governmental action. Pp. 678–679.

3. The record fully supports the District Court's findings that the colleges involved have not violated the statutory restrictions; it provides no basis for assuming that religiosity necessarily permeates the secular education of the colleges; and it yields no evidence that religion seeps into the use of any of the five facilities. Pp. 680–682.

4. The limitation of federal interest in the facilities to a period of 20 years violates the Religion Clauses of the First Amendment, as the unrestricted use of valuable property after 20 years is in effect a contribution to a religious body. Pp. 682–684.

5. This case is distinguished from *Lemon* v. *Kurtzman, ante,* p. 602; (a) there is less danger here than in church-related primary and secondary schools dealing with impressionable children that religion will permeate the area of secular education, since religious indoctrination is not a substantial purpose or activity of these church-related colleges, (b) the facilities provided here are themselves religiously neutral, with correspondingly less need for government surveillance, and (c) the government aid here is a one-time, single-purpose construction grant, with only minimal need for inspection. Cumulatively, these factors lessen substantially the potential for divisive religious fragmentation in the political arena. Pp. 684–689.

6. The implementation of the Act does not inhibit the free exercise of religion in violation of the First Amendment. P. 689.

MR. JUSTICE WHITE concurred in the judgment in this case. Pp. 661–671.

MR. JUSTICE DOUGLAS, joined by MR. JUSTICE BLACK and MR. JUSTICE MARSHALL, agreed only with that part of the plurality opinion relating to the limitation of federal interest in the facilities to 20 years, concluding that a reversion of a facility at the end of that period to a parochial school would be unconstitutional as a gift of taxpayers' funds. P. 692.

BURGER, C. J., announced the Court's judgment and delivered an opinion in which HARLAN, STEWART, and BLACKMUN, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, *ante,* p. 661. DOUGLAS, J., filed an opinion dissenting in part, in which BLACK and MARSHALL, JJ., joined, *post,* p. 689. BRENNAN, J., filed a dissenting opinion, *ante,* p. 642.

Leo Pfeffer argued the cause for appellants. With him on the briefs were *Peter L. Costas, Paul W. Orth,* and *Jerry Wagner.*

Daniel M. Friedman argued the cause for appellees Richardson et al. On the brief were *Solicitor General Griswold, Assistant Attorney General Ruckelshaus, Robert V. Zener,* and *Donald L. Horowitz. F. Michael Ahern,* Assistant Attorney General of Connecticut, argued the cause for appellee Peterson. With him on the brief was *Robert K. Killian,* Attorney General. *Edward Bennett Williams* argued the cause for appellee colleges and universities. With him on the brief were *Jeremiah C. Collins, Howard T. Owens, Lawrence W. Iannotti,* and *Bruce Lewellyn.*

Briefs of *amici curiae* urging reversal were filed by *Franklin C. Salisbury* for Protestants and Other Americans United for Separation of Church and State, and by *Peter L. Costas* and *Paul W. Orth* for the Connecticut State Conference of Branches of the NAACP et al.

Briefs of *amici curiae* urging affirmance were filed by *Wilber G. Katz* and *John Holt Myers* for the American Council on Education et al., and by *Nathan Lewin* for the National Jewish Commission on Law and Public Affairs.

MR. CHIEF JUSTICE BURGER announced the judgment of the Court and an opinion in which MR. JUSTICE HARLAN, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN join.

This appeal presents important constitutional questions as to federal aid for church-related colleges and universities under Title I of the Higher Education Facilities Act of 1963, 77 Stat. 364, as amended, 20 U. S. C. §§ 711–721 (1964 ed. and Supp. V), which provides construction grants for buildings and facilities used

exclusively for secular educational purposes. We must determine first whether the Act authorizes aid to such church-related institutions, and, if so, whether the Act violates either the Establishment or Free Exercise Clauses of the First Amendment.

I

The Higher Education Facilities Act was passed in 1963 in response to a strong nationwide demand for the expansion of college and university facilities to meet the sharply rising number of young people demanding higher education. The Act authorizes federal grants and loans to "institutions of higher education" for the construction of a wide variety of "academic facilities." But § 751 (a)(2) (1964 ed., Supp. V) expressly excludes

> "any facility used or to be used for sectarian instruction or as a place for religious worship, or . . . any facility which . . . is used or to be used primarily in connection with any part of the program of a school or department of divinity . . . ."

The Act is administered by the United States Commissioner of Education. He advises colleges and universities applying for funds that under the Act no part of the project may be used for sectarian instruction, religious worship, or the programs of a divinity school. The Commissioner requires applicants to provide assurances that these restrictions will be respected. The United States retains a 20-year interest in any facility constructed with Title I funds. If, during this period, the recipient violates the statutory conditions, the United States is entitled to recover an amount equal to the proportion of its present value that the federal grant bore to the original cost of the facility. During the 20-year period, the statutory restrictions are enforced by the Office of Education primarily by way of on-site inspections.

Appellants are citizens and taxpayers of the United States and residents of Connecticut. They brought this suit for injunctive relief against the officials who administer the Act. Four church-related colleges and universities in Connecticut receiving federal construction grants under Title I were also named as defendants. Federal funds were used for five projects at these four institutions: (1) a library building at Sacred Heart University; (2) a music, drama, and arts building at Annhurst College; (3) a science building at Fairfield University; (4) a library building at Fairfield; and (5) a language laboratory at Albertus Magnus College.

A three-judge federal court was convened under 28 U. S. C. § 2282 and § 2284. Appellants attempted to show that the four recipient institutions were "sectarian" by introducing evidence of their relations with religious authorities, the content of their curricula, and other indicia of their religious character. The sponsorship of these institutions by religious organizations is not disputed. Appellee colleges introduced testimony that they had fully complied with the statutory conditions and that their religious affiliation in no way interfered with the performance of their secular educational functions. The District Court ruled that Title I authorized grants to church-related colleges and universities. It also sustained the constitutionality of the Act, finding that it had neither the purpose nor the effect of promoting religion. 312 F. Supp. 1191. We noted probable jurisdiction. 399 U. S. 904 (1970).

II

We are satisfied that Congress intended the Act to include all colleges and universities regardless of any affiliation with or sponsorship by a religious body. Congress defined "institutions of higher education," which are eligible to receive aid under the Act, in broad and

inclusive terms. Certain institutions, for example, institutions that are neither public nor nonprofit, are expressly excluded, and the Act expressly prohibits use of the facilities for religious purposes. But the Act makes no reference to religious affiliation or nonaffiliation. Under these circumstances "institutions of higher education" must be taken to include church-related colleges and universities.

This interpretation is fully supported by the legislative history. Although there was extensive debate on the wisdom and constitutionality of aid to institutions affiliated with religious organizations, Congress clearly included them in the program. The sponsors of the Act so stated, 109 Cong. Rec. 19218 (1963) (remarks of Sen. Morse); *id.*, at 14954 (remarks of Rep. Powell); *id.*, at 14963 (remarks of Rep. Quie), and amendments aimed at the exclusion of church-related institutions were defeated. *Id.*, at 14990–14992, 19496.

III

Numerous cases considered by the Court have noted the internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause. *Walz* v. *Tax Comm'n,* 397 U. S. 664 (1970), is the most recent decision seeking to define the boundaries of the neutral area between these two provisions within which the legislature may legitimately act. There, as in other decisions, the Court treated the three main concerns against which the Establishment Clause sought to protect: "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Id.*, at 668.

Every analysis must begin with the candid acknowledgment that there is no single constitutional caliper that can be used to measure the precise degree to which these three factors are present or absent. Instead, our

analysis in this area must begin with a consideration of the cumulative criteria developed over many years and applying to a wide range of governmental action challenged as violative of the Establishment Clause.

There are always risks in treating criteria discussed by the Court from time to time as "tests" in any limiting sense of that term. Constitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics. The standards should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired. And, as we have noted in *Lemon* v. *Kurtzman* and *Earley* v. *DiCenso, ante,* at 612, candor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication.

Against this background we consider four questions: First, does the Act reflect a secular legislative purpose? Second, is the primary effect of the Act to advance or inhibit religion? Third, does the administration of the Act foster an excessive government entanglement with religion? Fourth, does the implementation of the Act inhibit the free exercise of religion?

(a)

The stated legislative purpose appears in the preamble where Congress found and declared that

> "the security and welfare of the United States require that this and future generations of American youth be assured ample opportunity for the fullest development of their intellectual capacities, and that this opportunity will be jeopardized unless the Nation's colleges and universities are encouraged and assisted in their efforts to accommodate rapidly growing numbers of youth who aspire to a higher education." 20 U. S. C. § 701.

This expresses a legitimate secular objective entirely appropriate for governmental action.

The simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago in *Bradfield* v. *Roberts,* 175 U. S. 291 (1899). There a federal construction grant to a hospital operated by a religious order was upheld. Here the Act is challenged on the ground that its primary effect is to aid the religious purposes of church-related colleges and universities. Construction grants surely aid these institutions in the sense that the construction of buildings will assist them to perform their various functions. But bus transportation, textbooks, and tax exemptions all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld. *Everson* v. *Board of Education,* 330 U. S. 1 (1947); *Board of Education* v. *Allen,* 392 U. S. 236 (1968); *Walz* v. *Tax Comm'n, supra.* See also *Bradfield* v. *Roberts, supra.* The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion.

A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement. There is nothing new in this argument. But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional.

The Act itself was carefully drafted to ensure that the federally subsidized facilities would be devoted to the secular and not the religious function of the recipient institutions. It authorizes grants and loans only for academic facilities that will be used for defined secular purposes and expressly prohibits their use for religious

instruction, training, or worship. These restrictions have been enforced in the Act's actual administration, and the record shows that some church-related institutions have been required to disgorge benefits for failure to obey them.

Finally, this record fully supports the findings of the District Court that none of the four church-related institutions in this case has violated the statutory restrictions. The institutions presented evidence that there had been no religious services or worship in the federally financed facilities, that there are no religious symbols or plaques in or on them, and that they had been used solely for nonreligious purposes. On this record, therefore, these buildings are indistinguishable from a typical state university facility. Appellants presented no evidence to the contrary.

Appellants instead rely on the argument that government may not subsidize any activities of an institution of higher learning that in some of its programs teaches religious doctrines. This argument rests on *Everson* where the majority stated that the Establishment Clause barred any "tax . . . levied to support any religious . . . institutions . . . whatever form they may adopt to teach or practice religion." 330 U. S., at 16. In *Allen,* however, it was recognized that the Court had fashioned criteria under which an analysis of a statute's purpose and effect was determinative as to whether religion was being advanced by government action. 392 U. S., at 243; *Abington School District* v. *Schempp,* 374 U. S. 203, 222 (1963).

Under this concept appellants' position depends on the validity of the proposition that religion so permeates the secular education provided by church-related colleges and universities that their religious and secular educational functions are in fact inseparable. The argument that government grants would thus inevitably advance

religion did not escape the notice of Congress. It was carefully and thoughtfully debated, 109 Cong. Rec. 19474–19475, but was found unpersuasive. It was also considered by this Court in *Allen*. There the Court refused to assume that religiosity in parochial elementary and secondary schools necessarily permeates the secular education that they provide.

This record, similarly, provides no basis for any such assumption here. Two of the five federally financed buildings involved in this case are libraries. The District Court found that no classes had been conducted in either of these facilities and that no restrictions were imposed by the institutions on the books that they acquired. There is no evidence to the contrary. The third building was a language laboratory at Albertus Magnus College. The evidence showed that this facility was used solely to assist students with their pronunciation in modern foreign languages—a use which would seem peculiarly unrelated and unadaptable to religious indoctrination. Federal grants were also used to build a science building at Fairfield University and a music, drama, and arts building at Annhurst College.

There is no evidence that religion seeps into the use of any of these facilities. Indeed, the parties stipulated in the District Court that courses at these institutions are taught according to the academic requirements intrinsic to the subject matter and the individual teacher's concept of professional standards. Although appellants introduced several institutional documents that stated certain religious restrictions on what could be taught, other evidence showed that these restrictions were not in fact enforced and that the schools were characterized by an atmosphere of academic freedom rather than religious indoctrination. All four institutions, for example, subscribe to the 1940 Statement of Principles on Aca-

demic Freedom and Tenure endorsed by the American Association of University Professors and the Association of American Colleges.

Rather than focus on the four defendant colleges and universities involved in this case, however, appellants seek to shift our attention to a "composite profile" that they have constructed of the "typical sectarian" institution of higher education. We are told that such a "composite" institution imposes religious restrictions on admissions, requires attendance at religious activities, compels obedience to the doctrines and dogmas of the faith, requires instruction in theology and doctrine, and does everything it can to propagate a particular religion. Perhaps some church-related schools fit the pattern that appellants describe. Indeed, some colleges have been declared ineligible for aid by the authorities that administer the Act. But appellants do not contend that these four institutions fall within this category. Individual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these characteristics. We cannot, however, strike down an Act of Congress on the basis of a hypothetical "profile."

(b)

Although we reject appellants' broad constitutional arguments we do perceive an aspect in which the statute's enforcement provisions are inadequate to ensure that the impact of the federal aid will not advance religion. If a recipient institution violates any of the statutory restrictions on the use of a federally financed facility, § 754 (b)(2) permits the Government to recover an amount equal to the proportion of the facility's present value that the federal grant bore to its original cost.

This remedy, however, is available to the Government only if the statutory conditions are violated "within twenty years after completion of construction." This 20-year period is termed by the statute as "the period of Federal interest" and reflects Congress' finding that after 20 years "the public benefit accruing to the United States" from the use of the federally financed facility "will equal or exceed in value" the amount of the federal grant. 20 U. S. C. § 754 (a).

Under § 754 (b)(2), therefore, a recipient institution's obligation not to use the facility for sectarian instruction or religious worship would appear to expire at the end of 20 years. We note, for example, that under § 718 (b)(7)(C) (1964 ed., Supp. V), an institution applying for a federal grant is only required to provide assurances that the facility will not be used for sectarian instruction or religious worship "during at least the period of the Federal interest therein (as defined in section 754 of this title)."

Limiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period. It cannot be assumed that a substantial structure has no value after that period and hence the unrestricted use of a valuable property is in effect a contribution of some value to a religious body. Congress did not base the 20-year provision on any contrary conclusion. If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion.

To this extent the Act therefore trespasses on the Religion Clauses. The restrictive obligations of a recipient institution under § 751 (a)(2) cannot, compatibly with the Religion Clauses, expire while the building has substantial value. This circumstance does not require us to

invalidate the entire Act, however. "The cardinal principle of statutory construction is to save and not to destroy." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30 (1937). In *Champlin Rfg. Co.* v. *Commission*, 286 U. S. 210, 234 (1932), the Court noted

> "The unconstitutionality of a part of an Act does not necessarily defeat . . . the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."

Nor does the absence of an express severability provision in the Act dictate the demise of the entire statute. *E. g., United States* v. *Jackson*, 390 U. S. 570, 585 n. 27 (1968).

We have found nothing in the statute or its objectives intimating that Congress considered the 20-year provision essential to the statutory program as a whole. In view of the broad and important goals that Congress intended this legislation to serve, there is no basis for assuming that the Act would have failed of passage without this provision; nor will its excision impair either the operation or administration of the Act in any significant respect.[1]

IV

We next turn to the question of whether excessive entanglements characterize the relationship between government and church under the Act. *Walz* v. *Tax Comm'n, supra,* at 674–676. Our decision today in

[1] We note that the Commissioner of Education apparently includes no time limitation on the assurances that applicants are required to give with respect to the use of the facilities for sectarian instruction or religious worship. Compare § 3 (B) (3) with § 3 (C) of part P of the Application Form, App. 87.

Lemon v. *Kurtzman* and *Robinson* v. *DiCenso* has discussed and applied this independent measure of constitutionality under the Religion Clauses. There we concluded that excessive entanglements between government and religion were fostered by Pennsylvania and Rhode Island statutory programs under which state aid was provided to parochial elementary and secondary schools. Here, however, three factors substantially diminish the extent and the potential danger of the entanglement.

In *DiCenso* the District Court found that the parochial schools in Rhode Island were "an integral part of the religious mission of the Catholic Church." There, the record fully supported the conclusion that the inculcation of religious values was a substantial if not the dominant purpose of the institutions. The Pennsylvania case was decided on the pleadings, and hence we accepted as true the allegations that the parochial schools in that State shared the same characteristics.

Appellants' complaint here contains similar allegations. But they were denied by the answers, and there was extensive evidence introduced on the subject. Although the District Court made no findings with respect to the religious character of the four institutions of higher learning, we are not required to accept the allegations as true under these circumstances, particularly where, as here, appellants themselves do not contend that these four institutions are "sectarian."

There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools.[2] The "affirmative if not dominant policy" of the instruction in pre-college church schools is "to assure future

[2] See Freund, Comment, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680, 1691 (1969).

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adherents to a particular faith by having control of their total education at an early age." *Walz* v. *Tax Comm'n*, *supra*, at 671.[3] There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination.[4] Common observation would seem to support that view, and Congress may well have entertained it. The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations. Furthermore, by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines. Many church-related colleges and universities are characterized by a high degree of academic freedom [5] and seek to evoke free and critical responses from their students.

The record here would not support a conclusion that any of these four institutions departed from this general pattern. All four schools are governed by Catholic religious organizations, and the faculties and student bodies at each are predominantly Catholic. Nevertheless, the evidence shows that non-Catholics were admitted as students and given faculty appointments. Not one of these four institutions requires its students to attend religious services. Although all four schools require their students to take theology courses, the parties stipulated that these courses are taught according to the academic requirements of the subject matter and the teacher's concept of professional standards. The parties also stipulated that the courses covered a range of human religious

[3] *E. g.*, J. Fichter, Parochial School: A Sociological Study 77–108 (1958); Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development, pt. II, The Nonestablishment Principle, 81 Harv. L. Rev. 513, 574 (1968).

[4] Giannella, *supra*, n. 3, at 583.

[5] M. Pattillo & D. Mackenzie, Church-Sponsored Higher Education in the United States 96, 167, 204 (1966).

experiences and are not limited to courses about the Roman Catholic religion. The schools introduced evidence that they made no attempt to indoctrinate students or to proselytize. Indeed, some of the required theology courses at Albertus Magnus and Sacred Heart are taught by rabbis. Finally, as we have noted, these four schools subscribe to a well-established set of principles of academic freedom, and nothing in this record shows that these principles are not in fact followed. In short, the evidence shows institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education.

Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities. Correspondingly, the necessity for intensive government surveillance is diminished and the resulting entanglements between government and religion lessened. Such inspection as may be necessary to ascertain that the facilities are devoted to secular education is minimal and indeed hardly more than the inspections that States impose over all private schools within the reach of compulsory education laws.

The entanglement between church and state is also lessened here by the nonideological character of the aid that the Government provides. Our cases from *Everson* to *Allen* have permitted church-related schools to receive government aid in the form of secular, neutral, or nonideological services, facilities, or materials that are supplied to all students regardless of the affiliation of the school that they attend. In *Lemon* and *DiCenso,* however, the state programs subsidized teachers, either directly or indirectly. Since teachers are not necessarily

religiously neutral, greater governmental surveillance would be required to guarantee that state salary aid would not in fact subsidize religious instruction. There we found the resulting entanglement excessive. Here, on the other hand, the Government provides facilities that are themselves religiously neutral. The risks of Government aid to religion and the corresponding need for surveillance are therefore reduced.

Finally, government entanglements with religion are reduced by the circumstance that, unlike the direct and continuing payments under the Pennsylvania program, and all the incidents of regulation and surveillance, the Government aid here is a one-time, single-purpose construction grant. There are no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures on secular as distinguished from religious activities. Inspection as to use is a minimal contact.

No one of these three factors standing alone is necessarily controlling; cumulatively all of them shape a narrow and limited relationship with government which involves fewer and less significant contacts than the two state schemes before us in *Lemon* and *DiCenso*. The relationship therefore has less potential for realizing the substantive evils against which the Religion Clauses were intended to protect.

We think that cumulatively these three factors also substantially lessen the potential for divisive religious fragmentation in the political arena. This conclusion is admittedly difficult to document, but neither have appellants pointed to any continuing religious aggravation on this matter in the political processes. Possibly this can be explained by the character and diversity of the recipient colleges and universities and the absence of any intimate continuing relationship or dependency between government and religiously affiliated institutions. The

potential for divisiveness inherent in the essentially local problems of primary and secondary schools is significantly less with respect to a college or university whose student constituency is not local but diverse and widely dispersed.

V

Finally, we must consider whether the implementation of the Act inhibits the free exercise of religion in violation of the First Amendment. Appellants claim that the Free Exercise Clause is violated because they are compelled to pay taxes, the proceeds of which in part finance grants under the Act. Appellants, however, are unable to identify any coercion directed at the practice or exercise of their religious beliefs. *Board of Education* v. *Allen, supra,* at 248–249. Their share of the cost of the grants under the Act is not fundamentally distinguishable from the impact of the tax exemption sustained in *Walz* or the provision of textbooks upheld in *Allen.*

We conclude that the Act does not violate the Religion Clauses of the First Amendment except that part of § 754 (b)(2) providing a 20-year limitation on the religious use restrictions contained in § 751 (a)(2). We remand to the District Court with directions to enter a judgment consistent with this opinion.

Vacated and remanded.

[For separate opinion of MR. JUSTICE BRENNAN, see *ante,* p. 642.]

[For opinion of MR. JUSTICE WHITE, concurring in the judgment, see *ante,* p. 661.]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE MARSHALL concur, dissenting in part.

The correct constitutional principle for this case was stated by President Kennedy in 1961 when questioned as

to his policy respecting aid to private and parochial schools: [1]

> "[T]he Constitution clearly prohibits aid to the school, to parochial schools. I don't think there is any doubt of that.
>
> "The Everson case, which is probably the most celebrated case, provided only by a 5 to 4 decision was it possible for a local community to provide bus rides to nonpublic school children. But all through the majority and minority statements on that particular question there was a very clear prohibition against aid to the school direct. The Supreme Court made its decision in the Everson case by determining that the aid was to the child, not to the school. Aid to the school is—there isn't any room for debate on that subject. It is prohibited by the Constitution, and the Supreme Court has made that very clear. And therefore there would be no possibility of our recommending it."

Taxpayer appellants brought this suit challenging the validity of certain expenditures, made by the Department of Health, Education, and Welfare, for the construction of (1) a library at Sacred Heart University, (2) a music, drama, and arts building at Annhurst College, (3) a library and a science building at Fairfield University, and (4) a laboratory at Albertus Magnus College. The complaint alleged that all of these institutions were controlled by religious orders and the Roman Catholic Diocese of Bridgeport, Conn., and that if the funds for construction were authorized by Title I of the Higher Education Facilities Act of 1963, 77 Stat. 364, as amended, 20 U. S. C. §§ 711–721 (1964 ed. and Supp. V), then that statute was unconstitutional because it violated the

[1] Public Papers of the Presidents of the United States, John F. Kennedy, 1961, pp. 142–143, News Conference March 1, 1961.

Establishment Clause. A three-judge District Court was convened and rejected appellants' claims.

Title I of the Higher Education Facilities Act of 1963 authorizes grants and loans up to 50% of the cost for the construction of undergraduate academic facilities in both public and private colleges and universities. A project is eligible if construction will result "in an urgently needed substantial expansion of the institution's student enrollment capacity, capacity to provide needed health care to students or personnel of the institution, or capacity to carry out extension and continuing education programs on the campus of such institution." 20 U. S. C. § 716 (1964 ed., Supp. V). The Commissioner of Education is authorized to prescribe basic criteria and is instructed to "give special consideration to expansion of undergraduate enrollment capacity." 20 U. S. C. § 717 (1964 ed., Supp. V).

Academic facilities are "structures suitable for use as classrooms, laboratories, libraries, and related facilities necessary or appropriate for instruction of students, or for research . . . programs." Specifically excluded are facilities "used or to be used for sectarian instruction or as a place for religious worship" or any facilities used "primarily in connection with any part of the program of a school or department of divinity." 20 U. S. C. § 751 (a) (1964 ed., Supp. V). The United States retains a 20-year interest in the facilities and should a facility be used other than as an academic facility then the United States is entitled to recover an amount equal to the proportion of present value which the federal grant bore to the original cost of the facility. 20 U. S. C. § 754 (b). According to a stipulation entered below, during the 20 years the Office of Education attempts to insure that facilities are used in the manner required by the Act primarily by on-site inspections. At the end of the 20-year period the federal interest in the facility ceases and

the college may use it as it pleases. See 20 U. S. C. § 754 (a).

The public purpose in secular education is, to be sure, furthered by the program. Yet the sectarian purpose is aided by making the parochial school system viable. The purpose is to increase "student enrollment" and the students obviously aimed at are those of the particular faith now financed by taxpayers' money. Parochial schools are not beamed at agnostics, atheists, or those of a competing sect. The more sophisticated institutions may admit minorities; but the dominant religious character is not changed.

The reversion of the facility to the parochial school [2] at the end of 20 years is an outright grant, measurable by the present discounted worth of the facility. A gift of taxpayers' funds in that amount would plainly be unconstitutional. The Court properly bars it even though disguised in the form of a reversionary interest. See *Lane* v. *Wilson,* 307 U. S. 268, 275.

But the invalidation of this one clause cannot cure the constitutional infirmities of the statute as a whole. The Federal Government is giving religious schools a block grant to build certain facilities. The fact that money is

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[2] "It should be clear to all that a Roman Catholic parochial school is an integral part of that church, as definitely so as is the service of worship. A parochial school is usually developed in connection with a church. In many cases the church and school monies are not even separated. Such a school is in no sense a public school, even though some children from other groups may be admitted to it. The buildings are not owned and controlled by a community of American people, not even by a community of American Roman Catholic *people.* The title of ownership in a public school is vested in the local community, in the elected officers of the school board or the city council. But the title of ownership in a parochial school is vested in the bishop as an individual, who is appointed by, who is under the direct control of, and who reports to the pope in Rome." L. Boettner, Roman Catholicism 375 (1962).

given once at the beginning of a program rather than apportioned annually as in *Lemon* and *DiCenso* is without constitutional significance. The First Amendment bars establishment of a religion. And as I noted today in *Lemon* and *DiCenso,* this bar has been consistently interpreted from *Everson* v. *Board of Education,* 330 U. S. 1, 16, through *Torcaso* v. *Watkins,* 367 U. S. 488, 493 as meaning: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." Thus it is hardly impressive that rather than giving a smaller amount of money annually over a long period of years, Congress instead gives a large amount all at once. The plurality's distinction is in effect that small violations of the First Amendment over a period of years are unconstitutional (see *Lemon* and *DiCenso*) while a huge violation occurring only once is *de minimis.* I cannot agree with such sophistry.

What I have said in *Lemon* and in the *DiCenso* cases decided today is relevant here. The facilities financed by taxpayers' funds are not to be used for "sectarian" purposes. Religious teaching and secular teaching are so enmeshed in parochial schools that only the strictest supervision and surveillance would insure compliance with the condition. Parochial schools may require religious exercises, even in the classroom. A parochial school operates on one budget. Money not spent for one purpose becomes available for other purposes. Thus the fact that there are no religious observances in federally financed facilities is not controlling because required religious observances will take place in other buildings. Our decision in *Engel* v. *Vitale,* 370 U. S. 421, held that a requirement of a prayer in public schools violated the Establishment Clause. Once these schools become federally funded they become bound by federal standards

(*Ivanhoe Irrig. Dist.* v. *McCracken,* 357 U. S. 275, 296; *Rosado* v. *Wyman,* 397 U. S. 397, 427 (concurring opinion); *Simkins* v. *Moses H. Cone Memorial Hosp.,* 323 F. 2d 959) and accordingly adherence to *Engel* would require an end to required religious exercises. That kind of surveillance and control will certainly be obnoxious to the church authorities and if done will radically change the character of the parochial school. Yet if that surveillance is not searching and continuous, this federal financing is obnoxious under the Establishment and Free Exercise Clauses for the reasons stated in the companion cases.

In other words, surveillance creates an entanglement of government and religion which the First Amendment was designed to avoid. Yet after today's decision there will be a requirement of surveillance which will last for the useful life of the building and as we have previously noted, "[it] is hardly lack of due process for the Government to regulate that which it subsidizes." *Wickard* v. *Filburn,* 317 U. S. 111, 131. The price of the subsidy under the Act is violation of the Free Exercise Clause. Could a course in the History of Methodism be taught in a federally financed building? Would a religiously slanted version of the Reformation or Quebec politics under Duplessis be permissible? How can the Government know what is taught in the federally financed building without a continuous auditing of classroom instruction? Yet both the Free Exercise Clause and academic freedom are violated when the Government agent must be present to determine whether the course content is satisfactory.

As I said in the *Lemon* and *DiCenso* cases, a parochial school is a unitary institution with subtle blending of sectarian and secular instruction. Thus the practices of religious schools are in no way affected by the minimal requirement that the government financed facility may

not "be used for sectarian instruction or as a place for religious worship." Money saved from one item in the budget is free to be used elsewhere. By conducting religious services in another building, the school has—rent free—a building for nonsectarian use. This is not called Establishment simply because the government retains a continuing interest in the building for its useful life, even though the religious schools need never pay a cent for the use of the building.

Much is made of the need for public aid to church schools in light of their pressing fiscal problems. Dr. Eugene C. Blake of the Presbyterian Church, however, wrote in 1959: [3]

> "When one remembers that churches pay no inheritance tax (churches do not die), that churches may own and operate business and be exempt from the 52 percent corporate income tax, and that real property used for church purposes (which in some states are most generously construed) is tax exempt, it is not unreasonable to prophesy that with reasonably prudent management, the churches ought to be able to control the whole economy of the nation within the predictable future. That the growing wealth and property of the churches was partially responsible for revolutionary expropriations of church property in England in the sixteenth century, in France in the eighteenth century, in Italy in the nineteenth century, and in Mexico, Russia, Czechoslovakia and Hungary (to name a few examples) in the twentieth century, seems self-evident. A government with mounting tax problems cannot be expected to keep its hands off the wealth of a rich church forever. That such a revolution is always

[3] Tax Exemption and the Churches, 3 Christianity Today, No. 22, Aug. 3, 1959, pp. 6, 7.

accompanied by anticlericalism and atheism should not be surprising."

The mounting wealth of the churches [4] makes ironic their incessant demands on the public treasury. I said in my dissent in *Walz* v. *Tax Comm'n,* 397 U. S. 664, 714:

> "The religiously used real estate of the churches today constitutes a vast domain. See M. Larson & C. Lowell, The Churches: Their Riches, Revenues, and Immunities (1969). Their assets total over $141 billion and their annual income at least $22 billion. *Id.,* at 232. And the extent to which they are feeding from the public trough in a variety of forms is alarming. *Id.,* c. 10."

See A. Balk, The Religion Business (1968); 20 Church and State 8 (1967).

It is almost unbelievable that we have made the radical departure from Madison's Remonstrance [5] memorialized in today's decision.

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[4] Churches that owned an unrelated business enjoyed until recently a special tax advantage. Other charitable organizations were taxed on their "unrelated business taxable income" derived from businesses regularly carried on by them. § 512 of the Internal Revenue Code of 1954. That tax was the normal tax and surtax. Thus in the case of income derived from corporations it was 22% on the first $25,000 and 48% on any additional income. § 11. Churches were exempted from this "unrelated business income" tax. § 511 (a)(2). Thus they paid no federal taxes on any of their revenues. Under the Tax Reform Act of 1969, 83 Stat. 487, the tax advantage for unrelated business income as respects all businesses owned by churches (prior to May 27, 1969) will be terminated after January 1, 1976. § 121 (b)(2), 83 Stat. 540, 26 U. S. C. § 512 (b)(16) (1964 ed., Supp. V). See H. R. Rep. No. 91–413 (pt. I), pp. 46–47, 48; H. R. Conf. Rep. No. 91–782, p. 67.

[5] The Remonstrance is reproduced in appendices to the dissenting opinion of Rutledge, J., in *Everson,* 330 U. S., at 63, and to that of DOUGLAS, J., in *Walz* v. *Tax Comm'n,* 397 U. S., at 719.

I dissent not because of any lack of respect for parochial schools but out of a feeling of despair that the respect which through history has been accorded the First Amendment is this day lost.

It should be remembered that in this case we deal with federal grants and with the command that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The million-dollar grants sustained today put Madison's miserable "three pence" to shame. But he even thought, as I do, that even a small amount coming out of the pocket of taxpayers and going into the coffers of a church was not in keeping with our constitutional ideal.

I would reverse the judgment below.

CLAY, AKA ALI *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 783. Argued April 19, 1971—Decided June 28, 1971

Petitioner appealed his local draft board's rejection of his application for conscientious objector classification. The Justice Department, in response to the State Appeal Board's referral for an advisory recommendation, concluded, contrary to a hearing officer's recommendation, that petitioner's claim should be denied, and wrote that board that petitioner did not meet any of the three basic tests for conscientious objector status. The Appeal Board then denied petitioner's claim, but without stating its reasons. Petitioner refused to report for induction, for which he was thereafter tried and convicted. The Court of Appeals affirmed. In this Court the Government has rightly conceded the invalidity of two of the grounds for denial of petitioner's claim given in its letter to the Appeal Board, but argues that there was factual support for the third ground. *Held:* Since the Appeal Board gave no reason for the denial of a conscientious objector exemption to petitioner, and it is impossible to determine on which of the three grounds offered in the Justice Department's letter that board relied, petitioner's conviction must be reversed. *Sicurella* v. *United States,* 348 U. S. 385.

430 F. 2d 165, reversed.

Chauncey Eskridge argued the cause for petitioner. With him on the briefs were *Jack Greenberg, James M. Nabrit III, Jonathan Shapiro,* and *Elizabeth B. DuBois.*

Solicitor General Griswold argued the cause for the United States. With him on the brief were *Assistant Attorney General Wilson* and *Beatrice Rosenberg.*

PER CURIAM.

The petitioner was convicted for willful refusal to submit to induction into the Armed Forces. 62 Stat. 622, as amended, 50 U. S. C. App. § 462 (a) (1964 ed., Supp.

V). The judgment of conviction was affirmed by the Court of Appeals for the Fifth Circuit.[1] We granted certiorari, 400 U. S. 990, to consider whether the induction notice was invalid because grounded upon an erroneous denial of the petitioner's claim to be classified as a conscientious objector.

I

The petitioner's application for classification as a conscientious objector was turned down by his local draft board, and he took an administrative appeal. The State Appeal Board tentatively classified him I–A (eligible for unrestricted military service) and referred his file to the Department of Justice for an advisory recommendation, in accordance with then-applicable procedures. 50 U. S. C. App. § 456 (j) (1964 ed., Supp. V). The FBI then conducted an "inquiry" as required by the statute, interviewing some 35 persons, including members of the petitioner's family and many of his friends, neighbors, and business and religious associates.

There followed a hearing on "the character and good faith of the [petitioner's] objections" before a hearing officer appointed by the Department. The hearing officer, a retired judge of many years' experience,[2] heard testimony from the petitioner's mother and father, from one of his attorneys, from a minister of his religion, and from the petitioner himself. He also had the benefit of a full report from the FBI. On the basis of this record the hearing officer concluded that the registrant

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[1] The original judgment of affirmance, 397 F. 2d 901, was set aside by this Court on a ground wholly unrelated to the issues now before us, *sub nom. Giordano* v. *United States,* 394 U. S. 310. Upon remand, the Court of Appeals again affirmed the conviction. 430 F. 2d 165.

[2] The hearing officer was Judge Lawrence Grauman, who had served on a Kentucky circuit court for some 25 years.

was sincere in his objection on religious grounds to participation in war in any form, and he recommended that the conscientious objector claim be sustained.[3]

Notwithstanding this recommendation, the Department of Justice wrote a letter to the Appeal Board, advising it that the petitioner's conscientious objector claim should be denied. Upon receipt of this letter of advice, the Board denied the petitioner's claim without a statement of reasons. After various further proceedings which it is not necessary to recount here, the petitioner was ordered to report for induction. He refused to take the traditional step forward, and this prosecution and conviction followed.

II

In order to qualify for classification as a conscientious objector, a registrant must satisfy three basic tests. He must show that he is conscientiously opposed to war in any form. *Gillette* v. *United States,* 401 U. S. 437. He must show that this opposition is based upon religious training and belief, as the term has been construed in our decisions. *United States* v. *Seeger,* 380 U. S. 163; *Welsh* v. *United States,* 398 U. S. 333. And he must show that this objection is sincere. *Witmer* v. *United States,* 348 U. S. 375. In applying these tests, the Selective Service System must be concerned with the registrant as an individual, not with its own interpretation of the dogma of the religious sect, if any, to which he may belong. *United States* v. *Seeger, supra; Gillette* v. *United States, supra; Williams* v. *United States,* 216 F. 2d 350, 352.

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[3] Applicable regulations, 32 CFR § 1626.25 (1967 ed.), did not require that the hearing officer's report be transmitted to the Appeal Board, and the Government declined to disclose it to the petitioner. The statements in text are taken from the description of that report in the letter of advice from the Department of Justice, recommending denial of the petitioner's claim.

In asking us to affirm the judgment of conviction, the Government argues that there was a "basis in fact," cf. *Estep* v. *United States,* 327 U. S. 114, for holding that the petitioner is not opposed to "war in any form," but is only selectively opposed to certain wars. See *Gillette* v. *United States, supra.* Counsel for the petitioner, needless to say, takes the opposite position. The issue is one that need not be resolved in this case. For we have concluded that even if the Government's position on this question is correct, the conviction before us must still be set aside for another quite independent reason.

III

The petitioner's criminal conviction stemmed from the Selective Service System's denial of his appeal seeking conscientious objector status. That denial, for which no reasons were ever given, was, as we have said, based on a recommendation of the Department of Justice, overruling its hearing officer and advising the Appeal Board that it "finds that the registrant's conscientious-objector claim is not sustained and recommends to your Board that he be not [so] classified." This finding was contained in a long letter of explanation, from which it is evident that Selective Service officials were led to believe that the Department had found that the petitioner had failed to satisfy each of the three basic tests for qualification as a conscientious objector.

As to the requirement that a registrant must be opposed to war in any form, the Department letter said that the petitioner's expressed beliefs "do not appear to preclude military service in any form, but rather are limited to military service in the Armed Forces of the United States. . . . These constitute only objections to certain types of war in certain circumstances, rather than a general scruple against participation in war in any form. However, only a general scruple against partici-

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pation in war in any form can support an exemption as a conscientious objector under the Act. *United States* v. *Kauten,* 133 F. 2d 703."

As to the requirement that a registrant's opposition must be based upon religious training and belief, the Department letter said: "It seems clear that the teachings of the Nation of Islam preclude fighting for the United States not because of objections to participation in war in any form but rather because of political and racial objections to policies of the United States as interpreted by Elijah Muhammad. . . . It is therefore our conclusion that registrant's claimed objections to participation in war insofar as they are based upon the teachings of the Nation of Islam, rest on grounds which primarily are political and racial."

As to the requirement that a registrant's opposition to war must be sincere, that part of the letter began by stating that "the registrant has not consistently manifested his conscientious-objector claim. Such a course of overt manifestations is requisite to establishing a subjective state of mind and belief." There followed several paragraphs reciting the timing and circumstances of the petitioner's conscientious objector claim, and a concluding paragraph seeming to state a rule of law—that "a registrant has not shown overt manifestations sufficient to establish his subjective belief where, as here, his conscientious-objector claim was not asserted until military service became imminent. *Campbell* v. *United States,* 221 F. 2d 454. *United States* v. *Corliss,* 280 F. 2d 808, *cert. denied,* 364 U. S. 884."

In this Court the Government has now fully conceded that the petitioner's beliefs *are* based upon "religious training and belief," as defined in *United States* v. *Seeger, supra:* "There is no dispute that petitioner's professed beliefs were founded on basic tenets of the Muslim reli-

gion, as he understood them, and derived in substantial part from his devotion to Allah as the Supreme Being. Thus, under this Court's decision in *United States* v. *Seeger,* 380 U. S. 163, his claim unquestionably was within the 'religious training and belief' clause of the exemption provision." [4] This concession is clearly correct. For the record shows that the petitioner's beliefs are founded on tenets of the Muslim religion as he understands them. They are surely no less religiously based than those of the three registrants before this Court in *Seeger.* See also *Welsh* v. *United States,* 398 U. S. 333.

The Government in this Court has also made clear that it no longer questions the sincerity of the petitioner's beliefs.[5] This concession is also correct. The Department hearing officer—the only person at the administrative appeal level who carefully examined the petitioner and other witnesses in person and who had the benefit of the full FBI file—found "that the registrant is sincere in his objection." The Department of Justice was wrong in advising the Board in terms of a purported rule of law that it should disregard this finding simply because of the circumstances and timing of the petitioner's claim. See *Ehlert* v. *United States,* 402 U. S. 99, 103–104; *United States ex rel. Lehman* v. *Laird,* 430 F. 2d 96, 99; *United States* v. *Abbott,* 425 F. 2d 910, 915; *United States ex rel. Tobias* v. *Laird,* 413 F. 2d 936, 939–940; *Cohen* v. *Laird,* 315 F. Supp. 1265, 1277–1278.

Since the Appeal Board gave no reasons for its denial of the petitioner's claim, there is absolutely no way of knowing upon which of the three grounds offered in the Department's letter it relied. Yet the Government now acknowledges that two of those grounds were not valid.

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[4] Brief for the United States 12.

[5] "We do not here seek to support the denial of petitioner's claim on the ground of insincerity . . . ." *Id.,* at 33.

And, the Government's concession aside, it is indisputably clear, for the reasons stated, that the Department was simply wrong as a matter of law in advising that the petitioner's beliefs were not religiously based and were not sincerely held.

This case, therefore, falls squarely within the four corners of this Court's decision in *Sicurella* v. *United States,* 348 U. S. 385. There as here the Court was asked to hold that an error in an advice letter prepared by the Department of Justice did not require reversal of a criminal conviction because there was a ground on which the Appeal Board might properly have denied a conscientious objector classification. This Court refused to consider the proffered alternative ground:

> "[W]e feel that this error of law by the Department, to which the Appeal Board might naturally look for guidance on such questions, must vitiate the entire proceedings at least where it is not clear that the Board relied on some legitimate ground. Here, where it is impossible to determine on exactly which grounds the Appeal Board decided, the integrity of the Selective Service System demands, at least, that the Government not recommend illegal grounds. There is an impressive body of lower court cases taking this position and we believe that they state the correct rule." *Id.,* at 392.

The doctrine thus articulated 16 years ago in *Sicurella* was hardly new. It was long ago established as essential to the administration of criminal justice. *Stromberg* v. *California,* 283 U. S. 359. In *Stromberg* the Court reversed a conviction for violation of a California statute containing three separate clauses, finding one of the three clauses constitutionally invalid. As Chief Justice Hughes put the matter, "[I]t is impossible to say under which clause of the statute the conviction was obtained." Thus, "if any of the clauses in question is invalid under the

Federal Constitution, the conviction cannot be upheld." *Id.*, at 368.

The application of this doctrine in the area of Selective Service law goes back at least to 1945, and Judge Learned Hand's opinion for the Second Circuit in *United States* v. *Cain,* 149 F. 2d 338. It is a doctrine that has been consistently and repeatedly followed by the federal courts in dealing with the criminal sanctions of the selective service laws. See, *e. g., United States* v. *Lemmens,* 430 F. 2d 619, 623–624 (CA7 1970); *United States* v. *Broyles,* 423 F. 2d 1299, 1303–1304 (CA4 1970); *United States* v. *Haughton,* 413 F. 2d 736 (CA9 1969); *United States* v. *Jakobson,* 325 F. 2d 409, 416–417 (CA2 1963), aff'd *sub nom. United States* v. *Seeger,* 380 U. S. 163; *Kretchet* v. *United States,* 284 F. 2d 561, 565–566 (CA9 1960); *Ypparila* v. *United States,* 219 F. 2d 465, 469 (CA10 1954); *United States* v. *Englander,* 271 F. Supp. 182 (SDNY 1967); *United States* v. *Erikson,* 149 F. Supp. 576, 578–579 (SDNY 1957). In every one of the above cases the defendant was acquitted or the conviction set aside under the *Sicurella* application of the *Stromberg* doctrine.

The long established rule of law embodied in these settled precedents thus clearly requires that the judgment before us be reversed.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, concurring.

I would reverse this judgment of conviction and set the petitioner free.

In *Sicurella* v. *United States,* 348 U. S. 385,[1] the wars

[1] As to the Court's analysis of *Sicurella* v. *United States,* 348 U. S. 385, and its application of *Stromberg* v. *California,* 283 U. S. 359, little need be said. The Court is, of course, quite accurate if

that the applicant would fight were not "carnal" but those "in defense of Kingdom interests." *Id.*, at 389. Since it was impossible to determine on exactly which grounds the Appeal Board had based its decision, we reversed the decision sustaining the judgment of conviction. We said: "It is difficult for us to believe that the Congress had in mind this type of activity when it said the thrust of conscientious objection must go to 'participation in war in any form.'" *Id.*, at 390.

In the present case there is no line between "carnal" war and "spiritual" or symbolic wars. Those who know the history of the Mediterranean littoral know that the *jihad* of the Moslem was a bloody war.

This case is very close in its essentials to *Negre* v. *Larsen*, 401 U. S. 437, decided March 8, 1971. The church to which that registrant belonged favored "just" wars and provided guidelines to define them. The church did not oppose the war in Vietnam but the registrant refused to comply with an order to go to Vietnam because participating in that conflict would violate his conscience. The Court refused to grant him relief as a conscientious objector, overruling his constitutional claim.

The case of Clay is somewhat different, though analogous. While there are some bits of evidence showing conscientious objection to the Vietnam conflict, the basic objection was based on the teachings of his religion. He testified that he was

"sincere in every bit of what the Holy Qur'an and

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opposition to "war in any form" as explained in *Gillette* v. *United States*, and *Negre* v. *Larsen*, 401 U. S. 437, is the law. But in my view the ruling in *Gillette* and *Negre* was unconstitutional. Hence of the three possible grounds on which the Board denied conscientious objector status, none was vaild.

> the teachings of the Honorable Elijah Muhammad tell us and it is that we are not to participate in wars on the side of nobody who—on the side of non-believers, and this is a Christian country and this is not a Muslim country, and the Government and the history and the facts shows that every move toward the Honorable Elijah Muhammad is made to distort and is made to ridicule him and is made to condemn him and the Government has admitted that the police of Los Angeles were wrong about attacking and killing our brothers and sisters and they were wrong in Newark, New Jersey, and they were wrong in Louisiana, and the outright, every day oppressors and enemies are the people as a whole, the whites of this nation. So, we are not, according to the Holy Qur'an, to even as much as aid in passing a cup of water to the—even a wounded. I mean, this is in the Holy Qur'an, and as I said earlier, this is not me talking to get the draft board—or to dodge nothing. This is there before I was borned and it will be there when I'm dead but we believe in not only that part of it, but all of it."

At another point he testified: "[T]he Holy Qur'an do teach us that we do not take part of—in any part of war unless declared by Allah himself, or unless it's an Islamic World War, or a Holy War, and it goes as far—the Holy Qur'an is talking still, and saying we are not to even as much as aid the infidels or the nonbelievers in Islam, even to as much as handing them a cup of water during battle."

"So, this is the teachings of the Holy Qur'an before I was born, and the Qur'an, we follow not only that part of it, but every part."

The Koran defines *jihad* as an injunction to the believers to war against nonbelievers: [2]

> "O ye who believe! Shall I guide you to a gainful trade which will save you from painful punishment? Believe in Allah and His Apostle and carry on warfare (*jihad*) in the path of Allah with your possessions and your persons. That is better for you. If ye have knowledge, He will forgive your sins, and will place you in the Gardens beneath which the streams flow, and in fine houses in the Gardens of Eden: that is the great gain." M. Khadduri, War and Peace in the Law of Islam 55–56 (1955).

The Sale edition of the Koran, which first appeared in England in 1734, gives the following translation at 410–411 (9th ed. 1923):

> "Thus God propoundeth unto men their examples. When ye encounter the unbelievers, strike off their heads, until ye have made a great slaughter among them; and bind them in bonds; and either give them a free dismission afterwards, or exact a ransom; until the war shall have laid down its arms. This shall ye do. Verily if God pleased he could take vengeance on them, without your assistance; but he commandeth you to fight his battles, that he may prove the one of you by the other. And as to those who fight in defence of God's true religion, God will not suffer their works to perish: he will guide them, and will dispose their heart aright; and

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[2] Koran 61:10–13.

"War, then, is here an integral part of the legal system; for in accordance with the doctrine of the *jihad*, which is recognized as 'the peak of religion,' the Islamic commonwealth must be expanding relentlessly, like a caravan continuously on the move, until it becomes coterminous with humanity, at which time war will have been transposed into universal peace." A. Bozeman, The Future of Law in a Multicultural World 81–82 (1971).

> he will lead them into paradise, of which he hath told them. O true believers, if ye assist God, by fighting for his religion, he will assist you against your enemies; and will set your feet fast. . . ."

War is not the exclusive type of *jihad;* there is action by the believer's heart, by his tongue, by his hands, as well as by the sword. War and Peace in the Law of Islam 56. As respects the military aspects it is written:

> "The *jihad,* in other words, is a sanction against polytheism and must be suffered by all non-Muslims who reject Islam, or, in the case of the dhimmis (Scripturaries), refuse to pay the poll tax. The *jihad,* therefore, may be defined as the litigation between Islam and polytheism; it is also a form of punishment to be inflicted upon Islam's enemies and the renegades from the faith. Thus in Islam, as in Western Christendom, the *jihad* is the *bellum justum.*" *Id.,* at 59.

The *jihad* is the Moslem's counterpart of the "just" war as it has been known in the West.[3] Neither Clay nor Negre should be subject to punishment because he will not renounce the "truth" of the teaching of his respective church that wars indeed may exist which are just wars in which a Moslem or Catholic has a respective duty to participate.

What Clay's testimony adds up to is that he believes only in war as sanctioned by the Koran, that is to say, a religious war against nonbelievers. All other wars are unjust.

That is a matter of belief, of conscience, of religious principle. Both Clay and Negre were "by reason of reli-

[3] The last attempt to use the *jihad* as a significant force was made in 1914 by the Ottoman sultan; but it failed and the *jihad* has fallen into disuse. See 1 A. Toynbee, Survey of International Affairs, 1925, p. 43 *et seq.* (1927); 8 Encyclopaedia of the Social Sciences 401–403 (1932).

gious training and belief" conscientiously opposed to participation in war of the character proscribed by their respective religions. That belief is a matter of conscience protected by the First Amendment which Congress has no power to qualify or dilute as it did in § 6 (j) of the Military Selective Service Act of 1967, 50 U. S. C. App. § 456 (j) (1964 ed., Supp. V) when it restricted the exemption to those "conscientiously opposed to participation in war in any form." For the reasons I stated in *Negre* and in *Gillette* v. *United States,* 401 U. S. 437, 463 and 470, that construction puts Clay in a class honored by the First Amendment, even though those schooled in a different conception of "just" wars may find it quite irrational.

I would reverse the judgment below.

MR. JUSTICE HARLAN, concurring in the result.

I concur in the result on the following ground. The Department of Justice advice letter was at least susceptible of the reading that petitioner's proof of sincerity was insufficient as a matter of law because his conscientious objector claim had not been timely asserted. This would have been erroneous advice had the Department's letter been so read. Since the Appeals Board might have acted on such an interpretation of the letter, reversal is required under *Sicurella* v. *United States,* 348 U. S. 385 (1955).

HUNTER *v.* TENNESSEE

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

No. 5085. Decided June 28, 1971*

Following the decision in *Witherspoon* v. *Illinois,* 391 U. S. 510, petitioners sought to supplement their bills of exceptions to raise issues thereunder in their pending appeals from convictions for rape in which they were sentenced to death, but were precluded by time limitations of the Tennessee Code. The State Supreme Court affirmed their convictions and sentences without considering *Witherspoon*'s possible effect. The time-limitation provision was later amended, while petitions for certiorari were pending here, and petitioners should be afforded an opportunity to apply to the State Supreme Court for leave to supplement their bills of exceptions under the new statute.

Certiorari granted; 222 Tenn. 672, 440 S. W. 2d 1, vacated and remanded.

PER CURIAM.

The motions for leave to proceed *in forma pauperis* and the petitions for writs of certiorari are granted.

After a joint trial in the state courts of Tennessee, petitioners were convicted of rape and sentenced to death. While their appeals were pending in the Tennessee Supreme Court, this Court announced its decision in *Witherspoon* v. *Illinois,* 391 U. S. 510 (1968). Petitioners sought to supplement their bills of exceptions to raise issues under that decision, but they were precluded from doing so by the provisions of former Tennessee Code Annotated § 27–111 (1955), which as it then stood prohibited the filing of bills of exceptions more than 90 days after judgment. The Tennessee Supreme Court there-

*Together with No. 5098, *Harris* v. *Tennessee;* No. 5101, *Houston et al.* v. *Tennessee,* and No. 5103, *Hunter et al.* v. *Tennessee,* also on petition for writ of certiorari to the same court.

fore affirmed petitioners' convictions and sentences without considering the possible effect of *Witherspoon*. 222 Tenn. 672, 440 S. W. 2d 1 (1969). While the petitions for certiorari were pending in this Court, the Tennessee Legislature amended § 27–111 to authorize the state appellate courts to order the filing of bills of exceptions in criminal cases at any time, for good cause shown. Tenn. Code Ann. § 27–111 (Supp. 1970). With matters in this posture, we believe that sound judicial administration requires us to vacate the judgments below and remand the cases to the Tennessee Supreme Court so as to afford petitioners an opportunity to apply to that court under the new Tennessee statute for leave to supplement their bills of exceptions. In so doing we, of course, intimate no view on the merits of petitioners' contentions or as to the applicability of the new Tennessee statute to these cases.

It is so ordered.

MR. JUSTICE BLACK dissents.

Syllabus

NEW YORK TIMES CO. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 1873. Argued June 26, 1971—Decided June 30, 1971*

The United States, which brought these actions to enjoin publication in the New York Times and in the Washington Post of certain classified material, has not met the "heavy burden of showing justification for the enforcement of such a [prior] restraint."

No. 1873, 444 F. 2d 544, reversed and remanded; No. 1885, —— U. S. App. D. C. ——, 446 F. 2d 1327, affirmed.

Alexander M. Bickel argued the cause for petitioner in No. 1873. With him on the brief were *William E. Hegarty* and *Lawrence J. McKay.*

Solicitor General Griswold argued the cause for the United States in both cases. With him on the brief were *Assistant Attorney General Mardian* and *Daniel M. Friedman.*

William R. Glendon argued the cause for respondents in No. 1885. With him on the brief were *Roger A. Clark, Anthony F. Essaye, Leo P. Larkin, Jr.,* and *Stanley Godofsky.*

Briefs of *amici curiae* were filed by *Bob Eckhardt* and *Thomas I. Emerson* for Twenty-Seven Members of Congress; by *Norman Dorsen, Melvin L. Wulf, Burt Neuborne, Bruce J. Ennis, Osmond K. Fraenkel,* and *Marvin M. Karpatkin* for the American Civil Liberties Union; and by *Victor Rabinowitz* for the National Emergency Civil Liberties Committee.

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*Together with No. 1885, *United States* v. *Washington Post Co. et al.,* on certiorari to the United States Court of Appeals for the District of Columbia Circuit.

PER CURIAM.

We granted certiorari in these cases in which the United States seeks to enjoin the New York Times and the Washington Post from publishing the contents of a classified study entitled "History of U. S. Decision-Making Process on Viet Nam Policy." *Post,* pp. 942, 943.

"Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58, 70 (1963); see also *Near* v. *Minnesota,* 283 U. S. 697 (1931). The Government "thus carries a heavy burden of showing justification for the imposition of such a restraint." *Organization for a Better Austin* v. *Keefe,* 402 U. S. 415, 419 (1971). The District Court for the Southern District of New York in the *New York Times* case and the District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit in the *Washington Post* case held that the Government had not met that burden. We agree.

The judgment of the Court of Appeals for the District of Columbia Circuit is therefore affirmed. The order of the Court of Appeals for the Second Circuit is reversed and the case is remanded with directions to enter a judgment affirming the judgment of the District Court for the Southern District of New York. The stays entered June 25, 1971, by the Court are vacated. The judgments shall issue forthwith.

So ordered.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring.

I adhere to the view that the Government's case against the Washington Post should have been dismissed and that the injunction against the New York Times should have been vacated without oral argument when the cases were first presented to this Court. I believe

that every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment. Furthermore, after oral argument, I agree completely that we must affirm the judgment of the Court of Appeals for the District of Columbia Circuit and reverse the judgment of the Court of Appeals for the Second Circuit for the reasons stated by my Brothers DOUGLAS and BRENNAN. In my view it is unfortunate that some of my Brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment.

Our Government was launched in 1789 with the adoption of the Constitution. The Bill of Rights, including the First Amendment, followed in 1791. Now, for the first time in the 182 years since the founding of the Republic, the federal courts are asked to hold that the First Amendment does not mean what it says, but rather means that the Government can halt the publication of current news of vital importance to the people of this country.

In seeking injunctions against these newspapers and in its presentation to the Court, the Executive Branch seems to have forgotten the essential purpose and history of the First Amendment. When the Constitution was adopted, many people strongly opposed it because the document contained no Bill of Rights to safeguard certain basic freedoms.[1] They especially feared that the

[1] In introducing the Bill of Rights in the House of Representatives, Madison said: "[B]ut I believe that the great mass of the people who opposed [the Constitution], disliked it because it did not contain effectual provisions against the encroachments on particular rights . . . ." 1 Annals of Cong. 433. Congressman Goodhue added: "[I]t is the wish of many of our constituents, that something should be added to the Constitution, to secure in a stronger manner their liberties from the inroads of power." *Id.*, at 426.

new powers granted to a central government might be interpreted to permit the government to curtail freedom of religion, press, assembly, and speech. In response to an overwhelming public clamor, James Madison offered a series of amendments to satisfy citizens that these great liberties would remain safe and beyond the power of government to abridge. Madison proposed what later became the First Amendment in three parts, two of which are set out below, and one of which proclaimed: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; *and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.*" [2] (Emphasis added.) The amendments were offered to *curtail* and *restrict* the general powers granted to the Executive, Legislative, and Judicial Branches two years before in the original Constitution. The Bill of Rights changed the original Constitution into a new charter under which no branch of government could abridge the people's freedoms of press, speech, religion, and assembly. Yet the Solicitor General argues and some members of the Court appear to agree that the general powers of the Government adopted in the original Constitution should be interpreted to limit and restrict the specific and emphatic guarantees of the Bill of Rights adopted later. I can imagine no greater perversion of history. Madison and the other Framers of the First Amendment, able men

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[2] The other parts were:

"The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."

"The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the Legislature by petitions, or remonstrances, for redress of their grievances." 1 Annals of Cong. 434.

that they were, wrote in language they earnestly believed could never be misunderstood: "Congress shall make no law . . . abridging the freedom . . . of the press . . . ." Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, the New York Times, the Washington Post, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.

The Government's case here is based on premises entirely different from those that guided the Framers of the First Amendment. The Solicitor General has carefully and emphatically stated:

> "Now, Mr. Justice [BLACK], your construction of . . . [the First Amendment] is well known, and I certainly respect it. You say that no law means no law, and that should be obvious. I can only

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> say, Mr. Justice, that to me it is equally obvious that 'no law' does not mean 'no law', and I would seek to persuade the Court that that is true. . . . [T]here are other parts of the Constitution that grant powers and responsibilities to the Executive, and . . . the First Amendment was not intended to make it impossible for the Executive to function or to protect the security of the United States." [3]

And the Government argues in its brief that in spite of the First Amendment, "[t]he authority of the Executive Department to protect the nation against publication of information whose disclosure would endanger the national security stems from two interrelated sources: the constitutional power of the President over the conduct of foreign affairs and his authority as Commander-in-Chief." [4]

In other words, we are asked to hold that despite the First Amendment's emphatic command, the Executive Branch, the Congress, and the Judiciary can make laws enjoining publication of current news and abridging freedom of the press in the name of "national security." The Government does not even attempt to rely on any act of Congress. Instead it makes the bold and dangerously far-reaching contention that the courts should take it upon themselves to "make" a law abridging freedom of the press in the name of equity, presidential power and national security, even when the representatives of the people in Congress have adhered to the command of the First Amendment and refused to make such a law.[5] See concurring opinion of MR. JUSTICE DOUGLAS,

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[3] Tr. of Oral Arg. 76.

[4] Brief for the United States 13–14.

[5] Compare the views of the Solicitor General with those of James Madison, the author of the First Amendment. When speaking of the Bill of Rights in the House of Representatives, Madison said: "If they [the first ten amendments] are incorporated into the Con-

post, at 721–722. To find that the President has "inherent power" to halt the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make "secure." No one can read the history of the adoption of the First Amendment without being convinced beyond any doubt that it was injunctions like those sought here that Madison and his collaborators intended to outlaw in this Nation for all time.

The word "security" is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic. The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged. This thought was eloquently expressed in 1937 by Mr. Chief Justice Hughes—great man and great Chief Justice that he was—when the Court held a man could not be punished for attending a meeting run by Communists.

> "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free

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stitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." 1 Annals of Cong. 439.

> assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government." [6]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK joins, concurring.

While I join the opinion of the Court I believe it necessary to express my views more fully.

It should be noted at the outset that the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." That leaves, in my view, no room for governmental restraint on the press.[1]

There is, moreover, no statute barring the publication by the press of the material which the Times and the Post seek to use. Title 18 U. S. C. § 793 (e) provides that "[w]hoever having unauthorized possession of, access to, or control over any document, writing . . . or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates . . . the same to any person not entitled to receive it . . . [s]hall be fined

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[6] *De Jonge* v. *Oregon,* 299 U. S. 353, 365.

[1] See *Beauharnais* v. *Illinois,* 343 U. S. 250, 267 (dissenting opinion of MR. JUSTICE BLACK), 284 (my dissenting opinion); *Roth* v. *United States,* 354 U. S. 476, 508 (my dissenting opinion which MR. JUSTICE BLACK joined); *Yates* v. *United States,* 354 U. S. 298, 339 (separate opinion of MR. JUSTICE BLACK which I joined); *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 293 (concurring opinion of MR. JUSTICE BLACK which I joined); *Garrison* v. *Louisiana,* 379 U. S. 64, 80 (my concurring opinion which MR. JUSTICE BLACK joined).

not more than $10,000 or imprisoned not more than ten years, or both."

The Government suggests that the word "communicates" is broad enough to encompass publication.

There are eight sections in the chapter on espionage and censorship, §§ 792–799. In three of those eight "publish" is specifically mentioned: § 794 (b) applies to "Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, *publishes,* or communicates . . . [the disposition of armed forces]."

Section 797 applies to whoever "reproduces, *publishes,* sells, or gives away" photographs of defense installations.

Section 798 relating to cryptography applies to whoever: "communicates, furnishes, transmits, or otherwise makes available . . . *or publishes*" the described material.[2] (Emphasis added.)

Thus it is apparent that Congress was capable of and did distinguish between publishing and communication in the various sections of the Espionage Act.

The other evidence that § 793 does not apply to the press is a rejected version of § 793. That version read: "During any national emergency resulting from a war to which the United States is a party, or from threat of such a war, the President may, by proclamation, declare the existence of such emergency and, by proclamation, prohibit the publishing or communicating of, or the attempting to publish or communicate any information relating to the national defense which, in his judgment, is of such character that it is or might be useful to the

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[2] These documents contain data concerning the communications system of the United States, the publication of which is made a crime. But the criminal sanction is not urged by the United States as the basis of equity power.

enemy." 55 Cong. Rec. 1763. During the debates in the Senate the First Amendment was specifically cited and that provision was defeated. 55 Cong. Rec. 2167.

Judge Gurfein's holding in the *Times* case that this Act does not apply to this case was therefore preeminently sound. Moreover, the Act of September 23, 1950, in amending 18 U. S. C. § 793 states in § 1 (b) that:

> "Nothing in this Act shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated hereunder having that effect." 64 Stat. 987.

Thus Congress has been faithful to the command of the First Amendment in this area.

So any power that the Government possesses must come from its "inherent power."

The power to wage war is "the power to wage war successfully." See *Hirabayashi* v. *United States,* 320 U. S. 81, 93. But the war power stems from a declaration of war. The Constitution by Art. I, § 8, gives Congress, not the President, power "[t]o declare War." Nowhere are presidential wars authorized. We need not decide therefore what leveling effect the war power of Congress might have.

These disclosures [3] may have a serious impact. But that is no basis for sanctioning a previous restraint on

[3] There are numerous sets of this material in existence and they apparently are not under any controlled custody. Moreover, the President has sent a set to the Congress. We start then with a case where there already is rather wide distribution of the material that is destined for publicity, not secrecy. I have gone over the material listed in the *in camera* brief of the United States. It is all history, not future events. None of it is more recent than 1968.

the press. As stated by Chief Justice Hughes in *Near* v. *Minnesota,* 283 U. S. 697, 719–720:

> "While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct."

As we stated only the other day in *Organization for a Better Austin* v. *Keefe,* 402 U. S. 415, 419, "[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity."

The Government says that it has inherent powers to go into court and obtain an injunction to protect the national interest, which in this case is alleged to be national security.

Near v. *Minnesota,* 283 U. S. 697, repudiated that expansive doctrine in no uncertain terms.

The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental sup-

pression of embarrassing information. It is common knowledge that the First Amendment was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-be. See T. Emerson, The System of Freedom of Expression, c. V (1970); Z. Chafee, Free Speech in the United States, c. XIII (1941). The present cases will, I think, go down in history as the most dramatic illustration of that principle. A debate of large proportions goes on in the Nation over our posture in Vietnam. That debate antedated the disclosure of the contents of the present documents. The latter are highly relevant to the debate in progress.

Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions there should be "uninhibited, robust, and wide-open" debate. *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 269–270.

I would affirm the judgment of the Court of Appeals in the *Post* case, vacate the stay of the Court of Appeals in the *Times* case and direct that it affirm the District Court.

The stays in these cases that have been in effect for more than a week constitute a flouting of the principles of the First Amendment as interpreted in *Near* v. *Minnesota.*

MR. JUSTICE BRENNAN, concurring.

I

I write separately in these cases only to emphasize what should be apparent: that our judgments in the present cases may not be taken to indicate the propriety, in the future, of issuing temporary stays and restraining

orders to block the publication of material sought to be suppressed by the Government. So far as I can determine, never before has the United States sought to enjoin a newspaper from publishing information in its possession. The relative novelty of the questions presented, the necessary haste with which decisions were reached, the magnitude of the interests asserted, and the fact that all the parties have concentrated their arguments upon the question whether permanent restraints were proper may have justified at least some of the restraints heretofore imposed in these cases. Certainly it is difficult to fault the several courts below for seeking to assure that the issues here involved were preserved for ultimate review by this Court. But even if it be assumed that some of the interim restraints were proper in the two cases before us, that assumption has no bearing upon the propriety of similar judicial action in the future. To begin with, there has now been ample time for reflection and judgment; whatever values there may be in the preservation of novel questions for appellate review may not support any restraints in the future. More important, the First Amendment stands as an absolute bar to the imposition of judicial restraints in circumstances of the kind presented by these cases.

II

The error that has pervaded these cases from the outset was the granting of any injunctive relief whatsoever, interim or otherwise. The entire thrust of the Government's claim throughout these cases has been that publication of the material sought to be enjoined "could," or "might," or "may" prejudice the national interest in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences

may result.* Our cases, it is true, have indicated that there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation "is at war," *Schenck* v. *United States,* 249 U. S. 47, 52 (1919), during which times "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." *Near* v. *Minnesota,* 283 U. S. 697, 716 (1931). Even if the present world situation were assumed to be tantamount to a time of war, or if the power of presently available armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust, in neither of these actions has the Government presented or even alleged that publication of items from or based upon the material at issue would cause the happening of an event of that nature. "[T]he chief purpose of [the First Amendment's] guaranty [is] to prevent previous restraints upon publication." *Near* v. *Minnesota, supra,* at 713. Thus, only governmental allegation and proof that publication must inevitably, di-

**Freedman* v. *Maryland,* 380 U. S. 51 (1965), and similar cases regarding temporary restraints of allegedly obscene materials are not in point. For those cases rest upon the proposition that "obscenity is not protected by the freedoms of speech and press." *Roth* v. *United States,* 354 U. S. 476, 481 (1957). Here there is no question but that the material sought to be suppressed is within the protection of the First Amendment; the only question is whether, notwithstanding that fact, its publication may be enjoined for a time because of the presence of an overwhelming national interest. Similarly, copyright cases have no pertinence here: the Government is not asserting an interest in the particular form of words chosen in the documents, but is seeking to suppress the ideas expressed therein. And the copyright laws, of course, protect only the form of expression and not the ideas expressed.

rectly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient: for if the Executive Branch seeks judicial aid in preventing publication, it must inevitably submit the basis upon which that aid is sought to scrutiny by the judiciary. And therefore, every restraint issued in this case, whatever its form, has violated the First Amendment—and not less so because that restraint was justified as necessary to afford the courts an opportunity to examine the claim more thoroughly. Unless and until the Government has clearly made out its case, the First Amendment commands that no injunction may issue.

MR. JUSTICE STEWART, with whom MR. JUSTICE WHITE joins, concurring.

In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations. This power, largely unchecked by the Legislative [1] and Judicial [2] branches, has been pressed to the very hilt since the advent of the nuclear missile age. For better or for worse, the simple fact is that a

[1] The President's power to make treaties and to appoint ambassadors is, of course, limited by the requirement of Art. II, § 2, of the Constitution that he obtain the advice and consent of the Senate. Article I, § 8, empowers Congress to "raise and support Armies," and "provide and maintain a Navy." And, of course, Congress alone can declare war. This power was last exercised almost 30 years ago at the inception of World War II. Since the end of that war in 1945, the Armed Forces of the United States have suffered approximately half a million casualties in various parts of the world.

[2] See *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103; *Hirabayashi* v. *United States*, 320 U. S. 81; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304; cf. *Mora* v. *McNamara*, 128 U. S. App. D. C. 297, 387 F. 2d 862, cert. denied, 389 U. S. 934.

President of the United States possesses vastly greater constitutional independence in these two vital areas of power than does, say, a prime minister of a country with a parliamentary form of government.

In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.

Yet it is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident.

I think there can be but one answer to this dilemma, if dilemma it be. The responsibility must be where the power is.[3] If the Constitution gives the Executive

[3] "It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which

a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. It is an awesome responsibility, requiring judgment and wisdom of a high order. I should suppose that moral, political, and practical considerations would dictate that a very first principle of that wisdom would be an insistence upon avoiding secrecy for its own sake. For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained. But be that as it may, it is clear to me that it is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect

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would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty—a refusal the wisdom of which was recognized by the House itself and has never since been doubted. . . ." *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 320.

the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.

This is not to say that Congress and the courts have no role to play. Undoubtedly Congress has the power to enact specific and appropriate criminal laws to protect government property and preserve government secrets. Congress has passed such laws, and several of them are of very colorable relevance to the apparent circumstances of these cases. And if a criminal prosecution is instituted, it will be the responsibility of the courts to decide the applicability of the criminal law under which the charge is brought. Moreover, if Congress should pass a specific law authorizing civil proceedings in this field, the courts would likewise have the duty to decide the constitutionality of such a law as well as its applicability to the facts proved.

But in the cases before us we are asked neither to construe specific regulations nor to apply specific laws. We are asked, instead, to perform a function that the Constitution gave to the Executive, not the Judiciary. We are asked, quite simply, to prevent the publication by two newspapers of material that the Executive Branch insists should not, in the national interest, be published. I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people. That being so, there can under the First Amendment be but one judicial resolution of the issues before us. I join the judgments of the Court.

MR. JUSTICE WHITE, with whom MR. JUSTICE STEWART joins, concurring.

I concur in today's judgments, but only because of the concededly extraordinary protection against prior re-

straints enjoyed by the press under our constitutional system. I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations.[1] Nor, after examining the materials the Government characterizes as the most sensitive and destructive, can I deny that revelation of these documents will do substantial damage to public interests. Indeed, I am confident that their disclosure will have that result. But I nevertheless agree that the United States has not satisfied the very heavy burden that it must meet to warrant an injunction against publication in these cases, at least in the absence of express and appropriately limited congressional authorization for prior restraints in circumstances such as these.

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[1] The Congress has authorized a strain of prior restraints against private parties in certain instances. The National Labor Relations Board routinely issues cease-and-desist orders against employers who it finds have threatened or coerced employees in the exercise of protected rights. See 29 U. S. C. § 160 (c). Similarly, the Federal Trade Commission is empowered to impose cease-and-desist orders against unfair methods of competition. 15 U. S. C. § 45 (b). Such orders can, and quite often do, restrict what may be spoken or written under certain circumstances. See, *e. g.*, *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 616–620 (1969). Article I, § 8, of the Constitution authorizes Congress to secure the "exclusive right" of authors to their writings, and no one denies that a newspaper can properly be enjoined from publishing the copyrighted works of another. See *Westermann Co.* v. *Dispatch Co.*, 249 U. S. 100 (1919). Newspapers do themselves rely from time to time on the copyright as a means of protecting their accounts of important events. However, those enjoined under the statutes relating to the National Labor Relations Board and the Federal Trade Commission are private parties, not the press; and when the press is enjoined under the copyright laws the complainant is a private copyright holder enforcing a private right. These situations are quite distinct from the Government's request for an injunction against publishing information about the affairs of government, a request admittedly not based on any statute.

The Government's position is simply stated: The responsibility of the Executive for the conduct of the foreign affairs and for the security of the Nation is so basic that the President is entitled to an injunction against publication of a newspaper story whenever he can convince a court that the information to be revealed threatens "grave and irreparable" injury to the public interest; [2] and the injunction should issue whether or not the material to be published is classified, whether or not publication would be lawful under relevant criminal statutes enacted by Congress, and regardless of the circumstances by which the newspaper came into possession of the information.

At least in the absence of legislation by Congress, based on its own investigations and findings, I am quite unable to agree that the inherent powers of the Executive and the courts reach so far as to authorize remedies having such sweeping potential for inhibiting publications by the press. Much of the difficulty inheres in the "grave and irreparable danger" standard suggested by the United States. If the United States were to have judgment under such a standard in these cases, our decision would be of little guidance to other courts in other cases, for the material at issue here would not be available from the Court's opinion or from public records, nor would it be published by the press. Indeed, even today where we hold that the United States has not met its burden, the material remains sealed in court records and it is

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[2] The "grave and irreparable danger" standard is that asserted by the Government in this Court. In remanding to Judge Gurfein for further hearings in the *Times* litigation, five members of the Court of Appeals for the Second Circuit directed him to determine whether disclosure of certain items specified with particularity by the Government would "pose such grave and immediate danger to the security of the United States as to warrant their publication being enjoined."

properly not discussed in today's opinions. Moreover, because the material poses substantial dangers to national interests and because of the hazards of criminal sanctions, a responsible press may choose never to publish the more sensitive materials. To sustain the Government in these cases would start the courts down a long and hazardous road that I am not willing to travel, at least without congressional guidance and direction.

It is not easy to reject the proposition urged by the United States and to deny relief on its good-faith claims in these cases that publication will work serious damage to the country. But that discomfiture is considerably dispelled by the infrequency of prior-restraint cases. Normally, publication will occur and the damage be done before the Government has either opportunity or grounds for suppression. So here, publication has already begun and a substantial part of the threatened damage has already occurred. The fact of a massive breakdown in security is known, access to the documents by many unauthorized people is undeniable, and the efficacy of equitable relief against these or other newspapers to avert anticipated damage is doubtful at best.

What is more, terminating the ban on publication of the relatively few sensitive documents the Government now seeks to suppress does not mean that the law either requires or invites newspapers or others to publish them or that they will be immune from criminal action if they do. Prior restraints require an unusually heavy justification under the First Amendment; but failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication. That the Government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way.

When the Espionage Act was under consideration in

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1917, Congress eliminated from the bill a provision that would have given the President broad powers in time of war to proscribe, under threat of criminal penalty, the publication of various categories of information related to the national defense.[3] Congress at that time was unwilling to clothe the President with such far-reaching powers to monitor the press, and those opposed to this part of the legislation assumed that a necessary concomitant of such power was the power to "filter out the news to the people through some man." 55 Cong. Rec. 2008 (remarks of Sen. Ashurst). However, these same members of Congress appeared to have little doubt that newspapers would be subject to criminal prosecution if they insisted on publishing information of the type Congress had itself determined should not be revealed. Senator Ashurst, for example, was quite sure that the editor of such a newspaper "should be punished if he did publish information as to the movements of the fleet, the troops, the aircraft, the location of powder factories, the location of defense works, and all that sort of thing." *Id.*, at 2009.[4]

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[3] "Whoever, in time of war, in violation of reasonable regulations to be prescribed by the President, which he is hereby authorized to make and promulgate, shall publish any information with respect to the movement, numbers, description, condition, or disposition of any of the armed forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense calculated to be useful to the enemy, shall be punished by a fine . . . or by imprisonment . . . ." 55 Cong. Rec. 2100.

[4] Senator Ashurst also urged that " 'freedom of the press' means freedom from the restraints of a censor, means the absolute liberty and right to publish whatever you wish; but you take your chances of punishment in the courts of your country for the violation of the laws of libel, slander, and treason." 55 Cong. Rec. 2005.

The Criminal Code contains numerous provisions potentially relevant to these cases. Section 797 [5] makes it a crime to publish certain photographs or drawings of military installations. Section 798,[6] also in precise language, proscribes knowing and willful publication of any classified information concerning the cryptographic sys-

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[5] Title 18 U. S. C. § 797 provides:

"On and after thirty days from the date upon which the President defines any vital military or naval installation or equipment as being within the category contemplated under section 795 of this title, whoever reproduces, publishes, sells, or gives away any photograph, sketch, picture, drawing, map, or graphical representation of the vital military or naval installations or equipment so defined, without first obtaining permission of the commanding officer of the military or naval post, camp, or station concerned, or higher authority, unless such photograph, sketch, picture, drawing, map, or graphical representation has clearly indicated thereon that it has been censored by the proper military or naval authority, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

[6] In relevant part 18 U. S. C. § 798 provides:

"(a) Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information—

"(1) concerning the nature, preparation, or use of any code, cipher, or cryptographic system of the United States or any foreign government; or

"(2) concerning the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by the United States or any foreign government for cryptographic or communication intelligence purposes; or

"(3) concerning the communication intelligence activities of the United States or any foreign government; or

"(4) obtained by the process of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

tems or communication intelligence activities of the United States as well as any information obtained from communication intelligence operations.[7] If any of the material here at issue is of this nature, the newspapers are presumably now on full notice of the position of the United States and must face the consequences if they

[7] The purport of 18 U. S. C. § 798 is clear. Both the House and Senate Reports on the bill, in identical terms, speak of furthering the security of the United States by preventing disclosure of information concerning the cryptographic systems and the communication intelligence systems of the United States, and explaining that "[t]his bill makes it a crime to reveal the methods, techniques, and matériel used in the transmission by this Nation of enciphered or coded messages. . . . Further, it makes it a crime to reveal methods used by this Nation in breaking the secret codes of a foreign nation. It also prohibits under certain penalties the divulging of any information which may have come into this Government's hands as a result of such a code-breaking." H. R. Rep. No. 1895, 81st Cong., 2d Sess., 1 (1950). The narrow reach of the statute was explained as covering "only a small category of classified matter, a category which is both vital and vulnerable to an almost unique degree." *Id.*, at 2. Existing legislation was deemed inadequate.

"At present two other acts protect this information, but only in a limited way. These are the Espionage Act of 1917 (40 Stat. 217) and the act of June 10, 1933 (48 Stat. 122). Under the first, unauthorized revelation of information of this kind can be penalized only if it can be proved that the person making the revelation did so with an intent to injure the United States. Under the second, only diplomatic codes and messages transmitted in diplomatic codes are protected. The present bill is designed to protect against knowing and willful publication or any other revelation of all important information affecting the United States communication intelligence operations and all direct information about all United States codes and ciphers." *Ibid.*

Section 798 obviously was intended to cover publications by nonemployees of the Government and to ease the Government's burden in obtaining convictions. See H. R. Rep. No. 1895, *supra,* at 2–5. The identical Senate Report, not cited in parallel in the text of this footnote, is S. Rep. No. 111, 81st Cong., 1st Sess. (1949).

publish. I would have no difficulty in sustaining convictions under these sections on facts that would not justify the intervention of equity and the imposition of a prior restraint.

The same would be true under those sections of the Criminal Code casting a wider net to protect the national defense. Section 793 (e) [8] makes it a criminal act for any unauthorized possessor of a document "relating to the national defense" either (1) willfully to communicate or cause to be communicated that document to any person not entitled to receive it or (2) willfully to retain the document and fail to deliver it to an officer of the United States entitled to receive it. The subsection was added in 1950 because pre-existing law provided no

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[8] Section 793 (e) of 18 U. S. C. provides that:

"(e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it;"

is guilty of an offense punishable by 10 years in prison, a $10,000 fine, or both. It should also be noted that 18 U. S. C. § 793 (g), added in 1950 (see 64 Stat. 1004; S. Rep. No. 2369, pt. 1, 81st Cong., 2d Sess., 9 (1950)), provides that "[i]f two or more persons conspire to violate any of the foregoing provisions of this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy."

penalty for the unauthorized possessor unless demand for the documents was made.[9] "The dangers surrounding the unauthorized possession of such items are self-

[9] The amendment of § 793 that added subsection (e) was part of the Subversive Activities Control Act of 1950, which was in turn Title I of the Internal Security Act of 1950. See 64 Stat. 987. The report of the Senate Judiciary Committee best explains the purposes of the amendment:

"Section 18 of the bill amends section 793 of title 18 of the United States Code (espionage statute). The several paragraphs of section 793 of title 18 are designated as subsections (a) through (g) for purposes of convenient reference. The significant changes which would be made in section 793 of title 18 are as follows:

"(1) Amends the fourth paragraph of section 793, title 18 (subsec. (d)), to cover the unlawful dissemination of 'information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation.' *The phrase 'which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation' would modify only 'information relating to the national defense' and not the other items enumerated in the subsection.* The fourth paragraph of section 793 is also amended to provide that only those with lawful possession of the items relating to national defense enumerated therein may retain them subject to demand therefor. Those who have unauthorized possession of such items are treated in a separate subsection.

"(2) Amends section 793, title 18 (subsec. (e)), to provide that unauthorized possessors of items enumerated in paragraph 4 of section 793 must surrender possession thereof to the proper authorities without demand. Existing law provides no penalty for the unauthorized possession of such items unless a demand for them is made by the person entitled to receive them. The dangers surrounding the unauthorized possession of such items are self-evident, and it is deemed advisable to require their surrender in such a case, regardless of demand, especially since their unauthorized possession may be unknown to the authorities who would otherwise make the demand. The only difference between subsection (d) and subsection (e) of section 793 is that a demand by the person entitled to receive the items would be a necessary element of an offense under subsection (d) where the possession is lawful, whereas such

evident, and it is deemed advisable to require their surrender in such a case, regardless of demand, especially since their unauthorized possession may be unknown to the authorities who would otherwise make the demand." S. Rep. No. 2369, pt. 1, 81st Cong., 2d Sess., 9 (1950). Of course, in the cases before us, the unpublished documents have been demanded by the United States and their import has been made known at least to counsel for the newspapers involved. In *Gorin* v. *United States,* 312 U. S. 19, 28 (1941), the words "national defense" as used in a predecessor of § 793 were held by a unanimous Court to have "a well understood connotation"—a "generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness"—and to be "sufficiently definite to apprise the public of prohibited activi-

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a demand would not be a necessary element of an offense under subsection (e) where the possession is unauthorized." S. Rep. No. 2369, pt. 1, 81st Cong., 2d Sess., 8–9 (1950) (emphasis added).

It seems clear from the foregoing, contrary to the intimations of the District Court for the Southern District of New York in this case, that in prosecuting for communicating or withholding a "document" as contrasted with similar action with respect to "information" the Government need not prove an intent to injure the United States or to benefit a foreign nation but only willful and knowing conduct. The District Court relied on *Gorin* v. *United States,* 312 U. S. 19 (1941). But that case arose under other parts of the predecessor to § 793, see 312 U. S., at 21–22—parts that imposed different intent standards not repeated in § 793 (d) or § 793 (e). Cf. 18 U. S. C. §§ 793 (a), (b), and (c). Also, from the face of subsection (e) and from the context of the Act of which it was a part, it seems undeniable that a newspaper, as well as others unconnected with the Government, are vulnerable to prosecution under § 793 (e) if they communicate or withhold the materials covered by that section. The District Court ruled that "communication" did not reach publication by a newspaper of documents relating to the national defense. I intimate no views on the correctness of that conclusion. But neither communication nor publication is necessary to violate the subsection.

ties" and to be consonant with due process. 312 U. S., at 28. Also, as construed by the Court in *Gorin*, information "connected with the national defense" is obviously not limited to that threatening "grave and irreparable" injury to the United States.[10]

It is thus clear that Congress has addressed itself to the problems of protecting the security of the country and the national defense from unauthorized disclosure of potentially damaging information. Cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 585–586 (1952); see also *id.*, at 593–628 (Frankfurter, J., concurring). It has not, however, authorized the injunctive remedy against threatened publication. It has apparently been satisfied to rely on criminal sanctions and their deterrent effect on the responsible as well as the irresponsible press. I am not, of course, saying that either of these newspapers has yet committed a crime or that either would commit a crime if it published all the material now in its possession. That matter must await resolution in the context of a criminal proceeding if one is instituted by the United States. In that event, the issue of guilt or innocence would be determined by procedures and standards quite different from those that have purported to govern these injunctive proceedings.

MR. JUSTICE MARSHALL, concurring.

The Government contends that the only issue in these cases is whether in a suit by the United States, "the First Amendment bars a court from prohibiting a news-

[10] Also relevant is 18 U. S. C. § 794. Subsection (b) thereof forbids in time of war the collection or publication, with intent that it shall be communicated to the enemy, of any information with respect to the movements of military forces, "or with respect to the plans or conduct . . . of any naval or military operations . . . or any other information relating to the public defense, which might be useful to the enemy . . . ."

paper from publishing material whose disclosure would pose a 'grave and immediate danger to the security of the United States.'" Brief for the United States 7. With all due respect, I believe the ultimate issue in these cases is even more basic than the one posed by the Solicitor General. The issue is whether this Court or the Congress has the power to make law.

In these cases there is no problem concerning the President's power to classify information as "secret" or "top secret." Congress has specifically recognized Presidential authority, which has been formally exercised in Exec. Order 10501 (1953), to classify documents and information. See, *e. g.,* 18 U. S. C. § 798; 50 U. S. C. § 783.[1] Nor is there any issue here regarding the President's power as Chief Executive and Commander in Chief to protect national security by disciplining employees who disclose information and by taking precautions to prevent leaks.

The problem here is whether in these particular cases the Executive Branch has authority to invoke the equity jurisdiction of the courts to protect what it believes to be the national interest. See *In re Debs,* 158 U. S. 564, 584 (1895). The Government argues that in addition to the inherent power of any government to protect itself, the President's power to conduct foreign affairs and his position as Commander in Chief give him authority to impose censorship on the press to protect his ability to deal effectively with foreign nations and to conduct the military affairs of the country. Of course, it is beyond cavil that the President has broad powers by virtue of his primary responsibility for the conduct of our foreign affairs and his position as Commander in Chief. *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.,* 333 U. S. 103 (1948); *Hirabayashi* v. *United States,* 320 U. S. 81, 93 (1943); *United States* v. *Curtiss-*

[1] See n. 3, *infra.*

Wright Corp., 299 U. S. 304 (1936).[2] And in some situations it may be that under whatever inherent powers the Government may have, as well as the implicit authority derived from the President's mandate to conduct foreign affairs and to act as Commander in Chief, there is a basis for the invocation of the equity jurisdiction of this Court as an aid to prevent the publication of material damaging to "national security," however that term may be defined.

It would, however, be utterly inconsistent with the concept of separation of powers for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit. There would be a similar damage to the basic concept of these co-equal branches of Government if when the Executive Branch has adequate authority granted by Congress to protect "national security" it can choose instead to invoke the contempt power of a court to enjoin the threatened conduct. The Constitution provides that Congress shall make laws, the President execute laws, and courts interpret laws. *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579 (1952). It did not provide for government by injunction in which the courts and the Executive Branch can "make law" without regard to the action of Congress. It may be more convenient for the Executive Branch if it need only convince a judge to prohibit conduct rather than ask the Congress to pass a law, and it may be more convenient to enforce a contempt order than to seek a criminal conviction in a jury trial. Moreover, it may be considered politically wise to get a court to share the responsibility for arresting those who the Executive Branch has probable cause to believe are violating the law. But convenience and political considerations of the

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[2] But see *Kent* v. *Dulles,* 357 U. S. 116 (1958); *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579 (1952).

moment do not justify a basic departure from the principles of our system of government.

In these cases we are not faced with a situation where Congress has failed to provide the Executive with broad power to protect the Nation from disclosure of damaging state secrets. Congress has on several occasions given extensive consideration to the problem of protecting the military and strategic secrets of the United States. This consideration has resulted in the enactment of statutes making it a crime to receive, disclose, communicate, withhold, and publish certain documents, photographs, instruments, appliances, and information. The bulk of these statutes is found in chapter 37 of U. S. C., Title 18, entitled Espionage and Censorship.[3] In that chapter,

[3] There are several other statutory provisions prohibiting and punishing the dissemination of information, the disclosure of which Congress thought sufficiently imperiled national security to warrant that result. These include 42 U. S. C. §§ 2161 through 2166 relating to the authority of the Atomic Energy Commission to classify and declassify "Restricted Data" ["Restricted Data" is a term of art employed uniquely by the Atomic Energy Act]. Specifically, 42 U. S. C. § 2162 authorizes the Atomic Energy Commission to classify certain information. Title 42 U. S. C. § 2274, subsection (a), provides penalties for a person who "communicates, transmits, or discloses [restricted data] . . . with intent to injure the United States or with intent to secure an advantage to any foreign nation . . . ." Subsection (b) of § 2274 provides lesser penalties for one who "communicates, transmits, or discloses" such information "with reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation . . . ." Other sections of Title 42 of the United States Code dealing with atomic energy prohibit and punish acquisition, removal, concealment, tampering with, alteration, mutilation, or destruction of documents incorporating "Restricted Data" and provide penalties for employees and former employees of the Atomic Energy Commission, the armed services, contractors and licensees of the Atomic Energy Commission. Title 42 U. S. C. §§ 2276, 2277. Title 50 U. S. C. App. § 781, 56 Stat. 390, prohibits the making of any sketch or other representation of military installations or any military equipment located on any military instal-

Congress has provided penalties ranging from a $10,000 fine to death for violating the various statutes.

Thus it would seem that in order for this Court to issue an injunction it would require a showing that such an injunction would enhance the already existing power of the Government to act. See *Bennett* v. *Laman,* 277 N. Y. 368, 14 N. E. 2d 439 (1938). It is a traditional axiom of equity that a court of equity will not do a useless thing just as it is a traditional axiom that equity will not enjoin the commission of a crime. See Z. Chafee & E. Re, Equity 935–954 (5th ed. 1967); 1 H. Joyce, Injunctions §§ 58–60a (1909). Here there has been no attempt to make such a showing. The Solicitor General does not even mention in his brief whether the Government considers that there is probable cause to believe a crime has been committed or whether there is a conspiracy to commit future crimes.

If the Government had attempted to show that there was no effective remedy under traditional criminal law, it would have had to show that there is no arguably applicable statute. Of course, at this stage this Court could not and cannot determine whether there has been a violation of a particular statute or decide the constitutionality of any statute. Whether a good-faith prosecution could have been instituted under any statute could, however, be determined.

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lation, as specified; and indeed Congress in the National Defense Act of 1940, 54 Stat. 676, as amended, 56 Stat. 179, conferred jurisdiction on federal district courts over civil actions "to enjoin any violation" thereof. 50 U. S. C. App. § 1152 (6). Title 50 U. S. C. § 783 (b) makes it unlawful for any officers or employees of the United States or any corporation which is owned by the United States to communicate material which has been "classified" by the President to any person who that governmental employee knows or has reason to believe is an agent or representative of any foreign government or any Communist organization.

At least one of the many statutes in this area seems relevant to these cases. Congress has provided in 18 U. S. C. § 793 (e) that whoever "having unauthorized possession of, access to, or control over any document, writing, code book, signal book . . . or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits . . . the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it . . . [s]hall be fined not more than $10,000 or imprisoned not more than ten years, or both." Congress has also made it a crime to conspire to commit any of the offenses listed in 18 U. S. C. § 793 (e).

It is true that Judge Gurfein found that Congress had not made it a crime to publish the items and material specified in § 793 (e). He found that the words "communicates, delivers, transmits . . ." did not refer to publication of newspaper stories. And that view has some support in the legislative history and conforms with the past practice of using the statute only to prosecute those charged with ordinary espionage. But see 103 Cong. Rec. 10449 (remarks of Sen. Humphrey). Judge Gurfein's view of the statute is not, however, the only plausible construction that could be given. See my Brother WHITE's concurring opinion.

Even if it is determined that the Government could not in good faith bring criminal prosecutions against the New York Times and the Washington Post, it is clear that Congress has specifically rejected passing legislation that would have clearly given the President the power he seeks here and made the current activity of the newspapers unlawful. When Congress specifically declines to make conduct unlawful it is not for this Court

to redecide those issues—to overrule Congress. See *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579 (1952).

On at least two occasions Congress has refused to enact legislation that would have made the conduct engaged in here unlawful and given the President the power that he seeks in this case. In 1917 during the debate over the original Espionage Act, still the basic provisions of § 793, Congress rejected a proposal to give the President in time of war or threat of war authority to directly prohibit by proclamation the publication of information relating to national defense that might be useful to the enemy. The proposal provided that:

> "During any national emergency resulting from a war to which the United States is a party, or from threat of such a war, the President may, by proclamation, declare the existence of such emergency and, by proclamation, prohibit the publishing or communicating of, or the attempting to publish or communicate any information relating to the national defense which, in his judgment, is of such character that it is or might be useful to the enemy. Whoever violates any such prohibition shall be punished by a fine of not more than $10,000 or by imprisonment for not more than 10 years, or both: *Provided,* That nothing in this section shall be construed to limit or restrict any discussion, comment, or criticism of the acts or policies of the Government or its representatives or the publication of the same." 55 Cong. Rec. 1763.

Congress rejected this proposal after war against Germany had been declared even though many believed that there was a grave national emergency and that the threat of security leaks and espionage was serious. The Executive Branch has not gone to Congress and requested that the decision to provide such power be reconsidered. In-

stead, the Executive Branch comes to this Court and asks that it be granted the power Congress refused to give.

In 1957 the United States Commission on Government Security found that "[a]irplane journals, scientific periodicals, and even the daily newspaper have featured articles containing information and other data which should have been deleted in whole or in part for security reasons." In response to this problem the Commission proposed that "Congress enact legislation making it a crime for any person willfully to disclose without proper authorization, for any purpose whatever, information classified 'secret' or 'top secret,' knowing, or having reasonable grounds to believe, such information to have been so classified." Report of Commission on Government Security 619–620 (1957). After substantial floor discussion on the proposal, it was rejected. See 103 Cong. Rec. 10447–10450. If the proposal that Sen. Cotton championed on the floor had been enacted, the publication of the documents involved here would certainly have been a crime. Congress refused, however, to make it a crime. The Government is here asking this Court to remake that decision. This Court has no such power.

Either the Government has the power under statutory grant to use traditional criminal law to protect the country or, if there is no basis for arguing that Congress has made the activity a crime, it is plain that Congress has specifically refused to grant the authority the Government seeks from this Court. In either case this Court does not have authority to grant the requested relief. It is not for this Court to fling itself into every breach perceived by some Government official nor is it for this Court to take on itself the burden of enacting law, especially a law that Congress has refused to pass.

I believe that the judgment of the United States Court of Appeals for the District of Columbia Circuit should

be affirmed and the judgment of the United States Court of Appeals for the Second Circuit should be reversed insofar as it remands the case for further hearings.

MR. CHIEF JUSTICE BURGER, dissenting.

So clear are the constitutional limitations on prior restraint against expression, that from the time of *Near* v. *Minnesota,* 283 U. S. 697 (1931), until recently in *Organization for a Better Austin* v. *Keefe,* 402 U. S. 415 (1971), we have had little occasion to be concerned with cases involving prior restraints against news reporting on matters of public interest. There is, therefore, little variation among the members of the Court in terms of resistance to prior restraints against publication. Adherence to this basic constitutional principle, however, does not make these cases simple. In these cases, the imperative of a free and unfettered press comes into collision with another imperative, the effective functioning of a complex modern government and specifically the effective exercise of certain constitutional powers of the Executive. Only those who view the First Amendment as an absolute in all circumstances—a view I respect, but reject—can find such cases as these to be simple or easy.

These cases are not simple for another and more immediate reason. We do not know the facts of the cases. No District Judge knew all the facts. No Court of Appeals judge knew all the facts. No member of this Court knows all the facts.

Why are we in this posture, in which only those judges to whom the First Amendment is absolute and permits of no restraint in any circumstances or for any reason, are really in a position to act?

I suggest we are in this posture because these cases have been conducted in unseemly haste. MR. JUSTICE HARLAN covers the chronology of events demonstrating the hectic pressures under which these cases have been processed and I need not restate them. The prompt

setting of these cases reflects our universal abhorrence of prior restraint. But prompt judicial action does not mean unjudicial haste.

Here, moreover, the frenetic haste is due in large part to the manner in which the Times proceeded from the date it obtained the purloined documents. It seems reasonably clear now that the haste precluded reasonable and deliberate judicial treatment of these cases and was not warranted. The precipitate action of this Court aborting trials not yet completed is not the kind of judicial conduct that ought to attend the disposition of a great issue.

The newspapers make a derivative claim under the First Amendment; they denominate this right as the public "right to know"; by implication, the Times asserts a sole trusteeship of that right by virtue of its journalistic "scoop." The right is asserted as an absolute. Of course, the First Amendment right itself is not an absolute, as Justice Holmes so long ago pointed out in his aphorism concerning the right to shout "fire" in a crowded theater if there was no fire. There are other exceptions, some of which Chief Justice Hughes mentioned by way of example in *Near* v. *Minnesota.* There are no doubt other exceptions no one has had occasion to describe or discuss. Conceivably such exceptions may be lurking in these cases and would have been flushed had they been properly considered in the trial courts, free from unwarranted deadlines and frenetic pressures. An issue of this importance should be tried and heard in a judicial atmosphere conducive to thoughtful, reflective deliberation, especially when haste, in terms of hours, is unwarranted in light of the long period the Times, by its own choice, deferred publication.[1]

[1] As noted elsewhere the Times conducted its analysis of the 47 volumes of Government documents over a period of several months and did so with a degree of security that a government might envy. Such security was essential, of course, to protect the enterprise

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It is not disputed that the Times has had unauthorized possession of the documents for three to four months, during which it has had its expert analysts studying them, presumably digesting them and preparing the material for publication. During all of this time, the Times, presumably in its capacity as trustee of the public's "right to know," has held up publication for purposes it considered proper and thus public knowledge was delayed. No doubt this was for a good reason; the analysis of 7,000 pages of complex material drawn from a vastly greater volume of material would inevitably take time and the writing of good news stories takes time. But why should the United States Government, from whom this information was illegally acquired by someone, along with all the counsel, trial judges, and appellate judges be placed under needless pressure? After these months of deferral, the alleged "right to know" has somehow and suddenly become a right that must be vindicated instanter.

Would it have been unreasonable, since the newspaper could anticipate the Government's objections to release of secret material, to give the Government an opportunity to review the entire collection and determine whether agreement could be reached on publication? Stolen or not, if security was not in fact jeopardized, much of the material could no doubt have been declassified, since it spans a period ending in 1968. With such an approach—one that great newspapers have in the past practiced and stated editorially to be the duty of an honorable press—the newspapers and Government might well have nar-

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from others. Meanwhile the Times has copyrighted its material and there were strong intimations in the oral argument that the Times contemplated enjoining its use by any other publisher in violation of its copyright. Paradoxically this would afford it a protection, analogous to prior restraint, against all others—a protection the Times denies the Government of the United States.

rowed the area of disagreement as to what was and was not publishable, leaving the remainder to be resolved in orderly litigation, if necessary. To me it is hardly believable that a newspaper long regarded as a great institution in American life would fail to perform one of the basic and simple duties of every citizen with respect to the discovery or possession of stolen property or secret government documents. That duty, I had thought—perhaps naively—was to report forthwith, to responsible public officers. This duty rests on taxi drivers, Justices, and the New York Times. The course followed by the Times, whether so calculated or not, removed any possibility of orderly litigation of the issues. If the action of the judges up to now has been correct, that result is sheer happenstance.[2]

Our grant of the writ of certiorari before final judgment in the *Times* case aborted the trial in the District Court before it had made a complete record pursuant to the mandate of the Court of Appeals for the Second Circuit.

The consequence of all this melancholy series of events is that we literally do not know what we are acting on. As I see it, we have been forced to deal with litigation concerning rights of great magnitude without an adequate record, and surely without time for adequate treatment either in the prior proceedings or in this Court. It is interesting to note that counsel on both sides, in oral argument before this Court, were frequently unable to respond to questions on factual points. Not surprisingly they pointed out that they had been working literally "around the clock" and simply were unable to review the documents that give rise to these cases and

[2] Interestingly the Times explained its refusal to allow the Government to examine its own purloined documents by saying in substance this might compromise *its* sources and informants! The Times thus asserts a right to guard the secrecy of its sources while denying that the Government of the United States has that power.

were not familiar with them. This Court is in no better posture. I agree generally with MR. JUSTICE HARLAN and MR. JUSTICE BLACKMUN but I am not prepared to reach the merits.[3]

I would affirm the Court of Appeals for the Second Circuit and allow the District Court to complete the trial aborted by our grant of certiorari, meanwhile preserving the status quo in the *Post* case. I would direct that the District Court on remand give priority to the *Times* case to the exclusion of all other business of that court but I would not set arbitrary deadlines.

I should add that I am in general agreement with much of what MR. JUSTICE WHITE has expressed with respect to penal sanctions concerning communication or retention of documents or information relating to the national defense.

We all crave speedier judicial processes but when judges are pressured as in these cases the result is a parody of the judicial function.

MR. JUSTICE HARLAN, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.

These cases forcefully call to mind the wise admonition of Mr. Justice Holmes, dissenting in *Northern Securities Co.* v. *United States,* 193 U. S. 197, 400–401 (1904):

> "Great cases like hard cases make bad law. For great cases are called great, not by reason of their

[3] With respect to the question of inherent power of the Executive to classify papers, records, and documents as secret, or otherwise unavailable for public exposure, and to secure aid of the courts for enforcement, there may be an analogy with respect to this Court. No statute gives this Court express power to establish and enforce the utmost security measures for the secrecy of our deliberations and records. Yet I have little doubt as to the inherent power of the Court to protect the confidentiality of its internal operations by whatever judicial measures may be required.

> real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."

With all respect, I consider that the Court has been almost irresponsibly feverish in dealing with these cases.

Both the Court of Appeals for the Second Circuit and the Court of Appeals for the District of Columbia Circuit rendered judgment on June 23. The New York Times' petition for certiorari, its motion for accelerated consideration thereof, and its application for interim relief were filed in this Court on June 24 at about 11 a. m. The application of the United States for interim relief in the *Post* case was also filed here on June 24 at about 7:15 p. m. This Court's order setting a hearing before us on June 26 at 11 a. m., a course which I joined only to avoid the possibility of even more peremptory action by the Court, was issued less than 24 hours before. The record in the *Post* case was filed with the Clerk shortly before 1 p. m. on June 25; the record in the *Times* case did not arrive until 7 or 8 o'clock that same night. The briefs of the parties were received less than two hours before argument on June 26.

This frenzied train of events took place in the name of the presumption against prior restraints created by the First Amendment. Due regard for the extraordinarily important and difficult questions involved in these litigations should have led the Court to shun such a precipitate timetable. In order to decide the merits of these cases properly, some or all of the following questions should have been faced:

1. Whether the Attorney General is authorized to bring these suits in the name of the United States. Com-

pare *In re Debs,* 158 U. S. 564 (1895), with *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579 (1952). This question involves as well the construction and validity of a singularly opaque statute—the Espionage Act, 18 U. S. C. § 793 (e).

2. Whether the First Amendment permits the federal courts to enjoin publication of stories which would present a serious threat to national security. See *Near* v. *Minnesota,* 283 U. S. 697, 716 (1931) (dictum).

3. Whether the threat to publish highly secret documents is of itself a sufficient implication of national security to justify an injunction on the theory that regardless of the contents of the documents harm enough results simply from the demonstration of such a breach of secrecy.

4. Whether the unauthorized disclosure of any of these particular documents would seriously impair the national security.

5. What weight should be given to the opinion of high officers in the Executive Branch of the Government with respect to questions 3 and 4.

6. Whether the newspapers are entitled to retain and use the documents notwithstanding the seemingly uncontested facts that the documents, or the originals of which they are duplicates, were purloined from the Government's possession and that the newspapers received them with knowledge that they had been feloniously acquired. Cf. *Liberty Lobby, Inc.* v. *Pearson,* 129 U. S. App. D. C. 74, 390 F. 2d 489 (1967, amended 1968).

7. Whether the threatened harm to the national security or the Government's possessory interest in the documents justifies the issuance of an injunction against publication in light of—

a. The strong First Amendment policy against prior restraints on publication;

b. The doctrine against enjoining conduct in violation of criminal statutes; and

c. The extent to which the materials at issue have apparently already been otherwise disseminated.

These are difficult questions of fact, of law, and of judgment; the potential consequences of erroneous decision are enormous. The time which has been available to us, to the lower courts,* and to the parties has been wholly inadequate for giving these cases the kind of consideration they deserve. It is a reflection on the stability of the judicial process that these great issues—as important as any that have arisen during my time on the Court—should have been decided under the pressures engendered by the torrent of publicity that has attended these litigations from their inception.

Forced as I am to reach the merits of these cases, I dissent from the opinion and judgments of the Court. Within the severe limitations imposed by the time constraints under which I have been required to operate, I can only state my reasons in telescoped form, even though in different circumstances I would have felt constrained to deal with the cases in the fuller sweep indicated above.

It is a sufficient basis for affirming the Court of Appeals for the Second Circuit in the *Times* litigation to observe that its order must rest on the conclusion that because of the time elements the Government had not been given an adequate opportunity to present its case

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*The hearing in the *Post* case before Judge Gesell began at 8 a. m. on June 21, and his decision was rendered, under the hammer of a deadline imposed by the Court of Appeals, shortly before 5 p. m. on the same day. The hearing in the *Times* case before Judge Gurfein was held on June 18 and his decision was rendered on June 19. The Government's appeals in the two cases were heard by the Courts of Appeals for the District of Columbia and Second Circuits, each court sitting *en banc,* on June 22. Each court rendered its decision on the following afternoon.

to the District Court. At the least this conclusion was not an abuse of discretion.

In the *Post* litigation the Government had more time to prepare; this was apparently the basis for the refusal of the Court of Appeals for the District of Columbia Circuit on rehearing to conform its judgment to that of the Second Circuit. But I think there is another and more fundamental reason why this judgment cannot stand—a reason which also furnishes an additional ground for not reinstating the judgment of the District Court in the *Times* litigation, set aside by the Court of Appeals. It is plain to me that the scope of the judicial function in passing upon the activities of the Executive Branch of the Government in the field of foreign affairs is very narrowly restricted. This view is, I think, dictated by the concept of separation of powers upon which our constitutional system rests.

In a speech on the floor of the House of Representatives, Chief Justice John Marshall, then a member of that body, stated:

> "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." 10 Annals of Cong. 613 (1800).

From that time, shortly after the founding of the Nation, to this, there has been no substantial challenge to this description of the scope of executive power. See *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319–321 (1936), collecting authorities.

From this constitutional primacy in the field of foreign affairs, it seems to me that certain conclusions necessarily follow. Some of these were stated concisely by President Washington, declining the request of the House of Representatives for the papers leading up to the negotiation of the Jay Treaty:

> "The nature of foreign negotiations requires caution, and their success must often depend on secrecy;

> and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers." 1 J. Richardson, Messages and Papers of the Presidents 194–195 (1896).

The power to evaluate the "pernicious influence" of premature disclosure is not, however, lodged in the Executive alone. I agree that, in performance of its duty to protect the values of the First Amendment against political pressures, the judiciary must review the initial Executive determination to the point of satisfying itself that the subject matter of the dispute does lie within the proper compass of the President's foreign relations power. Constitutional considerations forbid "a complete abandonment of judicial control." Cf. *United States* v. *Reynolds,* 345 U. S. 1, 8 (1953). Moreover, the judiciary may properly insist that the determination that disclosure of the subject matter would irreparably impair the national security be made by the head of the Executive Department concerned—here the Secretary of State or the Secretary of Defense—after actual personal consideration by that officer. This safeguard is required in the analogous area of executive claims of privilege for secrets of state. See *id.,* at 8 and n. 20; *Duncan* v. *Cammell, Laird & Co.,* [1942] A. C. 624, 638 (House of Lords).

But in my judgment the judiciary may not properly go beyond these two inquiries and redetermine for itself the probable impact of disclosure on the national security.

> "[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such de-

> cisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103, 111 (1948) (Jackson, J.).

Even if there is some room for the judiciary to override the executive determination, it is plain that the scope of review must be exceedingly narrow. I can see no indication in the opinions of either the District Court or the Court of Appeals in the *Post* litigation that the conclusions of the Executive were given even the deference owing to an administrative agency, much less that owing to a co-equal branch of the Government operating within the field of its constitutional prerogative.

Accordingly, I would vacate the judgment of the Court of Appeals for the District of Columbia Circuit on this ground and remand the case for further proceedings in the District Court. Before the commencement of such further proceedings, due opportunity should be afforded the Government for procuring from the Secretary of State or the Secretary of Defense or both an expression of their views on the issue of national security. The ensuing review by the District Court should be in accordance with the views expressed in this opinion. And for the reasons stated above I would affirm the judgment of the Court of Appeals for the Second Circuit.

Pending further hearings in each case conducted under the appropriate ground rules, I would continue the

restraints on publication. I cannot believe that the doctrine prohibiting prior restraints reaches to the point of preventing courts from maintaining the *status quo* long enough to act responsibly in matters of such national importance as those involved here.

MR. JUSTICE BLACKMUN, dissenting.

I join MR. JUSTICE HARLAN in his dissent. I also am in substantial accord with much that MR. JUSTICE WHITE says, by way of admonition, in the latter part of his opinion.

At this point the focus is on *only* the comparatively few documents specified by the Government as critical. So far as the other material—vast in amount—is concerned, let it be published and published forthwith if the newspapers, once the strain is gone and the sensationalism is eased, still feel the urge so to do.

But we are concerned here with the few documents specified from the 47 volumes. Almost 70 years ago Mr. Justice Holmes, dissenting in a celebrated case, observed:

> "Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure . . . ." *Northern Securities Co.* v. *United States,* 193 U. S. 197, 400–401 (1904).

The present cases, if not great, are at least unusual in their posture and implications, and the Holmes observation certainly has pertinent application.

The New York Times clandestinely devoted a period of three months to examining the 47 volumes that came into its unauthorized possession. Once it had begun publi-

cation of material from those volumes, the New York case now before us emerged. It immediately assumed, and ever since has maintained, a frenetic pace and character. Seemingly, once publication started, the material could not be made public fast enough. Seemingly, from then on, every deferral or delay, by restraint or otherwise, was abhorrent and was to be deemed violative of the First Amendment and of the public's "right immediately to know." Yet that newspaper stood before us at oral argument and professed criticism of the Government for not lodging its protest earlier than by a Monday telegram following the initial Sunday publication.

The District of Columbia case is much the same.

Two federal district courts, two United States courts of appeals, and this Court—within a period of less than three weeks from inception until today—have been pressed into hurried decision of profound constitutional issues on inadequately developed and largely assumed facts without the careful deliberation that, one would hope, should characterize the American judicial process. There has been much writing about the law and little knowledge and less digestion of the facts. In the New York case the judges, both trial and appellate, had not yet examined the basic material when the case was brought here. In the District of Columbia case, little more was done, and what was accomplished in this respect was only on required remand, with the Washington Post, on the excuse that it was trying to protect its source of information, initially refusing to reveal what material it actually possessed, and with the District Court forced to make assumptions as to that possession.

With such respect as may be due to the contrary view, this, in my opinion, is not the way to try a lawsuit of this magnitude and asserted importance. It is not the way for federal courts to adjudicate, and to be required to adjudicate, issues that allegedly concern the Nation's

vital welfare. The country would be none the worse off were the cases tried quickly, to be sure, but in the customary and properly deliberative manner. The most recent of the material, it is said, dates no later than 1968, already about three years ago, and the Times itself took three months to formulate its plan of procedure and, thus, deprived its public for that period.

The First Amendment, after all, is only one part of an entire Constitution. Article II of the great document vests in the Executive Branch primary power over the conduct of foreign affairs and places in that branch the responsibility for the Nation's safety. Each provision of the Constitution is important, and I cannot subscribe to a doctrine of unlimited absolutism for the First Amendment at the cost of downgrading other provisions. First Amendment absolutism has never commanded a majority of this Court. See, for example, *Near* v. *Minnesota,* 283 U. S. 697, 708 (1931), and *Schenck* v. *United States,* 249 U. S. 47, 52 (1919). What is needed here is a weighing, upon properly developed standards, of the broad right of the press to print and of the very narrow right of the Government to prevent. Such standards are not yet developed. The parties here are in disagreement as to what those standards should be. But even the newspapers concede that there are situations where restraint is in order and is constitutional. Mr. Justice Holmes gave us a suggestion when he said in *Schenck,*

> "It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." 249 U. S., at 52.

I therefore would remand these cases to be developed expeditiously, of course, but on a schedule permitting the

orderly presentation of evidence from both sides, with the use of discovery, if necessary, as authorized by the rules, and with the preparation of briefs, oral argument, and court opinions of a quality better than has been seen to this point. In making this last statement, I criticize no lawyer or judge. I know from past personal experience the agony of time pressure in the preparation of litigation. But these cases and the issues involved and the courts, including this one, deserve better than has been produced thus far.

It may well be that if these cases were allowed to develop as they should be developed, and to be tried as lawyers should try them and as courts should hear them, free of pressure and panic and sensationalism, other light would be shed on the situation and contrary considerations, for me, might prevail. But that is not the present posture of the litigation.

The Court, however, decides the cases today the other way. I therefore add one final comment.

I strongly urge, and sincerely hope, that these two newspapers will be fully aware of their ultimate responsibilities to the United States of America. Judge Wilkey, dissenting in the District of Columbia case, after a review of only the affidavits before his court (the basic papers had not then been made available by either party), concluded that there were a number of examples of documents that, if in the possession of the Post, and if published, "could clearly result in great harm to the nation," and he defined "harm" to mean "the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate . . . ." I, for one, have now been able to give at least some cursory study not only to the affidavits, but to the material itself. I regret to say that from this examination I fear that Judge Wilkey's statements have possible foundation. I therefore share

his concern. I hope that damage has not already been done. If, however, damage has been done, and if, with the Court's action today, these newspapers proceed to publish the critical documents and there results therefrom "the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate," to which list I might add the factors of prolongation of the war and of further delay in the freeing of United States prisoners, then the Nation's people will know where the responsibility for these sad consequences rests.

Reporter's Note

The next page is purposely numbered 901. The numbers between 763 and 901 were intentionally omitted, in order to make it possible to publish the orders in the current preliminary prints of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

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ORDERS FROM JUNE 7 THROUGH JUNE 30, 1971

JUNE 7, 1971

Affirmed on Appeal

No. 1269. SWANK, DIRECTOR, ILLINOIS DEPARTMENT OF PUBLIC AID *v.* RODRIGUEZ ET AL. Appeal from D. C. N. D. Ill. Motion for leave to amend jurisdictional statement, and motion of appellees for leave to proceed *in forma pauperis*, granted. Judgment affirmed. Reported below: 318 F. Supp. 289. [For earlier order herein, see 401 U. S. 990.]

No. 6847. ROMERO ET AL. *v.* HODGSON, SECRETARY OF LABOR, ET AL. Appeal from D. C. N. D. Cal. Motion of appellants for leave to proceed *in forma pauperis* granted. Judgment affirmed. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted. Reported below: 319 F. Supp. 1201.

Appeals Dismissed

No. 1534. AD HOC COMMITTEE ON CONSUMER PROTECTION *v.* UNITED STATES ET AL. Appeal from D. C. D. C. Motion to dispense with printing jurisdictional statement granted. Appeal dismissed for want of jurisdiction.

No. 1590. MUELLER BRASS CO. *v.* GROSS INCOME TAX DIVISION, DEPARTMENT OF REVENUE OF INDIANA. Appeal from Sup. Ct. Ind. dismissed for want of substantial federal question. Reported below: —— Ind. ——, 265 N. E. 2d 704.

Vacated and Remanded on Appeal

No. 495. GAYTAN ET AL. *v.* CASSIDY ET AL. Appeal from D. C. W. D. Tex. Motions of Gilbert Trujillo et al. for leave to proceed *in forma pauperis* and for leave to file a brief as *amici curiae* granted. Judgment vacated and case remanded for reconsideration in light of *Bell* v. *Burson,* 402 U. S. 535. Reported below: 317 F. Supp. 46.

No. 6171. CHAPPELL ET AL. *v.* BURSON, DIRECTOR, GEORGIA DEPARTMENT OF PUBLIC SAFETY, ET AL. Appeal from D. C. N. D. Ga. Motion of appellants for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for reconsideration in light of *Bell* v. *Burson,* 402 U. S. 535.

No. 6594. POLLION ET AL. *v.* LEWIS, SECRETARY OF STATE OF ILLINOIS, ET AL. Appeal from D. C. N. D. Ill. Motion of appellants for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for reconsideration in light of *Bell* v. *Burson,* 402 U. S. 535. Reported below: 320 F. Supp. 1343.

Certiorari Granted—Vacated and Remanded

No. 6453. WALLACE *v.* UNITED STATES. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Upon consideration of suggestion of the Solicitor General and upon this Court's examination of the documents submitted, judgment vacated and case remanded to hear further testimony from members of the appeal board as to basis for their action and for the court to reconsider case in light of this Court's decision in *McGee* v. *United States,* 402 U. S. 479. Reported below: 435 F. 2d 12.

No. 6870. CASTRO *v.* UNITED STATES. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for reconsideration in light of this Court's decisions in *Leary* v. *United States,* 395 U. S. 6 (1969), and *United States* v. *United States Coin & Currency,* 401 U. S. 715. Reported below: 436 F. 2d 975.

Miscellaneous Orders

No. —. PATLOGAN ET AL. *v.* WEST VIRGINIA ET AL. C. A. 2d Cir. Application for stay presented to MR. JUSTICE HARLAN, and by him referred to the Court, denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application.

No. —. SARG *v.* CHAFEE, SECRETARY OF THE NAVY, ET AL. C. A. 3d Cir. Application for stay or in the alternative recall of mandate, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

No. —. MITCHELL *v.* LOUISIANA. Sup. Ct. La. Application for stay presented to MR. JUSTICE BLACK, and by him referred to the Court, denied.

No. 6907. ODOM *v.* FERGUSON, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 1552. FORD MOTOR CO. *v.* UNITED STATES ET AL. Appeal from D. C. E. D. Mich. Probable jurisdiction noted. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this matter. Reported below: 286 F. Supp. 407, 315 F. Supp. 372.

No. 1606. DIES ET AL. *v.* CARTER ET AL. Appeal from D. C. N. D. Tex. Probable jurisdiction noted. Reported below: 321 F. Supp. 1358.

Certiorari Granted

No. 1549. GROPPI *v.* LESLIE, SHERIFF. C. A. 7th Cir. Certiorari granted. Reported below: 436 F. 2d 326 and 331.

No. 5712. MILTON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 428 F. 2d 463.

Certiorari Denied

No. 190. UNITED TRANSPORTATION UNION *v.* CHICAGO & NORTH WESTERN RAILWAY CO. C. A. 7th Cir. Certiorari denied. Reported below: 422 F. 2d 979.

No. 1245. BAKER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 437 F. 2d 239.

No. 1415. KANKAKEE FEDERATION OF TEACHERS LOCAL NO. 886 ET AL. *v.* BOARD OF EDUCATION OF KANKAKEE SCHOOL DISTRICT NO. 111. Sup. Ct. Ill. Certiorari denied. Reported below: 46 Ill. 2d 439, 264 N. E. 2d 18.

No. 1425. HILL ET UX. *v.* RACHAL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 435 F. 2d 59.

No. 1548. WILSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 436 F. 2d 972.

No. 1571. RANSOM *v.* BRENNAN, EXECUTRIX. C. A. 5th Cir. Certiorari denied. Reported below: 437 F. 2d 513.

No. 1578. CHANEY *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 237 So. 2d 281.

No. 1569. FIBREBOARD CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 141 U. S. App. D. C. 178, 436 F. 2d 908.

No. 1583. V. E. B. CARL ZEISS, JENA, ET AL. *v.* CARL ZEISS STIFTUNG ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 433 F. 2d 686.

No. 1587. STEIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 437 F. 2d 775.

No. 1588. SEARS, ROEBUCK & CO. ET AL. *v.* SOLIEN, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 440 F. 2d 124.

No. 1591. OHIO *v.* GRIFFITH. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 1593. SOCIETE INDUSTRIES MECHANIQUES ALLIES *v.* LEWIS, U. S. DISTRICT JUDGE. C. A. 4th Cir. Certiorari denied.

No. 1594. MARIE PHILLIPS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. Reported below: 143 U. S. App. D. C. 252, 443 F. 2d 667.

No. 1595. STEVENS ET AL. *v.* BUCKLEY ET AL. Ct. App. Wash. Certiorari denied. Reported below: 3 Wash. App. 593, 476 P. 2d 724.

No. 1597. CONTINENTAL BROADCASTING, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 142 U. S. App. D. C. 70, 439 F. 2d 580.

No. 1602. KINLOCH *v.* NEWS & OBSERVER PUBLISHING CO. C. A. 4th Cir. Certiorari denied. Reported below: 427 F. 2d 350.

No. 1603. STRONG ET AL. *v.* GENERAL ELECTRIC CO. C. A. 5th Cir. Certiorari denied. Reported below: 434 F. 2d 1042.

No. 1611. SMOTHERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 435 F. 2d 209.

No. 1618. PASTORELLE *v.* COLLINS ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 1638. JACKSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 436 F. 2d 39.

No. 1652. FIDELITY & CASUALTY COMPANY OF NEW YORK ET AL. *v.* NATIONAL BANK OF COMMERCE IN NEW ORLEANS. C. A. 5th Cir. Certiorari denied.

No. 1661. BEVERAGE DISTRIBUTORS, INC. *v.* OLYMPIA BREWING CO. C. A. 9th Cir. Certiorari denied. Reported below: 440 F. 2d 21.

No. 5791. BROWN *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 23 Mich. App. 369, 178 N. W. 2d 547.

No. 6562. HALL *v.* UNITED STATES; and
No. 6710. JAMES ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 432 F. 2d 303.

No. 6566. THOMAS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 440 Pa. 213, 270 A. 2d 211.

No. 6610. GERBERDING *v.* SWENSON, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 435 F. 2d 368.

No. 6622. KELLEY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 44 Ill. 2d 315, 255 N. E. 2d 390.

No. 6612. HORTON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 6656. HIGHTOWER *v.* SMITH, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: 227 Ga. 144, 179 S. E. 2d 242.

No. 6667. PETERSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 435 F. 2d 192.

No. 6672. DENNIS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 47 Ill. 2d 120, 265 N. E. 2d 385.

No. 6673. BRANION *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 47 Ill. 2d 70, 265 N. E. 2d 1.

No. 6674. ENGLISH *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied.

No. 6681. BROOKS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 3 Md. App. 485, 240 A. 2d 114.

No. 6690. RELIFORD *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 434 F. 2d 1315.

No. 6694. CARNES *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 6731. FLOYD *v.* NEIL. C. A. 6th Cir. Certiorari denied.

No. 6743. FIELDS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 438 F. 2d 205.

No. 6802. MCCUBBINS *v.* KEENAN ET AL. Sup. Ct. Alaska. Certiorari denied. Reported below: 475 P. 2d 696.

No. 6831. ARENADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 435 F. 2d 1347.

No. 6832. HODGES ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 436 F. 2d 676.

No. 6857. CASTLE *v.* MOSELEY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 6868. COHEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 436 F. 2d 586.

No. 6874. ETHINGTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 6875. SUMMERVILLE *v.* COOK, PENITENTIARY SUPERINTENDENT. C. A. 5th Cir. Certiorari denied. Reported below: 438 F. 2d 1196.

No. 6881. LoCICERO ET AL. *v.* LaVALLEE, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied.

No. 6882. WIDZIEWICZ *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 28 N. Y. 2d 544, 268 N. E. 2d 123.

No. 6883. HARDIN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 6886. FLOWERS *v.* HASKINS, CORRECTIONAL SUPERINTENDENT. Sup. Ct. Ohio. Certiorari denied. Reported below: 25 Ohio St. 2d 186, 267 N. E. 2d 430.

No. 6887. CARTER *v.* CALIFORNIA ADULT AUTHORITY. C. A. 9th Cir. Certiorari denied. Reported below: 433 F. 2d 978.

No. 6889. BURKES *v.* CALLION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 433 F. 2d 318.

No. 6888. COLLINS *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 186 Neb. 50, 180 N. W. 2d 687.

No. 6890. RANDOLPH ET AL. *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 186 Neb. 297, 183 N. W. 2d 225.

No. 6891. SIMMS *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied.

No. 6893. MASTRACCHIO *v.* HOWARD, WARDEN. C. A. 1st Cir. Certiorari denied.

No. 6894. TOTH *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 6896. FOREMAN *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 6902. HITE *v.* MOYNAHAN, CHIEF JUDGE, U. S. DISTRICT COURT. C. A. 6th Cir. Certiorari denied.

No. 6903. ROGERS *v.* PICARD, CORRECTIONAL SUPERINTENDENT. C. A. 1st Cir. Certiorari denied.

No. 6905. VARRELLA *v.* VARRELLA. C. A. D. C. Cir. Certiorari denied.

No. 6909. WOLFF *v.* BUCHKOE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 6917. BILLINGSLEY ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 440 F. 2d 823.

No. 1589. MODLA *v.* CHRYSLER CORP. ET AL. C. A. 6th Cir. Motion to dispense with printing petition granted. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion and petition.

No. 6926. GARR *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 463 S. W. 2d 109.

No. 6928. CAMPBELL *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 6969. HAMMOND *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: See —— Tenn. App. ——, 464 S. W. 2d 328.

No. 651. FLORIDA POWER CORP. *v.* GAINESVILLE UTILITIES DEPARTMENT ET AL.; and

No. 652. FLORIDA POWER CORP. *v.* FEDERAL POWER COMMISSION. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of these petitions. Reported below: 425 F. 2d 1196.

No. 1623. TODD *v.* NORTHWEST AIRLINES, INC. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 438 F. 2d 527.

No. 1309. ANCKAITIS, SECRETARY OF TRANSPORTATION OF PENNSYLVANIA, ET AL. *v.* MILLER. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 436 F. 2d 115.

No. 1584. CARLSON *v.* CITY OF TALLAHASSEE. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 240 So. 2d 866.

No. 6219. HOUSTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 433 F. 2d 939.

No. 6390. LLOYD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 431 F. 2d 160.

No. 1610. DAVIS *v.* ROYAL-GLOBE INSURANCE COMPANIES ET AL. Sup. Ct. La. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 257 La. 523, 242 So. 2d 839.

No. 6550. DEANS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 436 F. 2d 596.

No. 1601. LIPKIN *v.* DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA ET AL. Ct. App. Cal., 1st App. Dist. Motion to dispense with printing petition granted. Certiorari denied.

No. 1604. FRANKLIN *v.* GROSSINGER MOTOR SALES, INC. Sup. Ct. Ill. Motion to dispense with printing petition granted. Certiorari denied. Reported below: See 122 Ill. App. 2d 391, 259 N. E. 2d 307.

No. 1613. GOTTESMAN ET AL. *v.* GENERAL MOTORS CORP. ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE HARLAN and MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 436 F. 2d 1205.

No. 1634. DELAWARE & HUDSON RAILWAY CO. ET AL. *v.* UNITED TRANSPORTATION UNION. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE STEWART is of the opinion that certiorari should be granted. Reported below: —— U. S. App. D. C. ——, 450 F. 2d 603.

No. 1605. BLACK *v.* SHERATON CORPORATION OF AMERICA ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 6935. HYLER ET AL. *v.* REYNOLDS METALS CO. ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this petition. Reported below: 434 F. 2d 1064.

Rehearing Denied

No. 281. SWANN ET AL. *v.* CHARLOTTE-MECKLENBURG BOARD OF EDUCATION ET AL., 402 U. S. 1;

No. 349. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION ET AL. *v.* SWANN ET AL., 402 U. S. 1;

No. 1216. SID W. RICHARDSON FOUNDATION *v.* UNITED STATES, 401 U. S. 1009;

No. 1316. 2,606.84 ACRES OF LAND IN TARRANT COUNTY, TEXAS *v.* UNITED STATES, 402 U. S. 916;

No. 1380. MATHER CONSTRUCTION CO. ET AL. *v.* CONTINENTAL CASUALTY CO. ET AL., 402 U. S. 907;

No. 1390. PRUETT *v.* TEXAS, 402 U. S. 902;

No. 1439. ETHICON, INC. *v.* HANDGARDS, INC., ET AL., 402 U. S. 929;

No. 1443. CHAMBERS ET AL. *v.* UNITED STATES, 402 U. S. 944;

No. 6199. SPIELER *v.* UNITED STATES, 402 U. S. 950; and

No. 6688. GINSBURG *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, 402 U. S. 976. Petitions for rehearing denied.

No. 345. UNITED STATES *v.* FREED ET AL., 401 U. S. 601. Motion for leave to file petition for rehearing denied.

Miscellaneous Orders

No. 1719. LAMAR LIFE BROADCASTING CO. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Application for stay of enforcement of orders of the Federal Communications Commission presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. THE CHIEF JUSTICE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN took no part in the consideration or decision of this application.

No. 1773. SCAFATI, CORRECTIONAL SUPERINTENDENT *v.* FISHER. C. A. 1st Cir. Application for stay of order of the United States Court of Appeals for the First Circuit, dated June 4, 1971, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, granted by the Court pending further order. Reported below: 439 F. 2d 307.

JUNE 14, 1971

Affirmed on Appeal

No. 803. GUNDERSON ET AL. *v.* ADAMS, SECRETARY OF STATE OF FLORIDA, ET AL. Affirmed on appeal from D. C. S. D. Fla. MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

No. 887. BRENNER ET AL. *v.* SCHOOL DISTRICT OF KANSAS CITY, MISSOURI, ET AL. Affirmed on appeal from D. C. W. D. Mo. *Gordon* v. *Lance, ante,* p. 1. MR. JUSTICE MARSHALL took no part in the consideration or decision of this case. Reported below: 315 F. Supp. 627.

No. 1662. SCHOOL DISTRICT OF THE TOWNSHIP OF SHALER ET AL. *v.* INTERIM OPERATING COMMITTEE OF ADMINISTRATIVE UNIT NO. 5 ET AL. Affirmed on appeal from D. C. W. D. Pa.

Appeals Dismissed

No. 52. WHITCOMB, GOVERNOR OF INDIANA *v.* CHAVIS ET AL.; and

No. 53. RUCKELSHAUS ET AL. *v.* CHAVIS ET AL. Appeals from D. C. S. D. Ind. dismissed. *Gunn* v. *University Committee,* 399 U. S. 383 (1970), *Whitcomb* v. *Chavis, ante,* p. 124. MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases. Reported below: 305 F. Supp. 1364.

No. 148. DODDS *v.* JOHANSEN, CITY CLERK OF MINNEAPOLIS, ET AL. Appeal from D. C. Minn. dismissed. *Gunn* v. *University Committee,* 399 U. S. 383 (1970). MR. JUSTICE MARSHALL took no part in the consideration or decision of this case. Reported below: 310 F. Supp. 61.

No. 523. BOGERT ET AL. *v.* KINZER, CLERK OF CITY OF POCATELLO, ET AL. Appeal from Sup. Ct. Idaho dismissed for want of substantial federal question. *Gordon* v. *Lance, ante,* p. 1. MR. JUSTICE MARSHALL took no part in the consideration or decision of this case. Reported below: 93 Idaho 515, 465 P. 2d 639.

No. 6947. STRADER *v.* KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM. Appeal from Sup. Ct. Kan. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 206 Kan. 392, 479 P. 2d 860.

No. 6948. BREWSTER *v.* LAKE SUPERIOR DISTRICT POWER CO. Appeal from C. A. 7th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Vacated and Remanded on Appeal

No. 105. ADAMS ET AL. *v.* BOARD OF REGENTS OF THE STATE OF FLORIDA ET AL. Appeal from D. C. M. D. Fla. Judgment vacated and case remanded for reconsideration in light of this Court's decision in *Connell* v. *Higginbotham, ante,* p. 207. MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

No. 147. RIMARCIK *v.* JOHANSEN, CITY CLERK OF MINNEAPOLIS, ET AL. Appeal from D. C. Minn. Judgment vacated and case remanded for reconsideration in light of this Court's decision in *Gordon* v. *Lance, ante,* p. 1. MR. JUSTICE MARSHALL took no part in the consideration or decision of this case. Reported below: 310 F. Supp. 61.

No. 1645. ORLEANS PARISH BOARD OF SUPERVISORS OF ELECTIONS ET AL. *v.* DUNDEE. Appeal from C. A. 5th Cir. Judgment vacated and case remanded for reconsideration in light of amendments to Sections 1909, 1931, and 1995 of Title 47 of Louisiana Revised Statutes of 1950, enacted by the Legislature of Louisiana by Act No. 232 on July 2, 1970. MR. JUSTICE DOUGLAS dissents from this action of the Court. Reported below: 434 F. 2d 135.

Certiorari Granted—Vacated and Remanded

No. 641. MIHALY ET AL. *v.* WESTBROOK ET AL. Sup. Ct. Cal. Certiorari granted, judgment vacated, and case remanded for reconsideration in light of this Court's decision in *Gordon* v. *Lance, ante,* p. 1. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 2 Cal. 3d 765, 471 P. 2d 487.

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No. 1656. POLSKY *v.* WETHERILL ET AL. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded pursuant to recommendation of the Solicitor General in the Memorandum for the United States. Reported below: 438 F. 2d 132.

No. 6578. COLTON *v.* UNITED STATES. C. A. 10th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for reconsideration in light of this Court's decisions in *United States* v. *United States Coin & Currency,* 401 U. S. 715 (1970), and *Leary* v. *United States,* 395 U. S. 6 (1969).

Miscellaneous Orders

No. 958. FEDERAL POWER COMMISSION *v.* FLORIDA POWER & LIGHT CO. C. A. 5th Cir. [Certiorari granted, 401 U. S. 907.] Motion of American Public Power Assn. for leave to file a brief as *amicus curiae* granted. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 1184. NATIONAL LABOR RELATIONS BOARD *v.* PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' & CEMENT MASONS' INTERNATIONAL ASSN., AFL–CIO, ET AL.; and

No. 1231. TEXAS STATE TILE & TERRAZZO CO., INC., ET AL. *v.* PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' & CEMENT MASONS' INTERNATIONAL ASSN., AFL–CIO, ET AL. C. A. D. C. Cir. [Certiorari granted, 401 U. S. 973.] Motions of Associated General Contractors of America et al., Scientific Apparatus Makers Assn., and Laborers' International Union of North America, AFL–CIO, for leave to file briefs as *amici curiae,* granted.

No. 316. Uniformed Sanitation Men Assn., Inc., et al. *v.* Commissioner of Sanitation of the City of New York et al. C. A. 2d Cir. Motion to advance cause for immediate consideration denied. Reported below: 426 F. 2d 619.

No. 6060. Fuentes et al. *v.* Shevin, Attorney General of Florida, et al. Appeal from D. C. S. D. Fla. [Probable jurisdiction noted, 401 U. S. 906.] Motion to dispense with printing *amicus curiae* brief of National Legal Aid & Defender Assn. granted.

Probable Jurisdiction Noted

No. 774. Cole, State Hospital Superintendent, et al. *v.* Richardson. Appeal from D. C. Mass. Probable jurisdiction noted. Mr. Justice Marshall took no part in the consideration or decision of this case. Reported below: See 300 F. Supp. 1321.

Certiorari Granted. (See also No. 1267, *ante,* p. 384.)

No. 952. Perry et al. *v.* Sindermann. C. A. 5th Cir. Motion of National Education Assn. for leave to file a brief as *amicus curiae* and certiorari granted. Reported below: 430 F. 2d 939.

No. 5983. Papachristou et al. *v.* City of Jacksonville. Dist. Ct. App. Fla., 1st Dist. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 236 So. 2d 141.

No. 6294. Smith et al. *v.* Florida. Sup. Ct. Fla. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 239 So. 2d 250.

Certiorari Denied. (See also Nos. 6947 and 6948, *supra.*)

No. 1030. Del Nobile *v.* New Jersey. Super. Ct. N. J. Certiorari denied. Reported below: See 57 N. J. 137, 270 A. 2d 39.

No. 1362. CHABERT ET AL. *v.* CITY OF WESTWEGO ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 434 F. 2d 1065.

No. 1375. IRVING *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 439 F. 2d 351.

No. 1586. MARATHON OIL CO. ET AL. *v.* BRUCE ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 436 F. 2d 733.

No. 1608. LUNA ET UX. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 1609. GRABOWSKI, AKA GRABINSKI *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 206 Kan. 532, 479 P. 2d 830.

No. 1615. VAN RIPER *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 127 Ill. App. 2d 394, 262 N. E. 2d 141.

No. 1619. WATERHOUSE ET AL. *v.* MITCHELL, ATTORNEY GENERAL, ET AL. C. A. 4th Cir. Certiorari denied.

No. 1621. BARGER *v.* WASHINGTON. Super. Ct. Wash., Franklin County. Certiorari denied.

No. 1627. DAVERN *v.* CIVIL SERVICE COMMISSION OF THE CITY OF CHICAGO ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 47 Ill. 2d 469, 269 N. E. 2d 713.

No. 1628. NOVELART MANUFACTURING CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 434 F. 2d 1011.

No. 1632. HUGHES TOOL CO. *v.* INGERSOLL-RAND CO. C. A. 5th Cir. Certiorari denied. Reported below: 437 F. 2d 1106.

No. 1629. KOTAKES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 440 F. 2d 342.

No. 1633. VILLAGE OF CHICAGO RIDGE *v.* GARDNER. Sup. Ct. Ill. Certiorari denied. Reported below: See 128 Ill. App. 2d 157, 262 N. E. 2d 829.

No. 1636. BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS ET AL. *v.* RAILWAY EXPRESS AGENCY, INC. C. A. 5th Cir. Certiorari denied. Reported below: 437 F. 2d 388.

No. 1639. TUCKER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 461 S. W. 2d 630.

No. 1642. KARGER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 439 F. 2d 1108.

No. 1644. MILNE *v.* VERMONT. Sup. Ct. Vt. Certiorari denied. Reported below: 129 Vt. 81, 271 A. 2d 842.

No. 1648. RAGSDALE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 438 F. 2d 21.

No. 1653. HAYES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 439 F. 2d 1132.

No. 1668. AMERICAN BEEF PACKERS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied. Reported below: 438 F. 2d 331.

No. 1673. WEBB *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 1676. GAMBOCZ *v.* ELLMYER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 438 F. 2d 915.

No. 6611. TARALLO, AKA TARO *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 433 F. 2d 4.

No. 6523. DARNELL *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 6583. NATOLI *v.* ESTATE OF HAMILTON. Sup. Ct. Pa. Certiorari denied.

No. 6680. ODELL *v.* CADY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 6684. VAN HOOK *v.* LLOYD, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 6707. PIETSCH *v.* PRESIDENT OF THE UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 434 F. 2d 861.

No. 6736. MCBRIDE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 438 F. 2d 517.

No. 6782. LANIER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 6790. GRASSO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 437 F. 2d 317.

No. 6817. JACK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 439 F. 2d 879.

No. 6836. SHKUKANI *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 8th Cir. Certiorari denied. Reported below: 435 F. 2d 1378.

No. 6862. TIMMONS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 439 F. 2d 709.

No. 6867. SWIFT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 436 F. 2d 390.

No. 6899. CARTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 437 F. 2d 444.

No. 6922. TRAMMELL *v.* DEEGAN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 6914. Moss *v.* New Jersey. Sup. Ct. N. J. Certiorari denied. Reported below: 57 N. J. 437, 273 A. 2d 64.

No. 6924. Lane et al. *v.* Pate, Warden, et al. C. A. 7th Cir. Certiorari denied. Reported below: 437 F. 2d 909.

No. 6931. White *v.* Cardwell, Warden. C. A. 6th Cir. Certiorari denied.

No. 6932. Lane *v.* Wingo, Warden. C. A. 6th Cir. Certiorari denied.

No. 6937. Setzler *v.* Florida. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 240 So. 2d 203.

No. 6939. Valdez *v.* Craven, Warden. C. A. 9th Cir. Certiorari denied.

No. 6941. Weis *v.* Mancusi, Correctional Superintendent. C. A. 2d Cir. Certiorari denied.

No. 6943. Benningfield *v.* Maryland. Ct. Sp. App. Md. Certiorari denied.

No. 6949. Martin *v.* Illinois. Sup. Ct. Ill. Certiorari denied. Reported below: 47 Ill. 2d 331, 265 N. E. 2d 685.

No. 6951. Hillery *v.* Nelson, Warden. C. A. 9th Cir. Certiorari denied.

No. 6953. Rodriguez *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 129 Ill. App. 2d 1, 262 N. E. 2d 815.

No. 648. Barnes *v.* A. S. Abell Co. Ct. App. Md. Certiorari denied. Mr. Justice Marshall took no part in the consideration or decision of this petition. Reported below: 258 Md. 56, 265 A. 2d 207.

No. 6954. MATTHEWS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 257 La. 220, 242 So. 2d 227.

No. 6955. NASH *v.* HESS OIL & CHEMICAL CORP. ET AL. Ct. App. Ga. Certiorari denied. Reported below: 123 Ga. App. 132, 179 S. E. 2d 778.

No. 6997. FERNANDEZ *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 730. WESTBROOK ET AL. *v.* MIHALY ET AL. Sup. Ct. Cal. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 2 Cal. 3d 765, 471 P. 2d 487.

No. 1556. WHITMORE *v.* TARR, NATIONAL DIRECTOR, SELECTIVE SERVICE SYSTEM, ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 1625. GREGORY ET AL. *v.* TARR, NATIONAL DIRECTOR, SELECTIVE SERVICE SYSTEM, ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 436 F. 2d 513.

No. 6787. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 439 F. 2d 700.

No. 6957. COWLING *v.* CRAVEN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 436 F. 2d 419.

No. 1612. POLORON PRODUCTS, INC. *v.* BELA SEATING CO., INC. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEWART is of the opinion that certiorari should be granted. Reported below: 438 F. 2d 733.

No. 1622. WHDH, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.;

No. 1708. CHARLES RIVER CIVIC TELEVISION, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 1716. GREATER BOSTON TELEVISION CORP. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of these petitions. Reported below: 143 U. S. App. D. C. 383, 444 F. 2d 841. [For earlier order herein, see 402 U. S. 1007.]

No. 1643. BRANDO *v.* COFFMAN ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. Reported below: 13 Cal. App. 3d 409, 91 Cal. Rptr. 796.

No. 1746. NATIONAL GYPSUM CO. ET AL. *v.* UNITED STATES GYPSUM CO. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. Reported below: 440 F. 2d 510.

No. 6880. MARIN *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART are of the opinion that certiorari should be granted. Reported below: 438 F. 2d 932.

No. 6908. THERIAULT *v.* HARRIS, WARDEN. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

Rehearing Denied

No. 481, Misc., October Term, 1964. BRADY *v.* OHIO, 381 U. S. 904, 957. Motion for leave to file second petition for rehearing denied. THE CHIEF JUSTICE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. —. CONNOR ET AL. *v.* JOHNSON ET AL., 402 U. S. 690;

No. 68. DEMING *v.* UNITED STATES, 402 U. S. 949;

No. 133. UNITED STATES *v.* THIRTY-SEVEN (37) PHOTOGRAPHS (LUROS, CLAIMANT), 402 U. S. 363;

No. 141. BROSSARD *v.* UNITED STATES, 402 U. S. 981;

No. 142. HARRIS *v.* UNITED STATES, 402 U. S. 981;

No. 145. FLESCH *v.* UNITED STATES, 402 U. S. 982;

No. 149. DILLON *v.* UNITED STATES, 402 U. S. 982;

No. 151. POSNER *v.* UNITED STATES, 402 U. S. 982;

No. 284. BENDER *v.* UNITED STATES, 402 U. S. 982;

No. 356. EVANS *v.* UNITED STATES, 402 U. S. 987;

No. 534. UNITED STATES *v.* REIDEL, 402 U. S. 351;

No. 1475. FUHRMAN, ADMINISTRATRIX, ET AL. *v.* UNITED STATES STEEL CORP. ET AL., 402 U. S. 987;

No. 6067. TYCZKOWSKI *v.* PENNSYLVANIA, 400 U. S. 1022;

No. 6535. MITCHELL *v.* UNITED STATES, 402 U. S. 946; and

No. 6822. NELSON *v.* WARDEN, KANSAS STATE PENITENTIARY, 402 U. S. 997. Petitions for rehearing denied.

No. 1334. SILVERMAN *v.* UNITED STATES, 402 U. S. 953. Petition for rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition.

No. 5219. SHAH *v.* IMMIGRATION AND NATURALIZATION SERVICE, 400 U. S. 837; and

No. 6653. EDMONDSON *v.* UNITED STATES, 402 U. S. 931. Motions for leave to file petitions for rehearing denied.

No. 6848. RUDERER *v.* REGAN, U. S. District Judge, 402 U. S. 1008. Petition for rehearing denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 6519. BRADY *v.* OHIO, 402 U. S. 989. Petition for rehearing and other relief denied.

JUNE 15, 1971

Dismissal Under Rule 60

No. 1009. UNITED STATES *v.* UNICORN ENTERPRISES, INC., ET AL. C. A. 2d Cir. [Certiorari granted, 401 U. S. 907.] Writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 432 F. 2d 705.

JUNE 21, 1971

Affirmed on Appeal.

No. 1341. JACKSON ET AL. *v.* OGILVIE, GOVERNOR OF ILLINOIS, ET AL. Affirmed on appeal from D. C. N. D. Ill. Reported below: 325 F. Supp. 864. [For earlier orders herein, see, *e. g.*, 401 U. S. 952.]

No. 1360. BELLER ET AL. *v.* ASKEW, GOVERNOR OF FLORIDA, ET AL. Affirmed on appeal from D. C. S. D. Fla. Reported below: 328 F. Supp. 485.

Appeals Dismissed

No. 122. FUCINI *v.* ILLINOIS. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 44 Ill. 2d 305, 255 N. E. 2d 380.

No. 724. ALHAMBRA CITY SCHOOL DISTRICT OF LOS ANGELES COUNTY ET AL. *v.* MIZE ET AL. Appeal from Sup. Ct. Cal. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 2 Cal. 3d 806, 471 P. 2d 515.

No. 1664. DESERT OUTDOOR ADVERTISING, INC. *v.* CALIFORNIA. Appeal from App. Dept., Super. Ct. Cal., County of Riverside, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 953. D. *v.* COUNTY OF ONONDAGA. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL are of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 27 N. Y. 2d 90, 261 N. E. 2d 627.

No. 1598. HOENE ET AL. *v.* JAMIESON, STATE COMMISSIONER OF HIGHWAYS OF MINNESOTA, ET AL. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. Reported below: 289 Minn. 1, 182 N. W. 2d 834.

No. 5078. IN RE JOHNSON. Appeal from Ct. App. Md. Motion of appellant for leave to proceed *in forma pauperis* granted. Appeal dismissed for want of substantial federal question. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 254 Md. 517, 255 A. 2d 419.

No. 5667. DEBACKER *v.* SIGLER. Appeal from Sup. Ct. Neb. Motion of appellant for leave to proceed *in forma pauperis* granted. Appeal dismissed for want of substantial federal question. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 185 Neb. 352, 175 N. W. 2d 912.

Vacated and Remanded on Appeal

No. 1383. UNITED STATES *v.* B & H DIST. CORP. ET AL. Appeal from D. C. W. D. Wis. Judgment vacated and case remanded for reconsideration in light of this Court's decisions in *United States* v. *Reidel,* 402 U. S. 351, and *United States* v. *Thirty-seven (37) Photographs,* 402 U. S. 363. Reported below: 319 F. Supp. 1231.

No. 1387. VAN HOOMISSEN ET AL. *v.* HAYSE ET AL. Appeal from D. C. Ore. Judgment vacated and case remanded for reconsideration in light of this Court's decisions in *Younger* v. *Harris,* 401 U. S. 37; and *Samuels* v. *Mackell,* and *Fernandez* v. *Mackell,* 401 U. S. 66. MR. JUSTICE DOUGLAS is of the opinion that the judgment should be affirmed. Reported below: 321 F. Supp. 642.

No. 6364. GONZALES ET AL. *v.* SHEA, DIRECTOR, COLORADO DEPARTMENT OF SOCIAL SERVICES, ET AL. Appeal from D. C. Colo. Motion of appellants for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for reconsideration in light of this Court's decision in *Graham* v. *Richardson,* and *Sailer* v. *Leger, ante,* p. 365. Reported below: 318 F. Supp. 572.

Certiorari Granted—Vacated and Remanded

No 761. MIZE ET AL. *v.* ALHAMBRA CITY SCHOOL DISTRICT OF LOS ANGELES COUNTY ET AL. Sup. Ct. Cal. Certiorari granted, judgment vacated, and case remanded for reconsideration in light of this Court's decision in *Gordon* v. *Lance, ante,* p. 1. Reported below: 2 Cal. 3d 806, 471 P. 2d 515.

No. 1305. BAINES *v.* CITY OF BIRMINGHAM. Ct. Crim. App. Ala. Certiorari granted, judgment vacated, and case remanded for reconsideration in light of this Court's decision in *Cohen* v. *California, ante,* p. 15. Reported below: 46 Ala. App. 267, 240 So. 2d 689.

No. 5687. TATE *v.* BLACKWELL, WARDEN. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for reconsideration in light of this Court's decision in *Griffin* v. *Breckenridge, ante,* p. 88.

Miscellaneous Orders

No. —. DIXON *v.* OREGON. Sup. Ct. Ore. Application for stay and continuance of bail, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. —. CONNOR ET AL. *v.* JOHNSON ET AL., 402 U. S. 690. Application for further stay to enforce this Court's mandate denied.

No. 189. CHICAGO & NORTH WESTERN RAILWAY CO. *v.* UNITED TRANSPORTATION UNION, 402 U. S. 570. Motion of respondent to issue judgment forthwith granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 538. SWARB ET AL. *v.* LENNOX ET AL. Appeal from D. C. E. D. Pa. [Probable jurisdiction noted, 401 U. S. 991.] Motion of Pennsylvania Credit Union League for leave to file brief as *amicus curiae* granted. Motion of National Consumers Law Center for leave to dispense with printing *amicus curiae* brief granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of these motions.

No. 1331. AFFILIATED UTE CITIZENS OF UTAH ET AL. *v.* UNITED STATES ET AL. C. A. 10th Cir. [Certiorari granted, 402 U. S. 905.] Motion of Association on American Indian Affairs, Inc., for leave to file a brief as *amicus curiae* granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 1184. NATIONAL LABOR RELATIONS BOARD *v.* PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' & CEMENT MASONS' INTERNATIONAL ASSN., AFL–CIO, ET AL.; and

No. 1231. TEXAS STATE TILE & TERRAZZO CO., INC., ET AL. *v.* PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' & CEMENT MASONS' INTERNATIONAL ASSN., AFL–CIO, ET AL. C. A. D. C. Cir. [Certiorari granted, 401 U. S. 973.] Motion of petitioners for additional time for oral argument granted and a total of 15 additional minutes allotted for that purpose. Respondents also allotted 15 additional minutes for oral argument. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 1332. RELIANCE ELECTRIC CO. *v.* EMERSON ELECTRIC CO. C. A. 8th Cir. [Certiorari granted, 401 U. S. 1008.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted and a total of 15 minutes allotted for that purpose. Respondent allotted 15 additional minutes for oral argument. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 7158. DIGESUALDO ET AL. *v.* SHEA, DIRECTOR, COLORADO DEPARTMENT OF SOCIAL SERVICES, ET AL. Appeal from D. C. Colo. Motion to expedite consideration denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 6158. LINDSEY ET AL. *v.* NORMET ET AL. Appeal from D. C. Ore. [Probable jurisdiction noted, 402 U. S. 941.] Motion of Legal Aid Society of Pima County Bar Assn. for leave to file a brief as *amicus curiae* granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 1389. UNITED STATES *v.* TUCKER. C. A. 9th Cir. [Certiorari granted, 402 U. S. 942.] Motion of respondent for appointment of counsel granted. It is ordered that William A. Norris, Esquire, of Los Angeles, California, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for respondent in this case. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 6959. HARRIS *v.* WINGO, WARDEN; and
No. 7108. GUBINS *v.* NELSON, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1667. MUNCASTER *v.* JOHNSON, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 364. UNITED STATES *v.* 12 200-FT. REELS OF SUPER 8MM. FILM ET AL. (PALADINI, CLAIMANT). Appeal from D. C. C. D. Cal. Probable jurisdiction noted.

No. 867. GOODING, WARDEN *v.* WILSON. Appeal from C. A. 5th Cir. Motion of appellee for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 431 F. 2d 855.

Certiorari Granted

No. 1687. UNITED STATES *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN ET AL. (PLAMONDON ET AL., REAL PARTIES IN INTEREST). C. A. 6th Cir. Certiorari granted. Reported below: 444 F. 2d 651.

Certiorari Denied. (See also Nos. 724, 953, and 1664, *supra.*)

No. 880. KELLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 426 F. 2d 296.

No. 1509. California *v.* King. Sup. Ct. Cal. Certiorari denied. Reported below: 3 Cal. 3d 226, 474 P. 2d 983.

No. 1521. Giordano et al. *v.* Lee et al. C. A. 8th Cir. Certiorari denied. Reported below: 434 F. 2d 1227.

No. 1572. Stephens *v.* Florida Real Estate Commission et al. Sup. Ct. Fla. Certiorari denied.

No. 1650. Milligan *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1654. Ginzburg *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 436 F. 2d 1386.

No. 1658. Magafan *v.* United States Immigration and Naturalization Service. C. A. D. C. Cir. Certiorari denied.

No. 1659. Wilson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 440 F. 2d 797.

No. 1660. Polack *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 442 F. 2d 446.

No. 1663. Krasna *v.* Davies, Executrix. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 12 Cal. App. 3d 1049, 91 Cal. Rptr. 250.

No. 1669. Jimmie's Inc. et al. *v.* City of West Haven et al. C. A. 2d Cir. Certiorari denied. Reported below: 436 F. 2d 1339.

No. 1675. Morrison Motor Freight, Inc. *v.* Fox, Administratrix. Sup. Ct. Ohio. Certiorari denied. Reported below: 25 Ohio St. 2d 193, 267 N. E. 2d 405.

No. 1677. Union Pacific Railroad Co. *v.* United States. Ct. Cl. Certiorari denied. Reported below: See 185 Ct. Cl. 393, 401 F. 2d 778.

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No. 1678. VOLLMER ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 439 F. 2d 351.

No. 1688. FORT *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 143 U. S. App. D. C. 255, 443 F. 2d 670.

No. 1690. HALLMARK INDUSTRY *v.* PECKHAM, U. S. DISTRICT JUDGE (REYNOLDS METALS CO. ET AL., REAL PARTIES IN INTEREST). C. A. 9th Cir. Certiorari denied.

No. 1692. MACDONALD *v.* SHAWNEE COUNTRY CLUB, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 438 F. 2d 632.

No. 1702. SWEIG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 441 F. 2d 114.

No. 1715. BIEHUNIK ET AL. *v.* FELICETTA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 441 F. 2d 228.

No. 1807. TEXAS HIGHWAY DEPARTMENT ET AL. *v.* NAMED INDIVIDUAL MEMBERS OF THE SAN ANTONIO CONSERVATION SOCIETY. Petition for certiorari before judgment to C. A. 5th Cir. denied.

No. 5470. ARNOLD *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 438 Pa. 402, 264 A. 2d 719.

No. 6633. GOLEMBIEWSKI *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 437 F. 2d 1212.

No. 6712. WILLIS *v.* DUTTON, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 434 F. 2d 1029.

No. 6703. SUMMERS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 464 S. W. 2d 126.

No. 6754. WILLIAMS *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 435 F. 2d 1293.

No. 6757. MCCLEAN *v.* HENRY, PRISON ADMINISTRATOR. C. A. 4th Cir. Certiorari denied.

No. 6760. HOWE *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 182 N. W. 2d 658.

No. 6766. SMALLS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 438 F. 2d 711.

No. 6774. VAUGHN *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 82 N. M. 310, 481 P. 2d 98.

No. 6783. WOODALL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 438 F. 2d 1317.

No. 6792. FREEDMAN *v.* AMERICAN EXPORT ISBRANDTSEN LINES, INC. C. A. 2d Cir. Certiorari denied.

No. 6795. HITE *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 3 Wash. App. 9, 472 P. 2d 600.

No. 6796. JOHNS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 438 F. 2d 639.

No. 6855. BEYER *v.* MANCUSI, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 436 F. 2d 755.

No. 6860. PIERCEFIELD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 437 F. 2d 1188.

No. 6872. GROESSEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 440 F. 2d 602.

No. 6884. GUNZBURGER *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 2d Cir. Certiorari denied.

No. 6892. DANDRIDGE ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 437 F. 2d 1324.

No. 6915. TARLTON *v.* CLARK, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 441 F. 2d 384.

No. 6916. SMITH *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 6920. HARVEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 439 F. 2d 142.

No. 6921. BYRNES ET AL. *v.* BOSTICK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 438 F. 2d 130.

No. 6923. GONZALES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 435 F. 2d 1004.

No. 6927. FRIED *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 436 F. 2d 784.

No. 6936. PARKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 6938. LANE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 6945. SPENCER *v.* GEORGIA. C. A. 5th Cir. Certiorari denied. Reported below: 441 F. 2d 397.

No. 6956. OLIVER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 6974. SMITH *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 278 N. C. 36, 178 S. E. 2d 597.

No. 6958. LaRocca *v.* New York. Ct. App. N. Y. Certiorari denied.

No. 6961. Kyle *v.* United States. Petition for certiorari before judgment to C. A. 2d Cir. denied.

No. 6962. Redmond *v.* Moore, Correctional Superintendent. C. A. 1st Cir. Certiorari denied.

No. 6967. Bishop *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 435 F. 2d 1268.

No. 6971. Wells *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 6975. Snyder *v.* Tennessee. Sup. Ct. Tenn. Certiorari denied.

No. 6978. Kiper *v.* Kentucky. Ct. App. Ky. Certiorari denied.

No. 6981. Bargas *v.* Hocker, Warden. Sup. Ct. Nev. Certiorari denied. Reported below: 87 Nev. 30, 482 P. 2d 317.

No. 6984. Armstrong et al. *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 127 Ill. App. 2d 457, 262 N. E. 2d 354.

No. 6986. Turner *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 6989. Simmons *v.* Craven, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 435 F. 2d 554.

No. 6993. Bock *v.* New York. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 6995. Winegar *v.* Michigan. Sup. Ct. Mich. Certiorari denied.

No. 6996. Lack *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 7005. ARMES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 7007. DUBIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 438 F. 2d 858.

No. 7016. BRYANT *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 7021. MCKINNON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 7057. ROBERTS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 441 F. 2d 1162.

No. 1045. MANLEY *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 211 Va. 146, 176 S. E. 2d 309.

No. 1452. ZORNER *v.* OREGON. Ct. App. Ore. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 4 Ore. App. 84, 475 P. 2d 990.

No. 1666. NORTHERN VIRGINIA REGIONAL PARK AUTHORITY ET AL. *v.* UNITED STATES CIVIL SERVICE COMMISSION ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 437 F. 2d 1346.

No. 6181. HOLMES *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 13 Ariz. App. 357, 476 P. 2d 878.

No. 6806. KNUCKLES ET AL. *v.* PRASSE, CORRECTION COMMISSIONER, ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 435 F. 2d 1255.

No. 1620. EILERS ET AL. *v.* HERCULES, INC., ET AL. Ct. Civ. App. Tex., 9th Sup. Jud. Dist. Certiorari denied. Reported below: 458 S. W. 2d 221.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissenting.

Glenn Patrick was killed and Earl Eilers was severely injured when a defective dome lid on a railroad tank car, upon which they were working in the performance of their duties, exploded in their faces. Patrick's widow and her two children and Eilers, the injured workman, brought this action in the Texas state courts seeking recovery for their injuries under the Safety Appliance Acts, 27 Stat. 531, as amended, 45 U. S. C. § 1 *et seq.* They named as defendants Union Tank Car Co., the corporate owner of the tank car, Hercules, Inc., the lessee of the car, and the Atchison, Topeka & Santa Fe Railway Co., the railroad which delivered the car. The case was tried to a jury. The evidence at trial showed that the two workmen were sent to open the dome lid on top of the tank car. If functioning properly, the dome lid would have been loose and would have permitted the pressure accumulating during the loading of the car to escape. But rust and corrosion had caused the dome lid to freeze closed and, as the two workmen mounted the car, the lid exploded, killing one and crippling the other. In response to a special-issue charge submitted by the trial judge, the jury found that the dome lid of the tank car in question was a safety appliance within the coverage of the Safety Appliance Acts, that the dome lid had failed to operate properly to release the car's internal pressure, and that such failure was the proximate cause of the explosion and injuries. The jury awarded $80,000 each to Patrick's widow and two children, and $42,000 to Eilers.

The Texas Court of Civil Appeals reversed and rendered judgment for the respondents, holding that as a matter of law the dome lid of the tank car was not a safety appliance so as to invoke the absolute liability for violation of the Safety Appliance Acts. Believing that the court below is wrong in its interpretation of the Acts, I would grant the petition for writ of certiorari, reverse the decision below, and reinstate the jury verdict.

The Texas appellate court recognized that the dome lid in this case was designed to serve the dual function of an opening through which the car could be filled and an escape for pressure resulting from the filling. Indeed, the court below seemed to concede that the dome lid was a "safety appliance" but held that it was not covered by the Safety Appliance Acts because it was not specifically mentioned in the Acts or the regulations of the Interstate Commerce Commission. That court took this step in the face of this Court's express decision in *Shields* v. *Atlantic Coast Line R. Co.*, 350 U. S. 318 (1956), that the Safety Appliance Acts are not limited to those devices specified in the Acts and the Commission regulations. As we said in that case: "At best, appliances standardized in Commission regulations represent the minimum of safety equipment, and there is no prohibition of additional safety appliances." *Id.*, at 324. We held in *Shields* that if a safety appliance is provided by the railroad or the makers of the car and used by the railroad as an appliance necessary for the use of the car, it must be safe.

One man is dead and another is crippled for life because the dome lid on the tank car furnished by the respondents was defective. The dome lid was provided by the respondents as a safety appliance; its failure to function properly was the proximate cause of the explosion and injuries. In my view, petitioners have shown a

violation of the Safety Appliance Acts and therefore the decision below, depriving the petitioners of the jury verdict to which they were entitled, should be reversed. I dissent from the denial of the petition for writ of certiorari.

No. 7012. DAWSON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 440 F. 2d 1259.

No. 1655. MORRIS *v.* DAISY AVENUE ROAD DISTRICT OF JEFFERSON COUNTY, KENTUCKY. Ct. App. Ky. Motion to dispense with printing petition granted. Certiorari denied.

No. 1671. MORRIS *v.* SPARROW ET AL. Ct. App. Ky. Motion to dispense with printing petition granted. Certiorari denied.

No. 1719. LAMAR LIFE BROADCASTING CO. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 1773. SCAFATI, CORRECTIONAL SUPERINTENDENT *v.* FISHER. C. A. 1st Cir. Stay entered by this Court on June 11, 1971 [*ante,* p. 913], vacated. Order of June 4, 1971, of the Court of Appeals that "Fisher will be ordered released as soon as the district court can conduct a hearing," vacated and set aside. Provision of order of District Court entered July 13, 1970, that petitioner be discharged unless "timely retried without the use of tainted evidence" [314 F. Supp. 929, 938], reinstated and made effective from this date. Certiorari denied. Reported below: 439 F. 2d 307.

No. 5911. IN RE WHICHARD. Sup. Ct. N. C. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. Reported below: 276 N. C. 727.

No. 6660. PHILLIPS *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. Reported below: 86 Nev. 720, 475 P. 2d 671.

No. 6968. HUNTER ET AL. *v.* CENTER MOTORS, INC. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 139 U. S. App. D. C. 262, 432 F. 2d 695.

Rehearing Denied

No. 11. WASHINGTON ET UX. *v.* UNITED STATES, 402 U. S. 978;

No. 104. WILD ET AL. *v.* UNITED STATES, 402 U. S. 986;

No. 313. ORITO *v.* UNITED STATES, 402 U. S. 987;

No. 1087. KELLY, JUDGE *v.* FLORIDA JUDICIAL QUALIFICATIONS COMM'N, 401 U. S. 962;

No. 1165. EUBANK *v.* ILLINOIS, 402 U. S. 972;

No. 1370. LAMP, ADMINISTRATRIX *v.* UNITED STATES STEEL CORP. ET AL., 402 U. S. 987;

No. 1506. BOSTON & PROVIDENCE RAILROAD DEVELOPMENT GROUP *v.* BARTLETT, TRUSTEE, ET AL., 402 U. S. 989; and

No. 1537. EISENBERG ET AL. *v.* WISCONSIN, 402 U. S. 987. Petitions for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these petitions.

No. 1538. PASSEL ET AL. *v.* FORT WORTH INDEPENDENT SCHOOL DISTRICT ET AL., 402 U. S. 968;

No. 5145. EASON *v.* UNITED STATES, 402 U. S. 984;

No. 6312. BUCHANAN *v.* MICHIGAN, 401 U. S. 944;

No. 6317. STREULE *v.* GULF FINANCE CORP., 402 U. S. 975;

No. 6400. WEBSTER ET AL. *v.* UNITED STATES, 402 U. S. 986;

No. 6588. PARDO *v.* ILLINOIS, 402 U. S. 992;

No. 6728. CORRADO ET UX. *v.* PROVIDENCE REDEVELOPMENT AGENCY, 402 U. S. 947;

No. 6928. CAMPBELL *v.* UNITED STATES, *ante*, p. 910; and

No. 7034. RAY *v.* BRIERLEY, CORRECTIONAL SUPERINTENDENT, 402 U. S. 1008. Petitions for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these petitions.

No. 150, Misc., October Term, 1968. RUCKER *v.* CITY OF FLINT ET AL., 393 U. S. 873, 956. Motion for leave to file second petition for rehearing denied. THE CHIEF JUSTICE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 1080. FAIR ET AL. *v.* KIRK, GOVERNOR OF FLORIDA, ET AL., 401 U. S. 928. Motions to dispense with printing petitions granted. Petitions for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these motions and petitions.

No. 1395. DESAPIO *v.* UNITED STATES, 402 U. S. 999. Petition for rehearing denied. MR. JUSTICE WHITE and MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

June 23, 1971

Dismissal Under Rule 60

No. 706. United States *v.* Various Articles of "Obscene" Merchandise (Cherry, Claimant). Appeal from D. C. S. D. N. Y. dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 315 F. Supp. 191. [Probable jurisdiction noted, 402 U. S. 971.]

June 24, 1971

Dismissal Under Rule 60

No. 1528. Sweetheart Plastics, Inc., et al. *v.* Illinois Tool Works, Inc. C. A. 7th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 436 F. 2d 1180.

June 25, 1971

Certiorari Granted

No. 1873. New York Times Co. *v.* United States. C. A. 2d Cir. Certiorari granted and case set for oral argument on Saturday, June 26, 1971, at 11 a. m. Briefs and records shall be filed simultaneously, the requirement for printing being waived.

Application of New York Times Co. for stay of mandate of Court of Appeals granted pending further order of this Court. The Special Appendix referred to in the order of the Court of Appeals, and any additional items as the United States may have specified with particularity, shall be served on New York Times Co. and filed in this Court by 5 p. m. today, June 25, 1971. Restraint imposed upon New York Times Co. by the Court of Appeals continued pending argument and decision.

For purposes of argument this case is consolidated with No. 1885, *United States* v. *Washington Post Co.*,

certiorari granted, *infra*. Portions of record or argument relating to matters claimed to affect national security may be filed in sealed form.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL would grant the motion to vacate order of Court of Appeals except insofar as it affirms judgment of the District Court, would not continue restraint imposed upon New York Times Co. by the Court of Appeals, and would deny the petition for certiorari.

No. 1885. UNITED STATES *v.* WASHINGTON POST CO. ET AL. C. A. D. C. Cir. Treating the application for stay as a petition for certiorari, certiorari granted and case set for oral argument on Saturday, June 26, 1971, at 11 a. m. Briefs and records shall be filed simultaneously, the requirement for printing being waived. Portions of record or argument relating to matters claimed to affect national security may be filed in sealed form.

Pending argument and decision in this case, restraint imposed by Court of Appeals on the Washington Post Co. and its officers continued but limited to items specified in the Special Appendix filed on June 21, 1971, with the Court of Appeals for the Second Circuit in a case in that court captioned *United States* v. *New York Times Co.*, Docket 71–1616, decided June 23, 1971, and any such additional items as the United States may have specified with particularity by 5 p. m. today, June 25, 1971. Said Appendix as supplemented shall be served on respondent Washington Post Co. and filed in this Court at that time.

For purposes of argument case is consolidated with No. 1873, *New York Times Co.* v. *United States*, certiorari granted, *supra*.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL would not

continue restraint, as limited or otherwise, and, treating application as a petition for certiorari, would deny certiorari.

JUNE 26, 1971

Miscellaneous Order

No. 1873. NEW YORK TIMES CO. *v.* UNITED STATES; and

No. 1885. UNITED STATES *v.* WASHINGTON POST CO. ET AL.

THE CHIEF JUSTICE announced in open Court that the Government's motion to conduct part of oral arguments involving security matters *in camera* denied and under order granting writ counsel may submit arguments in writing under seal in lieu of *in camera* oral argument. THE CHIEF JUSTICE, MR. JUSTICE HARLAN, and MR. JUSTICE BLACKMUN would grant limited *in camera* argument. Two hours allowed for oral argument.

JUNE 28, 1971

Order Appointing Chief Deputy Clerk

It is ordered that Michael Rodak, Jr., be, and he is hereby, appointed Chief Deputy Clerk of this Court.

Appeals Dismissed

No. 517. BOARD OF EDUCATION OF COUNTY OF KANAWHA ET AL. *v.* HUGHES. Appeal from Sup. Ct. App. W. Va. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: —— W. Va. ——, 174 S. E. 2d 711.

No. 934. AMERICANS UNITED, INCORPORATED AS PROTESTANTS & OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH & STATE, ET AL. *v.* INDEPENDENT SCHOOL DISTRICT NO. 622, RAMSEY COUNTY, ET AL.; and

No. 935. STARK *v.* MATTHEIS, COMMISSIONER OF EDUCATION OF MINNESOTA, ET AL. Appeals from Sup. Ct. Minn. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL are of the opinion that probable jurisdiction should be noted and cases set for oral argument. Reported below: 288 Minn. 196, 179 N. W. 2d 146.

Vacated and Remanded on Appeal

No. 852. KERVICK, STATE TREASURER OF NEW JERSEY *v.* CLAYTON ET AL.; and

No. 858. LEVINE ET AL. *v.* CLAYTON ET AL. Appeals from Sup. Ct. N. J. Judgment vacated and cases remanded for reconsideration in light of this Court's decisions in *Lemon* v. *Kurtzman, Earley* v. *DiCenso,* and *Robinson* v. *DiCenso, ante,* p. 602; and *Tilton* v. *Richardson, ante,* p. 672. MR. JUSTICE BLACK is of the opinion that the judgment should be reversed. MR. JUSTICE BRENNAN took no part in the consideration or decision of these cases. Reported below: 56 N. J. 523, 267 A. 2d 503.

No. 1329. HUNT *v.* MCNAIR, GOVERNOR OF SOUTH CAROLINA, ET AL. Appeal from Sup. Ct. S. C. Judgment vacated and case remanded for reconsideration in light of this Court's decisions in *Lemon* v. *Kurtzman, Earley* v. *DiCenso,* and *Robinson* v. *DiCenso, ante,* p. 602; and *Tilton* v. *Richardson, ante,* p. 672. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 255 S. C. 71, 177 S. E. 2d 362.

Certiorari Granted—Reversed and Remanded

No. 5020. CLARK *v.* SMITH, WARDEN. Sup. Ct. Ga. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment reversed, *Miranda* v. *Arizona,* 384 U. S. 436 (1966), and case remanded for further proceedings. MR. JUSTICE BLACK dissents. Reported below: 224 Ga. 766, 164 S. E. 2d 790.

No. 5006. MATHIS *v.* NEW JERSEY. Sup. Ct. N. J. Reported below: 52 N. J. 238, 245 A. 2d 20;

No. 5015. MATHIS *v.* ALABAMA. Sup. Ct. Ala. Reported below: 283 Ala. 308, 216 So. 2d 286;

No. 5022. SPECK *v.* ILLINOIS. Sup. Ct. Ill. Reported below: 41 Ill. 2d 177, 242 N. E. 2d 208;

No. 5027. SEGURA *v.* PATTERSON, WARDEN. C. A. 10th Cir. Reported below: 402 F. 2d 249;

No. 5058. WHAN *v.* TEXAS. Ct. Crim. App. Tex. Reported below: 438 S. W. 2d 918;

No. 5063. DUPLESSIS *v.* LOUISIANA. Sup. Ct. La. Reported below: 253 La. 992, 221 So. 2d 484;

No. 5064. JAGGERS *v.* KENTUCKY. Ct. App. Ky. Reported below: 439 S. W. 2d 580;

No. 5065. AIKEN *v.* WASHINGTON, and

No. 5066. WHEAT *v.* WASHINGTON. Sup. Ct. Wash. Reported below: 75 Wash. 2d 421, 452 P. 2d 232; and

No. 5074. PRUETT *v.* OHIO. Sup. Ct. Ohio. Reported below: 18 Ohio St. 2d 167, 248 N. E. 2d 605. Motions for leave to proceed *in forma pauperis* and certiorari granted. Judgments, insofar as they impose the death sentence, reversed and cases remanded for further proceedings. *Witherspoon* v. *Illinois,* 391 U. S. 510 (1968); *Boulden* v. *Holman,* 394 U. S. 478 (1969); and *Maxwell* v. *Bishop,* 398 U. S. 262 (1970). MR. JUSTICE BLACK dissents.

No. 5077. QUINTANA *v.* TEXAS. Ct. Crim. App. Tex. Reported below: 441 S. W. 2d 191;

No. 5080. WIGGLESWORTH *v.* OHIO. Sup. Ct. Ohio. Reported below: 18 Ohio St. 2d 171, 248 N. E. 2d 607;

No. 5086. CRAIN *v.* BETO, CORRECTIONS DIRECTOR. Ct. Crim. App. Tex.;

No. 5094. WILSON ET AL. *v.* FLORIDA. Sup. Ct. Fla. Reported below: 225 So. 2d 321;

No. 5114. PEMBERTON *v.* OHIO. Sup. Ct. Ohio;

No. 5142. LADETTO *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Reported below: 356 Mass. 541, 254 N. E. 2d 415;

No. 5288. TURNER *v.* TEXAS. Ct. Crim. App. Tex. Reported below: 462 S. W. 2d 9;

No. 5887. BERNETTE *v.* ILLINOIS; and

No. 6049. TAJRA *v.* ILLINOIS. Sup. Ct. Ill. Reported below: 45 Ill. 2d 227, 258 N. E. 2d 793; and

No. 6458. HARRIS *v.* TEXAS. Ct. Crim. App. Tex. Motions for leave to proceed *in forma pauperis* and certiorari granted. Judgments, insofar as they impose the death sentence, reversed and cases remanded for further proceedings. *Witherspoon* v. *Illinois,* 391 U. S. 510 (1968); *Boulden* v. *Holman,* 394 U. S. 478 (1969); and *Maxwell* v. *Bishop,* 398 U. S. 262 (1970). MR. JUSTICE BLACK dissents.

No. 129. ADAMS *v.* WASHINGTON. Sup. Ct. Wash. Motions to dispense with printing petition and response granted. Certiorari granted and judgment, insofar as it imposes the death sentence, reversed and case remanded for further proceedings. *Witherspoon* v. *Illinois,* 391 U. S. 510 (1968); *Boulden* v. *Holman,* 394 U. S. 478 (1969); and *Maxwell* v. *Bishop,* 398 U. S. 262 (1970). MR. JUSTICE BLACK dissents. Reported below: 76 Wash. 2d 650, 458 P. 2d 558.

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No. 5011. FUNICELLO *v.* NEW JERSEY. Sup. Ct. N. J. Reported below: 52 N. J. 263, 245 A. 2d 181; and

No. 5014. CHILDS *v.* NORTH CAROLINA. Super. Ct. N. C., Buncombe County. Reported below: See 269 N. C. 307, 152 S. E. 2d 453. Motions for leave to proceed *in forma pauperis* and certiorari granted. Judgments, insofar as they impose the death sentence, reversed and cases remanded for further proceedings. *Witherspoon* v. *Illinois,* 391 U. S. 510 (1968); *Boulden* v. *Holman,* 394 U. S. 478 (1969); *Maxwell* v. *Bishop,* 398 U. S. 262 (1970); and *United States* v. *Jackson,* 390 U. S. 570 (1968). MR. JUSTICE BLACK dissents.

No. 5072. ATKINSON *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 275 N. C. 288, 167 S. E. 2d 241;

No. 5136. HILL *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 276 N. C. 1, 170 S. E. 2d 885;

No. 5178. ROSEBORO *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 276 N. C. 185, 171 S. E. 2d 886;

No. 5837. WILLIAMS *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 276 N. C. 703, 174 S. E. 2d 503;

No. 6006. SANDERS *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 276 N. C. 598, 174 S. E. 2d 487;

No. 6386. THOMAS *v.* LEEKE, CORRECTIONS DIRECTOR. Sup. Ct. S. C.; and

No. 7122. ATKINSON *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 278 N. C. 168, 179 S. E. 2d 410. Motions for leave to proceed *in forma pauperis* and certiorari granted. Judgments, insofar as they impose the death sentence, reversed, *United States* v. *Jackson,* 390 U. S. 570 (1968), *Pope* v. *United States,* 392 U. S. 651 (1968), and cases remanded for further proceedings. MR. JUSTICE BLACK dissents.

No. 5139. ANDERSON ET AL. *v.* LOUISIANA. Sup. Ct. La. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment reversed, *Bruton* v. *United States,* 391 U. S. 123 (1968), and case remanded for further proceedings. MR. JUSTICE BLACK dissents. Reported below: 254 La. 1107, 229 So. 2d 329.

Certiorari Dismissed

No. 48. HUDSON *v.* LOUISIANA. Sup. Ct. La. Certiorari dismissed. See *Molinaro* v. *New Jersey,* 396 U. S. 365 (1970). Reported below: 253 La. 992, 221 So. 2d 484.

Miscellaneous Orders

No. 35, Orig. UNITED STATES *v.* MAINE ET AL. Motion by the United States to dismiss counterclaim and deny demand for jury trial filed by the State of Florida received and filed, and the State of Florida allowed 60 days to respond. Upon receipt of response of the State of Florida, motion and response shall be referred to Special Master for his report and recommendation. Joint motion of the United States and the State of Florida to consolidate proceedings herein against the State of Florida with *United States* v. *Louisiana,* No. 9, Orig., granted. Report of Special Master upon motion of the State of Florida for severance received and filed, and motion of the State of Florida for severance granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of these matters. [For earlier orders herein, see, *e. g.,* 400 U. S. 914.]

No. 45, Orig. WASHINGTON ET AL. *v.* GENERAL MOTORS CORP. ET AL. Motion of the State of Idaho to be named as a party plaintiff granted. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion. [For earlier order herein, see 402 U. S. 940.]

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. (LOUISIANA BOUNDARY CASE). Joint motion of the United States and the State of Florida to initiate supplemental proceedings granted. Motions of the United States and the State of Florida to consolidate proceedings [see No. 35, Orig., *supra*] and to appoint Special Master granted.

IT IS ORDERED that the Honorable Albert B. Maris, Senior Judge of the United States Court of Appeals for the Third Circuit, be, and he is hereby, appointed Special Master to conduct supplemental proceedings which shall be docketed as case No. 52, Orig. The Special Master shall have authority to fix the time and conditions for filing additional pleadings and to direct subsequent proceedings, and authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. Allowances to him, compensation paid to his technical, stenographic, and clerical assistants, cost of printing his reports, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

IT IS FURTHER ORDERED that if the position of Special Master becomes vacant during recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein.

MR. JUSTICE MARSHALL took no part in the consideration or decision of these matters. [For earlier orders herein, see, *e. g.*, 395 U. S. 901.]

No. 48, Orig. MISSISSIPPI *v.* ARKANSAS. Report of Special Master contained in his letter dated May 12, 1971, to the Clerk of this Court, is approved and shall be filed with the Clerk. [For earlier orders herein, see, *e. g.,* 402 U. S. 939.]

No. 203. MCGAUTHA *v.* CALIFORNIA; and

No. 204. CRAMPTON *v.* OHIO, 402 U. S. 183. Issuance of mandate of this Court in each of these cases stayed pending disposition of petitions for rehearing.

No. 1606. DIES ET AL. *v.* CARTER ET AL. Appeal from D. C. N. D. Tex. [Probable jurisdiction noted, *ante,* p. 904.] Motion of appellee Pate for enlargement of time for oral argument granted, and an additional 10 minutes allotted to appellees to be divided equally between counsel for appellee Pate and counsel for appellee Wischkaemper. An additional 10 minutes for oral argument allotted to counsel for appellants. Pursuant to further motion of appellee Pate, total time allotted to appellees for oral argument is divided equally between counsel for appellee Pate and counsel for appellee Wischkaemper so that each will have 20 minutes.

No. 5161. JOHNSON *v.* LOUISIANA. Appeal from Sup. Ct. La. [Probable jurisdiction noted, 400 U. S. 900]; and

No. 5338. APODACA ET AL. *v.* OREGON. Ct. App. Ore. [Certiorari granted, 400 U. S. 901.] Cases restored to calendar for reargument.

No. 5712. MILTON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. [Certiorari granted, *ante,* p. 904.] Motion of petitioner for appointment of counsel granted. It is ordered that Neil P. Rutledge, Esquire, of Durham, North Carolina, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 6623. McKenzie *v.* Texas. Ct. Crim. App. Tex. Period of time for filing brief in support of petition for certiorari hereby extended to July 18, 1971. The Attorney General of Texas is invited to file a responsive brief within 10 days from date of receipt of petitioner's brief. [For earlier order herein, see 402 U. S. 971.]

Certiorari Granted. (See also Nos. 5085, 5098, 5101, and 5103, *ante,* p. 711.)

No. 5049. Aikens *v.* California. Sup. Ct. Cal. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted limited to the following question: "Does the imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?" Reported below: 70 Cal. 2d 369, 450 P. 2d 258.

No. 5025. Schneble *v.* Florida. Sup. Ct. Fla. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted limited to the question whether petitioner's conviction was in violation of *Bruton* v. *United States,* 391 U. S. 123 (1968). Reported below: 215 So. 2d 611.

No. 5059. Furman *v.* Georgia. Sup. Ct. Ga. Reported below: 225 Ga. 253, 167 S. E. 2d 628;

No. 5133. Jackson *v.* Georgia. Sup. Ct. Ga. Reported below: 225 Ga. 790, 171 S. E. 2d 501; and

No. 5135. Branch *v.* Texas. Ct. Crim. App. Tex. Reported below: 447 S. W. 2d 932. Certiorari granted limited to the following question: "Does the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?"

No. 5056. MOORE *v.* ILLINOIS. Sup. Ct. Ill. Motion of American Civil Liberties Union, Illinois Division, et al., for leave to file a brief as *amici curiae* granted. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Questions 1, 3, and 4 set forth in the petition which read as follows:

"1. Petitioner was sentenced to death for murder. Six items of exonerating evidence were not disclosed to him at trial. The court below affirmed on the ground that the prosecution's duty to disclose exonerating evidence depends upon a request; that the prosecutor had shown his entire file to defense counsel at trial and no further request for disclosure was made. None of the exonerating items was contained in said file. Trial defense counsel were ignorant of the existence of the suppressed information.

"Questions presented are:

> "(a) Whether a request is an indispensable prerequisite to disclosure of exonerating evidence by the State?
>
> "(b) Whether material evidence favorable to an accused should be disclosed by the State without a request where such evidence is not recorded?
>
> "(c) Whether denial of due process of law is contingent upon a request where a State knowingly permits false testimony to remain uncorrected?
>
> "(d) Where a prosecutor shows his entire file to defense counsel at trial, but none of the exonerating items of evidence are contained in said file, does that satisfy the prosecution's duty of disclosure?
>
> "(e) Whether nondisclosure of the prosecuting police department is imputable to the prosecution?"

"3. The deceased was killed with a twelve-gauge shotgun. The Chicago Scientific Crime Detection Laboratory determined that he was killed with a twelve-gauge

shotgun. (A.139.) The prosecutor stated in a Bill of Particulars that the murder weapon was a twelve-gauge shotgun. (A.2.)

"Over objection (A.81–94), the prosecution introduced a sixteen-gauge shotgun into evidence. (A.94.) The sixteen-gauge shotgun did not belong to the petitioner, was not recovered from him, and was never in his possession or control. (A.58, 66–71.)

"During closing argument the prosecutor told the jury that the sixteen-gauge shotgun was not the weapon that killed the deceased, but that any man who was with another man who had the shotgun and shells for it was the type of person that deserved the death penalty. (A.191–201, 204–206.)

"The question presented is whether the introduction and use of such evidence, totally unconnected with the petitioner or the crime charged, denied the petitioner a fair trial?"

"4. Eight veniremen were removed for cause when they voiced general objections to capital punishment or stated that they had religious or conscientious scruples against the death penalty in a proper case.

"In the light of *Witherspoon* v. *Illinois,* 391 U. S. 510, may a state court of review affirm a death sentence,

> "(a) on the ground that the tenor of *voir dire* examination was unlike that of *Witherspoon?*
>
> "(b) on the ground that the prosecution had sufficient peremptory challenges to have eliminated those prospective jurors eligible to serve under *Witherspoon?*"

Reported below: 42 Ill. 2d 73, 246 N. E. 2d 299.

Certiorari Denied. (See also No. 517, *supra.*)

No. 35. Davis *v.* Arkansas. Sup. Ct. Ark. Certiorari denied. Reported below: 246 Ark. 838, 440 S. W. 2d 244.

No. 1508. WILLIAMS ET AL. *v.* SEEGERS ET AL. Sup. Ct. La. Certiorari denied. Reported below: 256 La. 1039, 241 So. 2d 213.

No. 1626. DONAHEY, TREASURER OF OHIO, ET AL. *v.* PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 435 F. 2d 627.

No. 5017. BELL *v.* PATTERSON, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 402 F. 2d 394.

No. 5099. WILLIAMS *v.* TENNESSEE; and

No. 5100. BENTON *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 222 Tenn. 672, 440 S. W. 2d 1.

No. 1257. SAVILLE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 435 F. 2d 871.

No. 6658. MARTIN *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. Reported below: 10 Md. App. 385, 270 A. 2d 674.

JUNE 30, 1971

Affirmed on Appeal

No. 1596. SANDERS, SECRETARY OF THE BOARD OF EDUCATION OF CONNECTICUT, ET AL. *v.* JOHNSON ET AL.; and

No. 1624. BUCKLEY ET AL. *v.* JOHNSON ET AL. Affirmed on appeal from D. C. Conn. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these cases. Reported below: 319 F. Supp. 421.

Miscellaneous Orders

No. ——. GOSS ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF KNOXVILLE ET AL. Petitioners' motion for immediate order requiring submission of a plan for desegregation of Knoxville school system for the 1971–1972 school year and for an order requiring the District Court to hold timely hearings, enter such orders, and entertain such proceedings as may be necessary to achieve a unitary school system in Knoxville by the commencement of the 1971–1972 school year, presented to MR. JUSTICE STEWART and by him referred to the Court, denied. The United States District Court for the Eastern District of Tennessee has not had an opportunity since the June 22, 1971, remand of the case by the United States Court of Appeals for the Sixth Circuit to inquire whether respondents have failed to maintain a unitary school system as defined in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971), and prior cases. Of course, the District Court must conduct forthwith such proceedings as may be required for prompt determination of this question, and, should it find respondents have not maintained a unitary school system, respondents must "terminate dual school systems at once." *Alexander* v. *Holmes County Board of Education,* 396 U. S. 19, 20 (1969). The mandate of the Court of Appeals should issue forthwith.

No. 577. UNITED STATES *v.* JOHNSON. C. A. 9th Cir. [Certiorari granted, 400 U. S. 990.] Case restored to calendar for reargument. In their briefs and oral arguments, counsel requested to discuss, in addition to question specified in original petition, the following: "What relevance has the doctrine of *Vitarelli* v. *Seaton,* 359 U. S. 535, to the legality of the search in the present case?" Reported below: 425 F. 2d 630.

No. —. FRIEDLAND *v.* JUSTICES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, EN BANC. Application for extraordinary relief denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS—1968, 1969, AND 1970

	ORIGINAL			APPELLATE			MISCELLANEOUS			TOTALS		
Terms	1968	1969	1970	1968	1969	1970	1968	1969	1970	1968	1969	1970
Number of cases on dockets	9	15	20	1,559	1,758	1,903	2,350	2,429	2,289	3,918	4,202	4,212
Number disposed of during terms	0	5	7	1,288	1,433	1,613	1,863	1,971	1,802	3,151	3,409	3,422
Number remaining on dockets	9	10	13	271	325	290	487	458	487	767	793	790

	TERMS		
	1968	1969	1970
Cases argued during term	140	144	151
Number disposed of by full opinions	116	105	126
Number disposed of by per curiam opinions	14	21	22
Number set for reargument the following term	10	18	3
Cases granted review this term	135	150	161
Cases reviewed and decided without oral argument	130	113	192
Total cases to be available for argument at outset of following term	73	94	107

JUNE 30, 1971

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CHECKOFF OF UNION DUES. See **National Labor Relations Act**, 1–3.

CHURCH-AFFILIATED SCHOOLS. See **Constitutional Law**, IV, 5–6; **Schools**, 1–2.

CITY COUNCILS. See **Constitutional Law**, III, 3; VII, 1.

CITY-OWNED POOLS. See **Constitutional Law**, III, 3; VII, 1.

CIVIL RIGHTS. See also **Constitutional Law,** VII, 2.

Private conspiracies—Deprivation of rights—42 U. S. C. § 1985(3).—Section 1985 (3) does not require state action but reaches private conspiracies that are aimed at invidiously discriminatory deprivation of the equal enjoyment of rights secured to all by law, as it is clearly manifested by the wording and legislative history of the statute and companion statutory provisions. Griffin v. Breckenridge, p. 88.

CIVIL RIGHTS SUITS. See **Constitutional Law,** II, 1; **Contempt.**

CLAIMS. See **Great Salt Lake.**

CLASSIFICATIONS. See **Conscientious Objectors; Constitutional Law,** III, 1; **Procedure,** 1; **Social Security Act.**

CLASSIFIED MATERIAL. See **Constitutional Law,** IV, 4.

CLOSING POOLS. See **Constitutional Law,** III, 3; VII, 1.

COERCION. See **Constitutional Law,** VI, 1, 3–4.

COLLATERAL ESTOPPEL. See also **Constitutional Law,** I.

Mutuality—Double jeopardy.—As stated in *Ashe* v. *Swenson,* 397 U. S. 436, "mutuality" is not an ingredient of collateral estoppel rule imposed on States by the Fifth and Fourteenth Amendments; and unless jury verdict in second trial "could have [been] grounded . . . upon an issue other than that which the defendant seeks to foreclose from consideration" the double jeopardy provision vitiates petitioner's conviction. Simpson v. Florida, p. 384.

COLLECTIVE-BARGAINING AGREEMENTS. See **National Labor Relations Act,** 1–3.

COLLEGES. See **Constitutional Law,** IV, 6; **Schools,** 1.

COLOR OF LAW. See **Civil Rights; Constitutional Law,** VII, 2.

COMMUNITY ATTENTION. See **Constitutional Law,** II, 3; **Jury Trial; Juvenile Courts.**

COMMUNITY INCOME. See **Taxes,** 2.

COMPLAINTS BY UNION MEMBERS. See **Labor-Management Reporting and Disclosure Act.**

CONSCIENTIOUS OBJECTORS. See also **Procedure,** 1.

Denial of exemption—Grounds for denial—Department of Justice.—Since the Appeal Board gave no reason for denial of exemption to petitioner, and it is impossible to determine on which of three grounds offered in Justice Department's letter that board relied, petitioner's conviction must be reversed. Clay v. United States, p. 698.

CONSPIRACIES. See **Civil Rights; Constitutional Law,** VII, 2.

CONSTITUTIONAL LAW. See also **Civil Rights; Collateral Estoppel; Contempt; Immunity; Jury Trial; Justiciability; Juvenile Courts; Libel; Mootness; Schools,** 1–2; **Social Security Act.**

I. Double Jeopardy.

Collateral estoppel—Mutuality.—As stated in *Ashe* v. *Swenson,* 397 U. S. 436, "mutuality" is not an ingredient of collateral estoppel rule imposed on States by the Fifth and Fourteenth Amendments; and unless jury verdict in second trial "could have [been] grounded . . . upon an issue other than that which the defendant seeks to foreclose from consideration" the double jeopardy provision vitiates petitioner's conviction. Simpson v. Florida, p. 384.

II. Due Process.

1. *Criminal contempt—Awareness of judge.*—On charge of criminal contempt which arose from petitioner's alleged violation of courtroom procedure during earlier criminal trial where it is not clear that judge was personally aware of contemptuous action when it occurred, petitioner should be afforded fair hearing with opportunity to show that version of event related to judge was inaccurate, misleading, or incomplete. Johnson v. Mississippi, p. 212.

2. *Florida loyalty oath—Dismissal from employment.*—Florida's loyalty oath provision requiring employee as condition of employment to swear that he will support the Federal and State Constitutions is constitutionally valid, but portion of oath requiring him to swear that he does not believe in violent governmental overthrow is invalid as providing for dismissal without hearing or inquiry required by due process. Connell v. Higginbotham, p. 207.

3. *Juvenile courts—Right to jury trial.*—Trial by jury is not constitutionaly required in the adjudicatory phase of a state juvenile court delinquency proceeding. McKeiver v. Pennsylvania, p. 528.

III. Equal Protection of the Laws.

1. *Aliens—Welfare payments.*—State statutes that deny welfare benefits to resident aliens or to aliens who had not resided in United States for specified number of years are violative of the Equal Protection Clause and encroach upon exclusive federal power over entrance and residence of aliens. Graham v. Richardson, p. 365.

2. *Arizona reapportionment plan—Legislative action.*—District Court did not err in affording legislature reasonable time to enact constitutionally adequate apportionment plan for 1972 elections, on basis of availability of 1970 census figures, that court being in best position to know if November 1 deadline will be adequate to facili-

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tate its consideration of legislative plan and to enable it to prepare its own plan if the official version is not constitutional. Ely v. Klahr, p. 108.

3. *Closing municipal swimming pools—Jackson, Mississippi.*—Closing of Jackson's swimming pools to all persons did not constitute denial of equal protection to Negroes. Here, where there was substantial evidence to support city council's stated reason for closing the pools and there was no evidence of state action affecting Negroes differently from whites, petitioners' contention that equal protection requirements were violated because pool closing was motivated by anti-integration considerations, must fail since courts will not invalidate legislation solely on basis of illicit motivation by legislature. Palmer v. Thompson, p. 217.

4. *General obligation bonds—Approval of 60% of voters.*—West Virginia's requirement that political subdivisions may not incur bonded indebtedness or increase tax rates beyond those in the State Constitution without the approval of 60% of the voters in a referendum election does not discriminate against any identifiable class and does not violate the Equal Protection Clause or any other constitutional provision. Gordon v. Lance, p. 1.

5. *Georgia election procedure—nominating petitions.*—Challenge to Georgia's election procedure, which provides that nominee of "political body" (a group whose candidate did not receive 20% of the votes at the last election), or an independent candidate, file a nominating petition signed by not less than 5% of those eligible to vote at the last election to obtain his name on the ballot, was properly rejected as it does not abridge rights of free speech and association secured by the First and Fourteenth Amendments and is not violative of the Equal Protection Clause. Jenness v. Fortson, p. 431.

6. *Ghetto residents—Residence of legislators.*—Claim that fact that number of ghetto residents who were legislators was not proportionate to ghetto population proves invidious discrimination, notwithstanding absence of evidence that ghetto residents had less opportunity to participate in political process, is not valid, and on this record malapportionment was due to ghetto voters' choices losing the election contests. Whitcomb v. Chavis, p. 124.

7. *Multi-member election districts—Bloc voting.*—Actual, as distinguished from theoretical, impact of multi-member districts on individual voting power has not been sufficiently demonstrated to warrant departure from prior cases, and neither findings below nor the record sustains view that multi-member districts overrepresent

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CONSTITUTIONAL LAW—Continued.

their voters as compared with voters in single-member districts, even if multi-member legislative delegation tends to bloc voting. Whitcomb v. Chavis, p. 124.

8. *Multi-member election districts—Remedy.*—Multi-member districts have not been proved inherently invidious or violative of equal protection, but, even assuming their unconstitutionality, it is not clear that the remedy is a single-member system with lines drawn to ensure representation to all sizable racial, ethnic, economic, or religious groups. Whitcomb v. Chavis, p. 124.

9. *Rockland County apportionment—County and town coordination.*—In light of long tradition of overlapping functions and dual personnel in Rockland County government, where board of supervisors consisted of supervisors of the county's five towns, and the fact that the reapportionment plan does not contain any built-in bias favoring particular political interests or geographic areas, plan is not violative of Equal Protection Clause. Abate v. Mundt, p. 182.

IV. First Amendment.

1. *Freedom of expression—Disturbing the peace—Wearing jacket with words "Fuck the Draft."*—Absent a more particularized and compelling reason for its actions, California may not, consistently with the First and Fourteenth Amendments, make appellant's simple public display of single four-letter expletive a criminal offense pursuant to its disturbing-the-peace statute. Cohen v. California, p. 15.

2. *Freedom of speech—Libel—Arrest for possession of obscene literature.*—Court of Appeals' reversal of District Court damage award in libel suit based on radio broadcasts of news stories of petitioner's arrest for possession of obscene literature and police seizure of "obscene books," on ground that *New York Times Co.* v. *Sullivan,* 376 U. S. 254, standard applied, and "fact that plaintiff was not a public figure cannot be accorded decisive significance," is affirmed. Rosenbloom v. Metromedia, p. 29.

3. *Freedom of speech and association—Georgia election procedure.*—Challenge to Georgia's election procedure, which provides that nominee of "political body" (a group whose candidate did not receive 20% of the votes at the last election), or an independent candidate, file a nominating petition signed by not less than 5% of those eligible to vote at the last election to obtain his name on the ballot, was properly rejected as it does not abridge rights of free speech and association secured by the First and Fourteenth Amendments and is not violative of the Equal Protection Clause. Jenness v. Fortson, p. 431.

CONSTITUTIONAL LAW—Continued.

4. *Freedom of the press—Prior restraints—Classified documents.*—The United States, which brought these actions to enjoin publication in New York Times and Washington Post of certain classified material, has not met "heavy burden of showing justification for enforcement of such a [prior] restraint." New York Times Co. v. United States, p. 713.

5. *Religion Clauses—Aid to nonpublic schools.*—Pennsylvania and Rhode Island statutes providing aid to nonpublic schools are unconstitutional under the Religion Clauses, as the cumulative impact of the entire relationship arising under the statutes involves excessive entanglement between government and religion. Lemon v. Kurtzman, p. 602.

6. *Religion Clauses—Federal aid to higher education.*—The Higher Education Facilities Act, which authorizes construction grants to colleges and universities with religious affiliations, is constitutional except for that portion providing for a 20-year limitation on the religious use of the facilities constructed with federal funds. Tilton v. Richardson, p. 672.

V. Fourth Amendment.

Violation by federal narcotics agents—Action for damages.—Petitioner's complaint states federal cause of action under the Amendment for which damages are recoverable upon proof of injuries resulting from federal agents' violation thereof. Bivens v. Six Unknown Fed. Narcotics Agents, p. 388.

VI. Search and Seizure.

1. *Offer by petitioner's wife—Lack of police coercion.*—No search and seizure were implicated when police obtained guns and clothing from petitioner's wife, and hence they needed no warrant. Police, who exerted no effort to coerce or dominate her, were not obligated to refuse her offer for them to take the guns, and in making these and other items available to police, she was not acting as instrument or agent of the police. Coolidge v. New Hampshire, p. 443.

2. *Search warrant—Affidavit.*—Court of Appeals' reversal of respondent's conviction for possession of nontaxpaid liquor, on ground that tax investigator's affidavit, relating respondent's reputation and information from an informer, was insufficient to establish probable cause, is reversed. United States v. Harris, p. 573.

3. *Warrantless search—Exceptions.*—Basic constitutional rule is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established

CONSTITUTIONAL LAW—Continued.

and well-defined exceptions," and on facts here, a warrantless search and seizure of petitioner's car cannot be justified under those exceptions. Coolidge v. New Hampshire, p. 443.

4. *Warrants—Neutral and detached magistrate.*—Warrant for search and seizure of petitioner's automobile did not satisfy Fourth Amendment's requirements because it was issued by the State Attorney General, who had assumed charge of the investigation and was later chief prosecutor, and was thus not issued by a "neutral and detached magistrate." Coolidge v. New Hampshire, p. 443.

VII. Thirteenth Amendment.

1. *Badge or incident of slavery—Closing swimming pools.*—Jackson, Mississippi, city council's action in closing municipal swimming pools instead of keeping them open on an integrated basis did not create "badge or incident" of slavery in violation of the Thirteenth Amendment. Palmer v. Thompson, p. 217.

2. *Private conspiracies—Right of interstate travel.*—Congress had the constitutional authority to reach private conspiracy of sort alleged in complaint here, both under § 2 of the Thirteenth Amendment and under its power to protect the right of interstate travel. Griffin v. Breckenridge, p. 88.

CONSTRUCTION GRANTS. See **Constitutional Law,** IV, 6; **Schools,** 1.

CONTEMPT. See also **Constitutional Law,** II, 1.

Criminal contempt—Bias of judge—Recusation.—On charge of criminal contempt which arose from petitioner's alleged violation of courtroom procedure during earlier criminal trial where it is not clear that judge was personally aware of contemptuous action when it occurred, petitioner should be provided fair hearing with opportunity to show that version of event related to judge was inaccurate, misleading, or incomplete; and where motion that judge recuse himself was supported by lawyers' affidavits that judge had revealed prejudice against civil rights workers, and judge was losing defendant in civil rights suit brought by petitioner, he should have recused himself from trying the charge. Johnson v. Mississippi, p. 212.

CONTRACTS. See **National Labor Relations Act,** 1–3.

COUNTY GOVERNMENT. See **Constitutional Law,** III, 9.

COURTHOUSES. See **Constitutional Law,** IV, 1.

COURTROOM PROCEDURE. See **Constitutional Law,** II, 1; **Contempt.**

COURTS. See **Constitutional Law**, II, 3; **Jury Trial**; **Juvenile Courts.**

CRIMINAL CONTEMPT. See **Constitutional Law**, II, 1; **Contempt.**

CRIMINAL LAW. See **Collateral Estoppel**; **Conscientious Objectors**; **Constitutional Law**, I; II, 1, 3; IV, 1; VI, 1–4; **Jury Trial**; **Juvenile Courts**; **Procedure**, 1–2.

CRIMINAL OBSCENITY CHARGES. See **Constitutional Law**, IV, 2; **Libel.**

DAMAGES. See **Civil Rights**; **Constitutional Law**, IV, 2; V; VII, 2; **Immunity**; **Libel**; **National Labor Relations Act**, 1–3.

DEADLINES. See **Constitutional Law**, III, 2.

DEATH SENTENCES. See **Procedure**, 2.

DECREES. See **Great Salt Lake.**

DEDUCTIONS. See **Savings and Loan Associations**; **Taxes**, 1.

DEFAMATORY FALSEHOODS. See **Constitutional Law**, IV, 2; **Libel.**

DEFENSES. See **Constitutional Law**, V; **Immunity.**

DELINQUENTS. See **Constitutional Law**, II, 3; **Jury Trial**; **Juvenile Courts.**

DEPARTMENT OF DEFENSE REPORT. See **Constitutional Law**, IV, 4.

DEPARTMENT OF JUSTICE. See **Conscientious Objectors**; **Procedure**, 1.

DEPRIVATION OF RIGHTS. See **Civil Rights**; **Constitutional Law**, VII, 2.

DESEGREGATION. See **Constitutional Law**, III, 3; VII, 1.

DISCRIMINATION. See **Civil Rights**; **Constitutional Law**, III, 6–8; VII, 2; **Justiciability**; **Mootness.**

DISMISSAL FROM EMPLOYMENT. See **Constitutional Law**, II, 2.

DISTRICTING. See **Constitutional Law**, III, 2.

DISTRICTS. See **Constitutional Law**, III, 6–8; **Justiciability**; **Mootness.**

DISTURBING THE PEACE. See **Constitutional Law**, IV, 1.

DIVORCEES. See **Taxes**, 2.

DOUBLE COLLATERAL ESTOPPEL. See **Collateral Estoppel; Constitutional Law,** I.

DOUBLE JEOPARDY. See **Collateral Estoppel; Constitutional Law,** I.

DRAFT BOARDS. See **Conscientious Objectors; Procedure,** 1.

DUAL PERSONNEL. See **Constitutional Law,** III, 9.

DUE PROCESS. See **Constitutional Law,** II; **Jury Trial; Juvenile Courts.**

DUES ARREARAGES. See **National Labor Relations Act,** 1–3.

DUTY OF FAIR REPRESENTATION. See **National Labor Relations Act,** 1–3.

EDUCATION. See **Constitutional Law,** IV, 5–6; **Schools,** 1–2.

EDUCATIONAL FACILITIES. See **Constitutional Law,** III, 4; IV, 5–6; **Schools,** 1–2.

ELECTION DISTRICTS. See **Constitutional Law,** III, 6–8; **Justiciability; Mootness.**

ELECTIONS. See **Constitutional Law,** III, 2, 4–5; IV, 3; **Labor-Management Reporting and Disclosure Act.**

EMPLOYEES' OATHS. See **Constitutional Law,** II, 2.

EMPLOYMENT. See **National Labor Relations Act,** 1–3.

ENTANGLEMENT BETWEEN GOVERNMENT AND RELIGION. See **Constitutional Law,** IV, 5–6; **Schools,** 1–2.

EQUAL PROTECTION OF THE LAWS. See **Civil Rights; Constitutional Law,** III; **Justiciabiilty; Mootness; Social Security Act.**

ESPIONAGE ACT. See **Constitutional Law,** IV, 4.

ESTABLISHMENT OF RELIGION. See **Constitutional Law,** IV, 5–6; **Schools,** 1–2.

ESTOPPEL. See **Collateral Estoppel; Constitutional Law,** I.

EVIDENCE. See **Constitutioinal Law,** VI, 1–4; **Great Salt Lake.**

EXCEPTIONS. See **Constitutional Law,** VI, 1, 3–4.

EXCLUSIVE JURISDICTION. See **National Labor Relations Act,** 1–3.

EXEMPTIONS. See **Conscientious Objectors; Procedure,** 1; **Taxes,** 2.

EXHAUSTION OF REMEDIES. See **Labor-Management Reporting and Disclosure Act.**

EXPENSES. See **Savings and Loan Associations; Taxes,** 1.

EXPLETIVES. See **Constitutional Law,** IV, 1.

FACILITIES FOR EDUCATION. See **Constitutional Law,** III, 4; IV, 5–6; **Schools,** 1–2.

FAIRNESS. See **Constitutional Law,** II, 3; **Jury Trial; Juvenile Courts.**

FAIR REPRESENTATION. See **National Labor Relations Act,** 1–3.

FALSE STATEMENTS. See **Constitutional Law,** IV, 2; **Libel.**

FEDERAL AGENTS. See **Constitutional Law,** V; VI, 2; **Immunity.**

FEDERAL AID TO EDUCATION. See **Constitutional Law,** IV, 5–6; **Schools,** 1–2.

FEDERAL GRANTS. See **Constitutional Law,** IV, 5–6; **Schools,** 1–2.

FEDERAL SAVINGS AND LOAN INSURANCE CORP. See **Savings and Loan Associations; Taxes,** 1.

FEDERAL-STATE RELATIONS. See **Constitutional Law,** III, 1; **National Labor Relations Act,** 1–3; **Social Security Act; Taxes,** 2.

FIFTH AMENDMENT. See **Collateral Estoppel; Constitutional Law,** I.

FINANCIAL AID TO SCHOOLS. See **Constitutional Law,** IV, 5–6, **Schools,** 1–2.

FIRST AMENDMENT. See **Constitutional Law,** IV; **Libel; Schools,** 1–2.

FLORIDA. See **Collateral Estoppel; Constitutional Law,** I; II, 2.

FOREIGN AFFAIRS. See **Constitutional Law,** IV, 4.

FOURTEENTH AMENDMENT. See **Collateral Estoppel; Constitutional Law,** II–III; IV, 1–3; VI, 1, 3–4; VII, 1; **Contempt; Jury Trial; Justiciability; Juvenile Courts; Libel; Mootness; Social Security Act.**

FOURTH AMENDMENT. See **Constitutional Law,** V–VI; **Immunity.**

FREEDOM OF ASSOCIATION. See **Constitutional Law,** III, 5; IV, 3.

FREEDOM OF EXPRESSION. See **Constitutional Law,** IV, 1.

FREEDOM OF SPEECH. See **Constitutional Law,** III, 5; IV, 2–3; **Libel.**

FREEDOM OF THE PRESS. See **Constitutional Law,** IV, 4.

FREE EXERCISE CLAUSE. See **Constitutional Law,** IV, 5–6; **Schools,** 1–2.

"FUCK THE DRAFT." See **Constitutional Law,** IV, 1.

FUNDAMENTAL FAIRNESS. See **Constitutional Law,** II, 3; **Jury Trial; Juvenile Courts.**

GENERAL OBLIGATION BONDS. See **Constitutional Law,** III, 4.

GENERAL VERDICTS. See **Collateral Estoppel; Constitutional Law,** I.

GEORGIA. See **Constitutional Law,** III, 5; IV, 3.

GHETTOES. See **Constitutional Law,** III, 6–8; **Justiciability; Mootness.**

"GIRLIE-BOOK PEDDLERS." See **Constitutional Law,** IV, 2; **Libel.**

GOVERNMENTAL COORDINATION. See **Constitutional Law,** III, 9.

GOVERNMENTAL OVERTHROW. See **Constitutional Law,** II, 2.

GRANTS. See **Constitutional Law,** IV, 6; **Schools,** 1.

GREAT SALT LAKE.

Ownership of lake bed—Navigability—Admission to Union.—In suit involving conflicting claims of Utah and the United States to shorelands around the Lake the Special Master's report, finding that at date of Utah's admission to Union, Lake was navigable and that lake bed passed to Utah at that time, is supported by adequate evidence and is approved. Utah v. United States, p. 9.

GUNS. See **Constitutional Law,** VI, 1, 3–4.

HEARING OFFICERS. See **Conscientious Objectors; Procedure,** 1.

HEARINGS. See **Constitutional Law,** II, 1–2; **Contempt.**

HEARSAY. See **Constitutional Law,** VI, 2.

HIGHER EDUCATION FACILITIES ACT. See **Constitutional Law,** IV, 6; **Schools,** 1.

HUSBANDS AND WIVES. See **Taxes,** 2.

IDAHO. See **National Labor Relations Act,** 1–3.

ILLICIT LIQUOR. See **Constitutional Law,** VI, 2.

ILLICIT MOTIVATION. See **Constitutional Law**, III, 3; VII, 1.

IMMIGRATION. See **Constitutional Law**, III, 1; **Social Security Act.**

IMMUNITY. See also **Constitutional Law**, V.

Federal narcotics agents—Search of apartment—Action for damages.—This Court does not reach the question of official immunity, which was not passed on by Court of Appeals. Bivens v. Six Unknown Fed. Narcotics Agents, p. 388.

IMPARTIAL JURIES. See **Procedure**, 2.

INCIDENT TO ARREST. See **Constitutional Law**, VI, 1, 3–4.

INCOME TAXES. See **Savings and Loan Associations**; **Taxes**, 1–2.

INDEPENDENT CANDIDATES. See **Constitutional Law**, III, 5; IV, 3.

INDIANA. See **Constitutional Law**, III, 6–8; **Justiciability**; **Mootness.**

INDIANAPOLIS. See **Constitutional Law**, III, 6–8; **Justiciability**; **Mootness.**

INDIGENTS. See **Constitutional Law**, III, 1; **Social Security Act.**

INDUCTIONS. See **Conscientious Objectors**; **Procedure**, 1.

INFORMERS. See **Constitutional Law**, VI, 2.

INJUNCTIONS. See **Constitutional Law**, IV, 4

INJURIES. See **Constitutional Law**, V; **Immunity.**

INSCRIPTION ON JACKET. See **Constitutional Law**, IV, 1.

INSPECTION OF SCHOOL RECORDS. See **Constitutional Law**, IV, 5; **Schools**, 2.

INSTRUCTIONAL MATERIALS. See **Constitutional Law**, IV, 5; **Schools**, 2.

INSTRUMENTALITY OF CRIME. See **Constitutional Law**, VI, 1, 3–4.

INSURED INSTITUTIONS. See **Savings and Loan Associations**; **Taxes**, 1.

INTEGRATION. See **Constitutional Law**, III, 3; VII, 1.

INTERFERENCE WITH EMPLOYMENT. See **National Labor Relations Act**, 1–3.

INTERGOVERNMENTAL COORDINATION. See **Constitutional Law**, III, 9.

INTERNAL REVENUE CODE. See **Savings and Loan Associations; Taxes,** 1–2.

INTERNAL UNION REMEDIES. See **Labor-Management Reporting and Disclosure Act.**

INTERNATIONAL RELATIONS. See **Constitutional Law,** IV, 4.

INTERSTATE TRAVEL. See **Civil Rights; Constitutional Law,** VII, 2.

INTIMIDATION. See **Civil Rights; Constitutional Law,** VII, 2.

INVESTIGATORS. See **Constitutional Law,** VI, 2.

JACKSON, MISSISSIPPI. See **Constitutional Law,** III, 3; VII, 1.

JUDGES. See **Constitutional Law,** II, 1; **Contempt.**

JURIES. See **Procedure,** 2.

JURISDICTION. See **Civil Rights; Constitutional Law,** VII, 2; **National Labor Relations Act,** 1–3.

JURY TRIAL. See also **Constitutional Law,** II, 3; **Juvenile Courts.**

Juvenile courts—Due process.—Trial by jury is not constitutionally required in the adjudicatory phase of a state juvenile court delinquency proceeding. McKeiver v. Pennsylvania, p. 528.

JURY VERDICTS. See **Collateral Estoppel; Constitutional Law,** I.

JUSTICES OF THE PEACE. See **Constitutional Law,** VI, 1, 3–4.

JUSTICIABILITY. See also **Constitutional Law,** III, 6–8; **Mootness.**

Multi-member election districts—Burden of proof—Minority groups.—Validity of multi-member districts is justiciable, but challenger has burden of proving that such districts unconstitutionally operate to dilute or cancel the voting strength of racial or political groups. Whitcomb v. Chavis, p. 124.

JUSTIFICATION. See **Constitutional Law,** IV, 4.

JUVENILE COURTS. See also **Constitutional Law,** II, 3; **Jury Trial.**

Trial by jury.—Trial by jury is not constitutionally required in the adjudicatory phase of a state juvenile court delinquency proceeding. McKeiver v. Pennsylvania, p. 528.

JUVENILE DELINQUENTS. See **Constitutional Law,** II, 3; **Jury Trial; Juvenile Courts.**

LABOR. See **National Labor Relations Act,** 1–3.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT.

Union election—Complaint by union member—Secretary of Labor.—Failure of union member's election complaint to include objection to meeting-attendance rule, of which he was aware, during pursuit of internal union remedies, bars Secretary of Labor from later challenging that rule in action under § 402 of the Act. Hodgson v. Steelworkers, p. 333.

LAKE BED. See **Great Salt Lake.**

LAKE COUNTY. See **Constitutional Law,** III, 6–8; **Justiciability; Mootness.**

LAWYERS' AFFIDAVITS. See **Constitutional Law,** II, 1; **Contempt.**

LEGISLATIVE ACTION. See **Constitutional Law,** III, 2.

LEGISLATIVE REAPPORTIONMENT. See **Constitutional Law,** III, 2.

LEGISLATORS. See **Constitutional Law,** III, 6–8; **Justiciability; Mootness.**

LENGTH OF RESIDENCE. See **Constitutional Law,** III, 1; **Social Security Act.**

LIABILITY FOR TAXES. See **Taxes,** 2.

LIBEL. See also **Constitutional Law,** IV, 2.

Radio news broadcasts—Obscene literature.—Court of Appeals' reversal of District Court damage award in libel suit based on radio broadcasts of news stories of petitioner's arrest for possession of obscene literature and police seizure of "obscene books," on ground that *New York Times Co.* v. *Sullivan,* 376 U. S. 254, standard applied, and "fact that plaintiff was not a public figure cannot be accorded decisive significance," is affirmed. Rosenbloom v. Metromedia, p. 29.

LIE-DETECTOR TESTS. See **Constitutional Law,** VI, 1, 3–4.

LIMITATIONS OF TIME. See **Procedure,** 2.

LIMITATIONS ON GRANTS. See **Constitutional Law,** IV, 6; **Schools,** 1.

LOSS OF EMPLOYMENT. See **National Labor Relations Act,** 1–3.

LOUISIANA. See **Taxes,** 2.

LOYALTY OATHS. See **Constitutional Law,** II, 2.

MAGISTRATES. See **Constitutional Law,** VI, 1, 3–4.

MAJORITY VOTE. See **Constitutional Law,** III, 4.

MALAPPORTIONMENT. See **Constitutional Law,** III, 2, 6–9; **Justiciability; Mootness.**

MALICE. See **Constitutional Law,** IV, 2; **Libel.**

MARION COUNTY. See **Constitutional Law,** III, 6–8; **Justiciability; Mootness.**

MARRIED WOMEN. See **Taxes,** 2.

MEETING-ATTENDANCE RULE. See **Labor-Management Reporting and Disclosure Act.**

MILITARY SERVICE. See **Conscientious Objectors; Procedure,** 1.

MINORITY GROUPS. See **Constitutional Law,** III, 3, 6–8; VII, 1; **Justiciability; Mootness.**

MISSISSIPPI. See **Civil Rights; Constitutional Law,** II, 1; III, 3; VII, 1.

MOOTNESS. See also **Constitutional Law,** III, 2, 6–8; **Justiciability.**

Reapportionment legislation—Single-member districts.—Although, as Court was advised on June 1, 1971, the Indiana Legislature enacted new apportionment legislation providing for statewide single-member districts, the case is not moot. Whitcomb v. Chavis, p. 124.

MOTIVATION FOR LEGISLATION. See **Constitutional Law,** III, 3; VII, 1.

MULTI-MEMBER DISTRICTS. See **Constitutional Law,** III, 6–8; **Justiciability; Mootness.**

MULTIPLE VICTIMS. See **Collateral Estoppel; Constitutional Law,** I.

MUNICIPAL BONDS. See **Constitutional Law,** III, 4.

MUNICIPAL FACILITIES. See **Constitutional Law,** III, 3; VII, 1.

MURDER. See **Constitutional Law,** VI, 1, 3–4.

MUSLIM RELIGION. See **Conscientious Objectors; Procedure,** 1.

MUTUALITY. See **Collateral Estoppel; Constitutional Law,** I.

NARCOTICS AGENTS. See **Constitutional Law,** V; **Immunity.**

NATIONAL HOUSING ACT. See **Savings and Loan Associations; Taxes,** 1.

NATIONAL LABOR RELATIONS ACT.

1. *Exclusive jurisdiction—Suspension of union member—Interference with employment.*—Respondent's complaint that union, by suspending him for dues arrearage, had wrongfully interfered with his employment relations involved matter arguably protected by § 7 or prohibited by § 8 of the Act and was thus within exclusive jurisdiction of NLRB. Motor Coach Employees v. Lockridge, p. 274.

2. *Pre-emption—State court action to enforce contract.*—Respondent's contention that his state action is excepted from pre-emption principle of *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, as being suit for enforcement of collective-bargaining agreement is without merit since he specifically dropped employer as defendant, as is alternative contention that suit is one to redress union's breach of duty of fair representation, for to sustain such claim he would have to prove "arbitrary or bad faith conduct on the part of the union," whereas Idaho court found only that union had misinterpreted contract. Motor Coach Employees v. Lockridge, p. 274.

3. *Pre-emption—State court suit.*—Reasons relied on for assumption of state court jurisdiction here do not suffice to overcome factors on which pre-emption doctrine of *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, was predicated. Motor Coach Employees v. Lockridge, p. 274.

NATIONAL SECURITY. See **Constitutional Law,** IV, 4.

NATION OF ISLAM. See **Conscientious Objectors; Procedure,** 1.

NAVIGABILITY. See **Great Salt Lake.**

NEEDY PERSONS. See **Constitutional Law,** III, 1; **Social Security Act.**

NEGROES. See **Civil Rights; Constitutional Law,** III, 3; VII, 1–2.

NEUTRAL AND DETACHED MAGISTRATE. See **Constitutional Law,** VI, 1, 3–4.

NEWSPAPERS. See **Constitutional Law,** IV, 4.

NEWS STORIES. See **Constitutional Law,** IV, 2, 4; **Libel.**

NEW YORK. See **Constitutional Law,** III, 9.

NEW YORK TIMES. See **Constitutional Law,** IV, 4.

NOMINATING PETITIONS. See **Constitutional Law,** III, 5; IV, 3.

NONPUBLIC SCHOOLS. See **Constitutional Law,** IV, 5–6; **Schools,** 1–2.

NONTAXPAID LIQUOR. See **Constitutional Law**, VI, 2.

NORTH CAROLINA. See **Constitutional Law**, II, 3; **Jury Trial**; **Juvenile Courts.**

OATHS. See **Constitutional Law**, II, 2.

OBSCENE LITERATURE. See **Constitutional Law**, IV, 2; **Libel.**

OBSCENE WORDS. See **Constitutional Law**, IV, 1.

OFFENSIVE CONDUCT. See **Constitutional Law**, IV, 1.

OFFICIAL IMMUNITY. See **Constitutional Law**, V; **Immunity.**

ORDINARY AND NECESSARY EXPENSES. See **Savings and Loan Associations**; **Taxes**, 1.

OVERLAPPING FUNCTIONS. See **Constitutional Law**, III, 9.

OVERTHROW OF GOVERNMENTS. See **Constitutional Law**, II, 2.

OWNERSHIP OF LAKE BED. See **Great Salt Lake.**

PAROCHIAL SCHOOLS. See **Constitutional Law**, IV, 5–6; **Schools**, 1–2.

PARTICULAR WARS. See **Conscientious Objectors**; **Procedure**, 1.

PAYMENT OF UNION DUES. See **National Labor Relations Act**, 1–3.

PENNSYLVANIA. See **Constitutional Law**, II, 3; III, 1; IV, 2, 5; **Jury Trial**; **Juvenile Courts**; **Libel**; **Schools**, 2; **Social Security Act.**

PENTAGON PAPERS. See **Constitutional Law**, IV, 4.

PER-PUPIL EXPENDITURES. See **Constitutional Law**, IV, 5; **Schools**, 2.

PETITIONS. See **Constitutional Law**, III, 5; IV, 3.

"PLAIN VIEW" EXCEPTION. See **Constitutional Law**, VI, 1, 3–4.

PLANS OF REAPPORTIONMENT. See **Constitutional Law**, III, 2.

POLICE OFFICERS. See **Constitutional Law**, VI, 1, 3–4.

POLITICAL BODIES. See **Constitutional Law**, III, 5; IV, 3.

POLITICAL DIVISIVENESS. See **Constitutional Law**, IV, 5; **Schools**, 2.

POLITICAL PARTIES. See **Constitutional Law**, III, 5; IV, 3.

POOLS. See **Constitutional Law**, III, 3; VII, 1.

POOR PERSONS. See **Constitutional Law,** III, 1; **Social Security Act.**

POPULATION VARIANCES. See **Constitutional Law,** III, 2, 6–9; **Justiciability; Mootness.**

PRE-EMPTION. See **National Labor Relations Act,** 1–3.

PREJUDICE. See **Constitutional Law,** II, 1; **Contempt.**

PREMIUM PAYMENTS. See **Savings and Loan Associations; Taxes,** 1.

PRESIDENTIAL POWERS. See **Constitutional Law,** IV, 4.

PRESUMPTIONS. See **Constitutional Law,** IV, 4.

PRIMARY SCHOOLS. See **Constitutional Law,** IV, 5; **Schools,** 2.

PRIOR RESTRAINTS. See **Constitutional Law,** IV, 4.

PRIVACY. See **Constitutional Law,** IV, 2; **Libel.**

PRIVATE CONSPIRACIES. See **Civil Rights; Constitutional Law,** VII, 2.

PRIVATE SCHOOLS. See **Constitutional Law,** IV, 5–6; **Schools,** 1–2.

PRIVILEGES OF CITIZENSHIP. See **Civil Rights; Constitutional Law,** VII, 2.

PROBABLE CAUSE. See **Constitutional Law,** V–VI; **Immunity.**

PROCEDURE. See also **Collateral Estoppel; Conscientious Objectors; Constitutional Law,** I; II, 1; III, 2, 6–8; IV, 4; V; **Contempt; Immunity; Justiciability; Labor-Management Reporting and Disclosure Act; Mootness; National Labor Relations Act,** 1–3.

1. *Conscientious objector claim—Denial of exemption—Department of Justice.*—Since the Appeal Board gave no reason for denial of exemption to petitioner, and it is impossible to determine on which of three grounds offered in Justice Department's letter that board relied, petitioner's conviction must be reversed. Clay v. United States, p. 698.

2. *Death sentences—Time limitation—Amendment of statute.*—Time-limitation provision of Tennessee Code, which precluded petitioners from supplementing bills of exceptions in their appeals from death sentences following *Witherspoon* v. *Illinois,* 391 U. S. 510, was later amended while certiorari petitions were pending here, and petitioners should have opportunity to apply to State Supreme Court for leave to supplement bills of exceptions under new statute. Hunter v. Tennessee, p. 711.

PROPOSED DECREES. See **Great Salt Lake.**

PROSPECTIVE CANDIDATES. See **Constitutional Law,** III, 5; IV, 3.

PRUDENT PERSONS. See **Constitutional Law,** VI, 2.

PUBLIC ASSISTANCE. See **Constitutional Law,** III, 1; **Social Security Act.**

PUBLICATIONS. See **Constitutional Law,** IV, 4.

PUBLIC EMPLOYEES. See **Constitutional Law,** II, 2.

PUBLIC FIGURES. See **Constitutional Law,** IV, 2; **Libel.**

PUBLIC INTEREST. See **Constitutional Law,** IV, 2; **Libel.**

PUBLIC OWNERSHIP. See **Great Salt Lake.**

PUBLIC TRIAL. See **Constitutional Law,** II, 3; **Jury Trial; Juvenile Courts.**

PURCHASES OF WHISKEY. See **Constitutional Law,** VI, 2.

PURCHASING EDUCATIONAL SERVICE. See **Constitutional Law,** IV, 5; **Schools,** 2.

RACIAL DISCRIMINATION. See **Constitutional Law,** III, 3; VII, 1–2.

RACIAL MINORITIES. See **Constitutional Law,** III, 3, 6–8; VII, 1; **Justiciability; Mootness.**

RADIO BROADCASTS. See **Constitutional Law,** IV, 2; **Libel.**

RAPE. See **Procedure,** 2.

REAPPORTIONMENT. See **Constitutional Law,** III, 2, 6–9; **Justiciability; Mootness.**

REASONABLE TIME. See **Constitutional Law,** III, 2.

RECKLESS DISREGARD OF TRUTH. See **Constitutional Law,** IV, 2; **Libel.**

RECUSATION. See **Constitutional Law,** II, 1; **Contempt.**

REDISTRICTING. See **Constitutional Law,** III, 2, 6–8; **Justiciability; Mootness.**

REFERENDUMS. See **Constitutional Law,** III, 4.

REFUSAL TO REPORT. See **Conscientious Objectors; Procedure,** 1.

RELIEF. See **Constitutional Law,** III, 1; **Social Security Act.**

RELIGION CLAUSES. See **Constitutional Law,** IV, 5–6; **Schools,** 1–2.

RELIGIOUS INSTRUCTION. See **Constitutional Law,** IV, 5–6; **Schools,** 1–2.

RELIGIOUS TRAINING AND BELIEF. See **Conscientious Objectors; Procedure,** 1.

REMEDIES. See **Constitutional Law,** III, 6–8; V; **Justiciability; Labor-Management Reporting and Disclosure Act; Mootness.**

RENUNCIATION OF RIGHTS. See **Taxes,** 2.

REPUTATION. See **Constitutional Law,** IV, 2; VI, 2; **Libel.**

RESIDENCE OF LEGISLATORS. See **Constitutional Law,** III, 6–8; **Justiciability; Mootness.**

RESIDENT ALIENS. See **Constitutional Law,** III, 1; **Social Security Act.**

RESTRAINTS. See **Constitutional Law,** IV, 4.

RETRIALS. See **Collateral Estoppel; Constitutional Law,** I.

REVERSION TO GOVERNMENT. See **Constitutional Law,** IV, 6; **Schools,** 1.

RHODE ISLAND. See **Constitutional Law,** IV, 5; **Schools,** 2.

RIGHT OF INTERSTATE TRAVEL. See **Civil Rights; Constitutional Law,** VII, 2.

RIGHT TO TRAVEL. See **Constitutional Law,** III, 1; **Social Security Act.**

ROBBERY. See **Collateral Estoppel; Constitutional Law,** I.

ROCKLAND COUNTY. See **Constitutional Law,** III, 9.

ROMAN CATHOLIC SCHOOLS. See **Constitutional Law,** IV, 5–6; **Schools,** 1–2.

SALARIES OF TEACHERS. See **Constitutional Law,** IV, 5; **Schools,** 2.

SALARY SUPPLEMENT ACT. See **Constitutional Law,** IV, 5; **Schools,** 2.

SAVINGS AND LOAN ASSOCIATIONS. See also **Taxes,** 1.

Income tax deductions—Business expenses.—Payment by state-chartered savings and loan association of "additional premium" required by § 404 (d) of National Housing Act to be paid to Federal Savings and Loan Insurance Corp. is not deductible for income tax purposes as ordinary and necessary business expense under § 162 (a) of Internal Revenue Code. Commissioner v. Lincoln Savings & Loan Assn., p. 345.

SCHOOL BUILDINGS. See **Constitutional Law,** IV, 6; **Schools,** 1.

SCHOOL EXPENDITURES. See **Constitutional Law,** III, 4.

SCHOOLS. See also **Constitutional Law,** IV, 5–6.

1. *Aid to nonpublic colleges and universities—First Amendment—Religion Clauses.*—The Higher Education Facilities Act, which authorizes construction grants to colleges and universities with religious affiliations, is constitutional except for that portion providing for a 20-year limitation on the religious use of the facilities constructed with federal funds. Tilton v. Richardson, p. 672.

2. *Aid to nonpublic schools—First Amendment—Religion Clauses.*—Pennsylvania and Rhode Island statutes providing aid to nonpublic schools are unconstitutional under the Religion Clauses, as the cumulative impact of the entire relationship arising under the statutes involves excessive entanglement between government and religion. Lemon v. Kurtzman, p. 602.

SCHOOL TEACHERS. See **Constitutional Law,** II, 2; IV, 5; **Schools,** 2.

SCURRILOUS EPITHETS. See **Constitutional Law,** IV, 1.

SEARCH AND SEIZURE. See **Constitutional Law,** V–VI; **Immunity.**

SEARCH WARRANTS. See **Constitutional Law,** VI, 1–4.

SECRETARY OF LABOR. See **Labor-Management Reporting and Disclosure Act.**

SECRET DOCUMENTS. See **Constitutional Law,** IV, 4.

SECULAR EDUCATION. See **Constitutional Law,** IV, 5–6; **Schools,** 1–2.

SEGREGATION. See **Constitutional Law,** III, 3; VII, 1.

SELECTIVE CONSCIENTIOUS OBJECTORS. See **Conscientious Objectors; Procedure,** 1.

SELECTIVE SERVICE ACT. See **Conscientious Objectors; Procedure,** 1.

SENTENCES OF DEATH. See **Procedure,** 2.

SHORELANDS. See **Great Salt Lake.**

SINCERITY. See **Conscientious Objectors; Procedure,** 1.

SINGLE-MEMBER DISTRICTS. See **Constitutional Law,** III, 6–8; **Justiciability; Mootness.**

SIXTH AMENDMENT. See **Constitutional Law,** II, 3; **Jury Trial; Juvenile Courts.**

SIXTY PERCENT OF VOTERS. See **Constitutional Law,** III, 4.

"SMUT LITERATURE RACKET." See **Constitutional Law,** IV, 2; **Libel.**

SOCIAL SECURITY ACT. See also **Constitutional Law,** III, 1.

Aliens—State statutes—Welfare payments.—State statutes that deny welfare benefits to resident aliens or to aliens who had not resided in United States for specified number of years are violative of the Equal Protection Clause and encroach upon exclusive federal power over entrance and residence of aliens; and there is no authorization for Arizona's 15-year durational residency requirement in § 1402 (b) of the Act. Graham v. Richardson, p. 365.

SPECIAL MASTER. See **Great Salt Lake.**

STATE ACTION. See **Civil Rights; Constitutional Law,** VII, 2.

STATE-CHARTERED SAVINGS AND LOAN ASSOCIATIONS. See **Savings and Loan Associations; Taxes,** 1.

STATE CONSTITUTION. See **Constitutional Law,** III, 4.

STATE COURTS. See **National Labor Relations Act,** 1–3.

STATE EMPLOYEES. See **Constitutional Law,** II, 2.

STATEWIDE REDISTRICTING. See **Constitutional Law,** III, 6–8; **Justiciability; Mootness.**

STATUTORY AMENDMENTS. See **Procedure,** 2.

STEELWORKERS. See **Labor-Management Reporting and Disclosure Act.**

SUBMERGED LANDS. See **Great Salt Lake.**

SUPERINTENDENT OF PUBLIC INSTRUCTION. See **Constitutional Law,** IV, 5; **Schools,** 2.

SUPPORT OF CONSTITUTIONS. See **Constitutional Law,** II, 2.

SUPREME COURT.

Appointment of Chief Deputy Clerk, p. 944.

Retirement of Chief Deputy Clerk, p. v.

SUSPENSION FROM UNION. See **National Labor Relations Act,** 1–3.

SWIMMING POOLS. See **Constitutional Law,** III, 3; VII, 1.

TAXES. See also **Constitutional Law,** III, 4; **Savings and Loan Associations.**

1. *Income tax deductions—Savings and loan associations—Business expenses.*—Payment by state-chartered savings and loan association of "additional premium" required by § 404 (d) of National

TAXES—Continued.

Housing Act to be paid to Federal Savings and Loan Insurance Corp. is not deductible for income tax purposes as ordinary and necessary business expense under § 162 (a) of Internal Revenue Code. Commissioner v. Lincoln Savings & Loan Assn., p. 345.

2. *Income taxes—Married women—Community income.*—Married woman, domiciled in Louisiana, where under state law wife has vested interest in community property equal to that of husband, is personally liable for federal income taxes on her one-half interest in community income, notwithstanding her subsequent renunciation under state law of her community rights, since federal, not state, law governs what is exempt from federal taxation. United States v. Mitchell, p. 190.

TEACHERS. See **Constitutional Law,** II, 2; IV, 5; **Schools,** 2.

TENNESSEE. See **Procedure,** 2.

TEXTBOOKS. See **Constitutional Law,** IV, 5; **Schools,** 2.

THIRTEENTH AMENDMENT. See **Civil Rights; Constitutional Law,** VII.

THREE-FIFTHS VOTE. See **Constitutional Law,** III, 4.

TIME LIMITATIONS. See **Procedure,** 2.

TIPS. See **Constitutional Law,** VI, 2.

TITLE TO LAKE BED. See **Great Salt Lake.**

TOWN SUPERVISORS. See **Constitutional Law,** III, 9.

TRAVEL. See **Civil Rights; Constitutional Law,** III, 1; VII, 2.

TRIAL BY JURY. See **Constitutional Law,** II, 3; **Jury Trial; Juvenile Courts.**

TRIALS. See **Collateral Estoppel; Constitutional Law,** I; II, 1, 3; **Contempt; Jury Trial; Juvenile Courts.**

TRUTHFUL INFORMERS. See **Constitutional Law,** VI, 2.

TWENTY-YEAR LIMITATION. See **Constitutional Law,** IV, 6; **Schools,** 1.

UNBIASED JUDGES. See **Constitutional Law,** II, 1; **Contempt.**

UNFAIR LABOR PRACTICES. See **National Labor Relations Act,** 1–3.

UNION ELECTIONS. See **Labor-Management Reporting and Disclosure Act.**

UNIONS. See **National Labor Relations Act,** 1–3.

UNIVERSITIES. See **Constitutional Law,** IV, 6; **Schools,** 1.

UTAH. See **Great Salt Lake.**

VESTED INTERESTS. See **Taxes,** 2.

VIETNAM POLICY. See **Constitutional Law,** IV, 4.

VIOLENCE. See **Civil Rights; Constitutional Law,** VII, 2.

VOTERS. See **Constitutional Law,** III, 4–5; IV, 3.

VULGAR WORDS. See **Constitutional Law,** IV, 1.

WAR. See **Conscientious Objectors; Procedure,** 1.

WARRANTLESS SEARCHES. See **Constitutional Law,** V; VI, 1, 3–4; **Immunity.**

WARRANTS. See **Constitutional Law,** VI, 1–4.

WASHINGTON POST. See **Constitutional Law,** IV, 4.

WATER TRAFFIC. See **Great Salt Lake.**

WEAPONS. See **Constitutional Law,** VI, 1, 3–4.

WELFARE BENEFITS. See **Constitutional Law,** III, 1; **Social Security Act.**

WEST VIRGINIA. See **Constitutional Law,** III, 4.

WHISKEY. See **Constitutional Law,** VI, 2.

WIDOWS. See **Taxes,** 2.

WRITE-IN VOTES. See **Constitutional Law,** III, 5; IV, 3.