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U.S Supreme Court

UNITED STATES REPORTS

VOLUME 418

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1973

OPINIONS OF JUNE 24 (CONCLUDED) THROUGH JULY 25, 1974
ORDERS OF JUNE 21 THROUGH JULY 25, 1974
TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS
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.
WILLIAM O. DOUGLAS, 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.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.

RETIRED

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

OFFICERS OF THE COURT

WILLIAM B. SAXBE, Attorney General.
ROBERT H. BORK, Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
FRANK M. HEPLER, Marshal.
EDWARD G. HUDON, Librarian.

*Mr. Chief Justice Warren, who retired effective June 23, 1969 (395 U. S. VII), died July 9, 1974. See *post*, p. v.

1076-Dep

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, THURGOOD MARSHALL, 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, LEWIS F. POWELL, JR., Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, WILLIAM H. REHNQUIST, 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.

January 7, 1972.

(For next previous allotment, see 403 U. S., p. IV.)

DEATH OF MR. CHIEF JUSTICE WARREN

SUPREME COURT OF THE UNITED STATES

WEDNESDAY, JULY 24, 1974

Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL.

THE CHIEF JUSTICE said:

Before we proceed today with the regular business of the Court, it is my sad duty to take note for the record and the Journal of this Court of the death of our beloved colleague and friend Mr. Chief Justice Warren, who served as Chief Justice of the United States from 1953 to 1969.

His retirement on June 23, 1969, completed a career of public service of more than a half-century, a public career that has few parallels in modern times.

I speak for all the present and former members of the Court today in expressing our deep sorrow at his death, and our profound sympathy for Mrs. Warren and her family.

On an appropriate occasion during the next Term of the Court, a memorial service will be conducted for Mr. Chief Justice Warren in this chamber.

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 1970 edition.

Cases reported before page 901 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 901 *et seq.* are those in which orders were entered. The opinion reported on page 1301 was written in chambers by an individual Justice.

	Page
Adult Film Assn. of America *v.* Lucas	954
Adult Film Assn. of America *v.* Saxbe	954
Alabama; Trinkler *v.*	917
Allen Park Public Schools *v.* Bradley	717
Amaya; U. S. Board of Parole *v.*	902
American Civil Liberties Union; Staats *v.*	910
Anchorage Board of Education *v.* Haycraft	918
Arias *v.* United States	905
Arkansas; Mississippi *v.*	903
Arkansas; Weston *v.*	907
Association. For labor union, see name of trade.	
Attorney General; Adult Film Assn. of America *v.*	954
Austin; Letter Carriers *v.*	264
Avrech; Secretary of Navy *v.*	676
Bach; Bensinger *v.*	910
Baxter *v.* Palmigiano	908
Beaty; Weinberger *v.*	901
Bell Supervisors Protective Assn. *v.* Labor Board	904
Bensinger *v.* Bach	910
Berry *v.* National Broadcasting Co	911
Bigelow *v.* Virginia	909
Board of Ed. of Anchorage *v.* Haycraft	918
Board of Ed. of Jefferson County *v.* Newburg Area Council	918
Board of Ed. of Louisville *v.* Haycraft	918
Boyd *v.* Ohio	954
Bradas; Rapides Parish Police Jury *v.*	901
Bradley; Allen Park Public Schools *v.*	717
Bradley; Grosse Pointe Public School System *v.*	717
Bradley; Milliken *v.*	717

Page

Brotherhood. For labor union, see name of trade.
Brown *v.* United States 928
Buckley *v.* California 910
Buckley *v.* New York 944
Cahn *v.* Long Island Vietnam Moratorium Committee 906
California; Buckley *v.* 910
California; Enskat *v.* 937
California; Huguez *v.* 905
California; Miller *v.* 915
California *v.* Welton 905
California Newspapers, Inc. *v.* Typographical Union 905
Callaway; Calley *v.* 906
Calley *v.* Callaway 906
Cameron *v.* North Carolina 905
Cangiano *v.* United States 934
Cantrell *v.* Forest City Publishing Co 909
Cargill, Inc.; Missouri Portland Cement Co. *v.* 919
Carlson *v.* United States 924
Carter *v.* Court of Criminal Appeals of Texas 911
Carter *v.* Kern 911
Chiles *v.* Weinberger 902
City. See name of city.
Class of County Clerks and Registrars *v.* Ramirez 904
Codispoti *v.* Pennsylvania 506
Commissioner *v.* Idaho Power Co 1
Commissioner of Internal Revenue. See Commissioner.
Commonwealth. See name of Commonwealth.
Comptroller General *v.* American Civil Liberties Union 910
Connecticut National Bank; United States *v.* 656
Cote *v.* United States 954
County. See name of county.
Court of Criminal Appeals of Texas; Carter *v.* 911
DeChamplain; McLucas *v.* 904
DeFunis *v.* Odegaard 903
Dillenburg *v.* Kramer 901
Director of penal or correctional institution. See name of director.
Director of Public Aid of Illinois *v.* Wilson 910
District Atty., Nassau County *v.* Long Island Vietnam Com.. 906
District Judge. See U. S. District Judge.
Dorszynski *v.* United States 424
East Hampton; Gwathmey *v.* 907
Electrical Workers *v.* Labor Board 902

Page
Ellison *v.* United States 906
Enskat *v.* California 937
Farrell *v.* Iowa 907
Ferguson *v.* United States 910
Forest City Publishing Co.; Cantrell *v.* 909
Fry *v.* United States 904
Georgia; Jenkins *v.* 153
Gertz *v.* Robert Welch, Inc 323
Gomes *v.* Travisono 910
Gomes; Travisono *v.* 909
Governor. See name of State.
Grand Jury Proceedings, *In re* 1301
Gribble; Warm Springs Dam Task Force *v.* 910
Grosse Pointe Public School System *v.* Bradley 717
Grossman *v.* Striepeke 908
Guam Publications, Inc.; Porter *v.* 908
Gwathmey *v.* East Hampton 907
Hamling *v.* United States 87
Haycraft; Board of Ed. of Anchorage *v.* 918
Haycraft; Board of Ed. of Louisville *v.* 918
Hayes; Taylor *v.* 488
Heffernan *v.* Thoms 908
Hip Magazine *v.* United States 947
Hopkins; United States *v.* 909
Huguez *v.* California 905
Idaho Power Co.; Commissioner *v.* 1
Illinois; Meeks *v.* 905
Illinois; Sutherland *v.* 907
Illinois Director of Public Aid *v.* Wilson 910
In re. See name of party.
Internal Revenue Service. See Commissioner.
International. For labor union, see name of trade.
Interstate Commerce Comm'n *v.* Oregon Pacific Industries 904
Iowa; Farrell *v.* 907
Jefferson County Board of Ed. *v.* Newburg Area Council 918
Jenkins *v.* Georgia 153
J–R Distributors, Inc. *v.* Washington 949
Justices of Supreme Court of New York; Toporoff *v.* 905
Kaplan *v.* United States 942
Kern; Carter *v.* 911
Kerner *v.* United States 955
Kingswood; Michelman *v.* 902
Knight Newspapers, Inc. *v.* Tornillo 241

Page
Kramer; Dillenburg *v*..... 901
Labor Board; Bell Supervisors Protective Assn. *v*..... 904
Labor Board; Electrical Workers *v*..... 902
Labor Board *v*. Typographical Union..... 905
Labor Union. See name of trade.
Lehman *v*. Shaker Heights..... 298
Letter Carriers *v*. Austin..... 264
Lewis, *In re*..... 1301
Local. For labor union, see name of trade.
Long Island Vietnam Moratorium Committee; Cahn *v*..... 906
Louisville Board of Education *v*. Haycraft..... 918
Lucas; Adult Film Assn. of America *v*..... 954
Marine Bancorporation, Inc.; United States *v*..... 602
Marshall; Village Books, Inc. *v*..... 930
McDonnell; Wolff *v*..... 539
McLaughlin *v*. Prieto..... 903
McLucas *v*. DeChamplain..... 904
Meeks *v*. Illinois..... 905
Mendocino County Clerk *v*. Ramirez..... 24
Miami Herald Publishing Co. *v*. Tornillo..... 241
Michelman *v*. Kingswood..... 902
Michigan Governor *v*. Bradley..... 717
Miller *v*. California..... 915
Millican *v*. United States..... 947
Milliken *v*. Bradley..... 717
Minnesota *v*. Reserve Mining Co..... 911
Mississippi *v*. Arkansas..... 903
Missouri Portland Cement Co. *v*. Cargill, Inc..... 919
Mitchell *v*. Sirica..... 955
Nassau County District Atty. *v*. Long Island Vietnam Com.. 906
National Broadcasting Co.; Berry *v*..... 911
National Labor Relations Board. See Labor Board.
Newburg Area Council; Board of Ed. of Jefferson County *v*.. 918
New York; Buckley *v*..... 944
New York Supreme Court Justices; Toporoff *v*..... 905
New York Times Co.; Typographical Union *v*..... 901
Nixon *v*. United States..... 683, 904, 909
Nixon; United States *v*..... 683, 904, 909
North Carolina; Cameron *v*..... 905
Norton *v*. Weinberger..... 902
Odegaard; DeFunis *v*..... 903
Ohio; Boyd *v*..... 954
Oregon Pacific Industries; Interstate Commerce Comm'n *v*... 904

Page
Palmigiano; Baxter *v*. 908
Paris Adult Theatre I *v*. Slaton 939
Peachtree News Co. *v*. United States 932
Pennsylvania; Codispoti *v*. 506
Phillips Petroleum Co. *v*. United States 906
Porter *v*. Guam Publications, Inc 908
President of the United States *v*. United States 683, 904, 909
President of the United States; United States *v*. 683, 904, 909
Prieto; McLaughlin *v*. 903
Prince Georges County State's Atty.; Village Books *v*. 930
Ramirez; Class of County Clerks and Registrars *v*. 904
Ramirez; Richardson *v*. 24
Rapides Parish Police Jury *v*. Bradas 901
Reserve Mining Co.; Minnesota *v*. 911
Reservists Committee to Stop the War; Schlesinger *v*. 208
Richardson *v*. Ramirez 24
Richardson; United States *v*. 166
Robert Welch, Inc.; Gertz *v*. 323
San Rafael Independent Journal *v*. Typographical Union 905
Saxbe; Adult Film Assn. of America *v*. 954
Scata *v*. United States 903
Schlesinger *v*. Reservists Committee to Stop the War 208
Secretary of Air Force *v*. DeChamplain 904
Secretary of Army; Calley *v*. 906
Secretary of Defense *v*. Reservists Com. to Stop the War 208
Secretary of Health, Education, and Welfare *v*. Beaty 901
Secretary of Health, Education, and Welfare; Chiles *v*. 902
Secretary of Health, Education, and Welfare; Norton *v*. 902
Secretary of Navy *v*. Avrech 676
Secretary of State of Washington; Dillenburg *v*. 901
Shaker Heights; Lehman *v*. 298
Sians *v*. United States 926
Sirica; Mitchell *v*. 955
Slaton; Paris Adult Theatre I *v*. 939
South Carolina; Watkins *v*. 911
Spence *v*. Washington 405
Staats *v*. American Civil Liberties Union 910
State. See name of State.
State's Atty. for Prince Georges County; Village Books *v*. . . . 930
Striepeke; Grossman *v*. 908
Sutherland *v*. Illinois 907
Taylor *v*. Hayes 488
Terry *v*. United States 911

Page
Texas; Van Slyke *v*. 907
Texas Court of Criminal Appeals; Carter *v*. 911
Thevis *v*. United States. 932
Thoms; Heffernan *v*. 908
Tidewater Oil Co. *v*. United States. 906
Toporoff *v*. Justices of Supreme Court of New York. 905
Tornillo; Knight Newspapers, Inc. *v*. 241
Tornillo; Miami Herald Publishing Co. *v*. 241
Town. See name of town.
Travisono *v*. Gomes. 909
Travisono; Gomes *v*. 910
Trinkler *v*. Alabama. 917
Typographical Union; California Newspapers, Inc. *v*. 905
Typographical Union; Labor Board *v*. 905
Typographical Union *v*. New York Times Co. 901
Typographical Union; San Rafael Independent Journal *v*. . . . 905
Union. For labor union, see name of trade.
United States; Arias *v*. 905
United States; Brown *v*. 928
United States; Cangiano *v*. 934
United States; Carlson *v*. 924
United States *v*. Connecticut National Bank. 656
United States; Cote *v*. 954
United States; Dorszynski *v*. 424
United States; Ellison *v*. 906
United States; Ferguson *v*. 910
United States; Fry *v*. 904
United States; Hamling *v*. 87
United States; Hip Magazine *v*. 947
United States *v*. Hopkins. 909
United States; Kaplan *v*. 942
United States; Kerner *v*. 955
United States *v*. Marine Bancorporation, Inc. 602
United States; Millican *v*. 947
United States *v*. Nixon. 683, 904, 909
United States; Nixon *v*. 683, 904, 909
United States; Peachtree News Co. *v*. 932
United States; Phillips Petroleum Co. *v*. 906
United States *v*. Richardson. 166
United States; Scata *v*. 903
United States; Sians *v*. 926
United States; Terry *v*. 911
United States; Thevis *v*. 932

	Page
United States; Tidewater Oil Co. *v.*	906
United States *v.* Wilson	924
U. S. Board of Parole *v.* Amaya	902
U. S. District Judge; Adult Film Assn. of America *v.*	954
U. S. District Judge; Mitchell *v.*	955
Van Slyke *v.* Texas	907
Village Books, Inc. *v.* Marshall	930
Virginia; Bigelow *v.*	909
Warden. See name of warden.	
Warm Springs Dam Task Force *v.* Gribble	910
Washington; J–R Distributors, Inc. *v.*	949
Washington; Spence *v.*	405
Washington Secretary of State; Dillenburg *v.*	901
Watkins *v.* South Carolina	911
Weaver *v.* Wilson	910
Wedding; Wingo *v.*	461
Weinberger *v.* Beaty	901
Weinberger; Chiles *v.*	902
Weinberger; Norton *v.*	902
Welch, Inc.; Gertz *v.*	323
Welton; California *v.*	905
Weston *v.* Arkansas	907
Wilson; United States *v.*	924
Wilson; Weaver *v.*	910
Wingo *v.* Wedding	461
Wolff *v.* McDonnell	539

TABLE OF CASES CITED

Page

Abbott Labs. v. Gardner, 387 U. S. 136 236
Abrams v. United States, 250 U. S. 616 387
Accardi v. Shaughnessy, 347 U. S. 260 695
Adams v. Carlson, 368 F. Supp. 1050 594
Adderley v. Florida, 385 U. S. 39 303, 312–313
Aetna Life Ins. v. Haworth, 300 U. S. 227 35
Alabama Power v. Ickes, 302 U. S. 464 194
Aldridge v. United States, 283 U. S. 308 140
Alexander v. Holmes County Bd. of Ed., 396 U. S. 19 774
Alexander v. Louisiana, 405 U. S. 625 138
Alexander v. United States, 201 U. S. 117 691
All-Steel Equipment v. Commissioner, 54 T. C. 1749 18
American Automobile Assn. v. United States, 367 U. S. 687 15
American Fed. of Govt. Employees v. Hampton, 77 L. R. R. M. 2977 273
Anti-Fascist Committee v. McGrath, 341 U. S. 123 558, 594
Aptheker v. Secretary of State, 378 U. S. 500 143
Argersinger v. Hamlin, 407 U. S. 25 496
Arkansas Louisiana Gas v. Public Utilities Dept., 304 U. S. 61 698
Arnett v. Kennedy, 416 U. S. 134 558, 567, 584–585
Arnold Tours v. Camp, 400 U. S. 45 194

Page

Ashwander v. TVA, 297 U. S. 288 698
Associated Press v. United States, 326 U. S. 1 251–252, 254, 398
Associated Press v. Walker, 388 U. S. 130 336, 353, 377
Associates & Aldrich Co. v. Times Mirror, 440 F. 2d 133 256
Association of Data Processing Orgs. v. Camp, 397 U. S. 150 171, 176, 193, 196, 218, 223–224, 236
Atlee v. Laird, 339 F. Supp. 1347 223
Attorney General ex rel. Kies v. Lowrey, 199 U. S. 233 794, 796
Attorney General ex rel. Kies v. Lowrey, 131 Mich. 639 726, 770, 796
Attorney General ex rel. Zacharias v. Detroit Bd. of Ed., 154 Mich. 584 726, 770
Autobuses Internacionales v. El Continental Publishing, 483 S. W. 2d 506 379
Avery v. Georgia, 345 U. S. 559 138
Bailey v. Patterson, 369 U. S. 31 39, 216
Baker v. Carr, 369 U. S. 186 171, 178, 180–181, 194–197, 213–215, 217–218, 220, 223–224, 236, 693, 704
Baker v. Warner, 231 U. S. 588 384
Baldwin v. New York, 399 U. S. 66 495, 511, 535
Barlow v. Collins, 397 U. S. 159 181, 185, 194, 235–238

Page

Barnes v. Smith, 305 F. 2d 226 108
Barr v. Matteo, 360 U. S. 564 338
Barrows v. Jackson, 346 U. S. 249 196
Bartels v. Birmingham, 332 U. S. 126 22
Beacham v. Braterman, 300 F. Supp. 182 53, 83–84
Beauharnais v. Illinois, 343 U. S. 250 383, 385
Beckley Newspapers v. Hanks, 389 U. S. 81 281, 332, 335
Bell v. Burson, 402 U. S. 535 558, 594
Belli v. Curtis Publishing, 25 Cal. App. 3d 384 377
Berger v. United States, 295 U. S. 78 694, 709
Biddle v. Commissioner, 302 U. S. 573 22
Birzon v. King, 469 F. 2d 1241 590
Black v. United States, 385 U. S. 26 576
Blockburger v. United States, 284 U. S. 299 432, 441–442
Bloom v. Illinois, 391 U. S. 194 495–496, 500, 511, 513–514, 516, 520, 522–523, 532–534, 537
Blount v. Rizzi, 400 U. S. 410 142
Blumenthal v. United States, 332 U. S. 539 124
Board of Ed. v. Barnette, 319 U. S. 624 410, 412–413, 422
Board of Regents v. New Left Project, 404 U. S. 541 542
Board of Regents v. Roth, 408 U. S. 564 558
Bollman, Ex parte, 4 Cranch 75 468
Bouie v. Columbia, 378 U. S. 347 115–116
Bowman Dairy v. United States, 341 U. S. 214 698, 702
Boyd v. United States, 271 U. S. 104 108, 145

Page

Bradley v. Richmond School Bd., 416 U. S. 696 102
Bradley v. Richmond School Bd., 462 F. 2d 1058 736, 758
Branzburg v. Hayes, 408 U. S. 665 254, 709, 1301
Braxton v. Carlson, 483 F. 2d 933 572–573
Breard v. Alexandria, 341 U. S. 622 302–303, 314
Brewer v. Hearst Publishing, 185 F. 2d 846 375
Briarcliff Candy v. Commissioner, 475 F. 2d 775 13
Bridges v. California, 314 U. S. 252 305, 359
Broadrick v. Oklahoma, 413 U. S. 601 556
Brockington v. Rhodes, 396 U. S. 41 40, 71
Brookhart v. Janis, 384 U. S. 1 517
Brooks v. Commissioner, 50 T. C. 927 13
Brooks v. United States, 497 F. 2d 1059 425, 451, 453–454
Brotherhood. For labor union, see name of trade.
Brown v. Allen, 344 U. S. 443 469, 477–479
Brown v. Board of Ed., 347 U. S. 483 737, 746, 757, 761, 777, 781
Brown v. Board of Ed., 349 U. S. 294 737–738, 753, 755, 772–773, 809
Brown Shoe Co. v. United States, 370 U. S. 294 618, 620, 622–623, 653
Bryant v. Harris, 465 F. 2d 365 594
Bullock v. Carter, 405 U. S. 134 54
Burgin v. South Carolina, 404 U. S. 806 126
Byers v. Sun Savings Bank, 41 Okla. 728 86
Cafeteria Employees v. Angelos, 320 U. S. 293 284
Cafeteria Workers v. McElroy, 367 U. S. 886 557, 560

Page

Calafut v. Commissioner, 23 T. C. M. 1431 22
Cammarano v. United States, 358 U. S. 498 314–315, 420
Campbell v. U. S. District Court, 501 F. 2d 196 475, 587
Cantrell v. Forest City Publishing, 484 F. 2d 150 379
Carbo v. United States, 314 F. 2d 718 701
Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena, 40 F. R. D. 318 708
Carrington v. Rash, 380 U. S. 89 54, 74, 82
Carter v. United States, 113 U. S. App. D. C. 123 448
Carter v. West Feliciana School Bd., 396 U. S. 290 774
Carwile v. Richmond Newspapers, 196 Va. 1 269
Cervantes v. Time, Inc., 464 F. 2d 986 379
Chambers v. Mississippi, 410 U. S. 284 583, 585
Chaplinsky v. New Hampshire, 315 U. S. 568 340, 385, 417
Chapman v. FPC, 345 U. S. 153 693
Chase v. Daily Record, 83 Wash. 2d 37 379
Cheff v. Schnackenberg, 384 U. S. 373 495–496, 505, 535
Child Welfare Society v. Kennedy School Dist., 220 Mich. 290 797
Cincinnati, N. O. & T. P. R. Co. v. United States, 191 Ct. Cl. 572 15
Cipriano v. Houma, 395 U. S. 701 54, 80, 82
City. See name of city.
CSC v. Letter Carriers, 413 U. S. 548 273, 556
Clark v. United States, 289 U. S. 1 712
Clutchette v. Procunier, 497 F. 2d 809 572–573, 583, 586, 589, 592, 595
Cobbledick v. United States, 309 U. S. 323 690–691
Codispoti v. Pennsylvania, 418 U. S. 506 495, 500
Cohen v. California, 403 U. S. 15 320, 412
Collins v. Detroit, 195 Mich. 330 797
CBS v. Democratic Committee, 412 U. S. 94 255, 303
Commissioner v. Lincoln Savings, 403 U. S. 345 15
Commissioner of Internal Revenue. See Commissioner.
Commonwealth. See name of Commonwealth.
Communist Party v. Whitcomb, 414 U. S. 441 82
Confiscation Cases, 7 Wall. 454 693
Cooke v. United States, 267 U. S. 517 498, 527, 530
Cooper v. Aaron, 358 U. S. 1 773–774, 782, 792–793
Cooper v. Illinois Publishing, 218 Ill. App. 95 375
Cooper v. Pate, 378 U. S. 546 556, 576
Coors v. Commissioner, 60 T. C. 368 12, 14
Coplon v. United States, 89 U. S. App. D. C. 103 576
Covington v. Harris, 136 U. S. App. D. C. 35 596
Cox v. Louisiana, 379 U. S. 536 311, 313
Cox v. Louisiana, 379 U. S. 559 303, 316
Cox v. New Hampshire, 312 U. S. 569 303, 311
Cox v. United States, 473 F. 2d 334 425, 446, 451, 454
Cruz v. Beto, 405 U. S. 319 556, 576
C. & S. Air Lines v. Waterman S. S. Corp., 333 U. S. 103 710, 715
Curtis Publishing v. Butts, 388 U. S. 130 292, 328, 336
DaCosta v. Laird, 471 F. 2d 1146 215
Davis v. Alaska, 415 U. S. 308 586–588

552-191 O - 76 - 2

Page

Davis v. Beason, 133 U. S. 333 53, 81–82
Davis v. NBC, 447 F. 2d 981 379
Davis v. School Comm'rs, 402 U. S. 33 774–775, 802, 807
DeGregory v. Attorney General, 383 U. S. 825 359
Dennis v. United States, 341 U. S. 494 115, 387
Dent v. West Virginia, 129 U. S. 114 558
De Stefano v. Woods, 392 U. S. 631 513, 533
Detroit Bd. of Ed. v. Superintendent of Pub. Inst., 319 Mich. 436 793
Detroit Edison Co. v. Commissioner, 319 U. S. 98 11
Dillenberg v. Kramer, 469 F. 2d 1222 76, 79
Dills v. Delira Corp., 145 Cal. App. 2d 124 61
Dobson v. Commissioner, 320 U. S. 489 19
Doe v. McMillan, 412 U. S. 306 704
Doremus v. Board of Ed., 342 U. S. 429 226
Dorr v. United States, 195 U. S. 138 384
Dorszynski v. United States, 418 U. S. 424 909
Duncan v. Louisiana, 391 U. S. 145 511, 513, 515–516, 518, 532–535, 537
Dunn v. Blumstein, 405 U. S. 330 54, 62, 65–66, 76–78, 80, 82, 317
Dunn v. United States, 284 U. S. 390 101
Dutton v. Evans, 410 U. S. 74 701
Dyke v. Taylor Implement Co., 391 U. S. 216 495
Ecko Products v. FTC, 347 F. 2d 745 922
Edelman v. Jordan, 415 U. S. 651 83
Edwards v. South Carolina, 372 U. S. 229 313
Elfbrandt v. Russell, 384 U. S. 11 305, 359
Elkins v. United States, 364 U. S. 206 710
EPA v. Mink, 410 U. S. 73 175
Evans v. Cornman, 398 U. S. 419 82
Ex parte. See name of party.
Fairchild v. Hughes, 258 U. S. 126 181–182, 192, 220
Farkas v. Texas Instruments, 375 F. 2d 629 273
Farmer v. Philadelphia Electric, 329 F. 2d 3 273
Fay v. Noia, 372 U. S. 391 468
FCC v. Sanders Bros. Radio, 309 U. S. 470 193
FMB v. Isbrandtsen Co., 356 U. S. 481 693
FTC v. Procter & Gamble, 386 U. S. 568 623–624, 628, 637, 922
Fincher v. Scott, 352 F. Supp. 117 53, 83
Firestone v. Time, Inc., 460 F. 2d 712 379
Firestone v. Time, Inc., 271 So. 2d 745 378
First Nat. Bank v. Dickinson, 396 U. S. 122 610
First Nat. Bank v. Walker Bank, 385 U. S. 252 610
Fisher v. Pace, 336 U. S. 155 527
Flast v. Cohen, 392 U. S. 83 72, 169–175, 178, 180–189, 193–197, 202, 204–205, 207, 214–218, 222, 224–225, 227–229, 231–232, 237
Florida Power v. Electrical Workers, 417 U. S. 790 902
Fluery, In re, 67 Cal. 2d 600 62
Ford Motor v. United States, 405 U. S. 562 624, 922
Fowler v. Rhode Island, 345 U. S. 67 316
Frank v. United States, 395 U. S. 147 495, 511

Page

Fribourg Navigation v. Commissioner, 383 U. S. 272 11
Frink v. McEldowney, 29 N. Y. 2d 720 378
Frothingham v. Mellon, 262 U. S. 447 171–172, 181, 186, 192, 202, 205, 220, 229–231
Fuentes v. Shevin, 407 U. S. 67 583
Gagnon v. Scarpelli, 411 U. S. 778 544, 559–560, 570, 590–591, 594
Gallman v. Carnes, 254 Ark. 987 377
Garrison v. Louisiana, 379 U. S. 64 282, 311, 332, 335, 341, 344
Gault, In re, 387 U. S. 1 564, 585
Gay v. Ruff, 292 U. S. 25 692
General Foods v. FTC, 386 F. 2d 936 922
General Talking Pictures v. Western Electric, 304 U. S. 175 206
George Moore Ice Cream v. Rose, 289 U. S. 373 143
Gertz v. Robert Welch, Inc., 418 U. S. 323 262, 270, 284, 289–290, 297, 907–908
Gibson v. Florida Legislative Comm'n, 372 U. S. 539 1301
Giles v. Harris, 189 U. S. 475 220
Gilligan v. Morgan, 413 U. S. 1 174
Ginsberg v. New York, 390 U. S. 629 123, 949
Ginzburg v. United States, 383 U. S. 463 99–100, 110, 112, 130, 949
Gitlow v. New York, 268 U. S. 652 413
Glasser v. United States, 315 U. S. 60 124
Goldberg v. Kelly, 397 U. S. 254 585, 592, 594, 598
Gomillion v. Lightfoot, 364 U. S. 339 778, 808

Page

Gonsalves, In re, 48 Cal. 2d 638 41
Gonzalez v. Zelker, 477 F. 2d 797 475
Goosby v. Osser, 409 U. S. 512 34
Gordon v. Commissioner, 37 T. C. 986 16, 22
Gordon v. Random House, 486 F. 2d 1356 380
Gore v. United States, 357 U. S. 386 431, 441–442
Grannis v. Ordean, 234 U. S. 385 558
Gravel v. United States, 408 U. S. 606 704
Grayned v. Rockford, 408 U. S. 104 303, 311, 317
Great Northern R. Co. v. Commissioner, 40 F. 2d 372 7, 12
Green v. Board of Elections, 380 F. 2d 445 53, 81, 84
Green v. County School Bd., 391 U. S. 430 737, 746–747, 754, 774, 798, 803, 807, 809
Greenbelt Coop. Pub. Assn. v. Bresler, 398 U. S. 6 282, 284–286
Greene v. McElroy, 360 U. S. 474 567, 585–586, 596
Griffin v. School Board, 377 U. S. 218 774
Groppi v. Leslie, 404 U. S. 496 498–499, 515, 528
Grosjean v. American Press, 297 U. S. 233 256
Gurera v. United States, 40 F. 2d 338 441
Hagner v. United States, 285 U. S. 427 117
Hague v. CIO, 307 U. S. 496 305, 313
Haines v. Kerner, 404 U. S. 579 556–557, 579
Hall v. Beals, 396 U. S. 45 35, 66, 68
Hall v. United States, 378 F. 2d 349 133

Page

Halter v. Nebraska, 205 U. S. 34 413, 418–419, 421
Ham v. South Carolina, 409 U. S. 524 140
Hamling v. United States, 418 U. S. 87 151, 914, 916–917, 926–927, 930, 934, 936, 939, 942, 944, 946, 949
Haney v. County Board of Ed., 429 F. 2d 364 744, 755
Hannegan v. Esquire, Inc., 327 U. S. 146 126
Harlem River Consumers v. Associated Grocers, 54 F. R. D. 551 487
Harman v. Forssenius, 380 U. S. 528 80
Harnish v. Herald-Mail Co., 264 N. E. 2d 326 378
Harper v. Virginia Bd. of Elections, 383 U. S. 663 77
Harris v. United States, 382 U. S. 162 499
Hayakawa v. Brown, 415 U. S. 1304 86
Healy v. James, 408 U. S. 169 411
Heller v. New York, 413 U. S. 483 914, 916, 918, 927 929, 932–933, 936, 938, 941, 943, 946, 948, 953
Henry v. Collins, 380 U. S. 356 282
Herb v. Pitcairn, 324 U. S. 117 59–61
Hernandez v. Texas, 347 U. S. 475 137
Hertz Corp. v. United States, 364 U. S. 122 10
Hill v. Florida ex rel. Watson, 325 U. S. 538 282
Hillside Community Church v. Tacoma, 76 Wash. 2d 63 301, 315
Hobson v. Hansen, 269 F. Supp. 401 808
Hodges v. United States, 243 F. 2d 281 133–134
Hoffman, In re, 67 Cal. 2d 845 313

Page

Holiday v. Johnston, 313 U. S. 342 466–467, 474, 477–478
Holt v. Sarver, 309 F. Supp. 362 599
Hotz v. Alton Telegraph, 324 Ill. App. 1 375
Hull, Ex parte, 312 U. S. 546 556, 576
Humphrey's Executor v. United States, 295 U. S. 602 706
Illinois v. Allen, 397 U. S. 337 514, 520, 522
Imlay Township Dist. v. State Bd. of Ed., 359 Mich. 478 797
Indiana Employment Div. v. Burney, 409 U. S. 540 39, 69, 216
In re. See name of party.
International. For labor union, see name of trade.
Interstate Circuit v. Dallas, 390 U. S. 676 162
ICC v. Jersey City, 322 U. S. 503 693
Investment Co. Institute v. Camp, 401 U. S. 617 194
Irvine v. California, 347 U. S. 128 206, 432
Jacobellis v. Ohio, 378 U. S. 184 107, 143, 949
Jaffa v. United States, 198 F. Supp. 234 13
Jamison v. Texas, 318 U. S. 413 313
Jenkins v. Delaware, 395 U. S. 213 513, 532
Jenkins v. Georgia, 418 U. S. 153 114, 914, 917, 925, 929, 932–933, 936, 938, 943, 946, 948, 953
Jenkins v. McKeithen, 395 U. S. 411 150
Jimenez v. Weinberger, 417 U. S. 628 902
Johnson v. Avery, 393 U. S. 483 544, 556, 576–578, 591
Johnson v. New Jersey, 384 U. S. 719 532–533
Kaiser Aluminum v. United States, 141 Ct. Cl. 38 708

Page

Kansas City S. R. Co. v. Jones, 241 U. S. 181 108
Kaplan v. California, 413 U. S. 115 97, 100
Kennecott Copper v. FTC, 467 F. 2d 67 922
Kent v. Buffalo, 29 N. Y. 2d 818 378
Kent v. United States, 383 U. S. 541 457
Keyes v. School Dist. No. 1, 413 U. S. 189 738, 741, 754–755, 761, 771, 785–786, 793, 798, 804, 806, 812
Kilbourn v. Thompson, 103 U. S. 168 706
Kirstowsky v. Superior Court, 143 Cal. App. 2d 745 63
Kissinger v. New York Transit Auth., 274 F. Supp. 438 301, 315
Knoxville v. Knoxville Water Co., 212 U. S. 1 11
Kokoszka v. Belford, 417 U. S. 642 902
Konigsberg v. State Bar, 366 U. S. 36 386
Kovacs v. Cooper, 336 U. S. 77 320
Kramer v. Union Free Dist., 395 U. S. 621 54, 78–79, 746
Labor Board. See NLRB.
Laird v. Tatum, 408 U. S. 1 177, 220
Lamm v. Volpe, 449 F. 2d 1202 223
Landman v. Royster, 333 F. Supp. 621 585, 588, 593, 595
LaReau v. MacDougall, 473 F. 2d 974 595
Lassiter v. Northampton Bd. of Elections, 360 U. S. 45 53
Lee v. Macon County Bd. of Ed., 267 F. Supp. 458 798
Lee v. Washington, 390 U. S. 333 556
Legislature v. Reinecke, 6 Cal. 3d 595 63
Lehman v. Shaker Heights, 418 U. S. 298 419

Page

Lévitt, Ex parte, 302 U. S. 633 177–178, 180, 192, 219–220, 223–225, 234–235, 239
Linda R. S. v. Richard D., 410 U. S. 614 194, 224
Linkletter v. Walker, 381 U. S. 618 102
Linn v. Plant Workers, 383 U. S. 53 269–272, 275–276, 278, 281, 283–284, 287–293
Little, In re, 404 U. S. 553 513
Liverpool S. S. Co. v. Emigration Comm'rs, 113 U. S. 33 223
Local. For labor union, see name of trade.
Lopez v. United States, 373 U. S. 427 108, 147
Lovely v. United States, 169 F. 2d 386 133–134
Manhattan-Bronx Postal Union v. Gronouski, 121 U. S. App. D. C. 321 273
Manual Enterprises v. Day, 370 U. S. 478 99, 104, 112, 118–119, 121–122, 142
Mapp v. Ohio, 367 U. S. 643 398, 403
M'Ara v. Magistrates of Edinburgh, [1913] Sess. Cas. 1059 302
Marbury v. Madison, 1 Cranch 137 171, 191, 703, 705
Marshall v. Gordon, 243 U. S. 521 706
Martin v. Struthers, 319 U. S. 141 314
Massey Motors v. United States, 364 U. S. 92 11
Maters v. Triangle Publications, 445 Pa. 384 378
Mayberry v. Pennsylvania, 400 U. S. 455 498, 501, 503, 507, 514–515, 517–518, 523, 528, 530–532, 536
Mazer v. Stein, 347 U. S. 201 206
McCabe v. Atchison, T. & S. F. R. Co., 235 U. S. 151 222
McConnell, In re, 370 U. S. 230 513

Page

Mead v. Horvitz Publishing (9th Dist., Ohio Ct. App., 1973) 378
Memoirs v. Massachusetts, 383 U. S. 413 98–99, 130, 154, 162, 949
Memorial Hospital v. Maricopa County, 415 U. S. 250 78
Meyers v. Alldredge, 492 F. 2d 296 572–573
Miami Herald Publishing v. Tornillo, 418 U. S. 241 306, 347, 398, 401
Michelson v. United States 335 U. S. 469 125
Miller v. Argus Publishing, 79 Wash. 2d 816 379
Miller v. California, 413 U. S. 15 97–98, 101–104, 106–107, 112, 114–116, 129–130, 151, 155, 159–160, 162, 164, 913–914, 918, 925, 927–929, 931, 933, 935–936, 938, 941–943, 945, 948, 953
Miller v. Twomey, 479 F. 2d 701 572–573, 592
Milliken v. Bradley, 418 U. S. 717 918
Mills v. Alabama, 384 U. S. 214 247, 257, 259–260, 305, 359
Mine Workers v. Illinois Bar, 389 U. S. 217 359
Miranda v. Arizona, 384 U. S. 436 513, 532
Mishkin v. New York, 383 U. S. 502 107, 122–123, 128–129, 949
Mitchell v. Commissioner, 42 T. C. 953 16, 21
Monitor Patriot Co. v. Roy, 401 U. S. 265 367
Monroe v. Board of Comm'rs, 391 U. S. 450 737, 767, 802
Moore v. Ogilvie, 394 U. S. 814 35–36, 68
Moriarty v. Lippe, 162 Conn. 371 378

Page

Morrissey v. Brewer, 408 U. S. 471 500, 544, 556, 559–560, 564, 573, 582–583, 585, 587, 589, 592, 594–595, 597
Murchison, In re, 349 U. S. 133 501
Murdock v. Pennsylvania, 319 U. S. 105 359
Murphy v. Ramsey, 114 U. S. 15 53, 81–82
Nalle v. Oyster, 230 U. S. 165 384
Namet v. United States, 373 U. S. 179 108, 147
Nashville, C. & St. L. R. Co. v. Wallace, 288 U. S. 249 42
NAACP v. Button, 371 U. S. 415 78, 342, 361
NLRB v. Donnelly Co., 330 U. S. 219 125
NLRB v. Drivers, 362 U. S. 274 277, 280
National Licorice v. NLRB, 309 U. S. 350 206
Near v. Minnesota ex rel. Olson, 283 U. S. 697 385, 401
Newman v. Frizzell, 238 U. S. 537 220, 222
New York Times v. Sullivan, 376 U. S. 254 252, 257, 262, 272, 281–282, 291–292, 311, 327–328, 334–335, 340–341, 343, 347, 353–354, 357, 361, 365, 377, 384, 386–387
New York Times v. United States, 403 U. S. 713 259, 261
Niemotko v. Maryland, 340 U. S. 268 316
Nixon v. Sirica, 159 U. S. App. D. C. 58 689, 708
Noorlander v. Ciccone, 489 F. 2d 642 473, 475
Norfolk Shipbuilding v. United States, 321 F. Supp. 222 13
North Carolina v. Pearce, 395 U. S. 711 457
North Carolina v. Rice, 404 U. S. 244 71

Page

North Carolina Bd. of Ed. v. Swann, 402 U. S. 43 771, 791
North Dakota Pharmacy Bd. v. Snyder's Stores, 414 U. S. 156 35, 246
Northern Pacific R. Co. v. Helvering, 83 F. 2d 508 8
O'Brien v. United States, 386 U. S. 345 576
O'Connor v. Ohio, 385 U. S. 92 147
Offutt v. United States, 348 U. S. 11 497, 500, 503, 530
Old Colony R. Co. v. Commissioner, 284 U. S. 552 15
Old Dominion Branch v. Austin, 213 Va. 377 379
Oliver, In re, 333 U. S. 257 498, 528, 583
On Lee v. United States, 343 U. S. 747 701
Oregon v. Mitchell, 400 U. S. 112 75
Organization for a Better Austin v. Keefe, 402 U. S. 415 247
Orr v. United States, 343 F. 2d 553 16, 21
O'Shea v. Littleton, 414 U. S. 488 65, 219–220, 224
O'Shea v. United States, 491 F. 2d 774 473–475
Otsuka v. Hite, 64 Cal. 2d 596 33, 75
Packer Corp. v. Utah, 285 U. S. 105 302, 308, 315
Palko v. Connecticut, 302 U. S. 319 290, 358
Palmigiano v. Baxter, 487 F. 2d 1280 573, 581, 589–590
Palmore v. United States, 411 U. S. 389 487
Paris Adult Theatre v. Slaton, 413 U. S. 49 97, 100, 104, 142, 159–160, 162–163, 165, 386, 912–913, 915–918, 930–931, 937–939, 943–945, 949, 953, 955
Parker v. Levy, 417 U. S. 733 556, 678, 681

Page

Parnell v. Wainwright, 464 F. 2d 735 475
Patterson v. Colorado ex rel. Attorney General, 205 U. S. 454 385
Pauling v. McElroy, 107 U. S. App. D. C. 372 223
Payne v. Wingo, 442 F. 2d 1192 469
Pennekamp v. Florida, 328 U. S. 331 143, 263, 386
Pennsylvania v. Board of Trusts, 353 U. S. 230 793
People v. Finkelstein, 9 N. Y. 2d 342 122
People ex rel. Workman v. Board of Ed., 18 Mich. 400 749
Perlman v. United States, 247 U. S. 7 691
Perlmutter v. Commissioner, 44 T. C. 382 13
Phillips Co. v. Dumas School Dist., 361 U. S. 376 432
Pickering v. Board of Ed., 391 U. S. 563 282
Pietsch v. President of the United States, 434 F. 2d 861 223
Pinkus v. Pitchess, 429 F. 2d 416 126
Pittsburgh Press v. Human Relations Comm'n, 413 U. S. 376 255–256, 261, 303, 315
Plessy v. Ferguson, 163 U. S. 537 759
Poe v. Ullman, 367 U. S. 497 174
Pointer v. Texas, 380 U. S. 400 567
Police Dept. v. Mosley, 408 U. S. 92 303, 311, 315–317
Pollard v. Lyon, 91 U. S. 225 384
Polzin v. Helmbrecht, 54 Wis. 2d 578 379
Porter v. Guam Publications, 475 F. 2d 744 379
Poulos v. New Hampshire, 345 U. S. 395 303, 311

Page

Powell v. McCormack, 395 U. S. 486 213, 215, 693, 703–704
Preiser v. Rodriguez, 411 U. S. 475 544, 554, 557, 579, 600
Price v. Johnston, 334 U. S. 266 555
Priestly v. Hastings & Sons Publishing, 271 N. E. 2d 628 378
Procunier v. Martinez, 416 U. S. 396 411, 575, 580, 601
Producers Chemical v. Commissioner, 50 T. C. 940 13, 17
Public Utilities Comm'n v. Pollak, 343 U. S. 451 302–304, 307, 320, 402
Radio Officers v. NLRB, 347 U. S. 17 432
Raley v. Ohio, 360 U. S. 423 157
Raney v. Board of Ed., 391 U. S. 443 737
Red Lion Broadcasting v. FCC, 395 U. S. 367 303
Retail Clerks v. Schermerhorn, 375 U. S. 96 267
Reynolds v. Pegler, 123 F. Supp. 36 397
Reynolds v. Sims, 377 U. S. 533 54, 74, 77, 777–778, 807–808
Roe v. Wade, 410 U. S. 113 34, 67
Rosario v. Rockefeller, 410 U. S. 752 68, 78
Rosen v. United States, 161 U. S. 29 120–121
Rosenblatt v. Baer, 383 U. S. 75 261, 282, 289, 335, 341, 356, 377, 400, 402
Rosenbloom v. Metromedia, Inc., 403 U. S. 29 252, 281, 330, 332, 334, 337–339, 343, 346–347, 353, 361–364, 367–369, 371, 377
Rosenbloom v. Metromedia, Inc., 415 F. 2d 892 333

Page

Roth v. United States, 354 U. S. 476 99, 102, 107, 111, 114, 117–118, 162, 380, 386, 417, 931, 949
Roviaro v. United States, 353 U. S. 53 600
Rowan v. U. S. Post Office, 397 U. S. 728 131
Ruffalo, In re, 390 U. S. 544 558
Russell v. United States, 369 U. S. 749 118
Sacher v. United States, 343 U. S. 1 498, 500–501, 517, 524, 526, 529
Saia v. New York, 334 U. S. 558 305, 320, 359
St. Amant v. Thompson, 390 U. S. 727 332, 335
Salem v. United States Lines, 370 U. S. 31 125
Salinger v. Loisel, 265 U. S. 224 479
Samuels v. Mackell, 401 U. S. 66 907
San Antonio School Dist. v. Rodriguez, 411 U. S. 1 742, 751, 760
Sanders v. Harris, 213 Va. 369 379
San Diego Trades Council v. Garmon, 359 U. S. 236 271, 293
Saunders v. Shaw, 244 U. S. 317 110, 149
Savin, In re, 131 U. S. 267 527
Scheuer v. Rhodes, 416 U. S. 232 410
Schick v. United States, 195 U. S. 65 381
Schlude v. Commissioner, 372 U. S. 128 15
Schneckloth v. Bustamonte, 412 U. S. 218 678
Schneider v. State, 308 U. S. 147 80, 311, 314, 316, 411
School Dist. No. 6, In re, 284 Mich. 132 795
School Dist. of Lansing v. State Bd. of Ed., 367 Mich. 591 793–794, 797
Schulz v. Pennsylvania R. Co., 350 U. S. 523 105

Page

Screws v. United States, 325 U. S. 91 556
Scripps-Howard Radio v. FCC, 316 U. S. 4 184, 193
Secretary of Agriculture v. United States, 347 U. S. 645 693
Serrano v. Priest, 5 Cal. 3d 584 760
Service v. Dulles, 354 U. S. 363 696
Shapiro v. Thompson, 394 U. S. 618 76
Sharrow v. Brown, 447 F. 2d 94 223
Shelley v. Kraemer, 334 U. S. 1 793
Shelton v. Tucker, 364 U. S. 479 78
Shepard v. United States, 257 F. 2d 293 456
Shotkin v. Nelson, 146 F. 2d 402 702
Shuttlesworth v. Birmingham, 394 U. S. 147 317
Sierra Club v. Morton, 405 U. S. 727 177, 180, 191, 194–195, 215, 219, 222, 226
Small v. United States, 304 A. 2d 641 425, 451
Smith v. California, 361 U. S. 147 121, 123, 145
Smith v. Goguen, 415 U. S. 566 414, 421–422, 907–908
Smith v. Texas, 311 U. S. 128 138
Sniadach v. Family Finance, 395 U. S. 337 594
Snow v. Commissioner, 416 U. S. 500 18
Sostre v. McGinnis, 442 F. 2d 178 572–573, 594
Southern Nat. Gas v. United States, 188 Ct. Cl. 302 4, 6, 8, 12, 14
Southern Pacific Terminal v. ICC, 219 U. S. 498 65
Speiser v. Randall, 357 U. S. 513 365, 474
Spence v. Washington, 418 U. S. 416 906–908

Page

Spencer v. Kugler, 404 U. S. 1027 741
Standke v. B. E. Darby & Sons, 291 Minn. 468 378
Stanley v. Georgia, 394 U. S. 557 386
Stanley v. Illinois, 405 U. S. 645 558
State. See also name of State.
State v. Kool, 212 N. W. 2d 518 415–416
State v. News-Journal Corp., 36 Fla. Supp. 164 247
State v. Snyder, 277 So. 2d 660 378
Steffel v. Thompson, 415 U. S. 452 908
Stillwell Mfg. v. Phelps, 130 U. S. 520 108
Stone v. New York, C. & St. L. R. Co., 344 U. S. 407 105
Storer v. Brown, 415 U. S. 724 68
Street v. New York, 394 U. S. 576 412, 422
Stromberg v. California, 283 U. S. 359 158, 289, 311, 357, 410
Sturgis v. Allegan County, 343 Mich. 209 797
Sue v. Chicago Transit Auth., 279 F. 2d 416 702
Sultan v. United States, 249 F. 2d 385 133
Swain v. Boeing Airplane, 337 F. 2d 940 133
Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U. S. 1 737–738, 740–741, 744, 746, 757, 769, 771–772, 774–775, 788, 798, 802–803, 806, 809, 812–814
Talley v. California, 362 U. S. 60 359
Taylor v. Hayes, 418 U. S. 488 512, 515, 523, 525, 534, 908
Teamsters v. Oliver, 358 U. S. 283 282
Tennessee Electric v. TVA, 306 U. S. 118 194
Terminiello v. Chicago, 337 U. S. 1 319

Page

Terry, Ex parte, 128 U. S. 289 497, 527
Thiel v. Southern Pacific Co., 328 U. S. 217 138
Thornhill v. Alabama, 310 U. S. 88 288, 362
Time, Inc. v. Hill, 385 U. S. 374 335–336, 348, 354, 362, 364, 366, 402
Times Film Corp. v. Chicago, 365 U. S. 43 386
Tinker v. Des Moines School Dist., 393 U. S. 503 317, 410–411
Torres v. New York Labor Dept., 405 U. S. 949 70
Townsend v. Burke, 334 U. S. 736 432, 441
Townsend v. Swain, 372 U. S. 293 468
TPO, Inc. v. McMillen, 460 F. 2d 348 470
Trafficante v. Metropolitan Life Ins., 409 U. S. 205 193
Trails West v. Wolff, 32 N. Y. 2d 207 378
Troutman v. Shriver, 417 F. 2d 171 223
Tumey v. Ohio, 273 U. S. 510 501
Turner v. Warren County Board of Ed., 313 F. Supp. 380 755
Twenty-five East 40th St. Corp. v. Forbes, Inc., 30 N. Y. 2d 595 378
Twohig v. Boston Herald-Traveler, 291 N. E. 2d 398 378
Tyler v. Judges of Court of Registration, 179 U. S. 405 193, 220
Ungar v. Sarafite, 376 U. S. 575 501, 503, 529–530
United. For labor union, see name of trade.
United States, In re, 207 F. 2d 567 41
United States, In re, 257 F. 2d 844 41
United States v. Alcoa, 377 U. S. 271 619

Page

United States v. Augenblick, 393 U. S. 348 678
United States v. Barnett, 376 U. S. 681 527
United States v. Brewster, 408 U. S. 501 704
United States v. Brown, 479 F. 2d 1170 455, 457
United States v. Burr, 25 F. Cas. 30 702, 714–715
United States v. Burr, 25 F. Cas. 187 707–708, 713, 715
United States v. Butera, 420 F. 2d 564 137
United States v. Camara, 451 F. 2d 1122 137
United States v. Carll, 105 U. S. 611 117
United States v. Carter, 15 F. R. D. 367 701
United States v. Chicago, B. & Q. R. Co., 412 U. S. 401 11–12
United States v. Coefield, 155 U. S. App. D. C. 205 425, 432, 451, 453–454, 458–459
United States v. Concentrated Phosphate Assn., 393 U. S. 199 71
United States v. Connecticut Nat. Bank, 418 U. S. 656 693, 804
United States v. Connecticut Nat. Bank, 362 F. Supp. 240 627
United States v. Continental Can, 378 U. S. 441 621, 623–624, 628, 661–662
United States v. Cox, 342 F. 2d 167 693
United States v. Crocker-Anglo Bank, 277 F. Supp. 133 628
United States v. Daniels, 446 F. 2d 967 443
United States v. Debrow, 346 U. S. 374 117
United States v. Dotterweich, 320 U. S. 277 101
United States v. Du Pont, 353 U. S. 586 618

Page

United States v. El Paso Gas, 376 U. S. 651 615–616, 623, 922
United States v. Falstaff Brewing, 410 U. S. 526 621, 623–625, 628, 636–637, 639–640, 648, 675, 922
United States v. Fernandez, 456 F. 2d 638 133, 135
United States v. First City Nat. Bank, 386 U. S. 361 626
United States v. First Nat. Bancorporation, 329 F. Supp. 1003 627
United States v. First Nat. Bank, 376 U. S. 665 619, 626
United States v. First Nat. Bank of Jackson, 301 F. Supp. 1161 628
United States v. First Nat. Bank of Md., 310 F. Supp. 157 628
United States v. Gast, 457 F. 2d 141 137
United States v. General Dynamics Corp., 415 U. S. 486 616, 631, 642
United States v. Gooding, 473 F. 2d 425 137–138
United States v. Gross, 24 F. R. D. 138 700
United States v. Hall, 200 F. 2d 957 133
United States v. Hartford, 489 F. 2d 652 443
United States v. Hartwell, 6 Wall. 385 231
United States v. Hayman, 342 U. S. 205 469, 476–477, 479–480
United States v. Hess, 124 U. S. 483 118
United States v. Hoffa, 349 F. 2d 20 701
United States v. Idaho First Nat. Bank, 315 F. Supp. 261 627
United States v. ICC, 337 U. S. 426 693, 697
United States v. Iozia, 13 F. R. D. 335 699, 702

Page

United States v. Jarratt, 471 F. 2d 226 425, 455
United States v. Johnson, 383 U. S. 169 704
United States v. Kaylor, 491 F. 2d 1133 425, 448, 451, 453–454, 459
United States v. Kuhn, 441 F. 2d 179 137–138
United States v. Kurzyna, 485 F. 2d 517 429
United States v. Ludey, 274 U. S. 295 11
United States v. Luros, 243 F. Supp. 160 118
United States v. MacDonald, 455 F. 2d 1259 451, 454
United States v. Manarite, 448 F. 2d 583 126
United States v. Marine Bancorporation, 418 U. S. 602 659–660, 667, 669, 671–674, 693
United States v. Matlock, 415 U. S. 164 701
United States v. Morton, 483 F. 2d 573 701
United States v. Norcome, 375 F. Supp. 215 459
United States v. O'Brien, 391 U. S. 367 409, 414
United States v. Orito, 413 U. S. 139 97, 104, 119, 925, 927, 929, 933, 935, 947–948
United States v. Pabst Brewing, 384 U. S. 546 621, 669, 674
United States v. Palladino, 490 F. 2d 499 104, 144
United States v. Penn-Olin Chemical, 378 U. S. 158 621–622, 624, 653, 922
United States v. Pentado, 463 F. 2d 355 138
United States v. Philadelphia Nat. Bank, 374 U. S. 321 610, 619–621, 626, 628–630, 648, 653, 660–663, 666–670, 674
United States v. Phillips, 156 U. S. App. D. C. 217 457

Page

United States v. Phillipsburg Nat. Bank, 399 U. S. 350 619, 621, 626–627, 653, 660–664, 666, 668, 670, 673
United States v. Phillipsburg Nat. Bank, 306 F. Supp. 645 663
United States v. Pink, 315 U. S. 203 273
United States v. Reidel, 402 U. S. 478 99, 112, 117
United States v. Reynolds, 345 U. S. 1 710–711, 715
United States v. Richardson, 418 U. S. 166 220, 227, 235, 238
United States v. Ross, 205 F. 2d 619 143
United States v. Ryan, 402 U. S. 530 691
United States v. Santos, 385 F. 2d 43 701
United States v. Schartner, 426 F. 2d 470 133–135
United States v. Schenker, 486 F. 2d 318 425, 451, 455
United States v. Schooner Peggy, 1 Cranch 103 102
United States v. Scotland Neck Bd. of Ed., 407 U. S. 484 737, 744, 746–747, 755, 776
United States v. SCRAP, 412 U. S. 669 194, 204, 223, 229, 235, 239
United States v. Seale, 461 F. 2d 345 514
United States v. Spanos, 462 F. 2d 1012 701
United States v. Texas, 321 F. Supp. 1043 744, 755
United States v. Thevis, 484 F. 2d 1149 118
United States v. Third Nat. Bank, 390 U. S. 171 619, 626, 673
United States v. Tillman, 374 F. Supp. 215 459

Page

United States v. Titus, 221 F. 2d 571 133
United States v. Tucker, 404 U. S. 443 431, 455
United States v. 12 200-ft. Reels, 413 U. S. 123 97, 104–106, 113–115, 924, 926, 928, 932, 934, 942, 947, 954
United States v. United Virginia Bankshares, 347 F. Supp. 91 627
United States v. Vaught, 485 F. 2d 320 701
United States v. Velazquez, 482 F. 2d 139 455, 457
United States v. Von's Grocery, 384 U. S. 270 622, 667
United States v. Vuitch, 402 U. S. 62 354
United States v. Walker, 469 F. 2d 1377 425, 451
United States v. Waters, 141 U. S. App. D. C. 289 448, 450–451
United States v. Williams, 407 F. 2d 940 443
United States v. W. T. Grant Co., 345 U. S. 629 71
United States v. Wurzbach, 280 U. S. 396 124
U. S. ex rel. See name of real party in interest.
United States Steel v. FTC, 426 F. 2d 592 922
Valentine v. Chrestensen, 316 U. S. 52 314
Van Fleet v. Oltman, 244 Mich. 241 797
Velvel v. Nixon, 415 F. 2d 236 223
Virginia, Ex parte, 100 U. S. 339 792–793
Virginia v. Rives, 100 U. S. 313 793
Vitarelli v. Seaton, 359 U. S. 535 696
Wagonheim v. Maryland Censors, 255 Md. 297 931
Warden. See also name of warden.

Page

Warden v. Marrero, 417 U. S. 653 902–903
Washington v. Texas, 388 U. S. 14 583
Washington v. World Publishing, 506 P. 2d 913 378
Washington Post v. Chaloner, 250 U. S. 290 384
West v. Northern Publishing, 487 P. 2d 1304 377
White v. Nicholls, 3 How. 266 384
Whitmore v. Kansas City Star, 499 S. W. 2d 45 378
Whitney v. California, 274 U. S. 357 259
Whitus v. Georgia, 385 U. S. 545 138
William M., In re, 3 Cal. 3d 16 41, 62
Williams v. Rhodes, 393 U. S. 23 317, 321
Williams v. United States, 476 F. 2d 970 425, 451, 454
Wilwording v. Swenson, 404 U. S. 249 556, 579
Winship, In re, 397 U. S. 358 567

Page

Wirta v. Alameda-Contra Costa Dist., 68 Cal. 2d 51 301, 315, 318, 321
Wolff v. McDonnell, 418 U. S. 539 908–909
Wolin v. Port Authority, 392 F. 2d 83 313
Woodward v. Commissioner, 397 U. S. 572 12
Wright v. Emporia City Council, 407 U. S. 451 737, 742, 744, 746–747, 755, 776, 798, 801, 803, 805, 808
Wright v. McMann, 387 F. 2d 519 595
Yates v. United States, 355 U. S. 66 517
Yates v. United States, 356 U. S. 363 443
Young v. Gnoss, 7 Cal. 3d 18 41, 62
Younger v. Gilmore, 404 U. S. 15 556, 576, 578
Younger v. Harris, 401 U. S. 37 404, 907
Youngstown Sheet & Tube v. Sawyer, 343 U. S. 579 273, 703, 707

TABLE OF STATUTES CITED

(A) Statutes of the United States

	Page
1798, July 14, c. 74, 1 Stat. 596	323
1840, July 4, c. 45, 6 Stat. 802	323
1867, Feb. 5, c. 28, 14 Stat. 385, § 1	461
Mar. 2, c. 153, 14 Stat. 428, § 5	24
1868, June 22, c. 69, 15 Stat. 72	24
June 25, c. 70, 15 Stat. 73	24
1870, Jan. 26, c. 10, 16 Stat. 62	24
Feb. 1, c. 12, 16 Stat. 63	24
Feb. 23, c. 19, 16 Stat. 67	24
Mar. 30, c. 39, 16 Stat. 80	24
July 15, c. 299, 16 Stat. 363	24
1871, Apr. 20, c. 22, 17 Stat. 13, § 1	539
1876, July 12, c. 186, 19 Stat. 90	87
1903, Feb. 11, c. 544, 32 Stat. 823, § 2	602, 656
1914, Oct. 15, c. 323, 38 Stat. 730, as amended, § 7	602, 656, 919
1921, Nov. 23, c. 135, 42 Stat. 224	166
1928, May 29, c. 852, 45 Stat. 791, § 23	1
1930, June 17, c. 497, 46 Stat. 590, as amended, § 305	87
1935, July 5, c. 372, 49 Stat. 449, as amended, §§ 7–9, 14	264
1937, Mar. 1, c. 21, 50 Stat. 24	208
1946, Aug. 1, c. 724, 60 Stat. 755, as amended, § 261	166
1947, June 23, c. 120, 61 Stat. 136, as amended, § 101	264
1948, June 25, c. 646, 62 Stat. 869, § 36	1
§§ 637, 3401	461
1949, June 20, c. 227, 63 Stat. 208	166
1950, Sept. 21, c. 967, 64 Stat. 873, § 2	602, 656
Sept. 30, c. 1115, 64 Stat. 1085, § 2	424
Dec. 29, c. 1184, 64 Stat. 1125	602, 656, 919
1952, Apr. 8, c. 163, 66 Stat. 45	424
1954, Aug. 30, c. 1073, 68 Stat. 919, § 1	166
1962, Oct. 23, Pub. L. 87–856, 76 Stat. 1132, §§ 1, 4	166
1965, Oct. 22, Pub. L. 89–285, 79 Stat. 1028, § 101	298
1966, Feb. 21, Pub. L. 89–356, 80 Stat. 7, § 1	602, 656
1968, Mar. 27, Pub. L. 90–274, 82 Stat. 53, § 101	87
Oct. 17, Pub. L. 90–578, 82 Stat. 1107, § 101	461
1970, July 24, Pub. L. 91–353, 84 Stat. 466	241
Aug. 12, Pub. L. 91–375, 84 Stat. 719	87, 264
Oct. 27, Pub. L. 91–513, 84 Stat. 1236, § 404	424

Page

1971, Oct. 27, Pub. L. 92–145, 85 Stat. 394, § 801 et seq. 208
1972, Apr. 6, Pub. L. 92–269, 86 Stat. 117, § 2 ... 87
Oct. 25, Pub. L. 92–545, 86 Stat. 1135, § 801 et seq. 208
Revised Statutes.
§§ 102, 3893 87
§ 291 166
§§ 755, 761 461
§ 1979 539
§§ 5155, 5168–5169 602
U. S. Code.
Title 2, § 192 87
Title 5,
§ 552 166
§§ 701–706 676
§ 7301 264
Title 10,
§§ 269, 593, 672–675. 208
§§ 880, 934 676
Title 12,
§§ 26–27, 36 602
§ 1828 ..... 602, 656
§§ 1861, 1864 166
Title 15,
§ 18 ..... 602, 656, 919
§ 29 ..... 602, 656
§ 1801 et seq. 241
Title 18,
§§ 1, 3401 461
§ 2 ..... 87, 424
§§ 371, 3237 87
§ 1461 .... 87, 924, 947
§ 1462 ..... 87, 924, 926, 928, 932, 934, 947
§ 1465 934
§§ 3651, 4209, 5005 et seq. 424
Title 19, § 1305 87
Title 21, § 844 424
Title 23, § 131 298
Title 26, §§ 161–162, 167, 170, 213, 261, 263, 266, 404, 446, 615 1
Title 28 (1940 ed.), § 461 461
Title 28,
§§ 46, 537 166
§§ 294–295 955

Page

U. S. Code—Continued.
Title 28—Continued.
§§ 509–510, 515–516, 533, 1254, 2101.. 683
§§ 631–639, 2243, 2254 461
§ 1257 ..... 24, 241
§ 1291 ..... 602, 683
§ 1292 ..... 602, 717
§§ 1331, 1361 676
§ 1863 87
§ 2255 ..... 424, 461
Title 28 (Supp. II), § 1863 87
Title 29, §§ 157–159, 164 264
Title 31, § 107 166
Title 39 (1964 ed.), § 4354 87
Title 39,
§§ 201, 1201–1209.. 264
§§ 3008, 3011 87
Title 42,
§ 1983 539
§ 2017 166
Title 50, § 403a et seq.. 166
Bank Merger Act of 1966.. 602, 656
Bank Service Corporation Act 166
Central Intelligence Agency Act of 1949 166
Civil Rights Act of 1871... 539
Clayton Act 602, 656, 919
Expediting Act 602, 656
Federal Deposit Insurance Act 602, 656
Federal Magistrates Act... 461
Federal Youth Corrections Act 424
Freedom of Information Act 166
Habeas Corpus Act 461
Highway Beautification Act of 1965 298
Internal Revenue Code of 1939, § 1141 1
Internal Revenue Code of 1954, §§ 161–162, 167, 170, 213, 261, 263, 266, 404, 446, 615 1

	Page
Judiciary Act of 1867	461
Labor Management Relations Act, 1947	264
Maternity Act	166
National Labor Relations Act	264
Newspaper Preservation Act	241
Postal Reorganization Act	87, 264
Reconstruction Act	24
Revenue Act of 1928	1
Sedition Act of 1798	323
Taft-Hartley Act	264
Uniform Code of Military Justice, Arts. 80, 134	676

(B) Constitutions and Statutes of the States and the District of Columbia

	Page
Alabama.	
Const., Art. 6, § 5 (1819)	24
Code, Tit. 14, § 374	917
Arkansas.	
Stat. Ann. § 3–707	24
California.	
Const., Art. 2, § 5 (1849)	24
Const., Art. II, §§ 1, 3; Art. VI, § 10; Art. XX, § 11	24
Civil Code § 48a	323
Code Civ. Proc. §§ 1060, 1097	24
Elections Code §§ 310, 321, 350, 383, 389–390, 14240, 14246	24
Penal Code §§ 311, 311.2	915, 937
Penal Code §§ 1203.4, 4852.01, 4852.13, 4852.16–4852.17	24
Colorado.	
Const., Art. VII, § 10	24
Rev. Stat. Ann. § 49–3–2	24
Connecticut.	
Const., Art. 6, § 3 (1818)	24
Pub. Act No. 73–195	656
Gen. Stat. Rev. § 36–59	656
Delaware.	
Const., Art. 4, § 1 (1831)	24
District of Columbia.	
Code Ann. § 1–1102	24
Code Ann. § 22–2001	942
Code Ann. § 22–3202	424
Florida.	
Const., Art. 6, § 4 (1838)	24
Stat. Ann. § 104.38	241
Stat. Ann. § 940.05	24
Georgia.	
Const., Art. 2, § 6 (1868)	24
Code Ann. §§ 26–2011, 26–2105, 27–704	153
Code Ann. § 26–2101	153, 939
Hawaii.	
Rev. Stat. § 716–5	24
Illinois.	
Const., Art. 2, § 30 (1818)	24
Rev. Stat., c. 46, § 3–5	24
Indiana.	
Const., Art. 6, § 4 (1816)	24
Ann. Stat. § 29–4804	24
Iowa.	
Const., Art. 2, § 5 (1846)	24
Code § 32.1	405
Kansas.	
Const., Art. 5, § 2 (1859)	24
Stat. Ann. § 22–3722	24
Kentucky.	
Const., Art. 6, § 4 (1799)	24
Louisiana.	
Const., Art. 6, § 4 (1812)	24
Maine.	
Rev. Stat. Ann., Tit. 21, § 245	24

Page

Maryland.
Const., Art. 1, § 5 (1851) 24
Ann. Code, Art. 27, §§ 418, 418A..... 930
Massachusetts.
Gen. Laws Ann., c. 51, § 1 24
Michigan.
Const., Art. 2, § 2..... 24
Const., Art. 8, §§ 2–3.. 717
1867 Pub. Act No. 34, § 28; 1927 Pub. Act No. 319, pt. 2, c. 2, § 9; 1949 Pub. Act No. 231; 1962 Pub. Act No. 175; 1970 Pub. Act No. 48, § 12; 1973 Pub. Act No. 101..... 717
Comp. Laws §§ 132.1–132.2, 211.34, 257.811, 340.26–340.27, 340.55, 340.69, 340.77, 340.107, 340.113, 340.121, 340.148–340.149, 340.165, 340.188, 340.192, 340.253, 340.330–340.330u, 340.352, 340.355–340.356, 340.359, 340.361, 340.401–340.415, 340.431–340.449, 340.461–340.468, 340.563, 340.567, 340.569, 340.574–340.575, 340.582–340.586, 340.589–340.591, 340.594, 340.600, 340.605, 340.609, 340.613–340.614, 340.643a, 340.681, 340.711 et seq., 340.781–340.782, 340.882, 340.887, 388.182, 388.371, 388.611, 388.629, 388.681, 388.851, 388.1171, 388.1179 717
Comp. Laws § 168.10.. 24
Minnesota.
Const., Art. 7, § 2 (1857) 24
Stat. § 609.165..... 24

Page

Mississippi.
Const., Art. 6, § 5 (1817) 24
Missouri.
Const., Art. 3, § 14 (1820) 24
Montana.
Const., Art. IV, § 2... 24
Rev. Codes Ann. § 23–2701 24
Nebraska.
Laws 1973, LB57, § 1.. 539
Rev. Stat. §§ 29–2264, 83–1118 24
Rev. Stat. §§ 83–176, 83–185, 83–1107, 83–1109 539
Treatment and Corrections Act, §§ 7, 16, 38 539
Nevada.
Const., Art. 2, § 1 (1864) 24
New Hampshire.
Rev. Stat. Ann. § 607–A:2 24
New Jersey.
Const., Art. 2, § 1 (1844) 24
Stat. Ann. § 19:4–1.... 24
New York.
Const., Art. 2, § 2 (1821) 24
Election Law § 152.... 24
Penal Law §§ 235.00, 235.05 944
North Carolina.
Const., Art. 6, § 5 (1868) 24
Gen. Stat. § 13–1..... 24
Ohio.
Const., Art. 4, § 4 (1802) 24
Rev. Code Ann. § 2967.16 24
Rev. Code Ann. § 5516.01 et seq..... 298
Oregon.
Const., Art. 2, § 3 (1857) 24
Rev. Stat. §§ 137.240, 137.250 24

	Page
Pennsylvania.	
Const., Art. VII, § 1..	24
Stat. Ann., Tit. 19, § 893; Tit. 25, § 3552.	24
Rhode Island.	
Const., Art. 2, § 4 (1842)	24
South Carolina.	
Const., Art. 4 (1865)..	24
Code Ann. §§ 16–414.1 to 16–414.2.....	911
South Dakota.	
Comp. Laws Ann. §§ 23–57–7, 24–5–2..	24
Tennessee.	
Const., Art. 4, § 2 (1834)	24
Code Ann. § 2–202....	24
Texas.	
Const., Art. 7, § 4 (1845)	24
Utah.	
Const., Art. IV, § 6...	24
Vermont.	
Const., c. II, § 51.....	24
Virginia.	
Const., Art. 3, § 14 (1830)	24
Code Ann. § 8–630....	264
Washington.	
Rev. Code § 9.68.010..	949
Rev. Code §§ 9.86.10, 9.86.020, 9.86.030....	405
Rev. Code § 9.96.050..	24
Rev. Code §§ 30.04.230, 30.08.020, 30.40.020..	602
West Virginia.	
Const., Art. 3, § 1 (1863)	24
Const., Art. IV, § 1....	24
Wisconsin.	
Const., Art. 3, § 2 (1848)	24
Stat. Ann. § 57–078....	24
Wyoming.	
Stat. Ann. § 7–311.....	24

(C) Resolution

1818, Mar. 27, Res. 8, 3 Stat. 475..... 683

(D) Foreign Constitution and Statutes

England.	
11 & 12 Geo. 6, c. 58..	424
9 & 10 Eliz. 2, c. 39...	424
Criminal Justice Acts of 1948, 1961.....	424
India.	
Const., Art. 19.....	87

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1973

COMMISSIONER OF INTERNAL REVENUE *v.* IDAHO POWER CO.

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

No. 73-263. Argued February 27, 1974—Decided June 24, 1974

Section 167 (a) of the Internal Revenue Code of 1954 allows a depreciation deduction from gross income for "property used in the [taxpayer's] trade or business" or "held for the production of income," whereas § 263 (a) (1) of the Code disallows a deduction for "[a]ny amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate," expenditures which, the regulations state, include the "cost of acquisition, construction, or erection of buildings." Section 161 makes the deductions specified in that part of the Code, including § 167 (a), subject to the exceptions provided in the part including § 263. Respondent public utility claimed a deduction from gross income under § 167 (a) for *all* the depreciation for the year on its transportation equipment (cars, trucks, etc.), including that portion attributable to its use in constructing capital facilities, although on its books, as required by the regulatory agencies, it charged such equipment, to the extent it was used in construction, to the capital assets so constructed. The Commissioner of Internal Revenue disallowed the deduction for the construction-related depreciation, ruling that that depreciation was a nondeductible capital expenditure under § 263

(a). The Commissioner was upheld by the Tax Court, but the Court of Appeals reversed, holding that a deduction expressly enumerated in the Code, such as that for depreciation, may properly be taken even if it relates to a capital item, and that § 263 (a)(1) was inapplicable because depreciation is not an "amount paid out" as required by that section. *Held:* The equipment depreciation allocable to the taxpayer's construction of capital facilities must be capitalized under § 263 (a)(1). Pp. 10–19.

(a) Accepted accounting practice and established tax principles require the capitalization of the cost of acquiring a capital asset, including the cost incurred in a taxpayer's construction of capital facilities. The purpose of depreciation accounting is the allocation of the expense of using an asset over the tax periods benefited by that asset. Pp. 10–13.

(b) Construction-related depreciation is not unlike expenditure for other construction-related items, such as construction workers' wages, which must be treated as part of the cost of acquiring a capital asset. The significant fact is that the exhaustion of the construction equipment does not represent the final disposition of the taxpayer's investment in that equipment; rather such investment is assimilated into the cost of the capital asset constructed, and this capitalization prevents the distortion of income that would otherwise occur if depreciation properly allocable to asset acquisition were deducted from gross income currently realized. Pp. 13–14.

(c) Capitalization of construction-related equipment depreciation by the taxpayer which does its own construction work maintains tax parity with the taxpayer which has such work done independently. P. 14.

(d) Where a taxpayer's generally accepted method of accounting is made compulsory by the regulatory agency *and* that method clearly reflects income, as here, it is almost presumptively controlling of federal income tax consequences. Pp. 14–15.

(e) Considering § 263 (a)(1)'s literal language in denying a deduction for "[a]ny amount paid out" for construction or permanent improvement of facilities, and its purpose to reflect the basic principle that a capital expenditure may not be deducted from current income, as well as the regulations indicating that for purposes of § 263 (a)(1) "amount paid out" equates with "cost incurred," there is no question that the cost of the transportation equipment was "paid out" in the same manner as the cost of other

construction-related items, such as supplies, materials, and wages, which the taxpayer capitalized. Pp. 16–17.

(f) The priority-ordering directive of § 161 requires that § 263 (a)'s capitalization provision take precedence, on the facts, over § 167 (a). Pp. 17–19.

477 F. 2d 688, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 19.

Keith A. Jones argued the cause for petitioner. With him on the briefs were *Solicitor General Bork, Assistant Attorney General Crampton,* and *Elmer J. Kelsey.*

Frank Norton Kern argued the cause for respondent. With him on the brief was *Lawrence Chase Wilson.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the sole issue whether, for federal income tax purposes, a taxpayer is entitled to a deduction from gross income, under § 167 (a) of the Internal Revenue Code of 1954, 26 U. S. C. § 167 (a),[1] for depreciation on equipment the taxpayer owns and uses in the construction of its own capital facilities, or whether the capitalization provision of § 263 (a)(1) of the Code, 26 U. S. C. § 263 (a)(1),[2] bars the deduction.

---

[1] "§ 167. Depreciation.

"(a) General rule.

"There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

"(1) of property used in the trade or business, or

"(2) of property held for the production of income."

[2] "§ 263. Capital expenditures.

"(a) General rule.

[*Footnote 2 is continued on p. 4*]

The taxpayer claimed the deduction, but the Commissioner of Internal Revenue disallowed it. The Tax Court (Scott, J., in an opinion not reviewed by the full court) upheld the Commissioner's determination. 29 T. C. M. 383 (1970). The United States Court of Appeals for the Ninth Circuit, declining to follow a Court of Claims decision, *Southern Natural Gas Co.* v. *United States*, 188 Ct. Cl. 302, 372–380, 412 F. 2d 1222, 1264–1269 (1969), reversed. 477 F. 2d 688 (1973). We granted certiorari in order to resolve the apparent conflict between the Court of Claims and the Court of Appeals. 414 U. S. 999 (1973).

I

Nearly all the relevant facts are stipulated. The taxpayer-respondent, Idaho Power Company, is a Maine corporation organized in 1915, with its principal place of business at Boise, Idaho. It is a public utility engaged in the production, transmission, distribution, and sale of electric energy. The taxpayer keeps its books and files its federal income tax returns on the calendar year accrual basis. The tax years at issue are 1962 and 1963.

For many years, the taxpayer has used its own equipment and employees in the construction of improvements and additions to its capital facilities.[3] The major work has consisted of transmission lines, transmission switching stations, distribution lines, distribution stations, and connecting facilities.

"No deduction shall be allowed for—

"(1) Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate."

[3] For a period near the end of World War II, the taxpayer constructed all its capital improvements. At other times, outside contractors have performed part of this work. At the time of the trial of this tax case, the taxpayer had 140 employees engaged in new construction; it has had as many as 300 employees so engaged.

During 1962 and 1963, the tax years in question, taxpayer owned and used in its business a wide variety of automotive transportation equipment, including passenger cars, trucks of all descriptions, power-operated equipment, and trailers. Radio communication devices were affixed to the equipment and were used in its daily operations. The transportation equipment was used in part for operation and maintenance and in part for the construction of capital facilities having a useful life of more than one year.

On its books, the taxpayer used various methods of charging costs incurred in connection with its transportation equipment either to current expense or to capital accounts. To the extent the equipment was used in construction, the taxpayer charged depreciation of the equipment, as well as all operating and maintenance costs (other than pension contributions and social security and motor vehicle taxes) to the capital assets so constructed. This was done either directly or through clearing accounts in accordance with procedures prescribed by the Federal Power Commission and adopted by the Idaho Public Utilities Commission.

For federal income tax purposes, however, the taxpayer treated the depreciation on transportation equipment differently. It claimed as a deduction from gross income *all* the year's depreciation on such equipment, including that portion attributable to its use in constructing capital facilities. The depreciation was computed on a composite life of 10 years and under straight-line and declining-balance methods. The other operating and maintenance costs the taxpayer had charged on its books to capital were not claimed as current expenses and were not deducted.

To summarize: On its books, in accordance with Federal Power Commission-Idaho Public Utilities Commis-

sion prescribed methods, the taxpayer capitalized the construction-related depreciation, but for income tax purposes that depreciation increment was claimed as a deduction under § 167 (a).[4]

Upon audit, the Commissioner of Internal Revenue disallowed the deduction for the construction-related depreciation. He ruled that that depreciation was a nondeductible capital expenditure to which § 263 (a)(1) had application. He added the amount of the depreciation so disallowed to the taxpayer's adjusted basis in its capital facilities, and then allowed a deduction for an appropriate amount of depreciation on the addition, computed over the useful life (30 years or more) of the property constructed. A deduction for depreciation of the transportation equipment to the extent of its use in day-to-day operation and maintenance was also allowed. The result of these adjustments was the disallowance of depreciation, as claimed by the taxpayer on its returns, in the net amounts of $140,429.75 and $96,811.95 for 1962 and 1963, respectively. This gave rise to asserted deficiencies in taxpayer's income taxes for those two years of $73,023.47 and $50,342.21.

The Tax Court agreed with the decision of the Court of Claims in *Southern Natural Gas, supra,* and described that holding as one to the effect that "depreciation allocable to the use of the equipment in the construction of capital improvements was not deductible in the year the

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[4] For 1962 and 1963 the taxpayer's gross construction additions were $8,235,440.22 and $5,988,139.56, respectively. Of these amounts, the taxpayer itself constructed $7,139,940.72 and $5,642,342.79. The self-construction portion, therefore, obviously was a substantial part of the gross. The equipment depreciation for those years, to the extent allocated to use in construction and capitalized on the taxpayer's books, amounted to $150,047.42 and $130,523.99, respectively. These were the depreciation amounts deducted for income tax purposes, the major portions of which are presently at issue.

equipment was so used but should be capitalized and recovered over the useful life of the assets constructed." 29 T. C. M., at 386. The Tax Court, accordingly, held that the Commissioner "properly disallowed as a deduction . . . this allocable portion of depreciation and that such amount should be capitalized as part of [taxpayer's] basis in the permanent improvements in the construction of which the equipment was used." *Ibid.*

The Court of Appeals, on the other hand, perceived in the Internal Revenue Code of 1954 the presence of a liberal congressional policy toward depreciation, the underlying theory of which is that capital assets used in business should not be exhausted without provision for replacement. 477 F. 2d, at 690–693. The court concluded that a deduction expressly enumerated in the Code, such as that for depreciation, may properly be taken and that "no exception is made should it relate to a capital item." *Id.*, at 693. Section 263 (a)(1) of the Code was found not to be applicable because depreciation is not an "amount paid out," as required by that section. The court found *Southern Natural Gas* unpersuasive and felt "constrained to distinguish" it in reversing the Tax Court judgment. 477 F. 2d, at 695–696.

The taxpayer asserts that its transportation equipment is used in its "trade or business" and that depreciation thereon is therefore deductible under § 167 (a)(1) of the Code. The Commissioner concedes that § 167 may be said to have a literal application to depreciation on equipment used in capital construction,[5] Brief for Petitioner

[5] For purposes of the issue here presented, the key phrase of § 167 (a)(1) is "property used in the trade or business." Construction of this phrase in the present context has been infrequent and not consistent. In *Great Northern R. Co.* v. *Commissioner*, 40 F. 2d 372 (CA8), cert. denied, 282 U. S. 855 (1930), the court held that where a railroad transported men and equipment to a construction site, the depreciation of the train attributable to the construction work was to

16, but contends that the provision must be read in light of § 263 (a)(1) which specifically disallows any deduction for an amount "paid out for new buildings or for

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be capitalized. No consideration was given to whether the claimed deduction was available for property used in the taxpayer's trade or business. See also *Gulf, M. & N. R. Co.* v. *Commissioner,* 22 B. T. A. 233, 245–247 (1931), aff'd as to other issues, 63 U. S. App. D. C. 244, 71 F. 2d 953 (1934), aff'd, 293 U. S. 295 (1934); *Missouri Pacific R. Co.* v. *Commissioner,* 22 B. T. A. 267, 286–287 (1931); *Northern Pacific R. Co.* v. *Helvering,* 83 F. 2d 508, 513 (CA8 1936).

In a subsequent case, *Great Northern R. Co.* v. *Commissioner,* 30 B. T. A. 691 (1934), the Board of Tax Appeals reached the contrary result on identical facts. The Board held that the train equipment, even though used in part for construction of branch lines of the railroad, was used in *a* trade or business, and that this satisfied the requirements of the statute. The depreciation, therefore, was held deductible. *Id.,* at 708. This appears to have been the prevailing view until the issuance of Rev. Rul. 59–380, 1959–2 Cum. Bull. 87, where it was stated:

"In the instant case the capital improvements constructed constitute property to be used in the trade or business or property held for the production of income. However, the building equipment used in the construction cannot be considered as property used in the regular trade or business of the taxpayer." *Id.,* at 88.

Rev. Rul. 59–380 was in part the basis for the holding of the Court of Claims in *Southern Natural Gas Co.* v. *United States,* 188 Ct. Cl., 302, 378–379, 412 F. 2d 1222, 1268 (1969). The Court of Claims rejected the "'*a* trade or business'" approach in favor of the rule that, to be deductible from current income, depreciation must be of property used in *the* trade or business of the taxpayer. Equipment, to the extent used by the taxpayer in construction of additional facilities, was not used in *the* trade or business of the natural gas company. Thus, no depreciation deduction was allowable and the contested amount of depreciation was to be capitalized.

In the instant case, the Court of Appeals concluded that transportation equipment used by the taxpayer to construct its own capital improvements was used in the trade or business of the taxpayer:

"The continuity and regularity of taxpayer's construction activities, the number of employees engaged in construction and the amounts

permanent improvements or betterments." He argues that § 263 takes precedence over § 167 by virtue of what he calls the "priority-ordering" terms (and what the taxpayer describes as "housekeeping" provisions) of § 161 of the Code, 26 U. S. C. § 161,[6] and that sound principles of accounting and taxation mandate the capitalization of this depreciation.

It is worth noting the various items that are not at issue here. The mathematics, as such, is not in dispute. The taxpayer has capitalized, as part of its cost of acquisition of capital assets, the operating and maintenance costs (other than depreciation, pension contributions, and social security and motor vehicle taxes) of the transportation equipment attributable to construction. This is not contested. The Commissioner does not dispute that the portion of the transportation equipment's depreciation allocable to operation and maintenance of facilities, in contrast with construction thereof, qualifies as a deduction from gross income. There is no disagree-

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expended on construction all point to the conclusion that construction of facilities is a major aspect of the taxpayer's trade or business. These activities are auxiliary operations incident to the taxpayer's principal trade or business of producing, transmitting, distributing and selling electrical energy within the meaning of section 167." 477 F. 2d, at 696.

Since the Commissioner appears to have conceded the literal application of § 167 (a) to Idaho Power's equipment depreciation, we need not reach the issue whether the Court of Appeals has given the phrase "used in the trade or business" a proper construction. For purposes of this case, we assume, without deciding, that § 167 (a) does have a literal application to the depreciation of the taxpayer's transportation equipment used in the construction of its capital improvements.

[6] "§ 161. Allowance of deductions.

"In computing taxable income under section 63 (a), there shall be allowed as deductions the items specified in this part, subject to the exceptions provided in part IX (sec. 261 and following, relating to items not deductible)."

ment as to the allocation of depreciation between construction and maintenance. The issue, thus comes down primarily to a question of timing, as the Court of Appeals recognized, 477 F. 2d, at 692, that is, whether the construction-related depreciation is to be amortized and deducted over the *shorter* life of the equipment or, instead, is to be amortized and deducted over the *longer* life of the capital facilities constructed.

II

Our primary concern is with the necessity to treat construction-related depreciation in a manner that comports with accounting and taxation realities. Over a period of time a capital asset is consumed and, correspondingly over that period, its theoretical value and utility are thereby reduced. Depreciation is an accounting device which recognizes that the physical consumption of a capital asset is a true cost, since the asset is being depleted.[7] As the process of consumption continues, and depreciation is claimed and allowed, the asset's adjusted income tax basis is reduced to reflect the distribution of its cost over the accounting periods affected. The Court stated in *Hertz Corp.* v. *United States,* 364 U. S. 122, 126 (1960): "[T]he purpose of depreciation accounting is to allocate the expense of using an asset to the various periods

[7] The Committee on Terminology of the American Institute of Certified Public Accountants has discussed various definitions of depreciation and concluded that:

"These definitions view depreciation, broadly speaking, as describing not downward changes of value regardless of their causes but a money cost incident to exhaustion of usefulness. The term is sometimes applied to the exhaustion itself, but the committee considers it desirable to emphasize the cost concept as the primary if not the sole accounting meaning of the term: thus, *depreciation* means the cost of such exhaustion, as *wages* means the cost of labor." 2 APB Accounting Principles, Accounting Terminology Bulletin No. 1—Review and Resumé ¶ 48, p. 9512 (1973) (emphasis in original).

which are benefited by that asset." See also *United States* v. *Ludey,* 274 U. S. 295, 300–301 (1927); *Massey Motors, Inc.* v. *United States,* 364 U. S. 92, 96 (1960); *Fribourg Navigation Co.* v. *Commissioner,* 383 U. S. 272, 276–277 (1966). When the asset is used to further the taxpayer's day-to-day business operations, the periods of benefit usually correlate with the production of income. Thus, to the extent that equipment is used in such operations, a current depreciation deduction is an appropriate offset to gross income currently produced. It is clear, however, that different principles are implicated when the consumption of the asset takes place in the construction of other assets that, in the future, will produce income themselves. In this latter situation, the cost represented by depreciation does not correlate with production of current income. Rather, the cost, although certainly presently incurred, is related to the future and is appropriately allocated as part of the cost of acquiring an income-producing capital asset.

The Court of Appeals opined that the purpose of the depreciation allowance under the Code was to provide a means of cost recovery, *Knoxville* v. *Knoxville Water Co.,* 212 U. S. 1, 13–14 (1909), and that this Court's decisions, *e. g., Detroit Edison Co.* v. *Commissioner,* 319 U. S. 98, 101 (1943), endorse a theory of replacement through "a fund to restore the property." 477 F. 2d, at 691. Although tax-free replacement of a depreciating investment is one purpose of depreciation accounting, it alone does not require the result claimed by the taxpayer here. Only last Term, in *United States* v. *Chicago, B. & Q. R. Co.,* 412 U. S. 401 (1973), we rejected replacement as the strict and sole purpose of depreciation:

> "Whatever may be the desirability of creating a depreciation reserve under these circumstances, as a matter of good business and accounting practice,

> the answer is . . . [d]epreciation reflects the cost of an existing capital asset, not the cost of a potential replacement.'" *Id.*, at 415.

Even were we to look to replacement, it is the replacement of the constructed facilities, not the equipment used to build them, with which we would be concerned. If the taxpayer now were to decide not to construct any more capital facilities with its own equipment and employees, it, in theory, would have no occasion to replace its equipment to the extent that it was consumed in prior construction.

Accepted accounting practice [8] and established tax principles require the capitalization of the cost of acquiring a capital asset. In *Woodward* v. *Commissioner*, 397 U. S. 572, 575 (1970), the Court observed: "It has long been recognized, as a general matter, that costs incurred in the acquisition . . . of a capital asset are to be treated as capital expenditures." This principle has obvious application to the acquisition of a capital asset by purchase, but it has been applied, as well, to the costs incurred in a taxpayer's construction of capital facilities. See, *e. g.*, *Southern Natural Gas Co.* v. *United States, supra; Great Northern R. Co.* v. *Commissioner*, 40 F. 2d 372 (CA8), cert. denied, 282 U. S. 855 (1930); *Coors* v. *Commis-*

[8] The general proposition that good accounting practice requires capitalization of the cost of acquiring a capital asset is not seriously open to question. The Commissioner urges, however, that accounting methods as a rule require the treatment of construction-related depreciation of equipment as a capital cost of the facility constructed. Indeed, there is accounting authority for this. See, *e. g.*, W. Paton, Asset Accounting 188, 192–193 (1952); H. Finney & H. Miller, Principles of Accounting—Introductory 246–247 (6th ed. 1963) (depreciation as an expense should be matched with the production of income); W. Paton, Accountants' Handbook 652 (3d ed. 1943); Note, 1973 Duke L. J. 1377, 1384; Note, 52 N. C. L. Rev. 684, 692 (1974).

sioner, 60 T. C. 368, 398 (1973); *Norfolk Shipbuilding & Drydock Corp.* v. *United States,* 321 F. Supp. 222 (ED Va. 1971); *Producers Chemical Co.* v. *Commissioner,* 50 T. C. 940 (1968); *Brooks* v. *Commissioner,* 50 T. C. 927, 935–936 (1968), rev'd on other grounds, 424 F. 2d 116 (CA5 1970).[9]

There can be little question that other construction-related expense items, such as tools, materials, and wages paid construction workers, are to be treated as part of the cost of acquisition of a capital asset. The taxpayer does not dispute this. Of course, reasonable wages paid in the carrying on of a trade or business qualify as a deduction from gross income. § 162 (a)(1) of the 1954 Code, 26 U. S. C. § 162 (a)(1). But when wages are paid in connection with the construction or acquisition of a capital asset, they must be capitalized and are then entitled to be amortized over the life of the capital asset so acquired. *Briarcliff Candy Corp.* v. *Commissioner,* 475 F. 2d 775, 781 (CA2 1973); *Perlmutter* v. *Commissioner,* 44 T. C. 382, 404 (1965), aff'd, 373 F. 2d 45 (CA10 1967); *Jaffa* v. *United States,* 198 F. Supp. 234, 236 (ND Ohio 1961). See Treas. Reg. § 1.266–1 (e).

Construction-related depreciation is not unlike expenditures for wages for construction workers. The significant fact is that the exhaustion of construction equipment does not represent the final disposition of the taxpayer's in-

[9] Except for the Court of Appeals in the present case, the courts consistently have upheld the position of the Commissioner that construction-related depreciation is to be capitalized. *Great Northern R. Co.* v. *Commissioner,* 30 B. T. A. 691 (1934), upon which the Court of Appeals relied, is not to the contrary. In that case the Board concluded that construction-related depreciation was deductible under the Revenue Act of 1928, § 23 (k), 45 Stat. 800 (the provision corresponding to § 167 (a)(1) of the 1954 Code). The Commissioner in that case, however, had not argued for the capitalization of construction-related depreciation. 30 B. T. A., at 708.

552-191 O - 76 - 4

vestment in that equipment; rather, the investment in the equipment is assimilated into the cost of the capital asset constructed. Construction-related depreciation on the equipment is not an expense to the taxpayer of its day-to-day business. It is, however, appropriately recognized as a part of the taxpayer's cost or investment in the capital asset. The taxpayer's own accounting procedure reflects this treatment, for on its books the construction-related depreciation was capitalized by a credit to the equipment account and a debit to the capital facility account. By the same token, this capitalization prevents the distortion of income that would otherwise occur if depreciation properly allocable to asset acquisition were deducted from gross income currently realized. See, *e. g.*, *Coors* v. *Commissioner*, 60 T. C., at 398; *Southern Natural Gas Co.* v. *United States*, 188 Ct. Cl., at 373–374, 412 F. 2d, at 1265.

An additional pertinent factor is that capitalization of construction-related depreciation by the taxpayer who does its own construction work maintains tax parity with the taxpayer who has its construction work done by an independent contractor. The depreciation on the contractor's equipment incurred during the performance of the job will be an element of cost charged by the contractor for his construction services, and the entire cost, of course, must be capitalized by the taxpayer having the construction work performed. The Court of Appeals' holding would lead to disparate treatment among taxpayers because it would allow the firm with sufficient resources to construct its own facilities and to obtain a current deduction, whereas another firm without such resources would be required to capitalize its entire cost including depreciation charged to it by the contractor.

Some, although not controlling, weight must be given to the fact that the Federal Power Commission and the Idaho Public Utilities Commission required the taxpayer

to use accounting procedures that capitalized construction-related depreciation. Although agency-imposed compulsory accounting practices do not necessarily dictate tax consequences, *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552, 562 (1932), they are not irrelevant and may be accorded some significance. *Commissioner* v. *Lincoln Savings & Loan Assn.*, 403 U. S. 345, 355–356 (1971). The opinions in *American Automobile Assn.* v. *United States,* 367 U. S. 687 (1961), and *Schlude* v. *Commissioner,* 372 U. S. 128 (1963), urged upon us by the taxpayer here, are not to the contrary. In the former case it was observed that merely because the method of accounting a taxpayer employs is in accordance with generally accepted accounting procedures, this "is not to hold that for income tax purposes it so clearly reflects income as to be binding on the Treasury." 367 U. S., at 693. See also *Cincinnati, N. O. & T. P. R. Co.* v. *United States,* 191 Ct. Cl. 572, 583–584, 424 F. 2d 563, 570 (1970). Nonetheless, where a taxpayer's generally accepted method of accounting is made compulsory by the regulatory agency *and* that method clearly reflects income,[10] it is almost presumptively controlling of federal income tax consequences.

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[10] Section 446 of the Code, 26 U. S. C. § 446, reads in part as follows:

"§ 446. General rule for methods of accounting.

"(a) General rule.

"Taxable income shall be computed under the method of accounting on the basis of which the taxpayer regularly computes his income in keeping his books.

"(b) Exceptions.

"If no method of accounting has been regularly used by the taxpayer, or if the method used does not clearly reflect income, the computation of taxable income shall be made under such method as, in the opinion of the Secretary or his delegate, does clearly reflect income."

The presence of § 263 (a)(1) in the Code is of significance. Its literal language denies a deduction for "[a]ny amount paid out" for construction or permanent improvement of facilities. The taxpayer contends, and the Court of Appeals held, that depreciation of construction equipment represents merely a decrease in value and is not an amount "paid out," within the meaning of § 263 (a)(1). We disagree.

The purpose of § 263 is to reflect the basic principle that a capital expenditure may not be deducted from current income. It serves to prevent a taxpayer from utilizing currently a deduction properly attributable, through amortization, to later tax years when the capital asset becomes income producing. The regulations state that the capital expenditures to which § 263 (a) extends include the "cost of acquisition, construction, or erection of buildings." Treas. Reg. § 1.263 (a)–2 (a). This manifests an administrative understanding that for purposes of § 263 (a)(1), "amount paid out" equates with "cost incurred." The Internal Revenue Service for some time has taken the position that construction-related depreciation is to be capitalized. Rev. Rul. 59–380, 1959–2 Cum. Bull. 87; Rev. Rul. 55–252, 1955–1 Cum. Bull. 319.

There is no question that the cost of the transportation equipment was "paid out" in the same manner as the cost of supplies, materials, and other equipment, and the wages of construction workers.[11] The taxpayer does not

[11] The taxpayer contends that depreciation has been held not to be an expenditure or payment for purposes of a charitable contribution under § 170 of the Code, 26 U. S. C. § 170, *e. g.*, *Orr* v. *United States*, 343 F. 2d 553 (CA5 1965); *Mitchell* v. *Commissioner*, 42 T. C. 953, 973–974 (1964), or for purposes of a medical-expense deduction under § 213, 26 U. S. C. § 213, *e. g.*, *Gordon* v. *Commissioner*, 37 T. C. 986 (1962). Section 263 is concerned, however, with the capital nature of an expenditure and not with its timing, as are the phrases "payment . . . within the taxable year" or "paid during the taxable

question the capitalization of these other items as elements of the cost of acquiring a capital asset. We see no reason to treat construction-related depreciation differently. In acquiring the transportation equipment, taxpayer "paid out" the equipment's purchase price; depreciation is simply the means of allocating the payment over the various accounting periods affected. As the Tax Court stated in *Brooks* v. *Commissioner*, 50 T. C., at 935, "depreciation—inasmuch as it represents a using up of capital—is as much an 'expenditure' as the using up of labor or other items of direct cost."

Finally, the priority-ordering directive of § 161—or, for that matter, § 261 of the Code, 26 U. S. C. § 261 [12]—requires that the capitalization provision of § 263 (a) take precedence, on the facts here, over § 167 (a). Section 161 provides that deductions specified in Part VI of Subchapter B of the Income Tax Subtitle of the Code are "subject to the exceptions provided in part IX." Part VI includes § 167 and Part IX includes § 263. The clear import of § 161 is that, with stated exceptions set forth either in § 263 itself or provided for elsewhere (as, for example, in § 404 relating to pension contributions), none of which is applicable here, an expenditure incurred in acquiring capital assets must be capitalized even when the expenditure otherwise might be deemed deductible under Part VI.

The Court of Appeals concluded, without reference to § 161, that § 263 did not apply to a deduction, such as that for depreciation of property used in a trade or busi-

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year," respectively used in §§ 170 and 213. The treatment of depreciation under those sections has no relevance to the issue of capitalization here. See, *e. g.*, *Producers Chemical Co.* v. *Commissioner*, 50 T. C. 940, 959 (1968).

[12] "§ 261. General rule for disallowance of deductions.

"In computing taxable income no deduction shall in any case be allowed in respect of the items specified in this part."

ness, allowed by the Code even though incurred in the construction of capital assets.[13] We think that the court erred in espousing so absolute a rule, and it obviously overlooked the contrary direction of § 161. To the extent that reliance was placed on the congressional intent, in the evolvement of the 1954 Code, to provide for "liberalization of depreciation," H. R. Rep. No. 1337, 83d Cong., 2d Sess., 22 (1954), that reliance is misplaced. The House Report also states that the depreciation provisions would "give the economy added stimulus and resilience without departing from realistic standards of depreciation accounting." *Id.*, at 24. To be sure, the 1954 Code provided for new and accelerated methods for depreciation,

[13] The Court of Appeals relied on *All-Steel Equipment, Inc.* v. *Commissioner*, 54 T. C. 1749 (1970), rev'd in part, 467 F. 2d 1184 (CA7 1972), in holding that § 263 was inapplicable to deductions specifically allowed by the Code. 477 F. 2d, at 693. In *All-Steel*, the Tax Court faced the question whether taxes, losses, and research and experimental expenses incurred in manufacturing inventory items were currently deductible and did not have to be capitalized. The Tax Court held that these items were deductible, and that the taxpayer's method of accounting did not clearly reflect income. The Court of Appeals, in contrast, held that certain repair expenses incurred in producing inventory could be deducted "only in the taxable year in which the manufactured goods to which the repairs relate are sold." 467 F. 2d, at 1186. We need not decide this issue, but we note that § 263 (a) (1) (B) excepts research and experimental expenditures from capitalization treatment, see *Snow* v. *Commissioner*, 416 U. S. 500 (1974), and that § 266 of the Code, 26 U. S. C. § 266, creates a further exception by providing taxpayers with an election between capitalization and deduction of certain taxes and carrying charges. The Tax Court, in discussing deductions for taxes, losses, and research and experimental expenditures, observed that "deductions expressly granted by statute are not to be deferred even though they relate to inventory or capital items." 54 T. C., at 1759. This statement, when out of context, is subject to overbroad interpretation and, as is evident from our holding in the present case, has decided limitations in application.

resulting in the greater depreciation deductions currently available. These changes, however, relate primarily to computation of depreciation. Congress certainly did not intend that provisions for accelerated depreciation should be construed as enlarging the class of depreciable assets to which § 167 (a) has application or as lessening the reach of § 263 (a). See Note, 1973 Duke L. J. 1386.

We hold that the equipment depreciation allocable to taxpayer's construction of capital facilities is to be capitalized.

The judgment of the Court of Appeals is reversed.

It is so ordered.

MR. JUSTICE DOUGLAS, dissenting.

This Court has, to many, seemed particularly ill-equipped to resolve income tax disputes between the Commissioner and the taxpayers. The reasons are (1) that the field has become increasingly technical and complicated due to the expansions of the Code and the proliferation of decisions, and (2) that we seldom see enough of them to develop any expertise in the area. Indeed, we are called upon mostly to resolve conflicts between the circuits which more providently should go to the standing committee of the Congress for resolution.

That was the sentiment behind *Dobson* v. *Commissioner,* 320 U. S. 489, written by Mr. Justice Jackson and enthusiastically promoted by Mr. Justice Black, Mr. Justice Frankfurter, and myself. *Dobson,* save for egregious error and constitutional questions, would have left picayune cases such as the present one largely to the Tax Court, whose expertise is well recognized. But *Dobson* was short-lived, as Congress made clear its purpose that we were to continue on our leaden-footed pursuit of law and justice in this field. Internal Revenue Code of 1939, § 1141, as amended, 62 Stat. 991.

Now that we are on our own I disagree with the Court in disallowing the present claim for depreciation. A company truck has, let us say, a life of 10 years. If it cost $10,000, one would expect that "a reasonable allowance for the exhaustion, wear and tear" of the truck would be $1,000 a year within the meaning of 26 U. S. C. § 167 (a). That was the provision in the House Report of the 1954 Code when it said that it provided for "a liberalization of depreciation with respect to both the estimate of useful life of property and the method of allocating the depreciable cost over the years of service." [1] H. R. Rep. No. 1337, 83d Cong., 2d Sess., 22.

Not so, says the Government. Since the truck was used to build a plant for the taxpayer and the plant

[1] The Committee indicated that "reasonable" depreciation allowances include the straight-line method, the declining-balance method, or any other method that on an annual basis does not exceed the allowances on the declining-balance method. H. R. Rep. No. 1337, 83d Cong., 2d Sess., 22–23.

The purpose of providing more liberal depreciation allowances was explicitly stated:

"More liberal depreciation allowances are anticipated to have far-reaching economic effects. The incentives resulting from the changes are well timed to help maintain the present high level of investment in plant and equipment. The acceleration in the speed of the tax-free recovery of costs is of critical importance in the decision of management to incur risk. The faster tax writeoff would increase available working capital and materially aid growing businesses in the financing of their expansion. For all segments of the American economy, liberalized depreciation policies should assist modernization and expansion of industrial capacity, with resulting economic growth, increased production, and a higher standard of living.

"Small business and farmers particularly have a vital stake in a more liberal and constructive depreciation policy. They are especially dependent on their current earnings or short-term loans to obtain funds for expansion. The faster recovery of capital investment provided by this bill will permit them to secure short-term loans which would otherwise not be available." *Id.*, at 24.

has a useful life of 40 years, a lower rate of depreciation must be used—a rate that would spread out the life of the truck for 40 years even though it would not last more than 10. Section 167 (a) provides for a depreciation deduction with respect to property "used in the (taxpayer's) trade or business" or "held for the production of income" by the taxpayer. There is no intimation that § 167 (a) is not satisfied. The argument is rested upon § 161 which allows the deductions specified in § 167 (a) "subject to the exceptions" in § 263 (a) which provides:

> "No deduction shall be allowed for—
>
> "(1) Any amount paid out for new buildings or for permanent improvements or for betterments made to increase the value of any property or estate . . . ."

I agree with the Court of Appeals that depreciation claimed on a truck whose useful life is 10 years is not an amount "paid out" within the meaning of § 263 (a)(1). If "payment" in the setting of § 263 (a)(1) is to be read as including depreciation, Congress—not the courts—should make the decision.

I suspect that if the life of the vehicle were 40 years and the life of the building were 10 years the Internal Revenue Service would be here arguing persuasively that depreciation of the vehicle should be taken over a 40-year period. That is not to impugn the integrity of the IRS. It is only an illustration of the capricious character of how law is construed to get from the taxpayer the greatest possible return that is permissible under the Code.

The opinion of the Court of Appeals written by Judge Trask and concurred in by Judges Choy and McGovern, states my view of the law.

Depreciation on an automobile is not allowed as a charitable deduction, *Orr* v. *United States*, 343 F. 2d 553; *Mitchell* v. *Commissioner*, 42 T. C. 953, 973–974,

since it is not a "payment" within the meaning of § 170 (a)(1). Likewise depreciation on an automobile used to transport the taxpayer's son to a doctor is not deductible as a medical expense under § 213 because it is not an expense "paid" within the meaning of the section. *Gordon* v. *Commissioner*, 37 T. C. 986; *Calafut* v. *Commissioner*, 23 T. C. M. 1431.[2]

The IRS, however, has ruled that depreciation on construction equipment owned by a taxpayer and used in its construction work must be capitalized.[3] That Revenue Ruling, as the Court of Appeals held, is a legal opinion within the agency, not a Regulation or Treasury decision. It is without force when it conflicts with an Act of Congress.[4] See *Bartels* v. *Birmingham*, 332 U. S. 126, 132.

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[2] Where Congress has intended that depreciation be treated as an expenditure it has stated so explicitly, *e. g.*, § 615 (a) of the Internal Revenue Code.

[3] Rev. Rul. 59–380, 1959–2 Cum. Bull. 87, 88.

"[D]epreciation sustained on construction equipment owned by a taxpayer and used in the erection of capital improvements for its own use is not an allowable deduction, but shall be added to and made a part of the cost of the capital improvements. So much thereof as is applicable to the cost of depreciable capital improvements is recoverable through deductions for depreciation over the useful life of such capital improvements.

"In the instant case the capital improvements constructed constitute property to be used in the trade or business or property held for the production of income. However, the building equipment used in the construction cannot be considered as property used in the regular trade or business of the taxpayer."

[4] "[D]epartmental rulings not promulgated by the Secretary are of little aid in interpreting a tax statute . . . ," *Biddle* v. *Commissioner*, 302 U. S. 573, 582. Indeed, each issue of the Internal Revenue Bulletin warns that "Revenue Rulings . . . reported in the Bulletin do not have the force and effect of Treasury Department Regulations . . . ."

If the test under § 263 (a)(1) were the cost of capital improvements, the result would be different. But, as noted, the test is "any amount paid out," which certainly does not describe depreciation deductions unless words are to acquire esoteric meanings merely to accommodate the IRS. Congress is the lawmaker; and taking the law from it, we should affirm the Court of Appeals.

RICHARDSON, COUNTY CLERK AND REGISTRAR OF VOTERS OF MENDOCINO COUNTY *v.* RAMIREZ ET AL.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 72–1589. Argued January 15, 1974—Decided June 24, 1974

After the three individual respondents, who had been convicted of felonies and had completed their sentences and paroles, were refused registration to vote in three different California counties respectively because of their felony convictions, they brought a class petition, on behalf of themselves and all other ex-felons similarly situated, for a writ of mandate in the California Supreme Court, naming as defendants the Secretary of State and the three county election officials who had denied them registration "individually and as representatives of the class of all other" county election officials in the State, and challenging the constitutionality of respondents' disenfranchisement on the ground, *inter alia,* that provisions of the California Constitution and the implementing statutes that disenfranchised ex-felons denied them equal protection. The three county officials named as defendants decided not to contest the action and told the court they would henceforth register to vote ex-felons, including respondents, whose sentences and paroles had expired. Prior to the return date of the writ, the court added to the named defendants (instead of allowing her to intervene) another county election official (petitioner here) who was the defendant in a similar action by an ex-felon pending in the State Court of Appeal. After holding that the three first-named county officials' acquiescence did not render the case moot, the California Supreme Court went on to hold that the constitutional and statutory provisions in question, as applied to ex-felons whose sentences and paroles had expired, violated the Equal Protection Clause of the Fourteenth Amendment, but did not issue the peremptory writ. *Held:*

1. In view of its unusual procedural history in the Supreme Court of California, the case is not moot. Pp. 34–40.

(a) The State Supreme Court's action in adding petitioner as a named defendant after the other named county officials decided not to contest the action, and at a time when the Secretary of

State (who did not join in the petition to this Court) was still a party defendant who had answered the complaint, indicates that the court considered the suit to be not only on behalf of the three named plaintiffs, but also on behalf of all ex-felons in California similarly situated, and also that the court regarded petitioner's opponent in the Court of Appeal suit, both as an unnamed member of the class of ex-felons referred to in the complaint and as one of a class actually seeking to register in petitioner's county, as a party to the Supreme Court action. Pp. 38–40.

(b) Being rendered in a class action in which relief in the nature of declaratory relief was granted, the decision below is not only binding on petitioner and thus dispositive of her other suit, but also decides the federal constitutional question presented for the unnamed members of the classes represented below by petitioner and respondents, whose continuing controversy in the State Supreme Court still continues in this Court. *Brockington* v. *Rhodes*, 396 U. S. 41, distinguished. P. 40.

2. California, in disenfranchising convicted felons who have completed their sentences and paroles, does not violate the Equal Protection Clause. Pp. 41–56.

(a) The understanding of the framers of the Fourteenth Amendment, as reflected in the express language of § 2 of the Amendment, which exempts from the sanction of reduced congressional representation resulting from the denial of citizens' right to vote, the denial of such right for "participation in rebellion, or other crime," and in the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons, is of controlling significance in distinguishing such laws from those other state limitations on the franchise that this Court has held invalid under the Equal Protection Clause. Pp. 54–55.

(b) Section 1 of the Fourteenth Amendment, which contains the Equal Protection Clause, in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement that was expressly exempted from the less drastic sanction of reduced representation that § 2 imposed for other forms of disenfranchisement. P. 55.

(c) Even if § 2 was made part of the Amendment " 'largely through the accident of political exigency rather than for the relation which it bore to the other sections of Amendment,' " as respondents contend, this does not preclude looking to it for guidance in interpreting § 1, since § 2 is as much a part of the Amend-

ment as any of the other sections, and how it became part of the Amendment is less important than what it says and what it means. P. 55.

9 Cal. 3d 199, 507 P. 2d 1345, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. DOUGLAS, J., filed a dissenting statement, *post*, p. 86. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined and in Part I–A of which DOUGLAS, J., joined, *post*, p. 56.

Duncan M. James argued the cause and filed briefs for petitioner.

Martin R. Glick argued the cause for respondents. With him on the brief were *Gene Livingston* and *Burton D. Fretz*. *Daniel Hays Lowenstein* filed a brief for respondent Brown, Secretary of State of California.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The three individual respondents in this case were convicted of felonies and have completed the service of their respective sentences and paroles. They filed a petition for a writ of mandate in the Supreme Court of California to compel California county election officials to register them as voters.[1] They claimed, on behalf of

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**Evelle J. Younger*, Attorney General, *Iver E. Skjeie*, Assistant Attorney General, and *George J. Roth*, Deputy Attorney General, filed a brief for the State of California as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Chesterfield Smith* and *Daniel L. Skoler* for the American Bar Assn., and by *Philip L. Goar*, *A. L. Wirin*, and *Fred Okrand* for the American Civil Liberties Union of Southern California.

[1] The petition for a writ of mandate in the Supreme Court of California also named the California Secretary of State as a respond-

themselves and others similarly situated, that application to them of the provisions of the California Constitution and implementing statutes which disenfranchised persons convicted of an "infamous crime" denied them the right to equal protection of the laws under the Federal Constitution. The Supreme Court of California held that "as applied to all ex-felons whose terms of incarceration and parole have expired, the provisions of article II and article XX, section 11, of the California Constitution denying the right of suffrage to persons convicted of crime, together with the several sections of the Elections Code implementing that disqualification . . . , violate the equal protection clause of the Fourteenth Amendment." *Ramirez* v. *Brown,* 9 Cal. 3d 199, 216–217, 507 P. 2d 1345, 1357 (1973). We granted certiorari, 414 U. S. 816 (1973).

Article XX, § 11, of the California Constitution has provided since its adoption in 1879 that "[l]aws shall be made" to exclude from voting persons convicted of bribery, perjury, forgery, malfeasance in office, "or other high crimes." At the time respondents were refused registration, former Art. II, § 1, of the California Constitution provided in part that "no alien ineligible to citizenship, no idiot, no insane person, no person convicted of any infamous crime, no person hereafter convicted of the embezzlement or misappropriation of public money, and no person who shall not be able to read the Constitution in the English language and write his or her name, shall ever exercise the privileges of an elector

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ent in his capacity of chief elections officer of the State of California. He did not join the petition for a writ of certiorari to this Court, and has filed a brief as a party respondent. Respondents here (petitioners below) also include, in addition to the three individual respondents, the League of Women Voters and three nonprofit organizations which support the interests of ex-convicts—Los Pintos, 7th Step Foundations, Inc. (California Affiliates), and Prisoners' Union.

in this State." [2] Sections 310 and 321 of the California Elections Code provide that an affidavit of registration shall show whether the affiant has been convicted of "a felony which disqualifies [him] from voting." [3] Sections 383, 389, and 390 direct the county clerk to cancel the registration of all voters who have been convicted of "any infamous crime or of the embezzlement or misappropriation of any public money." [4] Sections 14240 and

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[2] Proposition 7, passed at the November 7, 1972, general election, repealed former Art. II, § 1, of the California Constitution and added new Art. II, § 3:

"The Legislature shall prohibit improper practices that affect elections and shall provide that no severely mentally deficient person, insane person, person convicted of an infamous crime, nor person convicted of embezzlement or misappropriation of public money, shall exercise the privileges of an elector in this state."

The Supreme Court of California concluded that the new constitutional provision was no different in substance from the former one, and that it did not implicitly repeal the implementing sections of the California Elections Code challenged here.

[3] Section 310 of the California Elections Code provides in relevant part that "[t]he affidavit of registration shall show:

. . . . . .

"(h) That the affiant is not disqualified to vote by reason of a felony conviction."

Section 321 sets the form of the registration affidavit, which includes the following: "10. I am not disqualified to vote by reason of a felony conviction."

[4] Section 383 of the California Elections Code provides:

"The county clerk shall cancel the registration in the following cases:

. . . . . .

"(c) Upon the production of a certified copy of a subsisting judgment of the conviction of the person registered of any infamous crime or of the embezzlement or misappropriation of any public money. . . ."

Section 389 provides:

"The county clerk shall, in the first week of September in each year, examine the records of the courts having jurisdiction in case of

14246 permit a voter's qualifications to be challenged on the ground that he has been convicted of "a felony" or of "the embezzlement or misappropriation of public money." [5] California provides by statute for restoration of the right to vote to persons convicted of crime either

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infamous crimes and the embezzlement or misappropriation of public money, and shall cancel the affidavits of registration of all voters who have been finally convicted of an infamous crime or of the embezzlement or misappropriation of public money. . . ."

Section 390 provides:

"The county clerk, on the basis of the records of courts in the county having jurisdiction of such offenses, shall furnish to the registrar of voters in a county where there is a registrar of voters, before the first day of September of each year, a statement showing the names of all persons convicted of infamous crimes or of the embezzlement or misappropriation of public money during the year prior to that first day of September, whose convictions have become final. The registrar of voters shall, during the first week of September in each year, cancel the affidavits of registration of such persons. The county clerk shall certify the statement under the seal of his office. . . ."

[5] Section 14240 of the California Elections Code (Supp. 1974) provides:

"A person offering to vote may be orally challenged within the polling place only by a member of the precinct board upon any or all of the following grounds:

. . . . . .

"(g) That he has been convicted of a felony.

. . . . . .

"On the day of the election no person, other than a member of a precinct board or other official responsible for the conduct of the election, shall challenge any voter or question him concerning his qualifications to vote. . . ."

Section 14246 (Supp. 1974) provides:

"If the challenge is on the ground that the person challenged has been convicted of a felony or that he has been convicted of the embezzlement or misappropriation of public money, he shall not be questioned, but the fact may be proved by the production of an authenticated copy of the record or by the sworn oral testimony of two witnesses."

552-191 O - 76 - 5

by court order after the completion of probation,[6] or, if a prison term was served, by executive pardon after completion of rehabilitation proceedings.[7] California also provides a procedure by which a person refused

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[6] Section 1203.4 of the California Penal Code (Supp. 1974) provides:

"(a) In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section, the defendant shall, at any time after the termination of the period of probation, if he is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his plea of guilty or plea of nolo contendere and enter a plea of not guilty; or, if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and, in either case, the court shall thereupon dismiss the accusations or information against the defendant and he shall thereafter be released from all penalties and disabilities resulting from the offense of which he has been convicted. The probationer shall be informed of this right and privilege in his probation papers. . . ."

[7] Section 4852.01 of the California Penal Code (1970) provides that a person convicted of a felony who was incarcerated may file, any time after his release from custody, a notice of intention to apply for a certificate of rehabilitation and pardon. It further provides, however:

"This chapter shall not apply to persons convicted of misdemeanors; to persons who have served time in county jails only; to persons serving a mandatory life parole; to persons committed under death sentences; or to persons in the military service."

Section 4852.13 of the California Penal Code (1970) provides:

"If, after hearing, the court finds that the petitioner has demonstrated by his course of conduct his rehabilitation and his fitness to exercise all of the civil and political rights of citizenship, the court shall make an order declaring that the petitioner has been rehabilitated, and recommending that the Governor grant a full pardon to the petitioner. Such order shall be filed with the clerk

registration may obtain judicial review of his disqualification.[8]

Each of the individual respondents was convicted of one or more felonies, and served some time in jail or prison followed by a successfully terminated parole. Respondent Ramirez was convicted in Texas; respondents Lee and Gill were convicted in California. When Ramirez applied to register to vote in San Luis Obispo County, the County Clerk refused to allow him to register. The Monterey County Clerk refused registration to respondent Lee, and the Stanislaus County Registrar of

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of the court, and shall be known as a certificate of rehabilitation. The certificate shall show the date on which the original notice of intention to apply for a certificate was filed."

Section 4852.16 provides:

"The certified copy of a certificate of rehabilitation transmitted to the Governor shall constitute an application for a full pardon upon receipt of which the Governor may, without any further investigation, issue a pardon to the person named therein, except that, pursuant to Section 1 of Article VII of the Constitution, the Governor shall not grant a pardon to any person twice convicted of felony, except upon the written recommendation of a majority of the judges of the Supreme Court."

Section 4852.17 (Supp. 1974) provides:

"Whenever a person is granted a full and unconditional pardon by the Governor, based upon a certificate of rehabilitation, the pardon shall entitle the person to exercise thereafter all civil and political rights of citizenship, including but not limited to: (1) the right to vote . . . ."

[8] Section 350 of the California Elections Code (1961) provides:

"If the county clerk refuses to register any qualified elector in the county, the elector may proceed by action in the superior court to compel his registration. In an action under this section, as many persons may join as plaintiffs as have causes of action."

Respondents contended that pardon was not an effective device for obtaining the franchise, noting that during 1968–1971, 34,262 persons were released from state prisons but only 282 pardons were granted.

Voters (hereafter also included in references to clerks) refused registration to respondent Gill. All three respondents were refused registration because of their felony convictions.[9]

In May 1972 respondents filed a petition for a writ of mandate in the Supreme Court of California, invoking its original jurisdiction.[10] They named as defendants[11] below the three election officials of San Luis Obispo,

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[9] Respondent Ramirez was convicted in Texas of the felony of "robbery by assault" in 1952. He served three months in jail and successfully terminated his parole in 1962. In February 1972 the San Luis Obispo County Clerk refused to allow Ramirez to register to vote on the ground that he had been convicted of a felony and spent time in incarceration. Respondent Lee was convicted of the felony of heroin possession in California in 1955, served two years in prison, and successfully terminated his parole in 1959. In March 1972 the Monterey County Clerk refused to allow Lee to register to vote on the sole ground that he had been convicted of a felony and had not been pardoned by the Governor. Respondent Gill was convicted in 1952 and 1967 of second-degree burglary in California, and in 1957 of forgery. He served some time in prison on each conviction, followed by a successful parole. In April 1972 the Stanislaus County Registrar of Voters refused to allow Gill to register to vote on the sole ground of his prior felony convictions.

[10] Paragraph VI of respondents' petition for mandamus states that the named "Petitioners bring this action individually and on behalf of all other persons who are ineligible to register to vote in California solely by reason of a conviction of a felony other than an election code felony." The remainder of the petition makes it clear that the class was further restricted to ex-felons, and the Supreme Court of California so treated it.

[11] We refer to the named "defendants" in the action in the Supreme Court of California, even though in that court they were actually denominated respondents according to California practice, and we refer to named "plaintiffs" in that court, even though they were actually there denominated as petitioners. We do this for convenience of reference, in order to avoid as much as possible confusion between reference to the position of the parties in the Supreme Court of California and their position here.

Monterey, and Stanislaus Counties who had refused to allow them to register, "individually and as representatives of the class of all other County Clerks and Registrars of Voters who have the duty of determining for their respective counties whether any ex-felon will be denied the right to vote." The petition for a writ of mandate challenged the constitutionality of respondents' exclusion from the voting rolls on two grounds. First, it was contended that California's denial of the franchise to the class of ex-felons could no longer withstand scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Relying on the Court's recent voting-rights cases, respondents argued that a compelling state interest must be found to justify exclusion of a class from the franchise, and that California could assert no such interest with respect to ex-felons. Second, respondents contended that application of the challenged California constitutional and statutory provisions by election officials of the State's 58 counties was so lacking in uniformity as to deny them due process and "geographical . . . equal protection." They appended a report by respondent California Secretary of State, and the questionnaires returned by county election officials on which it was based. The report concluded that there was wide variation in the county election officials' interpretation of the challenged voting exclusions.[12] The Su-

[12] The parties agree that the lack of uniformity is the result of differing interpretations of the 1966 Supreme Court of California decision in *Otsuka* v. *Hite*, 64 Cal. 2d 596, 414 P. 2d 412, which defined "infamous crime" as used in the California constitutional provisions.

The California Secretary of State's report noted that "[m]ost" of the 49 responding counties "have attempted to develop consistent criteria for determining which ex-felons shall be entitled to register. In some counties these policies have been formalized in writing, but

preme Court of California upheld the first contention and therefore did not reach the second one.

I

Before reaching respondents' constitutional challenge, the Supreme Court of California considered whether a decision reached by the three county clerks not to contest the action, together with their representation to the court that they would henceforth permit all ex-felons whose terms of incarceration and parole had expired to register and vote, rendered this case moot. That court decided that it did not. The acquiescence of the three officials was in no way binding on election officials of the other 55 California counties in which respondents might choose to reside, and it was undisputed that there were many ex-felons among the residents of those counties who had been or would be refused registration on the ground challenged. Because the case posed a question of broad public interest, which was likely to recur and which should receive a statewide resolution, the court exercised its "inherent discretion to resolve the issue, 'even though an event occurring during its pendency would normally render the matter moot.' . . . This rule is particularly applicable to challenges to the validity of election laws." 9 Cal. 3d, at 203, 507 P. 2d, at 1347. In addition to California cases, the court cited *Roe* v. *Wade,* 410 U. S. 113 (1973), and *Goosby* v. *Osser,* 409 U. S. 512 (1973).

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in most instances a case-by-case method has been used." The report concluded:

"2. Although the policy within most counties may be consistent, the fact that some counties have adopted different policies has created a situation in which there is a lack of uniformity across the state. It appears from the survey that a person convicted of almost any given felony would find that he is eligible to vote in some California counties and ineligible to vote in others.

"3. In order to remedy this lack of uniformity, authoritative guidelines from either the legislature or the courts are urgently needed."

As a practical matter, there can be no doubt that there is a spirited dispute between the parties in this Court as to the constitutionality of the California provisions disenfranchising ex-felons. Even though the Supreme Court of California did not in fact issue a permanent writ of mandate, and therefore its judgment is in effect a declaratory judgment, an action for such relief may stem from a controversy that is "definite and concrete, touching the legal relations of parties having adverse legal interests." *Aetna Life Insurance Co.* v. *Haworth,* 300 U. S. 227, 240–241 (1937). By reason of the special relationship of the public officials in a State to the court of last resort of that State, the decision of the Supreme Court of California, if left standing, leaves them permanently bound by its conclusion on a matter of federal constitutional law. Cf. *North Dakota Pharmacy Bd.* v. *Snyder's Stores,* 414 U. S. 156 (1973).

This case in some respects presents stronger arguments for concluding that a live case or controversy remains than in other election cases in which we have addressed the question of mootness. Unlike *Moore* v. *Ogilvie,* 394 U. S. 814 (1969), in which the particular candidacy was not apt to be revived in a future election, or *Hall* v. *Beals,* 396 U. S. 45 (1969), in which the voters who had been disenfranchised because of a residence requirement would not have suffered the same fate under the amended statute, respondents here are indefinitely disenfranchised by the provisions of California law which they challenge. While the situation in *Moore* v. *Ogilvie, supra,* was described as " 'capable of repetition, yet evading review,' " 394 U. S., at 816, that involved here can best be described, in view of the Supreme Court of California's decision against the state officials and their obligation to follow the law as laid down by that court, as "incapable of repetition," and therefore evading review. There are thus the strongest sorts of practical arguments, as well as the lan-

guage of *Moore* v. *Ogilvie, supra,* which militate against a conclusion of mootness in this case.

But purely practical considerations have never been thought to be controlling by themselves on the issue of mootness in this Court. While the Supreme Court of California may choose to adjudicate a controversy simply because of its public importance, and the desirability of a statewide decision, we are limited by the case-or-controversy requirement of Art. III to adjudication of actual disputes between adverse parties.

The mootness problem here arises because, as it noted, the Supreme Court of California was assured by the three county clerks who were named as defendants that the three named plaintiffs would be allowed to register and vote. The three named plaintiffs resided respectively in the California counties of San Luis Obispo, Monterey, and Stanislaus, and the county clerks of those counties who were named as defendants neither defended the action in the Supreme Court of California nor sought review here. Petitioner here is the County Clerk of Mendocino County, who though of course bound by the judgment of the Supreme Court of California, since she was made a party to that action, has no concrete dispute with voters who reside in other counties. Thus if the case were limited to the named parties alone, it could be persuasively argued that there was no present dispute on the issue of the right to register between the three named individual respondents in this Court and the one named petitioner here.

We think, however, that the unusual procedural history of the case in the Supreme Court of California leads to the conclusion that the litigation before us is not moot. The individual named plaintiffs brought their action in the Supreme Court of California on behalf of themselves and all other ex-felons similarly situated, and not simply

those ex-felons residing in the counties in which the named plaintiffs resided. While only the county clerks of Stanislaus, Monterey, and San Luis Obispo were named parties defendant, they were designated in the original complaint filed in the Supreme Court of California "as representatives of the class of all other County Clerks." The California Secretary of State was likewise named a party defendant. On the basis of this complaint, the Supreme Court of California issued an alternative writ of mandate directed to the three named county clerks "individually and as representatives of the class of all other County Clerks and Registrars of Voters," directing them to register to vote not simply the three named plaintiffs, but "all ex-felons whose term of incarceration and parole have expired and who upon application demonstrate that they are otherwise fully qualified to vote," or in the alternative to show cause why they had not done so upon the return date of the writ. Thus, while the Supreme Court of California did not in so many words say that it was permitting respondents to proceed by way of a "class action," the fact that the court's process recited that the named clerks were subject to it "individually and as representatives of the class of all other County Clerks and Registrars of Voters," and the fact that the beneficiaries of that process were not merely the named plaintiffs but "all ex-felons whose term of incarceration and parole [had] expired . . ." indicates that the court treated the action as one brought for the benefit of the class described in the petition for the writ of mandate.

Petitioner Viola Richardson, the County Clerk of Mendocino County, filed a complaint in intervention in the action in the Supreme Court of California, alleging that the suit as framed by the named plaintiffs was collusive, in that neither the three named county clerks nor the Secretary of State could be expected to contest the claims

of plaintiffs. Petitioner Viola Richardson further alleged in her complaint of intervention that she was a party to a lawsuit brought against her by an ex-felon (also named Richardson) who had sought to register in Mendocino County, had been denied the right, and whose suit seeking to establish the right was then pending in the State Court of Appeal.

The county clerks actually named as defendants in the mandate action each obeyed the alternative writ issued by the Supreme Court of California, and did not contest the named plaintiffs' legal claim that they had a right to vote secured by the Equal Protection Clause of the Fourteenth Amendment which overrode the contrary provisions of the California Constitution. The Secretary of State appeared in the action and generally denied the named plaintiffs' essential claims.

The Supreme Court of California, prior to the return date of the writ, issued an order denying petitioner Richardson's motion to intervene, but instead ordered her added to the named defendants in the action along with the three other named county clerks and the Secretary of State. This action in the Supreme Court of California, coming as it did after the acquiescence of the named clerks in the counties in which the named plaintiffs resided, and yet at a time when the Secretary of State was still a party defendant who had answered the complaint, clearly indicates to us that that court considered the action to be not only on behalf of the three named plaintiffs, but also on behalf of all ex-felons in California similarly situated. We are reinforced in this conclusion by the language quoted above from the alternative writ of mandate issued by the Supreme Court of California. Had the Supreme Court of California based its action on petitioner Richardson's claim that the suit was collusive, and that it might become a binding precedent in

her litigation then pending in the State Court of Appeal, it would seem to have been sufficient to grant the motion to intervene. But the court's action adding petitioner Richardson as a named defendant would appear to have been based on its conclusion that at least some members of the class represented by the plaintiffs in fact resided in Mendocino County, and were there seeking to exercise their right to vote. In reaching such a conclusion, of course, the Supreme Court of California had before it petitioner Richardson's allegation that at least her opponent in the litigation pending in the Court of Appeal was not merely seeking to register to vote in Mendocino County, but had brought a lawsuit to enforce his claim.

At the time petitioner Richardson was added as a party defendant, the three named plaintiffs had obtained the relief which they sought, whereas the remaining members of the class, including petitioner Richardson's opponent in the Court of Appeal litigation, had not. We have held that in the federal system one may not represent a class of which he is not a part, *Bailey* v. *Patterson,* 369 U. S. 31, 32–33 (1962), and if this action had arisen in the federal courts there would be serious doubt as to whether it could have proceeded as a class action on behalf of the class of ex-felons denied the right to register after the three named plaintiffs had been granted that right. *Indiana Employment Security Div.* v. *Burney,* 409 U. S. 540 (1973). But California is at liberty to prescribe its own rules for class actions, subject only to whether limits may be imposed by the United States Constitution, and we interpret its action in adding petitioner Richardson as a defendant to mean that it regarded her opponent in the Court of Appeal litigation, both as an unnamed member of the class of ex-felons referred to in the mandate complaint, and as one of a class actually seeking to register in Mendocino County,

as a party to the action in the Supreme Court of California, albeit an unnamed one.

In *Brockington* v. *Rhodes*, 396 U. S. 41 (1969), we emphasized in finding the case moot that appellant's "suit did not purport to be a class action, and he sought no declaratory relief." *Id.*, at 42. We said:

> "[I]n view of the limited nature of the relief sought, we think the case is moot because the congressional election is over. The appellant did not allege that he intended to run for office in any future election. He did not attempt to maintain a class action on behalf of himself and other putative independent candidates, present or future. He did not sue for himself and others similarly situated as independent *voters*, as he might have under Ohio law. . . . He did not seek a declaratory judgment, although that avenue too was open to him. . . ." *Id.*, at 43.

Here, unlike *Brockington*, there was a class action, and relief in the nature of declaratory relief was granted. The decision below is not only binding on petitioner Richardson, and thus dispositive of her other Court of Appeal litigation, but also decides the federal constitutional question presented for the unnamed members of the classes represented below by petitioner and respondents, whose continuing controversy led the Supreme Court of California to conclude that this case was not moot.

The briefs of the parties before us indicate that the adverse alignment in the Supreme Court of California continues in this Court, and we therefore hold the case is not moot.[13]

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[13] Our Brother MARSHALL argues in dissent that since the Supreme Court of California did not issue the peremptory writ of mandate, its opinion in this case is an advisory one which does not come within the "case or controversy" requirement of Art. III of the Constitution. He also contends that that court's refusal to issue the

II

Unlike most claims under the Equal Protection Clause, for the decision of which we have only the language of the Clause itself as it is embodied in the Fourteenth

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peremptory writ must rest on some unarticulated state ground, which he concludes should bar review of the federal constitutional question by this Court.

The Supreme Court of California has only recently noted its policy of avoiding advisory opinions on abstract questions of law, *In re William M.*, 3 Cal. 3d 16, 473 P. 2d 737 (1970), while in the same opinion adverting to its "declaratory use of habeas corpus in a number of cases" such as *In re Gonsalves*, 48 Cal. 2d 638, 311 P. 2d 483 (1957). In support of its determination in the case before us that exercise of its original jurisdiction would be appropriate, the Supreme Court of California cited *Young* v. *Gnoss*, 7 Cal. 3d 18, 496 P. 2d 445 (1972). There it had exercised its original mandamus jurisdiction to conclude that the durational residence requirements for voting imposed by California law violated the Equal Protection Clause of the Fourteenth Amendment. Saying that its "function at this time is simply to declare the minimum that must be done to implement *Dunn* v. *Blumstein*[, 405 U. S. 330 (1972)]," 7 Cal. 3d, at 27, 496 P. 2d, at 451, the court refused to issue a peremptory writ of mandate in that case, just as it did here, saying that "[s]ince there is no reason to believe that any of the parties to this proceeding will not accede to our holdings herein, no purpose would be served by issuing a writ of mandate to compel such compliance with respect to the November 1972 general election. . . ." *Id.*, at 29, 496 P. 2d, at 453. United States courts of appeals, which are barred by the case-or-controversy requirement of Art. III from issuing advisory opinions, have nonetheless declined to issue peremptory writs against district judges on the assumption that the latter would abide by the opinion of the court of appeals without the compulsion of such a writ. *In re United States*, 257 F. 2d 844 (CA5 1958); *In re United States*, 207 F. 2d 567 (CA5 1953).

We think that the reliance of the Supreme Court of California on its earlier decision recognizing and approving the use of its original jurisdiction to grant declaratory relief, as well as its reliance on precedent in an original mandamus proceeding in which it reached the merits but declined to issue the peremptory writ where there

Amendment, respondents' claim implicates not merely the language of the Equal Protection Clause of § 1 of the Fourteenth Amendment, but also the provisions of the less familiar § 2 of the Amendment:

> "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime,* the basis of representation therein shall be reduced in the proportion which the num-

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was no question of mootness, supports our conclusion that that court's judgment in this case is for all practical purposes at least a declaratory judgment. And it is well settled that, where there is "an actual and acute controversy," an appeal from a declaratory judgment of a state court presents a "case or controversy" within this Court's jurisdiction. *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249 (1933). Indeed, any other conclusion would unnecessarily permit a state court of last resort, quite contrary to the intention of Congress in enacting 28 U. S. C. § 1257, to invalidate state legislation on federal constitutional grounds without any possibility of state officials who were adversely affected by the decision seeking review in this Court.

We are equally unable to accept the view of the dissenters that the California court's failure here to issue the peremptory writ must rest on that court's resolution of some unspecified state law question against petitioner. The mere failure of a state court to award peremptory relief in a proceeding which it treats as one for a declaratory judgment is not an "adequate state ground" which precludes our review of its federal constitutional holding.

> ber of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." (Emphasis supplied.)

Petitioner contends that the italicized language of § 2 expressly exempts from the sanction of that section disenfranchisement grounded on prior conviction of a felony. She goes on to argue that those who framed and adopted the Fourteenth Amendment could not have intended to prohibit outright in § 1 of that Amendment that which was expressly exempted from the lesser sanction of reduced representation imposed by § 2 of the Amendment. This argument seems to us a persuasive one unless it can be shown that the language of § 2, "except for participation in rebellion, or other crime," was intended to have a different meaning than would appear from its face.

The problem of interpreting the "intention" of a constitutional provision is, as countless cases of this Court recognize, a difficult one. Not only are there deliberations of congressional committees and floor debates in the House and Senate, but an amendment must thereafter be ratified by the necessary number of States. The legislative history bearing on the meaning of the relevant language of § 2 is scant indeed; the framers of the Amendment were primarily concerned with the effect of reduced representation upon the States, rather than with the two forms of disenfranchisement which were exempted from that consequence by the language with which we are concerned here. Nonetheless, what legislative history there is indicates that this language was intended by Congress to mean what it says.

A predecessor of § 2 was contained in an earlier draft of the proposed amendment, which passed the House of Representatives, but was defeated in the Senate early in 1866. The Joint Committee of Fifteen on Recon-

struction then reconvened, and for a short period in April 1866, revised and redrafted what ultimately became the Fourteenth Amendment. The Journal of that Committee's proceedings shows only what motions were made and how the various members of the Committee voted on the motions; it does not indicate the nature or content of any of the discussion in the Committee. While the Journal thus enables us to trace the evolution of the draft language in the Committee, it throws only indirect light on the intention or purpose of those who drafted § 2. See B. Kendrick, Journal of the Joint Committee of Fifteen on Reconstruction 104–120 (1914).

We do know that the particular language of § 2 upon which petitioner relies was first proposed by Senator Williams of Oregon to a meeting of the Joint Committee on April 28, 1866. Senator Williams moved to strike out what had been § 3 of the earlier version of the draft, and to insert in place thereof the following:

> "Representatives shall be apportioned among the several states which may be included within this Union according to their respective numbers, counting the whole number of persons in each State excluding Indians not taxed. But whenever in any State the elective franchise shall be denied to any portion of its male citizens, not less than twenty-one years of age, or in any way abridged, except for participation in rebellion or other crime, the basis of representation in such State shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens not less than twenty-one years of age." *Id.*, at 102.

The Joint Committee approved this proposal by a lopsided margin, and the draft Amendment was reported to the House floor with no change in the language of § 2.

Throughout the floor debates in both the House and the Senate, in which numerous changes of language in § 2 were proposed, the language "except for participation in rebellion, or other crime" was never altered. The language of § 2 attracted a good deal of interest during the debates, but most of the discussion was devoted to its foreseeable consequences in both the Northern and Southern States, and to arguments as to its necessity or wisdom. What little comment there was on the phrase in question here supports a plain reading of it.

Congressman Bingham of Ohio, who was one of the principal architects of the Fourteenth Amendment and an influential member of the Committee of Fifteen, commented with respect to § 2 as follows during the floor debates in the House:

> "The second section of the amendment simply provides for the equalization of representation among all the States of the Union, North, South, East, and West. It makes no discrimination. New York has a colored population of fifty thousand. By this section, if that great State discriminates against her colored population as to the elective franchise, (except in cases of crime,) she loses to that extent her representative power in Congress. So also will it be with every other State." Cong. Globe, 39th Cong., 1st Sess., 2543 (1866).

Two other Representatives who spoke to the question made similar comments. Representative Eliot of Massachusetts commented in support of the enactment of § 2 as follows:

> "Manifestly no State should have its basis of national representation enlarged by reason of a portion of citizens within its borders to which the elective franchise is denied. If political power shall be lost because of such denial, not imposed because of

participation in rebellion or other crime, it is to be hoped that political interests may work in the line of justice, and that the end will be the impartial enfranchisement of all citizens not disqualified by crime." *Id.*, at 2511.

Representative Eckley of Ohio made this observation:

"Under a congressional act persons convicted of a crime against the laws of the United States, the penalty for which is imprisonment in the penitentiary, are now and always have been disfranchised, and a pardon did not restore them unless the warrant of pardon so provided.

". . . But suppose the mass of the people of a State are pirates, counterfeiters, or other criminals, would gentlemen be willing to repeal the laws now in force in order to give them an opportunity to land their piratical crafts and come on shore to assist in the election of a President or members of Congress because they are numerous? And let it be borne in mind that these latter offenses are only crimes committed against property; that of treason is against the nation, against the whole people—the highest known to the law." *Id.*, at 2535.

The debates in the Senate did not cover the subject as exhaustively as did the debates in the House, apparently because many of the critical decisions were made by the Republican Senators in an unreported series of caucuses off the floor. Senator Saulsbury of Delaware, a Democrat who was not included in the majority caucus, observed:

"It is very well known that the majority of the members of this body who favor a proposition of this character have been in very serious delibera-

> tion for several days in reference to these amendments, and have held some four or five caucuses on the subject." *Id.*, at 2869.

Nonetheless, the occasional comments of Senators on the language in question indicate an understanding similar to that of the House members. Senator Johnson of Maryland, one of the principal opponents of the Fourteenth Amendment, made this argument:

> "Now it is proposed to deny the right to be represented of a part, simply because they are not permitted to exercise the right of voting. You do not put them upon the footing of aliens, upon the footing of rebels, upon the footing of minors, upon the footing of the females, upon the footing of those who may have committed crimes of the most heinous character. Murderers, robbers, houseburners, counterfeiters of the public securities of the United States, all who may have committed any crime, at any time, against the laws of the United States or the laws of a particular State, are to be included within the basis; but the poor black man, unless he is permitted to vote, is not to be represented, and is to have no interest in the Government." *Id.*, at 3029.

Senator Henderson of Missouri, speaking in favor of the version of § 2 which had been reported by the Joint Committee in April, as opposed to the earlier provision of the proposal which had been defeated in the Senate, said this:

> "The States under the former proposition [the corresponding provision of the original Amendment reported by the Committee of Fifteen, which passed the House of Representatives but was defeated in the Senate] might have excluded the negroes under

> an educational test and yet retained their power in Congress. Under this they cannot. For all practical purposes, under the former proposition loss of representation followed the disfranchisement of the negro only; under this it follows the disfranchisement of white and black, unless excluded on account of 'rebellion or other crime.'" *Id.*, at 3033.

Further light is shed on the understanding of those who framed and ratified the Fourteenth Amendment, and thus on the meaning of § 2, by the fact that at the time of the adoption of the Amendment, 29 States had provisions in their constitutions which prohibited, or authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes.[14]

More impressive than the mere existence of the state constitutional provisions disenfranchising felons at the time of the adoption of the Fourteenth Amendment is the congressional treatment of States readmitted to the Union following the Civil War. For every State thus readmitted, affirmative congressional action in the form of an enabling act was taken, and as a part of the

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[14] Ala. Const., Art. 6, § 5 (1819); Cal. Const., Art. 2, § 5 (1849); Conn. Const., Art. 6, § 3 (1818); Del. Const., Art. 4, § 1 (1831); Fla. Const., Art. 6, § 4 (1838); Ga. Const., Art. 2, § 6 (1868); Ill. Const., Art. 2, § 30 (1818); Ind. Const., Art. 6, § 4 (1816); Iowa Const., Art. 2, § 5 (1846); Kan. Const., Art. 5, § 2 (1859); Ky. Const., Art. 6, § 4 (1799); La. Const., Art. 6, § 4 (1812); Md. Const., Art. 1, § 5 (1851); Minn. Const., Art. 7, § 2 (1857); Miss. Const., Art. 6, § 5 (1817); Mo. Const., Art. 3, § 14 (1820); Nev. Const., Art. 2, § 1 (1864); N. J. Const., Art. 2, § 1 (1844); N. Y. Const., Art. 2, § 2 (1821); N. C. Const., Art. 6, § 5 (1868); Ohio Const., Art. 4, § 4 (1802); Ore. Const., Art. 2, § 3 (1857); R. I. Const., Art. 2, § 4 (1842); S. C. Const., Art. 4 (1865); Tenn. Const., Art. 4, § 2 (1834); Tex. Const., Art. 7, § 4 (1845); Va. Const., Art. 3, § 14 (1830); W. Va. Const., Art. 3, § 1 (1863); Wis. Const., Art. 3, § 2 (1848).

readmission process the State seeking readmission was required to submit for the approval of the Congress its proposed state constitution. In March 1867, before any State was readmitted, Congress passed "An act to provide for the more efficient Government of the Rebel States," the so-called Reconstruction Act. Act of Mar. 2, 1867, c. 153, 14 Stat. 428. Section 5 of the Reconstruction Act established conditions on which the former Confederate States would be readmitted to representation in Congress. It provided:

> "That when the people of any one of said rebel States shall have formed a constitution of government in conformity with the Constitution of the United States in all respects, framed by a convention of delegates elected by the male citizens of said State, twenty-one years old and upward, of whatever race, color, or previous condition, who have been resident in said State for one year previous to the day of such election, *except such as may be disfranchised for participation in the rebellion or for felony at common law,* and when such constitution shall provide that the elective franchise shall be enjoyed by all such persons as have the qualifications herein stated for electors of delegates, and when such constitution shall be ratified by a majority of the persons voting on the question of ratification who are qualified as electors for delegates, and when such constitution shall have been submitted to Congress for examination and approval, and Congress shall have approved the same, and when said State, by a vote of its legislature elected under said constitution, shall have adopted the amendment to the Constitution of the United States, proposed by the Thirty-ninth Congress, and known as article fourteen, and when said article shall have become a part of the Constitution

> of the United States, said State shall be declared entitled to representation in Congress, and senators and representatives shall be admitted therefrom on their taking the oath prescribed by law, and then and thereafter the preceding sections of this act shall be inoperative in said State . . . ." (Emphasis supplied.)

Section 5 was introduced as a Senate amendment to the House bill, which was concerned only with the establishment of military government in the former Confederate States. Cong. Globe, 39th Cong., 2d Sess., 1360–1361 (1867). The legislative history of the Reconstruction Act was recounted by Senator Henderson of Missouri, who ultimately voted for it:

> "As the bill originally came from the House it was a bald and naked proposition to establish without limitation of power or the time of its duration a purely military government for the ten States now unrepresented. This, in my judgment, was a most dangerous experiment. . . .
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> "The Senate, being unwilling to embark on the experiment of pure military rule, modified the House bill by adopting what is known as the Blaine or Sherman amendment. This amendment conceded military rule, as asked by the House, but put some sort of limit to its duration. It provided that when the rebel States should adopt universal suffrage, regardless of color or race, excluding none, white or black, except for treason or such crimes as were felony at the common law, the regulation of exclusion to be left to the States themselves, and should adopt the constitutional amendment proposed at the last session of Congress . . . and so soon as a sufficient number of said States should adopt it to make it a

part of the Constitution of the United States, then military law should cease and the States should be admitted, provided that Congress even then should see fit to receive them." *Id.*, at 1641.

A series of enabling acts in 1868 and 1870 admitted those States to representation in Congress. The Act admitting Arkansas, the first State to be so admitted, attached a condition to its admission. Act of June 22, 1868, c. 69, 15 Stat. 72. That Act provided:

> "WHEREAS the people of Arkansas, in pursuance of the provisions of an act entitled 'An act for the more efficient government of the rebel States,' passed March second, eighteen hundred and sixty-seven, and the act supplementary thereto, have framed and adopted a constitution of State government, which is republican, and the legislature of said State has duly ratified the amendment to the Constitution of the United States proposed by the Thirty-ninth Congress, and known as article fourteen: Therefore,
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> "*Be it enacted* . . . That the State of Arkansas is entitled and admitted to representation in Congress as one of the States of the Union upon the following fundamental condition: That the constitution of Arkansas shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the constitution herein recognized, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted, under laws equally applicable to all the inhabitants of said State: *Provided,* That any alteration of said constitution prospective in its effect may be made in regard to the time and place of residence of voters."

The phrase "under laws equally applicable to all the inhabitants of said State" was introduced as an amendment to the House bill by Senator Drake of Missouri. Cong. Globe, 40th Cong., 2d Sess., 2600 (1868). Senator Drake's explanation of his reason for introducing his amendment is illuminating. He expressed concern that without that restriction, Arkansas might misuse the exception for felons to disenfranchise Negroes:

> "There is still another objection to the condition as expressed in the bill, and that is in the exception as to the punishment for crime. The bill authorizes men to be deprived of the right to vote 'as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted.' There is one fundamental defect in that, and that is that there is no requirement that the laws under which men shall be duly convicted of these crimes shall be equally applicable to all the inhabitants of the State. It is a very easy thing in a State to make one set of laws applicable to white men, and another set of laws applicable to colored men." *Ibid.*

The same "fundamental condition" as was imposed by the act readmitting Arkansas was also, with only slight variations in language, imposed by the Act readmitting North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, enacted three days later. Act of June 25, 1868, c. 70, 15 Stat. 73. That condition was again imposed by the Acts readmitting Virginia, Mississippi, Texas, and Georgia early in 1870. Act of Jan. 26, 1870, c. 10, 16 Stat. 62; Act of Feb. 1, 1870, c. 12, 16 Stat. 63; Act of Feb. 23, 1870, c. 19, 16 Stat. 67; Act of Mar. 30, 1870, c. 39, 16 Stat. 80; Act of July 15, 1870, c. 299, 16 Stat. 363.

This convincing evidence of the historical understanding of the Fourteenth Amendment is confirmed by the decisions of this Court which have discussed the constitutionality of provisions disenfranchising felons. Although the Court has never given plenary consideration to the precise question of whether a State may constitutionally exclude some or all convicted felons from the franchise, we have indicated approval of such exclusions on a number of occasions. In two cases decided toward the end of the last century, the Court approved exclusions of bigamists and polygamists from the franchise under territorial laws of Utah and Idaho. *Murphy* v. *Ramsey,* 114 U. S. 15 (1885); *Davis* v. *Beason,* 133 U. S. 333 (1890). Much more recently we have strongly suggested in dicta that exclusion of convicted felons from the franchise violates no constitutional provision. In *Lassiter* v. *Northampton County Board of Elections,* 360 U. S. 45 (1959), where we upheld North Carolina's imposition of a literacy requirement for voting, the Court said, *id.,* at 51:

> "Residence requirements, age, previous criminal record (*Davis* v. *Beason,* 133 U. S. 333, 345–347) are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters."

Still more recently, we have summarily affirmed two decisions of three-judge District Courts rejecting constitutional challenges to state laws disenfranchising convicted felons. *Fincher* v. *Scott,* 352 F. Supp. 117 (MDNC 1972), aff'd, 411 U. S. 961 (1973); *Beacham* v. *Braterman,* 300 F. Supp. 182 (SD Fla.), aff'd, 396 U. S. 12 (1969). Both District Courts relied on *Green* v. *Board of Elections,* 380 F. 2d 445 (1967), cert. denied, 389 U. S. 1048 (1968), where the Court of Appeals for the

Second Circuit held that a challenge to New York's exclusion of convicted felons from the vote did not require the convening of a three-judge district court.

Despite this settled historical and judicial understanding of the Fourteenth Amendment's effect on state laws disenfranchising convicted felons, respondents argue that our recent decisions invalidating other state-imposed restrictions on the franchise as violative of the Equal Protection Clause require us to invalidate the disenfranchisement of felons as well. They rely on such cases as *Dunn* v. *Blumstein,* 405 U. S. 330 (1972), *Bullock* v. *Carter,* 405 U. S. 134 (1972), *Kramer* v. *Union Free School District,* 395 U. S. 621 (1969), and *Cipriano* v. *City of Houma,* 395 U. S. 701 (1969), to support the conclusions of the Supreme Court of California that a State must show a "compelling state interest" to justify exclusion of ex-felons from the franchise and that California has not done so here.

As we have seen, however, the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment, a sanction which was not present in the case of the other restrictions on the franchise which were invalidated in the cases on which respondents rely. We hold that the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of § 2 and in the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons, is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court. We do not think that the Court's refusal to accept Mr. Justice Harlan's position in his dissents in *Reynolds* v. *Sims,* 377 U. S. 533, 589 (1964), and *Carrington* v. *Rash,* 380 U. S. 89, 97 (1965), that § 2 is the only part of the Amend-

ment dealing with voting rights, dictates an opposite result. We need not go nearly so far as Mr. Justice Harlan would to reach our conclusion, for we may rest on the demonstrably sound proposition that § 1, in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which § 2 imposed for other forms of disenfranchisement. Nor can we accept respondents' argument that because § 2 was made part of the Amendment " 'largely through the accident of political exigency rather than through the relation which it bore to the other sections of the Amendment,' " we must not look to it for guidance in interpreting § 1. It is as much a part of the Amendment as any of the other sections, and how it became a part of the Amendment is less important than what it says and what it means.

Pressed upon us by the respondents, and by *amici curiae*, are contentions that these notions are outmoded, and that the more modern view is that it is essential to the process of rehabilitating the ex-felon that he be returned to his role in society as a fully participating citizen when he has completed the serving of his term. We would by no means discount these arguments if addressed to the legislative forum which may properly weigh and balance them against those advanced in support of California's present constitutional provisions. But it is not for us to choose one set of values over the other. If respondents are correct, and the view which they advocate is indeed the more enlightened and sensible one, presumably the people of the State of California will ultimately come around to that view. And if they do not do so, their failure is some evidence, at least, of the fact that there are two sides to the argument.

We therefore hold that the Supreme Court of California erred in concluding that California may no longer, consistent with the Equal Protection Clause of the Fourteenth Amendment, exclude from the franchise convicted felons who have completed their sentences and paroles. The California court did not reach respondents' alternative contention that there was such a total lack of uniformity in county election officials' enforcement of the challenged state laws as to work a separate denial of equal protection, and we believe that it should have an opportunity to consider the claim before we address ourselves to it. Accordingly, we reverse and remand for further proceedings not inconsistent with this opinion.

It is so ordered.

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

The Court today holds that a State may strip ex-felons who have fully paid their debt to society of their fundamental right to vote without running afoul of the Fourteenth Amendment. This result is, in my view, based on an unsound historical analysis which already has been rejected by this Court. In straining to reach that result, I believe that the Court has also disregarded important limitations on its jurisdiction. For these reasons, I respectfully dissent.

I

A brief retracing of the procedural history of this case is necessary to a full understanding of my views. Each of the respondents, the plaintiffs below,[1] had been con-

[1] The proceeding below was a petition for a writ of mandate in the California Supreme Court, hence the moving parties should properly be described as petitioners rather than plaintiffs. However, to avoid confusion, since the petitioners below are the re-

victed of a felony unrelated to voting and had fully served his term of incarceration and parole. Each applied to register to vote in his respective county—Ramirez in San Luis Obispo County, Lee in Monterey County, and Gill in Stanislaus County. All three were refused registration because, under applicable provisions of the California Constitution, "no person convicted of any infamous crime . . . shall ever exercise the privileges of an elector." [2]

The three named plaintiffs filed a petition for a writ of mandate in the California Supreme Court, invoking its original jurisdiction. Plaintiffs challenged the State's disenfranchisement of ex-felons as being violative of the Equal Protection Clause of the Fourteenth Amendment and sought issuance of a peremptory writ of mandate to compel their registration. The complaint labeled the suit as brought "individually and on behalf of all other persons who are ineligible to register to vote in California solely by reason of a conviction of a felony other than an election code felony" and who had fully served their terms of incarceration and parole. The complaint named, as defendants, the election officials who had refused to register them, "individually and as representatives of the class of all other County Clerks and Registrars of Voters who have the duty of determining for their respective counties whether any ex-felon will be denied the right to vote."

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spondents here and vice versa, the parties in the California court will be referred to herein simply as plaintiffs and defendants.

[2] California Const., Art. II, § 1, provided, in part, that "no person convicted of any infamous crime . . . shall ever exercise the privileges of an elector in this State." Article II, § 1, was repealed by referendum at the November 7, 1972, general election and was replaced by a new Art. II, § 3, containing the same prohibition. The state implementing statutes include California Elections Code §§ 310, 321, 383, 389, 390, and 14240.

The three named election officials did not contest the action and represented to the state court that they would permit the named plaintiffs and all similarly situated ex-felons in their counties to register and to vote. The representative of the Secretary of State of California, also named as a defendant, has similarly agreed not to contest the suit.[3] At this point in the litigation all of the named plaintiffs had been voluntarily afforded the relief they were seeking by the election officials in their respective counties.

Subsequently, the petitioner in this Court, Viola Richardson, as County Clerk of Mendocino County, filed a motion to intervene in the proceedings before the California Supreme Court. She indicated to the court that she was being sued in a separate action in a lower state court by an ex-felon seeking to register in her county and that the decision in this case would be dispositive of the legal issue in that controversy. The State Supreme Court ordered Richardson added as a named defendant in the instant action, but did not name the ex-felon suing her as a plaintiff or named class representative herein.

In its opinion, the California Supreme Court found the case not to be moot and took the opportunity to address the merits of the Fourteenth Amendment issue. It indicated that, in its view, the ex-felon disenfranchisement provision of the California Constitution and its implementing statutes violated the Equal Protection Clause. The state court did not, however, afford the plaintiffs the relief they sought. The court denied the peremptory writ of mandate.

Although the California Supreme Court did not issue a writ ordering Richardson to register either the ex-felon

[3] The Attorney General filed a separate petition for certiorari, No. 73-324, to review the judgment of the California Supreme Court. The Secretary of State filed a memorandum opposing that petition for certiorari. The petition was denied today, *post*, p. 904.

suing her or any other potential elector in her county, she sought review of the state court's decision by way of writ of certiorari in this Court. The election officials in the named plaintiffs' counties did not seek review and the Secretary of State filed a memorandum opposing review by this Court.

A

There are a number of reasons why I do not believe this case is properly before us at this time. First, I am persuaded that the judgment of the California Supreme Court rests on an adequate and independent state ground.

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. . . . Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb* v. *Pitcairn,* 324 U. S. 117, 125–126 (1945).

Plaintiffs sought, from the California Supreme Court, a writ of mandate compelling their registration. The state court denied that relief. The entirety of the judgment of that court is as follows:

> "The alternative writ, having served its purpose, is discharged, and the petition for peremptory writ is denied." *Ramirez* v. *Brown,* 9 Cal. 3d 199, 217, 507 P. 2d 1345, 1357 (1973).[4]

[4] The judgment of the California Supreme Court is by custom the final paragraph of its opinion. The alternative writ referred to is merely a show-cause order, requiring the respondent to com-

The accompanying opinion indicates that the California court did not consider the case before it to be moot and that, in its view, the plaintiffs' assertion that the disenfranchisement provisions were unconstitutional was well taken. Since the court nonetheless denied plaintiffs the relief they sought, we can only conclude that it did so on independent state law grounds. Cf. *Brockington* v. *Rhodes,* 396 U. S. 41, 44 (1969). For example, a writ of mandate being discretionary, the state court may have declined its issuance simply because the named plaintiffs had already been registered and mandate relief seemed unnecessary.[5] There is certainly no indication that the decision to deny the writ was based on the state court's view on any federal question.

This Court creates an interesting anomaly by purporting to reverse the judgment of the California court. Since that court denied a writ of mandate to compel the registration of ex-felons, the only disposition consistent with this Court's view that the California disenfranchisement provisions are constitutional would be to affirm the judgment below. By reversing, the Court apparently directs the issuance of the peremptory writ. This anomaly demonstrates that this is a classic example of a case where "the same judgment would be rendered by the state court after we corrected its views of federal laws," *Herb* v. *Pitcairn, supra,* at 126; hence we can but offer an advisory opinion here. Whether we agree or disagree with the state court's view of the constitutionality of the challenged provisions, the judgment of the state court will necessarily remain to deny the writ of mandate.

The Court is aware of this problem and purports to resolve it by speculating that the California court may

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ply with the petitioner's demand or show cause why it should not be ordered to do so.

[5] See 5 B. Witkin, Cal. Proc. 2d, Extraordinary Writs § 22, pp. 3796–3797, and § 123, p. 3899 (1971).

have afforded plaintiffs declaratory relief. Such speculation is totally unfounded. Neither the opinion nor the judgment of the court below even mentions declaratory relief. The plaintiffs did not seek a declaratory judgment. The California Constitution on its face appears to bar the State Supreme Court from issuing a declaratory judgment in an original proceeding such as the one before us, since it limits that court's original jurisdiction to "proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition." Calif. Const., Art. 6, § 10 (Supp. 1974). Exclusive jurisdiction for suits seeking declaratory relief is vested, by statute, in the State Superior Courts.[6]

This Court's basis for construing the judgment of the court below as affording declaratory relief is its argument that because the California Supreme Court is the highest court of the State, its observations on the constitutionality of the challenged disenfranchisement provisions are apt to be heeded by state officials. It is true that the opinion of the California court did indicate a view on the merits of the plaintiffs' constitutional claim. But this Court's power "is to correct wrong judgments, not to revise opinions." *Herb* v. *Pitcairn, supra,* at 126. One could always argue that where a state court had commented on a matter of federal law, state officials would heed those comments. To say that such comments are a "declaration of federal law" reviewable by this Court is a rationale that would reach every case in which the state court decision rests on adequate

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[6] Calif. Code Civ. Proc. § 1060; see 15 Cal. Jur. 2d, Declaratory Relief § 13; 3 B. Witkin, Cal. Proc. 2d, Pleading § 705 (c), p. 2329 (1971); see, *e. g., Dills* v. *Delira Corp.,* 145 Cal. App. 2d 124, 129, 302 P. 2d 397, 400 (1956).

The difference between "mandamus and declaratory relief [is] that appellate courts cannot give the latter." 5 B. Witkin, Cal. Proc. 2d, Extraordinary Writs § 21, p. 3796 (1971).

552-191 O - 76 - 7

state grounds, rendering that doctrine a virtual nullity. The Court also cites two cases for the proposition that the California Supreme Court can issue a declaratory judgment in an original proceeding. But, on closer inspection, the cases cited by the Court, *ante,* at 41 n. 13, merely demonstrate that California courts, whose jurisdiction is not limited by any equivalent to Art. III, are free to render advisory opinions.[7] There is little doubt

[7] In the first case relied on by the majority, *In re William M.*, 3 Cal. 3d 16, 473 P. 2d 737 (1970), the California Supreme Court had previously granted a writ of habeas corpus which effectively mooted the petitioner's claim for relief. The court, nonetheless, later issued an opinion on the issue posed by the case while denying further relief. In a footnote, the court observed that as a general proposition, courts should avoid advisory opinions, but, in the very next sentence, reaffirmed its inherent discretion to issue such opinions. In the accompanying text, the court noted that it could render a decision in a moot case which would not be binding on a party before it, where the case involved issues of particular public importance. Although the court referred to its "declaratory use of habeas corpus in a number of cases," citing B. Witkin, Cal. Crim. Proc. § 790 (1963), and *In re Fluery*, 67 Cal. 2d 600, 432 P. 2d 986 (1967), the Witkin treatise refers to the court's "declaratory use of habeas corpus" and *In re Fluery, supra,* in particular, as examples of the "use of the writ to render a purely advisory opinion unnecessary to the determination of the particular controversy." B. Witkin, Cal. Crim. Proc., Habeas Corpus and Other Extraordinary Writs § 790, p. 247 (Supp. 1967).

The second case relied on by the majority is *Young* v. *Gnoss*, 7 Cal. 3d 18, 496 P. 2d 445 (1972), cited by the court below solely for the proposition that mandamus is an appropriate remedy to seek in an original proceeding. In that case, the petitioners had sought mandamus relief from the application of a state durational residence requirement for voting in order that they might vote in a June primary. The California Supreme Court, in a lengthy opinion, indicated that the challenged requirement was unconstitutional on the authority of our decision in *Dunn* v. *Blumstein*, 405 U. S. 330 (1972), but exercised its equitable discretion not to order a change in the residence requirements for the June primary

that many public officials would heed such an advisory opinion from the California Supreme Court and they would also heed an advisory opinion issued by this Court, but that does not free us from the constitutional limitations on our jurisdiction.

Because I believe that the judgment of the California court was based on adequate and independent state grounds, I do not think we have jurisdiction to consider any other issues presented by this case.

B

Assuming, *arguendo,* that the California Supreme Court did grant a declaratory judgment, I still believe that we are without jurisdiction because no case or controversy is presented. The Court seems willing to concede that the claims of the named plaintiffs may well be moot. *Ante,* at 36. The Court, however, premises its

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because too little time remained for such a change to be implemented in an orderly fashion. Accordingly, mandamus relief was denied. The court recommended that the necessary changes in residence requirements be effected before the November election but did not so order to give the "Legislature the opportunity to address itself to the problem . . . ." 7 Cal. 3d, at 28, 496 P. 2d, at 452–453. The court relied on its earlier decision in *Legislature* v. *Reinecke,* 6 Cal. 3d 595, 492 P. 2d 385 (1972), where the court had expressed its views on a legislative reapportionment problem, denied a writ of mandate, and retained jurisdiction to allow the legislature an opportunity to act before providing any judicial relief.

Each of these cases involves examples of advisory opinions rather than declaratory relief. In the latter, what the California Supreme Court did was to provide some guidance to the legislature while staying its hand and not affording judicial relief for the claimed deprivation. It seems well settled that California courts have "inherent discretion" to issue such advisory opinions. See 2 B. Witkin, Cal. Proc. 2d, Actions § 44, p. 920 (1970); *id.,* § 42, p. 916; 5 B. Witkin, Cal. Proc. 2d, Extraordinary Writs § 117, p. 3894; cf. *Kirstowsky* v. *Superior Court,* 143 Cal. App. 2d 745, 749, 300 P. 2d 163, 166 (1956).

jurisdiction on the assumption that there is a live controversy between the named petitioner in this Court and the unnamed plaintiff class members in her own county. To reach this conclusion, it is essential for the Court to conclude that this case is, in fact, a class action and that, in the circumstances of this case, it is appropriate to look to unnamed class members to determine whether there is a live controversy.

I am forced to point out that one of the crucial premises upon which the Court bases its assumption of jurisdiction—the existence of a class action—is highly speculative. I am persuaded that the California court never treated this case as a class action. As the majority notes, the case was titled a class action by its originators and the show-cause order merely tracked the language of the complaint. But the California court was, of course, not bound by that designation. In the entirety of its lengthy opinion, the California court does not once refer to this suit as a class action, to respondents as class representatives, to the existence of unnamed parties or to any other indicia of class-action status. Rather, the state court describes the case as simply "a proceeding for writ of mandate brought by three ex-felons to compel respondent election officials to register them as voters." 9 Cal. 3d, at 201, 507 P. 2d, at 1346. The opinion proceeds to list the three plaintiffs and, in a footnote, to explain that the only other plaintiffs were the League of Women Voters and three nonprofit organizations which support the interests of ex-felons. The opinion describes the defendants as the election officials of San Luis Obispo, Monterey, and Stanislaus Counties and the Secretary of State "in his capacity [as] chief elections officer of California," and notes that "[u]pon application we ordered the Mendocino County clerk [the petitioner here] joined as an additional party [defendant]." *Id.*, at 202 n. 1, 507 P. 2d, at 1346 n. 1. This description of the parties

plainly indicates that this suit was not treated as a class action by the state court. I think it highly inappropriate that on the basis of nothing but speculation, this case be fashioned into a class action, for the first time, in this Court.

C

Even assuming that this case is a class action, I still would not agree that it is properly before us. I do not believe that we can look beyond the named class members to find a case or controversy in the circumstances of this case. The Court seems to hold that review is not foreclosed by the possible mootness of the named plaintiffs' claim because, but for the California Supreme Court's decision, unnamed class members would still be subject to the challenged disenfranchisement, hence the case presents, as to unnamed class members, an issue capable of repetition, yet evading review. I disagree.

As the Court properly notes, a general rule of justiciability is that one may not represent a class of which he is not a part. Thus, as a general proposition, a federal court will not look to unnamed class members to establish the case-or-controversy requirement of Art. III.[8] But, the "evading review" doctrine of *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911), as recently applied in *Dunn* v. *Blumstein*, 405 U. S. 330, 333 n. 2 (1972), provides a limited exception to the general rule—an exception necessary to insure that judicial review is not foreclosed in cases where intervening events threaten invariably to moot the named plaintiff's claim for relief.

[8] The Court has held, for example, that Art. III restricts standing to bring a class action to the actual members of the class. *O'Shea* v. *Littleton*, 414 U. S. 488 (1974). The named plaintiffs here had been disenfranchised at the time they filed suit, and there is thus no question concerning their standing to challenge the California disenfranchisement provisions.

The necessity for looking beyond the named class members in this limited category of cases is evidenced by our decision in *Dunn* v. *Blumstein, supra,* in which the Court struck down a durational residence requirement for voting. The suit had been brought to compel the registration of the named plaintiff and the members of the class he represented in order that they might participate in an election scheduled for August 6, 1970. The Federal District Court did not order preliminary relief in time for the August election and, by the time the District Court decided the case, the next election was scheduled for November 1970. By then, the named plaintiff would have met the challenged three-month requirement. The District Court, nonetheless, rejected the State's argument that the controversy over the validity of the three-month requirement was therefore moot.

By the time the appeal reached this Court, the only named plaintiff had also satisfied the one-year state residence requirement. We nonetheless reached the merits, observing that "[a]lthough appellee [the only named plaintiff] now can vote, the problem to voters posed by the Tennessee residence requirements is ' "capable of repetition, yet evading review." ' *Moore* v. *Ogilvie,* 394 U. S. 814, 816 (1969)." 405 U. S., at 333 n. 2. Both this Court and the District Court found that, although the named plaintiff had satisfied the challenged residence requirements and would no longer be disenfranchised thereby, the case was not moot. The challenged requirement remained applicable to unnamed class members,[9] and the

[9] The Court distinguished its decision in *Hall* v. *Beals,* 396 U. S. 45 (1969), finding a challenge to Colorado's durational residence requirement moot, on the grounds that, in *Hall,* there had been an intervening change in law reducing the residence requirements from six months to two while the case was on appeal. Accordingly, application of the six-month requirement was incapable of repetition as to the named plaintiff or any other member of his class, and, having

issue presented was likely to evade review. Obviously the mere passage of a few months would invariably have rendered a challenge to the residence requirements by individual named plaintiffs moot—threatening virtually to foreclose judicial review.

A similar situation was presented in *Roe* v. *Wade,* 410 U. S. 113 (1973), relied on by the California court. We there held that although a woman who was not pregnant at the time the suit was filed did not have standing to challenge the constitutionality of the Texas abortion laws, a continuing controversy over the constitutionality of those laws existed as to a named plaintiff who was pregnant when the suit was filed, even though she may not have been pregnant at later stages of the appeal. We concluded that this case provided a classic example of an issue capable of repetition, yet evading review, hence the termination of the plaintiff's pregnancy while the case was on appeal did not render the case moot—even though a woman whose pregnancy has ended is no more affected by the abortion laws than one who was not pregnant at the time the suit was filed. "[T]he . . . human gestation period is so short that . . . pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, . . . appellate review will be effectively denied." *Id.,* at 125.

There are two common threads running through these cases—in each the challenged statute would continue to be applied, but the named plaintiff's claim would inevitably mature into mootness pending resolution of the lawsuit. In *Roe,* the termination of pregnancy, in *Dunn,* the passage of the residence requirement period, and in other voting cases, the occurrence of an election,[10] deprived

never been disenfranchised thereby, the named plaintiff had no standing to challenge the two-month requirement.

[10] The Court has found a live controversy in other voting cases in which intervening circumstances seemed to have mooted the named

the named plaintiff of a continuing controversy over the application of the challenged statute. In each instance, the mere passage of time threatened to insulate a constitutional deprivation from judicial review, and it is that danger which served as the rationale for rejecting suggestions of mootness. Where an invalid statute would thus continue to be applied simply because judicial review of a live controversy involving the named plaintiff was invariably foreclosed—the issue would be capable of repetition yet evading review.

Accordingly, the *Southern Pacific* doctrine requires the satisfaction of two tests in order to provide an answer to a suggestion of mootness. First, the claimed deprivation must, in fact, be "capable of repetition." This element is satisfied where, even though the named plaintiff's immediate controversy has been mooted by intervening events, either he or unnamed class members may continue to suffer the alleged constitutional deprivation in the future. The case before us clearly satisfies this first element of the *Southern Pacific* doctrine test. Since the California court declined to order any county clerk to

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plaintiff's claim for relief. *Moore* v. *Ogilvie*, 394 U. S. 814 (1969), for example, was an appeal from a decision denying relief to appellants who had unsuccessfully sought to be certified, as required by state law, as independent candidates for Presidential elector on the 1968 ballot. Appellants asserted that the Illinois certification requirement violated the State's constitutional obligation not to discriminate against voters in less populous counties. By the time their appeal reached this Court, the 1968 election had already taken place, but we held the case was not moot because "while the 1968 election is over, [the challenged burden] remains and controls future elections . . . ," *id.*, at 816; see *Hall* v. *Beals*, *supra*, at 49, and the short span of time between the denial of certification for candidacy and actual balloting threatens to moot all future attacks on the questioned candidacy requirements. 394 U. S., at 816. See also *Storer* v. *Brown*, 415 U. S. 724, 737 n. 8 (1974); *Rosario* v. *Rockefeller*, 410 U. S. 752, 756 n. 5 (1973).

register ex-felons, presumably the challenged disenfranchisement provisions could continue to be applied to unnamed class members in counties other than those in which the named plaintiffs reside.[11]

Second, the issue presented must be likely to evade review, but for invocation of the *Southern Pacific* doctrine. It is on the "evading review" element that the Court's analysis fails. Because the claim raised in this case concerns not a time-related but rather a status-based deprivation, there is no issue evading review and no reason to look beyond the named plaintiffs.[12] This is

[11] The extent of continuing disenfranchisement is apt to be minimal. A survey conducted by the Secretary of State of California indicated that the election officials of 52 of the 58 counties in California, representing counties which contain 97.39% of the registered voters in the State, agreed with the clerks in the named plaintiffs' counties that ex-felons should not be barred from voting in their counties. Brief for Respondents 30.

[12] The Court's opinion cites our decision in *Indiana Employment Security Div.* v. *Burney*, 409 U. S. 540 (1973), for the proposition that unnamed class members may not be looked to in cases arising from the federal system, but the case does not support that proposition. *Burney* concerned a constitutional challenge to the termination of unemployment insurance benefits without a prior hearing. The only named class representative received a post-termination hearing at which she obtained a reversal of the initial determination of ineligiblity and full retroactive benefits. The Court remanded for consideration of mootness. The jurisdictional issue in this Court revolved around whether the case presented issues "capable of repetition, yet evading review." The Court did not have to find the alleged constitutional deprivation incapable of repetition, hence was not concerned with the problem of whether a future application to the named class representative was required. Rather, it appeared that the prior-hearing issue was not one which would evade review. But see *id.*, at 542–546 (dissenting opinion). The Court reasoned that a post-termination hearing, afforded as a matter of course, would not invariably moot all claims for relief from members of the class. If the post-termination hearing did not result in an award of retroactive payments, as it had in the named plain-

not a situation where, by the time a case reaches this Court, it will always be too late to grant the named plaintiff relief. If and when an ex-felon is refused access to the voting rolls because of his past criminal record, an intervening election will not moot his claim for relief and the status giving rise to his disenfranchisement will not inevitably terminate pending review.

There are clearly ways in which a challenge to the California disenfranchisement provisions could reach this Court. The California Supreme Court has not issued a writ of mandate compelling the registration of any ex-felon.[13] If such a potential voter is, in fact, refused registration, a controversy suitable for resolution by this Court will be presented. The suit brought against petitioner Richardson, by an ex-felon resident of her own county, raising the same issues as those presented by this case, is presently pending in a California intermediate appellate court.[14] In that case, petitioner Richardson did, in fact, deny the plaintiff registration because he was an ex-felon. Once that case completes its passage through the state courts, it could well serve as a vehicle for our review of the California disenfranchisement provisions.

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tiff's case, a live and continuing controversy would be presented as to the insured's claim to the benefits allegedly wrongfully withheld pending the hearing. A case had already come to this Court in just such a posture, and the Court had summarily affirmed the judgment of the three-judge court. *Torres* v. *New York State Department of Labor*, 405 U. S. 949 (1972), but see 410 U. S. 971 (1973) (dissenting opinion to denial of rehearing). It was a failure to satisfy the "evading review" element of the test that led the Court to remand *Burney* for consideration of mootness.

[13] In the absence of such an order, petitioner Richardson is under no compulsion to register ex-felons in her county nor subject to any penalty for failing to do so. See Cal. Code Civ. Proc. § 1097 (1955).

[14] The suit against petitioner, *Richardson* v. *James*, 1 Civ. 32283, is presently pending in Division 3 of the Court of Appeal for the First Appellate District of California.

That is, of course, but one example of how the issue presented here could properly reach this Court. This case does not therefore benefit from the *Southern Pacific* doctrine's authority to look to unnamed class members to establish a case or controversy.

That the California Supreme Court appears to have found the plaintiffs' claims not to be moot does not detract from this conclusion since "[e]ven in cases arising in the state courts, the question of mootness is a federal one which a federal court must resolve before it assumes jurisdiction." *North Carolina* v. *Rice*, 404 U. S. 244, 246 (1971). Thus, unlike the Court, I am persuaded that we can look only to the named plaintiffs to satisfy the case-or-controversy requirement of Art. III.

D

The named plaintiffs here were registered only because the clerks in their counties had voluntarily abandoned an allegedly illegal practice of disenfranchising ex-felons, and we have said that "[m]ere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.' . . . [But a] case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States* v. *Concentrated Phosphate Export Assn.*, 393 U. S. 199, 203 (1968); accord, *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632 (1953). Accordingly, whether the named plaintiffs have a live controversy with the clerks in their own counties would depend on the likelihood of future disenfranchisement.[15] But we need not consider that question here be-

[15] If claims of the named plaintiffs are moot, the proper disposition of this case would seem to be to vacate the judgment of the California Supreme Court and remand for such proceedings as that court deems appropriate. *Brockington* v. *Rhodes*, 396 U. S. 41, 44 (1969).

cause none of the election officials in the named plaintiffs' counties sought review in this Court and none is now before us.

The sole petitioner before this Court is Viola Richardson. None of the named plaintiffs are residents of her county. While those named plaintiffs may or may not have a live controversy with the clerks in their own counties, they surely do not have one with petitioner Richardson. While Richardson may well have a live controversy with ex-felons in her own county over the validity of the disenfranchisement laws, those ex-felons are not before this Court, and she has no dispute with the named plaintiffs. In sum, there is no controversy between the parties before this Court. Petitioner Richardson seeks to use the named plaintiffs' controversy with their own county clerks as a vehicle for this Court to issue an advisory opinion on the issue presented by the suit brought against her by an ex-felon in her own county. Such a decision would violate the " 'oldest and most consistent thread in the federal law of justiciability . . . that the federal courts will not give advisory opinions.' " *Flast* v. *Cohen*, 392 U. S. 83, 96 (1968).

II

Since the Court nevertheless reaches the merits of the constitutionality of California's disenfranchisement of ex-felons, I find it necessary to register my dissent on the merits as well. The Court construes § 2 of the Fourteenth Amendment as an express authorization for the States to disenfranchise former felons. Section 2 does except disenfranchisement for "participation in rebellion, or other crime" from the operation of its penalty provision. As the Court notes, however, there is little independent legislative history as to the crucial words "or

other crime"; the proposed § 2 went to a joint committee containing only the phrase "participation in rebellion" and emerged with "or other crime" inexplicably tacked on.[16] In its exhaustive review of the lengthy legislative history of the Fourteenth Amendment, the Court has come upon only one explanatory reference for the "other crimes" provision—a reference which is unilluminating at best.[17]

The historical purpose for § 2 itself is, however, relatively clear and, in my view, dispositive of this case. The Republicans who controlled the 39th Congress were concerned that the additional congressional representation of the Southern States which would result from the abolition of slavery might weaken their own political dominance.[18] There were two alternatives available—either to limit southern representation, which was unacceptable on a long-term basis,[19] or to insure that southern Negroes, sympathetic to the Republican cause, would be enfranchised; but an explicit grant of suffrage to Negroes was thought politically unpalatable at the time.[20] Section 2 of the Fourteenth Amendment was the resultant com-

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[16] See, *e. g.*, Note, Restoring the Ex-offender's Right to Vote: Background and Developments, 11 Am. Crim. L. Rev. 721, 746–747, n. 158 (1973).

[17] Statement of Rep. Eckley, quoted, *ante*, at 46.

[18] Bonfield, The Right to Vote and Judicial Enforcement of Section Two of the Fourteenth Amendment, 46 Cornell L. Q. 108, 109 (1960); H. Flack, The Adoption of the Fourteenth Amendment 98, 126 (1908); B. Kendrick, Journal of the Joint Committee of Fifteen on Reconstruction 290–291 (1914); J. James, The Framing of the Fourteenth Amendment 185 (1956); Van Alstyne, The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-ninth Congress, 1965 Sup. Ct. Rev. 33, 44 (1965).

[19] James, n. 18, *supra*, at 138–139.

[20] Kendrick, n. 18, *supra*, at 291; cf. Flack, n. 18, *supra*, at 111, 118.

promise. It put Southern States to a choice—enfranchise Negro voters or lose congressional representation.[21]

The political motivation behind § 2 was a limited one. It had little to do with the purposes of the rest of the Fourteenth Amendment. As one noted commentator explained:

> " 'It became a part of the Fourteenth Amendment largely through the accident of political exigency rather than through the relation which it bore to the other sections of the Amendment.' " [22] "[I]t seems quite impossible to conclude that there was a clear and deliberate understanding in the House that § 2 was the sole source of national authority to protect voting rights, or that it expressly recognized the states' power to deny or abridge the right to vote." [23]

It is clear that § 2 was not intended and should not be construed to be a limitation on the other sections of the Fourteenth Amendment. Section 2 provides a special remedy—reduced representation—to cure a particular form of electoral abuse—the disenfranchisement of Negroes. There is no indication that the framers of the provisions intended that special penalty to be the exclusive remedy for all forms of electoral discrimination. This Court has repeatedly rejected that rationale. See *Reynolds* v. *Sims*, 377 U. S. 533 (1964); *Carrington* v. *Rash*, 380 U. S. 89 (1965).

Rather, a discrimination to which the penalty provision of § 2 is inapplicable must still be judged against the Equal Protection Clause of § 1 to determine whether judicial or congressional remedies should be invoked.

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[21] Bonfield, n. 18, *supra*, at 111; James, n. 18, *supra*, at 185; Van Alstyne, n. 18, *supra*, at 43–44, 58, 65.

[22] *Id.*, at 43–44 (quoting from Mathews, Legislative and Judicial History of the Fifteenth Amendment (1909)).

[23] *Id.*, at 65.

That conclusion is compelled by this Court's holding in *Oregon* v. *Mitchell*, 400 U. S. 112 (1970). Although § 2 excepts from its terms denial of the franchise not only to ex-felons but also to persons under 21 years of age, we held that the Congress, under § 5, had the power to implement the Equal Protection Clause by lowering the voting age to 18 in federal elections. As MR. JUSTICE BRENNAN, joined by MR. JUSTICE WHITE, as well as myself, there observed, § 2 was intended as no more "than a remedy supplementary, and in some conceivable circumstances indispensable, to other congressional and judicial remedies available under §§ 1 and 5." 400 U. S., at 278.

The Court's references to congressional enactments contemporaneous to the adoption of the Fourteenth Amendment, such as the Reconstruction Act and the readmission statutes, are inapposite. They do not explain the purpose for the adoption of § 2 of the Fourteenth Amendment. They merely indicate that disenfranchisement for participation in crime was not uncommon in the States at the time of the adoption of the Amendment. Hence, not surprisingly, that form of disenfranchisement was excepted from the application of the special penalty provision of § 2. But because Congress chose to exempt one form of electoral discrimination from the reduction-of-representation remedy provided by § 2 does not necessarily imply congressional approval of this disenfranchisement.[24] By providing a special remedy for disenfran-

[24] To say that § 2 of the Fourteenth Amendment is a direct limitation on the protection afforded voting rights by § 1 leads to absurd results. If one accepts the premise that § 2 authorizes disenfranchisement for any crime, the challenged California provision could, as the California Supreme Court has observed, require disenfranchisement for seduction under promise of marriage, or conspiracy to operate a motor vehicle without a muffler. *Otsuka* v. *Hite*, 64 Cal. 2d 596, 414 P. 2d 412 (1966). Disenfranchisement extends to convictions for vagrancy in Alabama or breaking a water pipe in North

chisement of a particular class of voters in § 2, Congress did not approve all election discriminations to which the § 2 remedy was inapplicable, and such discriminations thus are not forever immunized from evolving standards of equal protection scrutiny. Cf. *Shapiro* v. *Thompson*, 394 U. S. 618, 638–639 (1969). There is no basis for concluding that Congress intended by § 2 to freeze the meaning of other clauses of the Fourteenth Amendment to the conception of voting rights prevalent at the time of the adoption of the Amendment. In fact, one form of disenfranchisement—one-year durational residence requirements—specifically authorized by the Reconstruction Act, one of the contemporaneous enactments upon which the Court relies to show the intendment of the framers of the Fourteenth Amendment, has already been declared unconstitutional by this Court in *Dunn* v. *Blumstein*, 405 U. S. 330 (1972).

Disenfranchisement for participation in crime, like durational residence requirements, was common at the time of the adoption of the Fourteenth Amendment. But "constitutional concepts of equal protection are not immutably frozen like insects trapped in Devonian amber." *Dillenburg* v. *Kramer*, 469 F. 2d 1222, 1226 (CA9 1972). We have repeatedly observed:

> "[T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed

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Dakota, to note but two examples. Note, Disenfranchisement of Ex-felons: A Reassessment, 25 Stan. L. Rev. 845, 846 (1973). Even a jaywalking or traffic conviction could conceivably lead to disenfranchisement, since § 2 does not differentiate between felonies and misdemeanors.

> to be the limits of fundamental rights." *Harper* v. *Virginia Board of Elections,* 383 U. S. 663, 669 (1966).

Accordingly, neither the fact that several States had ex-felon disenfranchisement laws at the time of the adoption of the Fourteenth Amendment, nor that such disenfranchisement was specifically excepted from the special remedy of § 2, can serve to insulate such disenfranchisement from equal protection scrutiny.

III

In my view, the disenfranchisement of ex-felons must be measured against the requirements of the Equal Protection Clause of § 1 of the Fourteenth Amendment. That analysis properly begins with the observation that because the right to vote "is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government," *Reynolds* v. *Sims,* 377 U. S., at 555, voting is a "fundamental" right. As we observed in *Dunn* v. *Blumstein, supra,* at 336:

> "There is no need to repeat now the labors undertaken in earlier cases to analyze [the] right to vote and to explain in detail the judicial role in reviewing state statutes that selectively distribute the franchise. In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. See, *e. g., Evans* v. *Cornman,* 398 U. S. 419, 421–422, 426 (1970); *Kramer* v. *Union Free School District,* 395 U. S. 621, 626–628 (1969); *Cipriano* v. *City of Houma,* 395 U. S. 701, 706 (1969); *Harper* v. *Virginia Board of Elections,* 383 U. S. 663, 667 (1966); *Carrington* v. *Rash,* 380 U. S. 89, 93–94 (1965); *Reynolds* v. *Sims, supra.*"

552-191 O - 76 - 8

We concluded: "[I]f a challenged statute grants the right to vote to some citizens and denies the franchise to others, 'the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest.'" 405 U. S., at 337. (Emphasis in original.)

To determine that the compelling-state-interest test applies to the challenged classification is, however, to settle only a threshold question. "Compelling state interest" is merely a shorthand description of the difficult process of balancing individual and state interests that the Court must embark upon when faced with a classification touching on fundamental rights. Our other equal protection cases give content to the nature of that balance. The State has the heavy burden of showing, first, that the challenged disenfranchisement is necessary to a legitimate and substantial state interest; second, that the classification is drawn with precision—that it does not exclude too many people who should not and need not be excluded; and, third, that there are no other reasonable ways to achieve the State's goal with a lesser burden on the constitutionally protected interest. *E. g., Dunn* v. *Blumstein, supra,* at 343, 360; *Kramer* v. *Union Free School District,* 395 U. S. 621, 632 (1969); see *Rosario* v. *Rockefeller,* 410 U. S. 752, 770 (1973) (POWELL, J., dissenting); cf. *Memorial Hospital* v. *Maricopa County,* 415 U. S. 250 (1974); *NAACP* v. *Button,* 371 U. S. 415, 438 (1963); *Shelton* v. *Tucker,* 364 U. S. 479, 488 (1960).

I think it clear that the State has not met its burden of justifying the blanket disenfranchisement of former felons presented by this case. There is certainly no basis for asserting that ex-felons have any less interest in the democratic process than any other citizen. Like everyone else, their daily lives are deeply affected and changed by the decisions of government. See *Kramer, supra,* at 627. As the Secretary of State of California observed in his

memorandum to the Court in support of respondents in this case:

> "It is doubtful . . . whether the state can demonstrate either a compelling or rational policy interest in denying former felons the right to vote. The individuals involved in the present case are persons who have fully paid their debt to society. They are as much affected by the actions of government as any other citizens, and have as much of a right to participate in governmental decision-making. Furthermore, the denial of the right to vote to such persons is a hindrance to the efforts of society to rehabilitate former felons and convert them into law-abiding and productive citizens." [25]

It is argued that disenfranchisement is necessary to prevent vote frauds. Although the State has a legitimate and, in fact, compelling interest in preventing election fraud, the challenged provision is not sustainable on that ground. First, the disenfranchisement provisions are patently both overinclusive and underinclusive. The provision is not limited to those who have demonstrated a marked propensity for abusing the ballot by violating election laws. Rather, it encompasses all former felons and there has been no showing that ex-felons generally are any more likely to abuse the ballot than the remainder of the population. See *Dillenburg* v. *Kramer*, 469 F. 2d, at 1225. In contrast, many of those convicted of violating election laws are treated as misdemeanants and are not barred from voting at all. It seems clear that the classification here is not tailored to achieve its articulated goal, since it crudely excludes large numbers of otherwise qualified voters. See *Kramer* v. *Union Free*

[25] Memorandum of the Secretary of State of California in Opposition to Certiorari, in *Class of County Clerks and Registrars of Voters of California* v. *Ramirez*, No. 73–324.

School District, supra, at 632; *Cipriano* v. *City of Houma,* 395 U. S. 701, 706 (1969).

Moreover, there are means available for the State to prevent voting fraud which are far less burdensome on the constitutionally protected right to vote. As we said in *Dunn, supra,* at 353, the State "has at its disposal a variety of criminal laws that are more than adequate to detect and deter whatever fraud may be feared." Cf. *Harman* v. *Forssenius,* 380 U. S. 528, 543 (1965); *Schneider* v. *State,* 308 U. S. 147, 164 (1939). The California court's catalogue of that State's penal sanctions for election fraud surely demonstrates that there are adequate alternatives to disenfranchisement.

> "Today . . . the Elections Code punishes at least 76 different acts as felonies, in 33 separate sections; at least 60 additional acts are punished as misdemeanors, in 40 separate sections; and 14 more acts are declared to be felony-misdemeanors. Among this plethora of offenses we take particular note, in the present connection, of the felony sanctions against fraudulent registrations (§ 220), buying and selling of votes (§§ 12000–12008), intimidating voters by threat or bribery (§§ 29130–29135), voting twice, or fraudulently voting without being entitled to do so, or impersonating another voter (§§ 14403, 29430–29431), fraud or forgery in casting absentee ballots (§§ 14690–14692), tampering with voting machines (§ 15280) or ballot boxes (§§ 17090–17092), forging or altering election returns (§§ 29100–29103), and so interfering 'with the officers holding an election or conducting a canvass, or with the voters lawfully exercising their rights of voting at an election, as to prevent the election or canvass from being fairly held and lawfully conducted' (§ 17093)." 9 Cal. 3d, at

215–216, 507 P. 2d, at 1355–1356 (1973) (footnotes omitted).

Given the panoply of criminal offenses available to deter and to punish electoral misconduct, as well as the statutory reforms and technological changes which have transformed the electoral process in the last century, election fraud may no longer be a serious danger.[26]

Another asserted purpose is to keep former felons from voting because their likely voting pattern might be subversive of the interests of an orderly society. See *Green* v. *Board of Elections,* 380 F. 2d 445, 451 (CA2 1967). Support for the argument that electors can be kept from the ballot box for fear they might vote to repeal or emasculate provisions of the criminal code, is drawn primarily from this Court's decisions in *Murphy* v. *Ramsey,* 114 U. S. 15 (1885), and *Davis* v. *Beason,* 133 U. S. 333 (1890). In *Murphy,* the Court upheld the disenfranchisement of anyone who had ever entered into a bigamous or polygamous marriage and in *Davis,* the Court sanctioned, as a condition to the exercise of franchise, the requirement of an oath that the elector did not "teach, advise, counsel or encourage any person to commit the crime of bigamy or polygamy." The Court's intent was clear—"to withdraw all political influence from those who are practically hostile to" the goals of certain criminal laws. *Murphy, supra,* at 45; *Davis, supra,* at 348.

To the extent *Murphy* and *Davis* approve the doctrine that citizens can be barred from the ballot box because they would vote to change the existing criminal law, those decisions are surely of minimal continuing precedential value. We have since explicitly held that such "differences of opinion cannot justify excluding [any] group

[26] *Ramirez* v. *Brown,* 9 Cal. 3d 199, 215–216, 507 P. 2d 1345, 1355–1356 (1973).

from . . . 'the franchise,'" *Cipriano* v. *City of Houma*, 395 U. S., at 705–706; see *Communist Party of Indiana* v. *Whitcomb*, 414 U. S. 441 (1974); *Evans* v. *Cornman*, 398 U. S. 419, 423 (1970).

> "[I]f they are . . . residents, . . . they, as all other qualified residents, have a right to an equal opportunity for political representation. . . . 'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." *Carrington* v. *Rash*, 380 U. S., at 94.

See *Dunn*, 405 U. S., at 355.

Although, in the last century, this Court may have justified the exclusion of voters from the electoral process for fear that they would vote to change laws considered important by a temporal majority, I have little doubt that we would not countenance such a purpose today. The process of democracy is one of change. Our laws are not frozen into immutable form, they are constantly in the process of revision in response to the needs of a changing society. The public interest, as conceived by a majority of the voting public, is constantly undergoing reexamination. This Court's holding in *Davis*, *supra*, and *Murphy*, *supra*, that a State may disenfranchise a class of voters to "withdraw all political influence from those who are practically hostile" to the existing order, strikes at the very heart of the democratic process. A temporal majority could use such a power to preserve inviolate its view of the social order simply by disenfranchising those with different views. Voters who opposed the repeal of prohibition could have disenfranchised those who advocated repeal "to prevent persons from being enabled by their votes to defeat the criminal laws of the country." *Davis*, *supra*, at 348. Today, presumably those who support the legalization of marihuana could be barred

from the ballot box for much the same reason. The ballot is the democratic system's coin of the realm. To condition its exercise on support of the established order is to debase that currency beyond recognition. Rather than resurrect *Davis* and *Murphy*, I would expressly disavow any continued adherence to the dangerous notions therein expressed.[27]

The public purposes asserted to be served by disenfranchisement have been found wanting in many quarters. When this suit was filed, 23 States allowed ex-felons full access to the ballot. Since that time, four more States have joined their ranks.[28] Shortly after lower federal

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[27] The Court also notes that the disenfranchisement of ex-felons has received support in the dicta of this Court and that we have only recently affirmed without opinion the decisions of two three-judge District Courts upholding disenfranchisement provisions. *Fincher* v. *Scott*, 352 F. Supp. 117 (MDNC 1972), aff'd mem., 411 U. S. 961 (1973); *Beacham* v. *Braterman*, 300 F. Supp. 182 (SD Fla.), aff'd *per curiam*, 396 U. S. 12 (1969). But, dictum is not precedent and as MR. JUSTICE REHNQUIST has only recently reminded us, summary affirmances are obviously not of the same precedential value as would be an opinion of this Court treating the question on the merits. *Edelman* v. *Jordan*, 415 U. S. 651, 671 (1974). See F. Frankfurter & J. Landis, The Business of the Supreme Court at October Term, 1929, 44 Harv. L. Rev. 1, 14 (1930).

[28] The following States do not disenfranchise all former felons: Arkansas, Ark. Stat. Ann. § 3–707 (Supp. 1973); Colorado, Colo. Const., Art. VII, § 10, and Colo. Rev. Stat. Ann. § 49–3–2 (Perm. Cum. Supp. 1971); Florida, Fla. Stat. Ann. § 940.05 (1973); Hawaii, Hawaii Rev. Stat. § 716–5 (Supp. 1972); Illinois, Ill. Rev. Stat., c. 46, § 3–5 (1973); Indiana, Ind. Ann. Stat. § 29–4804 (1969); Kansas, Kan. Stat. Ann. § 22–3722 (Supp. 1973); Maine, Me. Rev. Stat. Ann., Tit. 21, § 245 (1964); Massachusetts, Mass. Gen. Laws Ann., c. 51, § 1 (Supp. 1974–1975) (except election code offenders); Michigan, Mich. Const., Art. II, § 2, and Mich. Comp. Laws Ann. § 168.10 (1970); Minnesota, Minn. Stat. § 609.165 (1971); Nebraska, Neb. Rev. Stat. § 29–2264 (Supp. 1972) and Neb. Rev. Stat. § 83–1118 (1971); New Hampshire, N. H. Rev. Stat. Ann. § 607–A:2 (Supp. 1973); New Jersey, N. J. Stat. Ann. § 19:4–1 (Supp. 1974–

courts sustained New York's and Florida's disenfranchisement provisions, the legislatures repealed those laws. Congress has recently provided for the restoration of felons' voting rights at the end of sentence or parole in the District of Columbia. D. C. Code § 1–1102 (7) (1973). The National Conference on Uniform State

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1975) (except election code offenders); Ohio Rev. Code Ann. § 2967.16 (Supp. 1972); Oregon, Ore. Rev. Stat. §§ 137.240 and 137.250 (1973); Pennsylvania, Pa. Const., Art. VII, § 1, Pa. Stat. Ann., Tit. 19, § 893 (1964), and Tit. 25, § 3552 (1963) (except election code offenders for four years); South Dakota, S. D. Comp. Laws Ann. §§ 24–5–2 and 23–57–7 (1969); Utah, Utah Const., Art. IV, § 6 (except those convicted of treason or election code offenses); Vermont, Vt. Const., c. II, § 51 (except election code offenders); Washington, Wash. Rev. Code Ann. § 9.96.050 (Supp. 1972); West Virginia, 51 Op. W. Va. Atty. Gen. No. 42, p. 182 (1965) (construing W. Va. Const., Art. IV, § 1); Wisconsin, Wis. Stat. Ann. § 57–078 (Supp. 1974–1975); Wyoming, Wyo. Stat. Ann. § 7–311 (1957).

In 1972 Montana amended its constitution to disenfranchise potential electors only while "serving a sentence for a felony." Mont. Const., Art. IV, § 2; Mont. Rev. Codes Ann. § 23–2701 (Supp. 1973). In 1973, New York amended its laws to allow former felons whose sentence had expired or who were released from parole to vote. N. Y. Election Law § 152 (Supp. 1973–1974). Also in 1973, North Carolina amended its laws to restore all civil rights including the franchise to former felons discharged from prison or parole. N. C. Gen. Stat. § 13–1 (Supp. 1973). And, in the same year, the Tennessee Legislature amended its ex-felon disenfranchisement statutes. See Tenn. Code Ann. § 2–202 (Supp. 1973).

The New York ex-felon disenfranchisement provision was upheld in *Green* v. *Board of Elections*, 380 F. 2d 445 (CA2 1967), and shortly thereafter the New York Legislature repealed that law. N. Y. Election Law § 152 (Supp. 1973–1974). Similarly the Florida disenfranchisement provisions were upheld in *Beacham* v. *Braterman*, 300 F. Supp. 182 (SD Fla.), aff'd *per curiam*, 396 U. S. 12 (1969). Subsequently, Florida statutes were amended to provide for the automatic restoration of all civil rights, including the franchise, upon the completion of sentence or release from parole or probation. Fla. Stat. Ann. § 940.05 (1973).

Laws,[29] the American Law Institute,[30] the National Probation and Parole Association,[31] the National Advisory Commission on Criminal Justice Standards and Goals,[32] the President's Commission on Law Enforcement and the Administration of Justice,[33] the California League of Women Voters,[34] the National Democratic Party,[35] and the Secretary of State of California[36] have all strongly endorsed full suffrage rights for former felons.

The disenfranchisement of ex-felons had "its origin in the fogs and fictions of feudal jurisprudence and

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[29] National Conference of Commissioners on Uniform State Laws, Uniform Act on Status of Convicted Persons §§ 2–3 (1964).

[30] American Law Institute, Model Penal Code § 306.3 (Proposed Official Draft 1962).

[31] National Probation and Parole Association, Standard Probation and Parole Act §§ 12 and 27 (1955).

[32] National Advisory Commission on Criminal Justice Standards and Goals, Corrections, Standard 16.17, p. 592 (1973). The Report observed:

"Loss of citizenship rights—[including] the right to vote . . . —inhibits reformative efforts. If correction is to reintegrate an offender into free society, the offender must retain all attributes of citizenship. In addition, his respect for law and the legal system may well depend, in some measure, on his ability to participate in that system. Mandatory denials of that participation serve no legitimate public interest." *Id.*, at 593.

[33] President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Corrections 89–90 (1967):

"[T]here seems no justification for permanently depriving all convicted felons of the vote . . . . [T]o be deprived of the right to representation in a democratic society is an important symbol. Moreover, rehabilitation might be furthered by encouraging convicted persons to participate in society by exercising the vote."

[34] California League of Women Voters, Policy Statement, Feb. 16, 1972.

[35] National Democratic Party, Party Platform 1972.

[36] Memorandum of the Secretary of State of California in Opposition to Certiorari in *Class of County Clerks and Registrars of Voters of California* v. *Ramirez*, No. 73–324.

doubtless has been brought forward into modern statutes without fully realizing either the effect of its literal significance or the extent of its infringement upon the spirit of our system of government." *Byers* v. *Sun Savings Bank*, 41 Okla. 728, 731, 139 P. 948, 949 (1914). I think it clear that measured against the standards of this Court's modern equal protection jurisprudence, the blanket disenfranchisement of ex-felons cannot stand.

I respectfully dissent.

MR. JUSTICE DOUGLAS, agreeing with Part I–A of this opinion, dissents from a reversal of the judgment below as he cannot say that it does not rest on an independent state ground. See *Hayakawa* v. *Brown*, 415 U. S. 1304 (DOUGLAS, J., in chambers).

Syllabus

HAMLING ET AL. *v.* UNITED STATES

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

No. 73-507. Argued April 15, 1974—Decided June 24, 1974

Petitioners were convicted of mailing and conspiring to mail an obscene advertising brochure with sexually explicit photographic material relating to their illustrated version (hereafter Illustrated Report) of an official report on obscenity, in violation of 18 U. S. C. §§ 2, 371, and 1461. The indictment under § 1461 charged petitioners in the language of the statute, which provides in pertinent part that obscene material and written information as to where it may be obtained is nonmailable and that "[w]hoever knowingly uses the mails for the mailing . . . of anything declared by this section . . . to be nonmailable . . ." commits a crime. The jury was unable to reach a verdict on the counts charging the mailing of the allegedly obscene Illustrated Report. Following affirmance of the convictions by the Court of Appeals, this Court decided *Miller* v. *California*, 413 U. S. 15, and companion cases (hereafter collectively the *Miller* cases), after considering which, the Court of Appeals denied a petition for rehearing. Petitioners challenge their convictions based upon the pre-*Miller* obscenity test in *Memoirs* v. *Massachusetts*, 383 U. S. 413, and also as failing to meet the standards of the *Miller* cases; and challenge various procedural and evidentiary rulings of the District Court, as well as its instructions. *Held:*

1. Title 18 U. S. C. § 1461, "applied according to the proper standard for judging obscenity, do[es] not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited," *Roth* v. *United States*, 354 U. S. 476, 492. Pp. 98–99.

2. The jury's determination that the brochure was obscene was supported by the evidence and was consistent with the *Memoirs* obscenity formulation. P. 100.

3. The inability of the jury to reach a verdict on the counts charging distribution of the Illustrated Report had no relevance to its finding that the brochure was obscene, consistency in verdicts not being required, and the brochure being separable from the Illustrated Report. Pp. 100–101.

4. The standards established in the *Miller* cases do not, as applied to petitioners' pre-*Miller* conduct, require a reversal of their convictions. Pp. 101–117.

(a) Defendants like petitioners, who were convicted prior to the decisions in the *Miller* cases but whose convictions were on direct appeal at that time, should receive any benefit available to them from those decisions. Pp. 101–102.

(b) The instruction to the jury on the application of national community standards of obscenity was not constitutionally improper, since in rejecting the view that the First and Fourteenth Amendments require that the proscription of obscenity be based on uniform national standards, the Court in the *Miller* cases did not require as a constitutional matter the substitution of some smaller geographical area into the same sort of formula; the test was stated in terms of the understanding of the "average person, applying contemporary community standards." The Court's holding in *Miller* that California could constitutionally proscribe obscenity in terms of a "statewide" standard did not mean that any such precise geographic area is required as a matter of constitutional law. Reversal is required in pre-*Miller* cases only where there is a probability that the excision of the references to the "nation as a whole" in the instruction dealing with community standards would have materially affected the deliberations of the jury. Pp. 103–110.

(c) Construing 18 U. S. C. § 1461 as being limited to the sort of "patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in *Miller* v. *California*," the statute is not unconstitutionally vague, it being plain that the brochure is a form of hard-core pornography well within the permissibly proscribed depictions described in *Miller*. The enumeration of specific categories of obscene material in *Miller* did not purport to proscribe, for purposes of 18 U. S. C. § 1461, conduct that had not previously been thought criminal but instead added a "clarifying gloss" to the prior construction, making the statute's meaning "more definite." *Bouie* v. *City of Columbia*, 378 U. S. 347, 353. Pp. 110–116.

(d) *Miller*'s rejection of *Memoirs*' "social value" formulation did not mean that 18 U. S. C. § 1461 was unconstitutionally vague at the time of petitioners' convictions because it did not provide them with sufficient guidance as to the proper test of "social value," that formula having been rejected not for vagueness

reasons but because it departed from *Roth*'s obscenity definition and entailed a virtually impossible prosecutorial burden. Pp. 116–117.

5. The indictment was sufficiently definite. Pp. 117–119.

(a) The language of § 1461 was not "too vague to support conviction for crime," *Roth* v. *United States, supra,* at 480. P. 117.

(b) The indictment gave petitioners adequate notice of the charges against them, since at the time petitioners were indicted the statutory term "obscene," a legal term of art and not a generic expression, had a definite legal meaning. *Russell* v. *United States,* 369 U. S. 749, distinguished. Pp. 117–119.

6. The District Court did not err in its instructions to the jury on scienter, including its instruction that "[petitioners'] belief as to the obscenity or non-obscenity of the material is irrelevant," it being constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of materials that he distributes, and that he knew the character and nature of the materials. *Rosen* v. *United States,* 161 U. S. 29, followed; *Smith* v. *California,* 361 U. S. 147, distinguished. Pp. 119–124.

7. The Court of Appeals correctly concluded that there was substantial evidence to support the jury's verdict. P. 124.

8. The District Court did not abuse its discretion in excluding allegedly comparable materials (materials with second-class mailing privileges, or judicially found to have been nonobscene, or available on newsstands), since, *inter alia,* expert testimony had been allowed on relevant community standards; and similar materials or judicial determinations with respect thereto do not necessarily prove nonobscenity of the materials the accused is charged with circulating; and with respect to whether proffered evidence is cumulative, clearly relevant, or confusing, the trial court has considerable latitude. Pp. 125–127.

9. The District Court's instruction that in deciding whether the predominant appeal of the brochure was to a prurient interest in sex the jury could consider whether some portions appealed to a specifically defined deviant group as well as to the average person was not erroneous, since in measuring prurient appeal, the jury (which was instructed that it must find that the material as a whole appealed generally to a prurient interest in sex) may consider the material's prurient appeal to clearly defined deviant sexual groups. *Mishkin* v. *New York,* 383 U. S. 502, 508–509. Pp. 127–130.

10. Since evidence of pandering can be relevant in determining obscenity, as long as the proper constitutional definition of obscenity is applied, *Ginzburg* v. *United States*, 383 U. S. 463, it was not improper for the District Court to instruct the jury in connection with the *Memoirs* test that it could also consider whether the brochure had been pandered by looking to the manner of its distribution and editorial intent. Pp. 130–131.

11. The Court of Appeals did not err in refusing to reverse petitioners' convictions for the District Court's failure to comply with Fed. Rule Crim. Proc. 30 by denying petitioners' counsel's request to make additional objections to the instructions out of the presence of the jury, since this Court's independent examination of the record confirms the Court of Appeals' view that petitioners were not prejudiced thereby. Pp. 131–135.

12. Petitioners' argument that the District Court abused its discretion in refusing to grant a continuance until a new jury with a presumably greater ratio of young people could be drawn—it having been almost four years since the jury wheel had last been filled—is without merit, since there was no showing of a discriminatory exclusion of an identifiable group entitled to a group-based protection. Pp. 135–138.

13. The District Court's *voir dire* examination was sufficient to test the qualifications and competency of the prospective jurors and complied with Fed. Rule Crim. Proc. 24 (a), and that court did not constitutionally err in not asking certain questions propounded by petitioners. Pp. 138–140.

481 F. 2d 307, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and POWELL, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 140. BRENNAN, J., filed a dissenting opinion, in which STEWART and MARSHALL, JJ., joined, *post*, p. 141.

Stanley Fleishman argued the cause for petitioners Hamling et al. With him on the briefs was *Sam Rosenwein*. *Mr. Rosenwein* argued the cause for petitioners Kemp et al. With him on the briefs were *Mr. Fleishman* and *Louis S. Katz*.

Allan Abbott Tuttle argued the cause for the United States. With him on the brief were *Solicitor General*

Bork, Assistant Attorney General Petersen, Jerome M. Feit, and *Shirley Baccus-Lobel.**

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

On March 5, 1971, a grand jury in the United States District Court for the Southern District of California indicted petitioners William L. Hamling, Earl Kemp, Shirley R. Wright, David L. Thomas, Reed Enterprises, Inc., and Library Service, Inc., on 21 counts of an indictment charging use of the mails to carry an obscene book, The Illustrated Presidential Report of the Commission on Obscenity and Pornography, and an obscene advertisement, which gave information as to where, how, and from whom and by what means the Illustrated Report might be obtained, and of conspiracy to commit the above offenses, in violation of 18 U. S. C. §§ 2, 371, and 1461.[1] Prior to trial, petitioners moved to dismiss the indictment on the grounds that it failed to inform them of the charges, and that the grand jury had insufficient evidence before it to return an indictment and was improperly instructed on the law. Petitioners also challenged the petit jury panel and moved to strike the venire on the ground that there had been an unconstitutional exclusion of all persons under 25 years of age. The District Court denied all of these motions.

Following a jury trial, petitioners were convicted on 12 counts of mailing and conspiring to mail the obscene

*Briefs of *amici curiae* urging reversal were filed by *Melvin L. Wulf, Joel M. Gora,* and *Fred Okrand* for the American Civil Liberties Union et al.; by *Ira M. Millstein* for the Association of American Publishers, Inc.; and by *William D. North* for the American Library Assn.

[1] The indictment is reproduced in full at App. 14–31.

advertisement.[2] On appeal, the United States Court of Appeals for the Ninth Circuit affirmed. 481 F. 2d 307 (1973). The jury was unable to reach a verdict with regard to the counts of the indictment which charged the mailing of the allegedly obscene Illustrated Report.[3] The advertisement found obscene is a single sheet brochure mailed to approximately 55,000 persons in various parts of the United States; one side of the brochure contains a collage of photographs from the Illustrated Report; the other side gives certain information and an order blank from which the Illustrated Report could be ordered.

The Court of Appeals accurately described the photographs in the brochure as follows:

> "The folder opens to a full page splash of pictures portraying heterosexual and homosexual intercourse, sodomy and a variety of deviate sexual acts. Specifically, a group picture of nine persons, one male engaged in masturbation, a female masturbating two

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[2] Each petitioner was convicted on counts 1–5 and 7–13 of the indictment. App. 9. Petitioner Hamling was sentenced to imprisonment for one year on the conspiracy count, and consecutive to that, concurrent terms of three years each on the 11 substantive counts, and he was fined $32,000. Petitioner Kemp was sentenced to imprisonment for one year and one day on the conspiracy count, and consecutive to that, concurrent terms of two years each on the 11 substantive counts. Petitioners Wright and Thomas received suspended sentences of one and one-half years, and were placed on probation for five years. Petitioners Reed Enterprises, Inc., and Library Services, Inc., were fined $43,000 and $12,000, respectively.

[3] Those counts on which the jury was unable to reach a verdict and upon which a mistrial was declared were counts 15, 16, 17, 19, and 21. App. 10. After presentation of the Government's case, the District Court dismissed four of the substantive counts (6, 14, 18, and 20) for lack of proof. App. 7; Brief for United States 6 n. 4. The obscenity *vel non* of the Illustrated Report was thus not at issue in the Court of Appeals nor is it at issue in this Court.

> males, two couples engaged in intercourse in reverse fashion while one female participant engages in fellatio of a male; a second group picture of six persons, two males masturbating, two fellatrices practicing the act, each bearing a clear depiction of ejaculated seminal fluid on their faces; two persons with the female engaged in the act of fellatio and the male in female masturbation by hand; two separate pictures of males engaged in cunnilinction; a film strip of six frames depicting lesbian love scenes including a cunnilinguist in action and female masturbation with another's hand and a vibrator, and two frames, one depicting a woman mouthing the penis of a horse, and a second poising the same for entrance into her vagina." 481 F. 2d, at 316–317.[4]

The reverse side of the brochure contains a facsimile of the Illustrated Report's cover, and an order form for the Illustrated Report. It also contains the following language:

> "THANKS A LOT, MR. PRESIDENT. A monumental work of research and investigation has now become a giant of a book. All the facts, all the statistics, presented in the best possible format . . . and . . . completely illustrated in black and white and full color. Every facet of the most controversial public report ever issued is covered in detail.

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[4] The only printed words appearing on the interfold of pictures are:

"In the Katzman Studies (1970) for the Commission (see page 180), some 90 photographs were rated on five-point scales for 'obscene' and 'sexually stimulating' by the control group. Group activity scenes of the type here illustrated could have been part of the 90. Both these group sex pictures are from the Danish magazine Porno Club No. 3, supposedly this was filmed at a 'live show' night club in Copenhagen. There are many similar clubs."

552-191 O - 76 - 9

> "The book is a MUST for the research shelves of every library, public or private, seriously concerned with full intellectual freedom and adult selection.
> "Millions of dollars in public funds were expended to determine the PRECISE TRUTH about eroticism in the United States today, yet every possible attempt to suppress this information was made from the very highest levels.
> "Even the President dismissed the facts, out of hand. The attempt to suppress this volume is an inexcusable insult directed at every adult in this country. Each individual MUST be allowed to make his own decision; the facts are inescapable. Many adults, MANY OF THEM, will do just that after reading this REPORT. In a truly free society, a book like this wouldn't even be necessary."

The Court of Appeals indicated that the actual report of the Commission on Obscenity and Pornography is an official Government document printed by the United States Government Printing Office. The major difference between the Illustrated Report, charged to be obscene in the indictment, and the actual report is that the Illustrated Report contained illustrations, which the publishers of the Illustrated Report said were included " 'as examples of the type of subject matter discussed and the type of material shown to persons who were part of the research projects engaged in for the Commission as basis for their *Report.*' " 481 F. 2d, at 315.

The facts adduced at trial showed that postal patrons in various parts of the country received the brochure advertising the Illustrated Report. The mailings these persons received consisted of an outer envelope, an inner return envelope addressed to Library Service, Inc., at a post office box in San Diego, California, and the brochure itself, which also identified Library Service, Inc., at the

same address, as the party responsible for the mailing. The outer envelopes bore a postmark that indicated they were mailed from North Hollywood, California, on or about January 12, 1971, and that the postage was affixed to the envelopes by a Pitney-Bowes meter number.

The mailing of these brochures was accomplished by petitioners through the use of other businesses. Approximately 55,000–58,000 of these brochures were placed in envelopes, and postage was affixed to them by one Richard and one Venita Harte, who operate the Academy Addressing and Mailing Service. The brochures and the Pitney-Bowes meter number, with which they affixed the postage, were supplied to them by one Bernard Lieberman of Regent House, Inc., of North Hollywood, California, who, on January 11, 1971, had paid the United States Postal Service to set $3,300 worth of postage on the meter number. Regent House was billed $541.15 by the Hartes for their services. Regent House in turn charged its services and costs for the postage and the Hartes' mailing service to Reed Enterprises, Inc., which paid the bill on January 19, 1971, with a check signed by petitioner Hamling.

Those individuals responding to the brochure would be sent copies of the Illustrated Report, which would be mailed with postage affixed by a second Pitney-Bowes meter number which was installed at Library Service, Inc., at the direction of an employee of Pitney-Bowes. The rental agreement for this meter was signed for Library Service by petitioner David Thomas, whom that employee identified as the person with whom he had dealt on the matter.

The evidence indicated that the individual petitioners were officers in the corporate petitioners, and also indicated that they were involved with selling the Illustrated Report, which entailed mailing out the advertising bro-

chure. Petitioner Hamling, as president of Reed Enterprises, Inc., signed the check on the corporation's behalf in payment to Regent House for the mailing of the advertisement. Petitioner Kemp was the editor of the Illustrated Report, and was vice president of Library Service, Inc., and Greenleaf Classics, Inc., which is the publisher of the Illustrated Report.[5] He signed the application on behalf of Library Service, Inc., for the post office box in San Diego, which was the same post office box on the return envelope sent with the advertisement and on the advertisement itself. Petitioner Thomas signed the rental agreement for the postage meter which was used in affixing postage for sending copies of the Illustrated Report, and which Thomas directed to be installed at Library Service.

Petitioner Wright was the secretary of Reed Enterprises, Inc., and Greenleaf Classics, Inc. Wright assisted the postal superintendent in obtaining Kemp's signature on the application for the post office box in San Diego. Wright also received a memorandum from London Press, Inc., the printer of the Illustrated Report, addressed to her as representative of Reed Enterprises, Inc., confirming the shipment of 28,537 copies of the Illustrated Report. Various other corporate documents tended to show the individual petitioners' involvement with the corporate petitioners. Both the Government and the petitioners introduced testimony from various expert witnesses concerning the obscenity *vel non* of both the Illustrated Report and the brochure.

In affirming the convictions of these petitioners for the distribution of the obscene brochure, the Court of

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[5] Greenleaf Classics, Inc., was also indicted, but was acquitted on the counts involving the brochure, including the conspiracy count. As mentioned above, the jury was unable to reach a verdict on the counts involving the Illustrated Report. See n. 3, *supra*.

Appeals rejected various contentions made by the petitioners. The Court of Appeals also rejected petitioners' petition for rehearing and suggestion for rehearing en banc. We granted certiorari, 414 U. S. 1143 (1974), and now affirm the judgment of the Court of Appeals.

I

These petitioners were convicted by a jury on December 23, 1971. App. 9. The Court of Appeals affirmed their convictions in an opinion filed on June 7, 1973. The Court of Appeals originally denied rehearing and suggestion for rehearing en banc on July 9, 1973. That order was withdrawn by the Court of Appeals to be reconsidered in light of this Court's decisions, announced June 21, 1973, in *Miller* v. *California,* 413 U. S. 15, and related cases,[6] and was submitted to the en banc court, by order dated August 20, 1973.[7] On August 22, 1973, the Court of Appeals entered an order denying the

[6] *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49 (1973); *Kaplan* v. *California,* 413 U. S. 115 (1973); *United States* v. *12 200-ft. Reels of Film,* 413 U. S. 123 (1973); *United States* v. *Orito,* 413 U. S. 139 (1973).

[7] Upon withdrawing the original order denying rehearing for reconsideration in light of *Miller* v. *California, supra,* and the related cases, the Court of Appeals stated (Pet. for Cert. App. 39–40):

"We heretofore determined that the evidence was abundantly sufficient to meet, and the District Court's jury instructions in full compliance with, the essential elements of the *Roth-Memoirs* test. *United States* v. *One Reel of Film,* et al., — F. 2d — (1st Cir. July 16, 1973, No. 73–1181) at pages 5 and 7 of the slip opinion, in considering the same problem, succinctly states:

" '*A fortiori* the more relaxed standards announced by the Supreme Court were met.

" '[W]e see no possible reason to remand, especially as the Supreme Court has just addressed itself to the construction and adequacy of the federal statute involved. See *United States* v. *12 200-Ft. Reels of Super 8mm. Film, supra,* 41 U. S. L. W. at 4963, n. 7.' "

petition for rehearing and the suggestion for rehearing en banc.

The principal question presented by this case is what rules of law shall govern obscenity convictions that occurred prior to the date on which this Court's decision in *Miller* v. *California, supra,* and its companion cases were handed down, but which had not at that point become final. Petitioners mount a series of challenges to their convictions based upon the so-called *Memoirs* test for the proscription of obscenity. (*Memoirs* v. *Massachusetts,* 383 U. S. 413 (1966).) They also attack the judgments as failing to comply with the standards enunciated in the *Miller* cases, and conclude by challenging other procedural and evidentiary rulings of the District Court.

Questions as to the constitutionality of 18 U. S. C. § 1461,[8] the primary statute under which petitioners

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[8] Title 18 U. S. C. § 1461 provides in pertinent part:

"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—

. . . . . .

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made . . . .

. . . . . .

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001 (e) of Title 39 to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such

were convicted, were not strangers to this Court prior to the *Miller* decision. In *Roth* v. *United States,* 354 U. S. 476 (1957), the Court held that this statute did not offend the free speech and free press guarantees of the First Amendment, and that it did not deny the due process guaranteed by the Fifth Amendment because it was "too vague to support conviction for crime." *Id.,* at 480. That holding was reaffirmed in *United States* v. *Reidel,* 402 U. S. 351 (1971). See also *Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478 (1962); *Ginzburg* v. *United States,* 383 U. S. 463 (1966). Prior to *Miller,* therefore, this Court had held that 18 U. S. C. § 1461, "applied according to the proper standard for judging obscenity, do[es] not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited." *Roth* v. *United States, supra,* at 492.

These petitioners were tried and convicted under the definition of obscenity originally announced by the Court in *Roth* v. *United States, supra,* and significantly refined by the plurality opinion in *Memoirs* v. *Massachusetts, supra.* The *Memoirs* plurality held that under the *Roth* definition

> "as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." *Id.,* at 418.

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offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter. . . ."

Petitioners make no contention that the instructions given by the District Court in this case were inconsistent with the test of the *Memoirs* plurality. They argue instead that the obscenity *vel non* of the brochure has not been established under the *Memoirs* test. The Court of Appeals ruled against petitioners on this score, concluding that the jury's finding that the brochure was obscene under the *Memoirs* plurality test was correct. Petitioners argue at length that their expert witnesses established that the brochure did not appeal to a prurient interest in sex, that it was not patently offensive, and that it had social value. Examining the record below, we find that the jury could constitutionally find the brochure obscene under the *Memoirs* test. Expert testimony is not necessary to enable the jury to judge the obscenity of material which, as here, has been placed into evidence. See *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 56 (1973); *Kaplan* v. *California,* 413 U. S. 115, 120–121 (1973); *Ginzburg* v. *United States, supra,* at 465. In this case, both the Government and the petitioners introduced testimony through expert witnesses concerning the alleged obscenity of the brochure. The jury was not bound to accept the opinion of any expert in weighing the evidence of obscenity, and we conclude that its determination that the brochure was obscene was supported by the evidence and consistent with the *Memoirs* formulation of obscenity.

Petitioners nevertheless contend that since the jury was unable to reach a verdict on the counts charging the obscenity *vel non* of the Illustrated Report itself, that report must be presumed to be nonobscene, and therefore protected by the First Amendment. From this premise they contend that since the brochure fairly advertised the Illustrated Report, the brochure must also be nonobscene. The Court of Appeals rejected this con-

tention, noting that "[t]he premise is false. The jury made no finding on the charged obscenity of the Report." 481 F. 2d, at 315. The jury in this case did not *acquit* the petitioners of the charges relating to the distribution of the allegedly obscene Illustrated Report. It instead was unable to reach a verdict on the counts charging the distribution of the Illustrated Report, and accordingly, the District Court declared a mistrial as to those counts. App. 9–10. It has, of course, long been the rule that consistency in verdicts or judgments of conviction is not required. *United States* v. *Dotterweich,* 320 U. S. 277, 279 (1943); *Dunn* v. *United States,* 284 U. S. 390, 393 (1932). "The mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged. As this Court observed in *Roth* v. *United States,* 354 U. S., at 492 n. 30, 'it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system. Cf. *Dunlop* v. *United States,* 165 U. S. 486, 499–500.' " *Miller* v. *California,* 413 U. S., at 26 n. 9. The brochure in this case stands by itself, and must accordingly be judged. It is not, as petitioners suggest, inseparable from the Illustrated Report, and it cannot be seriously contended that an obscene advertisement could not be prepared for some type of nonobscene material. If consistency in jury verdicts as to the obscenity *vel non* of identical materials is not constitutionally required, *Miller* v. *California, supra,* the same is true *a fortiori* of verdicts as to separate materials, regardless of their similarities.

Our *Miller* decisions dealing with the constitutional aspects of obscenity prosecutions were announced after the petitioners had been found guilty by a jury, and their judgment of conviction affirmed by a panel of the Court

of Appeals. Our prior decisions establish a general rule that a change in the law occurring after a relevant event in a case will be given effect while the case is on direct review. *United States* v. *Schooner Peggy,* 1 Cranch 103 (1801); *Linkletter* v. *Walker,* 381 U. S. 618, 627 (1965); *Bradley* v. *School Board of Richmond,* 416 U. S. 696, 711 (1974). Since the judgment in this case has not become final, we examine the judgment against petitioners in the light of the principles laid down in the *Miller* cases. While the language of 18 U. S. C. § 1461 has remained the same throughout this litigation, the statute defines an offense in terms of "obscenity," and this Court's decisions, at least since *Roth* v. *United States, supra,* indicate that there are constitutional limitations which must be borne in mind in defining that statutory term. Thus any constitutional principle enunciated in *Miller* which would serve to benefit petitioners must be applied in their case.

Recognizing that the *Memoirs* plurality test had represented a sharp break with the test of obscenity as announced in *Roth* v. *United States, supra,* our decision in *Miller* v. *California* reformulated the test for the determination of obscenity *vel non:*

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U. S., at 24.

The Court of Appeals held on rehearing that the *Miller* cases generally prescribed a more relaxed standard of re-

view under the Federal Constitution for obscenity convictions, and that therefore petitioners could derive no benefit from the principles enunciated in those cases. See n. 7, *supra*. Petitioners concede that this observation may be true in many particulars, but that in at least two it is not. They contend that the *Miller* treatment of the concept of "national standards" necessarily invalidates the District Court's charge to the jury in their case relating to the standard by which the question of obscenity was to be judged, and they further contend that the general language of 18 U. S. C. § 1461 is, in the light of the holding in the *Miller* cases, unconstitutionally vague.

A

The trial court instructed the jury that it was to judge the obscenity *vel non* of the brochure by reference to "what is reasonably accepted according to the contemporary standards of the community as a whole. . . . Contemporary community standards means the standards generally held throughout this country concerning sex and matters pertaining to sex. This phrase means, as it has been aptly stated, the average conscience of the time, and the present critical point in the compromise between candor and shame, at which the community may have arrived here and now." App. 241. Petitioners describe this as an instruction embodying the principle of "national standards" which, although it may have been proper under the law as it existed when they were tried, cannot be sustained under the law as laid down in *Miller*, where the Court stated:

> "Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable 'national standards' when attempting to determine whether certain materials are obscene as a matter of fact." 413 U. S., at 31–32.

Paradoxically, however, petitioners also contend that in order to avoid serious constitutional questions the standards in federal obscenity prosecutions *must* be national ones, relying on *Manual Enterprises, Inc.* v. *Day*, 370 U. S., at 488 (opinion of Harlan, J.), and *United States* v. *Palladino*, 490 F. 2d 499 (CA1 1974). Petitioners assert that our decisions in the two federal obscenity cases decided with *Miller*[9] indicate that this Court has not definitively decided whether the Constitution requires the use of nationwide standards in federal obscenity prosecutions.

We think that both of these contentions evidence a misunderstanding of our *Miller* holdings. *Miller* rejected the view that the First and Fourteenth Amendments require that the proscription of obscenity be based on uniform nationwide standards of what is obscene, describing such standards as "hypothetical and unascertainable," 413 U. S., at 31. But in so doing the Court did not require as a constitutional matter the substitution of some smaller geographical area into the same sort of formula; the test was stated in terms of the understanding of "the average person, applying contemporary community standards." *Id.*, at 24. When this approach is coupled with the reaffirmation in *Paris Adult Theatre I* v. *Slaton*, 413 U. S., at 56, of the rule that the prosecution need not as a matter of constitutional law produce "expert" witnesses to testify as to the obscenity of the materials, the import of the quoted language from *Miller* becomes clear. A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a "reasonable" per-

[9] *United States* v. *Orito*, 413 U. S. 139 (1973); *United States* v. *12 200-ft. Reels of Film*, 413 U. S. 123 (1973).

son in other areas of the law. *Stone* v. *New York, C. & St. L. R. Co.*, 344 U. S. 407, 409 (1953); *Schulz* v. *Pennsylvania R. Co.*, 350 U. S. 523, 525–526 (1956). Our holding in *Miller* that California could constitutionally proscribe obscenity in terms of a "statewide" standard did not mean that any such precise geographic area is required as a matter of constitutional law.

Our analysis in *Miller* of the difficulty in formulating uniform national standards of obscenity, and our emphasis on the ability of the juror to ascertain the sense of the "average person, applying contemporary community standards" without the benefit of expert evidence, clearly indicates that 18 U. S. C. § 1461 is not to be interpreted as requiring proof of the uniform national standards which were criticized in *Miller*. In *United States* v. *12 200-ft. Reels of Film*, 413 U. S. 123 (1973), a federal obscenity case decided with *Miller*, we said:

> "We have today arrived at standards for testing the constitutionality of state legislation regulating obscenity. See *Miller* v. *California, ante*, at 23–25. These standards are applicable to federal legislation." *Id.*, at 129–130.

Included in the pages referred to in *Miller* is the standard of "the average person, applying contemporary community standards." In view of our holding in *12 200-ft. Reels of Film*, we hold that 18 U. S. C. § 1461 incorporates this test in defining obscenity.

The result of the *Miller* cases, therefore, as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion "the average person, applying contemporary community standards" would reach in a given case. Since this case was tried in the Southern District of California, and presumably jurors

from throughout that judicial district were available to serve on the panel which tried petitioners, it would be the standards of that "community" upon which the jurors would draw. But this is not to say that a district court would not be at liberty to admit evidence of standards existing in some place outside of this particular district, if it felt such evidence would assist the jurors in the resolution of the issues which they were to decide.

Our Brother BRENNAN suggests in dissent that in holding that a federal obscenity case may be tried on local community standards, we do violence both to congressional prerogative and to the Constitution. Both of these arguments are foreclosed by our decision last Term in *United States* v. *12 200-ft. Reels of Film, supra,* that the *Miller* standards, including the "contemporary community standards" formulation, applied to federal legislation. The fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity. Those same distributors may be subjected to such varying degrees of criminal liability in prosecutions by the States for violations of state obscenity statutes; we see no constitutional impediment to a similar rule for federal prosecutions. In *Miller* v. *California,* 413 U. S., at 32, we cited with approval Mr. Chief Justice Warren's statement:

> "[W]hen the Court said in *Roth* that obscenity is to be defined by reference to 'community standards,' it meant community standards—not a national standard, as is sometimes argued. I believe that there is no provable 'national standard,' and perhaps there should be none. At all events, this Court has not

> been able to enunciate one, and it would be unreasonable to expect local courts to divine one. It is said that such a 'community' approach may well result in material being proscribed as obscene in one community but not in another, and, in all probability, that is true. But communities throughout the Nation are in fact diverse, and it must be remembered that, in cases such as this one, the Court is confronted with the task of reconciling conflicting rights of the diverse communities within our society and of individuals." *Jacobellis* v. *Ohio*, 378 U. S. 184, 200–201 (1964) (dissenting opinion).

Judging the instruction given by the District Court in this case by these principles, there is no doubt that its occasional references to the community standards of the "nation as a whole" delineated a wider geographical area than would be warranted by *Miller, 12 200-ft. Reels of Film*, and our construction of § 1461 herein, *supra*, at 105. Whether petitioners were materially prejudiced by those references is a different question. Certainly the giving of such an instruction does not render their convictions void as a matter of constitutional law. This Court has emphasized on more than one occasion that a principal concern in requiring that a judgment be made on the basis of "contemporary community standards" is to assure that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group. *Miller* v. *California, supra*, at 33; *Mishkin* v. *New York*, 383 U. S. 502, 508–509 (1966); *Roth* v. *United States*, 354 U. S., at 489. The District Court's instruction in this case, including its reference to the standards of the "nation as a whole," undoubtedly accomplished this purpose.

We have frequently held that jury instructions are to be judged as a whole, rather than by picking isolated

phrases from them. *Boyd* v. *United States,* 271 U. S. 104, 107 (1926). In the unusual posture of this case, in which petitioners agree that the challenged instruction was proper at the time it was given by the District Court, but now seek to claim the benefit of a change in the law which casts doubt on the correctness of portions of it, we hold that reversal is required only where there is a probability that the excision of the references to the "nation as a whole" in the instruction dealing with community standards would have materially affected the deliberations of the jury. Cf. *Namet* v. *United States,* 373 U. S. 179, 190–191 (1963); *Lopez* v. *United States,* 373 U. S. 427, 436 (1963). Our examination of the record convinces us that such a probability does not exist in this case.

Our Brother BRENNAN takes us to task for reaching this conclusion, insisting that the District Court's instructions and its exclusion of the testimony of a witness, Miss Carlsen, who had assertedly conducted a survey of standards in the San Diego area require that petitioners be accorded a new trial. As we have noted, *infra,* at 124–125, the District Court has wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony. *Stillwell Mfg. Co.* v. *Phelps,* 130 U. S. 520, 527 (1889); *Barnes* v. *Smith,* 305 F. 2d 226, 232 (CA10 1962); 2 J. Wigmore, Evidence § 561 (3d ed. 1940).[10] But even assuming that the Dis-

[10] The stated basis for the District Court's exclusion of the testimony of Miss Carlsen was that her survey was not framed in terms of "national" standards, but it is not at all clear that the District Court would have admitted her testimony had it been so framed. "[A] specific objection *sustained* . . . is sufficient, though naming an untenable ground, if some other tenable one existed." 1 J. Wigmore, Evidence § 18, p. 32 (3d ed. 1940), citing *Kansas City S. R. Co.* v. *Jones,* 241 U. S. 181 (1916). Miss Carlsen was a student at San Diego State University who worked part time at F. W. Woolworth, doing

trict Court may have erred in excluding the witness' testimony in light of the *Miller* cases, we think arguments made by petitioners' counsel urging the admission of the survey re-emphasize the confusing and often gossamer distinctions between "national" standards and other types of standards. Petitioners' counsel, in urging the District Court to admit the survey, stated:

> "We have already had experts who have testified and expect to bring in others who have testified both for the prosecution and the defense that the material that they found was similar in all cities...." Tr. 3931.
>
> "This witness can testify about experiences she had in one particular city. Whether this is or not a typical city is for the jury to decide." *Id.*, at 3932.
>
> "Now this supports the national survey. It is not something that stands alone. The findings here are consistent with the national survey and as part of the overall picture, taking into account, of course, that this is something that has taken place after the national survey, which was about two years ago, that Dr. Abelson performed." *Id.*, at 3934–3935.

The District Court permitted Dr. Wilson, one of the four expert witnesses who testified on behalf of petitioners, to testify as to materials he found available in San Diego, as a result of having spent several days there. *Id.*, at 3575. He was then asked by petitioners' counsel whether this material was "similar to or different than"

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composition layouts of newspaper advertising for the company's store in Fashion Valley. She had undertaken a "Special Studies" course with her journalism professor, Mr. Haberstroh, who was also offered by petitioners as an expert witness at the trial. Miss Carlsen had circulated through the San Diego area and asked various persons at random whether they thought "adults should be able to buy and view this book and material." Tr. 3926.

552-191 O - 76 - 10

the material found in other cities where he had also visited adult bookstores. The witness responded that he thought "essentially the same kinds of material are found throughout the United States." *Id.*, at 3577. These statements, in colloquies between counsel and Dr. Wilson, only serve to confirm our conclusion that while there may have been an error in the District Court's references to the "community standards of the nation as a whole" in its instructions, and in its stated reasons for excluding the testimony of Miss Carlsen, these errors do not require reversal under the standard previously enunciated.[11]

B

Petitioners next argue that prior to our decision in *Miller*, 18 U. S. C. § 1461 did not contain in its language, nor had it been construed to apply to, the specific types of sexual conduct referred to in *Miller*, and therefore the section was unconstitutionally vague as applied to them

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[11] The sequence of events in this case is quite different from that in *Saunders* v. *Shaw*, 244 U. S. 317 (1917), upon which our Brother BRENNAN relies. There the Supreme Court of Louisiana directed the entry of judgment against an intervening defendant who had prevailed in the trial court, on the basis of testimony adduced merely as an offer of proof by the plaintiff, and to which the intervening defendant had therefore had no occasion to respond. Since the trial court had ruled that the issue to which plaintiff's proof was addressed was irrelevant, this Court reversed the Supreme Court of Louisiana in order that the intervening defendant might have an opportunity to controvert the plaintiff's proof. Here petitioners were given full latitude in rebutting every factual issue dealt with in the Government's case, and no claim is made that the jury was permitted to rely on evidence introduced merely by way of offer of proof which was not subject to cross-examination or to contradiction by countervailing evidence offered by the petitioners. The present case seems to us much closer to *Ginzburg* v. *United States*, 383 U. S. 463 (1966), than to *Saunders*.

in the prosecution of these cases. Such an argument, however, not only neglects this Court's decisions prior to *Miller* rejecting vagueness challenges to the federal statute, but also fundamentally misconceives the thrust of our decision in the *Miller* cases.

In *Roth* v. *United States,* 354 U. S., at 491, we upheld the constitutionality of 18 U. S. C. § 1461 against a contention that it did "not provide reasonably ascertainable standards of guilt and therefore violate[s] the constitutional requirements of due process." In noting that the federal obscenity statute made punishable the mailing of material that is "obscene, lewd, lascivious, or filthy . . . [and of] other publication[s] of an indecent character," the Court stated in *Roth:*

> "Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. '. . . [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .' *United States* v. *Petrillo,* 332 U. S. 1, 7–8. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark '. . . boundaries sufficiently distinct for judges and juries fairly to administer the law . . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . .' *Id.,* at 7." 354 U. S., at 491–492 (footnote omitted).

Other decisions dealing with the pre-*Miller* constitution-

ality or interpretation of 18 U. S. C. § 1461 in other contexts have not retreated from the language of *Roth*. See, *e. g.*, *United States* v. *Reidel*, 402 U. S. 351 (1971); *Ginzburg* v. *United States*, 383 U. S. 463 (1966); *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478 (1962). And as made clear by the opinion of Mr. Justice Harlan in *Manual Enterprises*, the language of 18 U. S. C. § 1461 had been, prior to the date of our decision in *Miller*, authoritatively construed in a manner consistent with *Miller*:

> "The words of section 1461, 'obscene, lewd, lascivious, indecent, filthy or vile,' connote something that is portrayed in a manner so offensive as to make it unacceptable under current community *mores*. While in common usage the words have different shades of meaning, the statute since its inception has always been taken as aimed at obnoxiously debasing portrayals of sex. Although the statute condemns such material irrespective of the *effect* it may have upon those into whose hands it falls, the early case of *United States* v. *Bennett*, 24 Fed. Cas. 1093 (No. 14571), put a limiting gloss upon the statutory language: the statute reaches only indecent material which, as now expressed in *Roth* v. *United States*, *supra*, at 489, 'taken as a whole appeals to prurient interest.'" 370 U. S., at 482–484 (footnotes omitted) (emphasis in original).

At no point does *Miller* or any of the other obscenity decisions decided last Term intimate that the constitutionality of pre-*Miller* convictions under statutes such as 18 U. S. C. § 1461 was to be cast in doubt. Indeed, the contrary is readily apparent from the opinions in those cases. We made clear in *Miller*, 413 U. S., at 24 n. 6, that our decision was not intended to hold all state statutes inadequate, and we clearly recognized that existing statutes

"as construed heretofore or hereafter, may well be adequate." That recognition is emphasized in our opinion in *United States* v. *12 200-ft. Reels of Film*, 413 U. S. 123 (1973). That case had come to this Court on appeal from the District Court's dismissal of the Government's forfeiture action under 19 U. S. C. § 1305 (a), which statute the District Court had found unconstitutional. In vacating the District Court's constitutional decision and remanding the case to the District Court for a determination of the obscenity *vel non* of the materials there involved, we stated:

> "We further note that, while we must leave to state courts the construction of state legislation, we do have a duty to authoritatively construe federal statutes where 'a serious doubt of constitutionality is raised' and ' "a construction of the statute is fairly possible by which the question may be avoided." ' *United States* v. *Thirty-seven Photographs*, 402 U. S. 363, 369 (1971) (opinion of WHITE, J.), quoting from *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932). If and when such a 'serious doubt' is raised as to the vagueness of the words 'obscene,' 'lewd,' 'lascivious,' 'filthy,' 'indecent,' or 'immoral' as used to describe regulated material in 19 U. S. C. § 1305 (a) and 18 U. S. C. § 1462, see *United States* v. *Orito*, [413 U. S.,] at 140 n. 1, we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in *Miller* v. *California*, [413 U. S.,] at 25. See *United States* v. *Thirty-seven Photographs*, *supra*, at 369–374 (opinion of WHITE, J.). Of course, Congress could always define other specific 'hard core' conduct." 413 U. S., at 130 n. 7.

Miller undertook to set forth examples of the types of

material which a statute might proscribe as portraying sexual conduct in a patently offensive way, 413 U. S., at 25–26, and went on to say that no one could be prosecuted for the "sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed." *Id.*, at 27. As noted above, we indicated in *United States* v. *12 200-ft. Reels of Film, supra,* at 130 n. 7, that we were prepared to construe the generic terms in 18 U. S. C. § 1462 to be limited to the sort of "patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in *Miller* v. *California.*" We now so construe the companion provision in 18 U. S. C. § 1461, the substantive statute under which this prosecution was brought. As so construed, we do not believe that petitioners' attack on the statute as unconstitutionally vague can be sustained.

Miller, in describing the type of material which might be constitutionally proscribed, 413 U. S., at 25, was speaking in terms of substantive constitutional law of the First and Fourteenth Amendments. See *Jenkins* v. *Georgia, post,* at 160–161. While the particular descriptions there contained were not intended to be exhaustive, they clearly indicate that there is a limit beyond which neither legislative draftsmen nor juries may go in concluding that particular material is "patently offensive" within the meaning of the obscenity test set forth in the *Miller* cases. And while the Court in *Miller* did refer to "specific prerequisites" which "will provide fair notice to a dealer in such materials," 413 U. S., at 27, the Court immediately thereafter quoted the language of the Court in *Roth* v. *United States,* 354 U. S., at 491–492, concluding with these words:

> " 'That there may be marginal cases in which it is difficult to determine the side of the line on which

> a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . .'" 413 U. S., at 28 n. 10.

The *Miller* cases, important as they were in enunciating a constitutional test for obscenity to which a majority of the Court subscribed for the first time in a number of years, were intended neither as legislative drafting handbooks nor as manuals of jury instructions. Title 18 U.S.C. § 1461 had been held invulnerable to a challenge on the ground of unconstitutional vagueness in *Roth;* the language of *Roth* was repeated in *Miller,* along with a description of the types of material which could constitutionally be proscribed and the adjuration that such statutory proscriptions be made explicit either by their own language or by judicial construction; and *United States* v. *12 200-ft. Reels of Film, supra,* made clear our willingness to construe federal statutes dealing with obscenity to be limited to material such as that described in *Miller.* It is plain from the Court of Appeals' description of the brochure involved here that it is a form of hard-core pornography well within the types of permissibly proscribed depictions described in *Miller,* and which we now hold § 1461 to cover. Whatever complaint the distributor of material which presented a more difficult question of obscenity *vel non* might have as to the lack of a previous limiting construction of 18 U. S. C. § 1461, these petitioners have none. See *Dennis* v. *United States,* 341 U. S. 494, 511–515 (1951) (opinion of Vinson, C. J.).

Nor do we find merit in petitioners' contention that cases such as *Bouie* v. *City of Columbia,* 378 U. S. 347 (1964), require reversal of their convictions. The Court in *Bouie* held that since the crime for which the petitioners there stood convicted was "not enumerated in the statute" at the time of their conduct, their conviction could not be sustained. *Id.,* at 363. The Court noted that "a

deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Id.*, at 352. But the enumeration of specific categories of material in *Miller* which might be found obscene did not purport to make criminal, for the purpose of 18 U. S. C. § 1461, conduct which had not previously been thought criminal. That requirement instead added a "clarifying gloss" to the prior construction and therefore made the meaning of the federal statute involved here "more definite" in its application to federal obscenity prosecutions. *Bouie* v. *City of Columbia, supra,* at 353. Judged by both the judicial construction of § 1461 prior to *Miller,* and by the construction of that section which we adopt today in the light of *Miller,* petitioners' claims of vagueness and lack of fair notice as to the proscription of the material which they were distributing must fail.

C

Petitioners' final *Miller*-based contention is that our rejection of the third part of the *Memoirs* test and our revision of that test in *Miller* indicate that 18 U. S. C. § 1461 was at the time of their convictions unconstitutionally vague for the additional reason that it provided insufficient guidance to them as to the proper test of "social value." But our opinion in *Miller* plainly indicates that we rejected the *Memoirs* "social value" formulation, not because it was so vague as to deprive criminal defendants of adequate notice, but instead because it represented a departure from the definition of obscenity in *Roth,* and because in calling on the prosecution to "prove a negative," it imposed a "[prosecutorial] burden virtually impossible to discharge" and not constitutionally required. 413 U. S., at 22. Since *Miller* per-

mits the imposition of a lesser burden on the prosecution in this phase of the proof of obscenity than did *Memoirs*, and since the jury convicted these petitioners on the basis of an instruction concedely based on the *Memoirs* test, petitioners derive no benefit from the revision of that test in *Miller*.

II

Petitioners attack the sufficiency of the indictment under which they were charged for two reasons: first, that it charged them only in the statutory language of 18 U. S. C. § 1461, which they contend was unconstitutionally vague as applied to them; and, second, that the indictment failed to give them adequate notice of the charges against them. As noted above, however, at the time of petitioners' convictions, *Roth* v. *United States* had held that the language of § 1461 was not "too vague to support conviction for crime." 354 U. S., at 480. See *United States* v. *Reidel*, 402 U. S., at 354.

Our prior cases indicate that an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. *Hagner* v. *United States*, 285 U. S. 427 (1932); *United States* v. *Debrow*, 346 U. S. 374 (1953). It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as "those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished." *United States* v. *Carll*, 105 U. S. 611, 612 (1882). "Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused

of the specific offence, coming under the general description, with which he is charged." *United States* v. *Hess*, 124 U. S. 483, 487 (1888).

Russell v. *United States*, 369 U. S. 749 (1962), relied upon by petitioners, does not require a finding that the indictment here is insufficient. In *Russell*, the indictment recited the proscription of 2 U. S. C. § 192, and charged that the defendants had refused to answer questions that "were pertinent to the question then under inquiry" by a committee of Congress. In holding that the indictment was insufficient because it did not state the subject which was under inquiry, this Court stated:

> "[T]he very core of criminality under 2 U. S. C. § 192 is pertinency to the subject under inquiry of the questions which the defendant refused to answer. What the subject actually was, therefore, is central to every prosecution under the statute. Where guilt depends so crucially upon such *a specific identification of fact*, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute." 369 U. S., at 764 (emphasis added).

The definition of obscenity, however, is not a question of fact, but one of law; the word "obscene," as used in 18 U. S. C. § 1461, is not merely a generic or descriptive term, but a legal term of art. See *Roth* v. *United States*, 354 U. S., at 487–488; *Manual Enterprises, Inc.* v. *Day*, 370 U. S., at 482–487 (opinion of Harlan, J.); *United States* v. *Thevis*, 484 F. 2d 1149, 1152 (CA5 1973), cert. pending, No. 73–1075; *United States* v. *Luros*, 243 F. Supp. 160, 167 (ND Iowa), cert. denied, 382 U. S. 956 (1965). The legal definition of obscenity does not change with each indictment; it is a term sufficiently definite in legal meaning to give a defendant notice of the charge against him. *Roth* v. *United States, supra*,

at 491–492; *Manual Enterprises, Inc.* v. *Day, supra,* at 482–487 (opinion of Harlan, J.). Since the various component parts of the constitutional definition of obscenity need not be alleged in the indictment in order to establish its sufficiency, the indictment in this case was sufficient to adequately inform petitioners of the charges against them.[12]

Petitioners also contend that in order for them to be convicted under 18 U. S. C. § 1461 for the crime of mailing obscene materials, the Government must prove that they knew the materials mailed were obscene. That statute provides in pertinent part that "[w]hoever knowingly uses the mails for the mailing . . . of anything declared by this section . . . to be nonmailable . . ." is guilty of the proscribed offense. Consistent with the statute, the District Court instructed the jury, *inter alia,* that in order to prove specific intent on the part of these petitioners, the Government had to demonstrate that petitioners "knew the envelopes and packages containing the subject materials were mailed or placed . . . in Interstate Commerce, and . . . that they had knowledge of the character of the

[12] Petitioners' further contention that our remand to the District Court in *United States* v. *Orito,* 413 U. S. 139 (1973), for reconsideration of the sufficiency of the indictment in light of *Miller* and *United States* v. *12 200-ft. Reels of Film,* indicates that the sufficiency of their indictment is in question misses the mark. In *Orito,* we reviewed a District Court judgment which had dismissed an indictment under 18 U. S. C. § 1462 and held the statute unconstitutional. In upholding the statute and vacating the judgment of the District Court, we remanded the case for reconsideration of the indictment in light of *Miller* and *12 200-ft. Reels,* which had, of course, enunciated new standards for state and federal obscenity prosecutions, and for reconsideration in light of our opinion reversing the District Court's holding that the statute was unconstitutional. Here of course, the District Court and the Court of Appeals have already upheld both the sufficiency of the indictment and the constitutionality of 18 U. S. C. § 1461, and we agree with their rulings.

materials." App. 236. The District Court further instructed that the "[petitioners'] belief as to the obscenity or non-obscenity of the material is irrelevant." *Ibid.*

Petitioners contend that this instruction was improper and that proof of scienter in obscenity prosecutions requires, "at the very least, proof both of knowledge of the contents of the material and awareness of the obscene character of the material." Brief for Petitioner Kemp 31–32. In support of this contention, petitioners urge, as they must, that we overrule our prior decision in *Rosen* v. *United States,* 161 U. S. 29 (1896). We decline that invitation, and hold that the District Court in this case properly instructed the jury on the question of scienter.

In *Rosen* v. *United States, supra,* this Court was faced with the question of whether, under a forerunner statute to the present 18 U. S. C. § 1461, see Rev. Stat. § 3893, 19 Stat. 90, c. 186, a charge of mailing obscene material must be supported by evidence that a defendant "knew or believed that such [material] could be properly or justly characterized as obscene . . . ." 161 U. S., at 41. The Court rejected this contention, stating:

> "The statute is not to be so interpreted. The inquiry under the statute is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mail by one who knew or had notice at the time of its contents, the offence is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. Congress did not intend that the question as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails of the United States. The evils that Congress sought to

> remedy would continue and increase in volume if the belief of the accused as to what was obscene, lewd, and lascivious was recognized as the test for determining whether the statute has been violated." *Id.*, at 41–42.

Our subsequent cases have not retreated from this general rule, as a matter of either statutory or constitutional interpretation, nor have they purported to hold that the prosecution must prove a defendant's knowledge of the legal status of the materials he distributes.

In *Smith* v. *California*, 361 U. S. 147 (1959), this Court was faced with a challenge to the constitutionality of a Los Angeles ordinance which had been construed by the state courts as making the proprietor of a bookstore absolutely liable criminally for the mere possession in his store of a book later judicially determined to be obscene, even though he had no knowledge of the contents of the book. The Court held that the ordinance could not constitutionally eliminate altogether a scienter requirement, and that, in order to be constitutionally applied to a book distributor, it must be shown that he had "knowledge of the contents of the book." *Id.*, at 153. The Court further noted that "[w]e need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock." *Id.*, at 154.

Smith does not support petitioners' claim in this case, since it dealt with an ordinance which totally dispensed with any proof of scienter on the part of the distributor of obscene material. Nor did the Court's decision in *Manual Enterprises, Inc.* v. *Day, supra,* also relied upon by petitioners, suggest otherwise. There Mr. Justice Harlan's opinion, recognizing that scienter was required for a criminal prosecution under 18 U. S. C. § 1461, rejected the Government's contention that such a require-

ment was unnecessary in an administrative determination by the Post Office Department that certain materials were nonmailable under that section. That opinion concluded that the obscene advertising proscription of the federal statute was not applicable in such an administrative determination unless the publisher of the materials knew that at least some of his advertisers were offering to sell obscene material. Such proof was deemed lacking and therefore the publishers could not be administratively prohibited from mailing the publications.[13]

Significantly, a substantially similar claim to the instant one was rejected by this Court in *Mishkin* v. *New York*, 383 U. S. 502 (1966). In examining a New York statute, the Court there noted that the New York Court of Appeals had "authoritatively interpreted" the statutory provision to require the "vital element of scienter" and that it had defined the required mental element as follows:

> " 'A reading of the [New York] statute . . . as a whole clearly indicates that only those who are in some manner aware of the *character* of the material they attempt to distribute should be punished. It is not innocent but *calculated purveyance* of filth which is exorcised . . . .' " *Id.*, at 510 (emphasis in original), quoting from *People* v. *Finkelstein*, 9 N. Y. 2d 342, 344–345, 174 N. E. 2d 470, 471 (1961).

The Court emphasized that this construction of the New York statute "foreclosed" the defendant's challenge to

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[13] MR. JUSTICE BRENNAN, joined by Mr. Chief Justice Warren and MR. JUSTICE DOUGLAS, concluded that 18 U. S. C. § 1461 does not authorize the Postmaster General to employ any administrative process of his own to close the mails to matter which, in his view, falls within the ban of that section. *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478, 495–519 (1962) (separate opinion).

the statute based on *Smith* v. *California, supra,* and stated:

> "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity. The New York definition of the scienter required by [the New York statute] amply serves those ends, and therefore fully meets the demands of the Constitution. Cf. *Roth* v. *United States,* 354 U. S., at 495–496 (WARREN, C. J., concurring)." 383 U. S., at 511.

The *Mishkin* holding was reaffirmed in *Ginsberg* v. *New York,* 390 U. S. 629 (1968). There the Court was again faced with the sufficiency of the scienter requirement of another New York statute, which proscribed the "knowing" distribution of obscene materials to minors. "Knowingly" was defined in the statute as "knowledge" of, or "reason to know" of, the character and content of the material. Citing *Mishkin,* and the New York Court of Appeals' construction of the other similar statutory language, the Court rejected the challenge to the scienter provision.

We think the "knowingly" language of 18 U. S. C. § 1461, and the instructions given by the District Court in this case satisfied the constitutional requirements of scienter. It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement

is required neither by the language of 18 U. S. C. § 1461 nor by the Constitution.

> "Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk." *United States* v. *Wurzbach,* 280 U. S. 396, 399 (1930).

Petitioners also make a broad attack on the sufficiency of the evidence. The general rule of application is that "[t]he verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser* v. *United States,* 315 U. S. 60, 80 (1942). The primary responsibility for reviewing the sufficiency of the evidence to support a criminal conviction rests with the Court of Appeals, which in this case held that the Government had satisfied its burden. We agree. Based on the evidence before it, the jury was entitled to conclude that the individual petitioners, as corporate officials directly concerned with the activities of their organizations, were aware of the mail solicitation scheme, and of the contents of the brochure. The evidence is likewise sufficient to establish the existence of a conspiracy to mail the obscene brochure. The existence of an agreement may be shown by circumstances indicating that criminal defendants acted in concert to achieve a common goal. See, *e. g., Blumenthal* v. *United States,* 332 U. S. 539, 556–558 (1947).

III

We turn now to petitioners' attack on certain evidentiary rulings of the District Court. Petitioners have very much the laboring oar in showing that such rulings constitute reversible error, since "in judicial trials, the

whole tendency is to leave rulings as to the illuminating relevance of testimony largely to the discretion of the trial court that hears the evidence." *NLRB* v. *Donnelly Co.*, 330 U. S. 219, 236 (1947); *Michelson* v. *United States*, 335 U. S. 469, 480 (1948); *Salem* v. *United States Lines Co.*, 370 U. S. 31, 35 (1962).

Petitioners offered in evidence at trial three categories of allegedly comparable materials argued to be relevant to community standards: (1) materials which had received second-class mailing privileges; (2) materials which had previously been the subject of litigation and had been found to be "constitutionally protected"; and (3) materials openly available on the newsstands. The District Court, after examining the materials, refused to admit them into evidence on the grounds that "they tend to confuse the jury" and "would serve no probative value in comparison to the amount of confusion and deluge of material that could result therefrom." App. 158. The Court of Appeals concluded that the District Court was correct in rejecting the proffered evidence, stating that any abuse of discretion in refusing to admit the materials themselves had been "cured by the District Court's offer to entertain expert testimony with respect to the elements to be shown for the advice of the jury." 481 F. 2d, at 320. Here the District Court permitted four expert witnesses called by petitioners to testify extensively concerning the relevant community standards.

The defendant in an obscenity prosecution, just as a defendant in any other prosecution, is entitled to an opportunity to adduce relevant, competent evidence bearing on the issues to be tried. But the availability of similar materials on the newsstands of the community does not automatically make them admissible as tending to prove the nonobscenity of the materials which the defendant is charged with circulating. As stated by

552-191 O - 76 - 11

the Court of Appeals, the mere fact that materials similar to the brochure at issue here "are for sale and purchased at book stores around the country does not make them witnesses of virtue." *Ibid.* Or, as put by the Court of Appeals in *United States* v. *Manarite*, 448 F. 2d 583 (CA2 1971):

> "Mere availability of similar material by itself means nothing more than that other persons are engaged in similar activities." *Id.*, at 593.

Nor do we think the District Court erred in refusing petitioners' offer of a magazine which had received a second-class mailing privilege.[14] While federal law, see former 39 U. S. C. § 4354 (1964 ed.); 39 CFR Pt. 132 (1973), may lay down certain standards for the issuance of a second-class mailing permit, this Court has held that these standards give postal inspectors no power of censorship. *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146 (1946). The mere fact that a publication has acquired a second-class mailing privilege does not therefore create any presumption that it is not obscene.

Finally, we do not think the District Court abused its discretion in refusing to admit certain allegedly comparable materials, a film and two magazines,[15] which had been found to be nonobscene by this Court. See *Pinkus* v. *Pitchess*, 429 F. 2d 416 (CA9), aff'd *sub nom. California* v. *Pinkus*, 400 U. S. 922 (1970); *Burgin* v. *South Carolina*, 404 U. S. 806 (1971), rev'g 255 S. C. 237, 178 S. E. 2d 325 (1970). A judicial determination that particular matters are not obscene does not necessarily make them relevant to the determination of the obscenity of

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[14] The magazine offered was entitled Nude Living, No. 63. The foundation alleged for its admissibility was that it had received a second-class mailing privilege. App. 212–213.

[15] Brief for Petitioner Kemp 69.

other materials, much less mandate their admission into evidence.

Much of the material offered by petitioners was not of demonstrated relevance to the issues in this case. Such of it as may have been clearly relevant was subject to the District Court's observation that it would tend to create more confusion than enlightenment in the minds of the jury, and to the court's expressed willingness to permit the same material to be treated in the testimony of expert witnesses. The District Court retains considerable latitude even with admittedly relevant evidence in rejecting that which is cumulative, and in requiring that which is to be brought to the jury's attention to be done so in a manner least likely to confuse that body. We agree with the Court of Appeals that the District Court's discretion was not abused.[16]

Petitioners' second contention is that the District Court erred in instructing the jury as to the determination of the prurient appeal of the brochure. At the trial, the Government introduced, over petitioners' objection, testimony from an expert witness that the material in the Illustrated Report appealed to the prurient interest of various deviant sexual groups.[17] The testimony concerning the brochure was that it appealed to a prurient

[16] Other proffered materials, alleged to be comparable, included numerous magazines and films, and also the survey (see n. 10, *supra*) conducted by the student at San Diego State University of the reactions of people in the San Diego area to the Illustrated Report and the brochure. Brief for Petitioner Kemp 64–71.

[17] Petitioners also contend that this evidence was at variance with the Government's answer to their Bill of Particulars. Brief for Petitioner Hamling 49–50. The Court of Appeals assumed, without deciding, that such evidence did constitute a variance, but concluded that "such variance was in no wise a surprise or prejudice to the defendants as their own expert opinion testimony interwove and covered the same field completely." 481 F. 2d, at 322. We agree with the Court of Appeals.

interest in general, and not specifically to some deviant group. Petitioners concede, however, that each of the pictures said to appeal to deviant groups did in fact appear in the brochure.[18] The District Court accordingly instructed the jury that in deciding whether the predominant appeal of the Illustrated Report and the brochure was to a prurient interest in sex, it could consider whether some portions of those materials appealed to a prurient interest of a specifically defined deviant group as well as whether they appealed to the prurient interest of the average person. App. 239–241. The Court of Appeals found no error in the instruction, since it was "manifest that the District Court considered that some of the portrayals in the Brochure might be found to have a prurient appeal" to a deviant group. 481 F. 2d, at 321.

Petitioners contend that the District Court's instruction was improper because it allowed the jury to measure the brochure by its appeal to the prurient interest not only of the average person but also of a clearly defined deviant group. Our decision in *Mishkin* v. *New York,* 383 U. S. 502 (1966), clearly indicates that in measuring the prurient appeal of allegedly obscene materials, *i. e.,* whether the "dominant theme of the material taken as a whole appeals to a prurient interest in sex," consideration may be given to the prurient appeal of the material to clearly defined deviant sexual groups. Petitioners appear to argue that if some of the material appeals to the prurient interest of sexual deviants while other parts appeal to the prurient interest of the average person, a general finding that the material appeals to a prurient interest in sex is somehow precluded. But we stated in *Mishkin* v. *New York:*

> "Where the material is designed for and primarily disseminated to a clearly defined deviant sexual

[18] Brief for Petitioner Hamling 49–50.

> group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. The reference to the 'average' or 'normal' person in *Roth,* 354 U. S., at 489–490, does not foreclose this holding. . . . We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group; and since our holding requires that the recipient group be defined with more specificity than in terms of sexually immature persons, it also avoids the inadequacy of the most-susceptible-person facet of the [*Regina* v.] *Hicklin* [[1868] L. R. 3 Q. B. 360] test." 383 U. S., at 508–509 (footnotes omitted).

The District Court's instruction was consistent with this statement in *Mishkin.* The jury was instructed that it must find that the materials as a whole appealed generally to a prurient interest in sex. In making that determination, the jury was properly instructed that it should measure the prurient appeal of the materials as to all groups. Such an instruction was also consistent with our recent decision in the *Miller* cases. We stated in *Miller:*

> "As the Court made clear in *Mishkin* v. *New York,* 383 U. S., at 508–509, the primary concern with requiring a jury to apply the standard of 'the average person, applying contemporary community standards' is to be certain that, *so far as material is not aimed at a deviant group,* it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed

a totally insensitive one." 413 U. S., at 33 (emphasis added).

Finally, we similarly think petitioners' challenge to the pandering instruction given by the District Court is without merit. The District Court instructed the jurors that they must apply the three-part test of the plurality opinion in *Memoirs* v. *Massachusetts*, 383 U. S., at 418, and then indicated that the jury could, in applying that test, if it found the case to be close, also consider whether the materials had been pandered, by looking to their "[m]anner of distribution, circumstances of production, sale, . . . advertising . . . . [and] editorial intent . . . ." App. 245. This instruction was given with respect to both the Illustrated Report and the brochure which advertised it, both of which were at issue in the trial.

Petitioners contend that the instruction was improper on the facts adduced below and that it caused them to be "convicted" of pandering. Pandering was not charged in the indictment of the petitioners, but it is not, of course, an element of the offense of mailing obscene matter under 18 U. S. C. § 1461. The District Court's instruction was clearly consistent with our decision in *Ginzburg* v. *United States*, 383 U. S. 463 (1966), which held that evidence of pandering could be relevant in the determination of the obscenity of the materials at issue, as long as the proper constitutional definition of obscenity is applied. Nor does the enactment by Congress of 39 U. S. C. § 3008, enabling the Postal Service to cease forwarding pandering advertisements at the request of an addressee, authorize, as contended by petitioners, the pandering of obscene advertisements. That statute simply gives a postal recipient the means to insulate himself from advertisements which offer for sale matter "which the addressee in his sole discretion believes to be erotically arousing or sexually provocative," by

instructing the Post Office to order the sender to refrain from mailing any further advertisements to him. See *Rowan* v. *U. S. Post Office Dept.*, 397 U. S. 728 (1970). The statute does not purport to authorize the mailing of legally obscene pandering advertisements, which continues to be proscribed by 18 U. S. C. § 1461. See 39 U. S. C. § 3011 (e).

IV

Petitioners' final contentions are directed at alleged procedural irregularities said to have occurred during the course of the trial.

They first contend that the District Court committed reversible error by denying their request to make additional objections to the court's instructions to the jury out of the presence of the jury. Prior to closing arguments and instructions to the jury the parties had made a record with respect to the instructions which the Court indicated it would give. After argument and instructions, but before the jury had retired, petitioners' counsel approached the bench and requested that the jury be excused in order that he might present further objections to the charge. The court declined to excuse the jury, saying:

> "You have made all the objections suitable that I can think of. I want to send this Jury out. If you want to make a statement, make a statement." App. 257.

Petitioners contend that the court's refusal to excuse the jury violated the provisions of Fed. Rule Crim. Proc. 30, and requires reversal. Rule 30 provides:

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the re-

> quests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. *Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.*" (Emphasis added.)

Nothing in Rule 30 transfers from the district court to counsel the function of deciding at what point in the trial, consistent with established practice, counsel shall be given the opportunity required by Rule 30 to make a record on the instructions given by the court. But when counsel at the close of the court's instruction to the jury indicates that he wishes to make objections of a kind which could not previously have been brought to the court's attention, he runs the risk of waiving a claim of error under the fourth sentence of the Rule unless the court indicates that it will permit such objections to be made after the jury retires. Since the court here asked counsel for comments, and did not indicate that it would permit objections which could not have been previously formulated to be made after the jury retired, we agree with the Court of Appeals that the District Court erred in refusing to permit such objections to be made out of the presence of the jury. We also agree with the Court of Appeals' conclusion that such procedural error does not mandate reversal.

The courts of appeals have taken varying approaches to the question of when a failure to comply with the pro-

visions of Rule 30 constitutes reversible error.[19] Some appear to have applied a general rule that such a violation is not reversible error unless the defendant demonstrates that he has been prejudiced. *United States* v. *Hall*, 200 F. 2d 957 (CA2 1953); *United States* v. *Titus*, 221 F. 2d 571 (CA2), cert. denied, 350 U. S. 832 (1955); *United States* v. *Fernandez*, 456 F. 2d 638 (CA2 1972); *Hodges* v. *United States*, 243 F. 2d 281 (CA5 1957); *Sultan* v. *United States*, 249 F. 2d 385 (CA5 1957). Others appear to have adopted a rule whereby a violation is not reversible error where it affirmatively appears that the defendant was not prejudiced. *United States* v. *Schartner*, 426 F. 2d 470 (CA3 1970); *Lovely* v. *United States*, 169 F. 2d 386 (CA4 1948). At least one Court of Appeals appears to take the position that the failure to comply with Rule 30 is automatic grounds for reversal, regardless of attenuating circumstances. *Hall* v. *United States*, 378 F. 2d 349 (CA10 1967).

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[19] Federal Rule Civ. Proc. 51 states that "[o]pportunity shall be given to make the objection out of the hearing of the jury." Though the "out of the presence of the jury" language is not contained in that Rule, the Advisory Committee's note attending Fed. Rule Crim. Proc. 30 states that it is to "correspond to Rule 51 of the Federal Rules of Civil Procedure . . . . It seemed appropriate that on a point such as instructions to juries there should be no difference in procedure between civil and criminal cases." The Government argues that in considering whether failure to comply with Fed. Rule Crim. Proc. 30 requires reversal, the appropriate test should be similar to the general standard of consideration where there is a failure to comply with Fed. Rule Civ. Proc. 51, *i. e.*, reversal is required "if there is reasonable basis for concluding that the colloquy had in the presence of the jury as a result of the judge's ignoring or denying a proper request was prejudicial." *Swain* v. *Boeing Airplane Co.*, 337 F. 2d 940, 943 (CA2 1964), cert. denied, 380 U. S. 951 (1965). This approach was used by a panel of the Court of Appeals for the Second Circuit in a case involving failure to comply with Fed. Rule Crim. Proc. 30. *United States* v. *Fernandez*, 456 F. 2d 638 (1972).

The Court of Appeals in this case felt that the rule announced by the Third Circuit in *United States* v. *Schartner, supra,* was the appropriate one for application where Rule 30 has not been complied with. The court in *Schartner* held that a District Court's failure to comply with the "out of the presence of the jury" requirement of Rule 30, upon proper request by a party, constitutes reversible error "unless it be demonstrable on an examination of the whole record that the denial of the right did not prejudice" the defendant's case. 426 F. 2d, at 480. Applying that rule, the Court of Appeals here concluded that there was no prejudice to any of the petitioners as a result of the District Court's failure to comply with Rule 30.

The language in Rule 30 at issue here was added to that Rule by a 1966 amendment; prior to that time the Rule had only provided that a party should be given the opportunity to make the objection out of the *hearing* of the jury. The significance of the change was not elaborated by the Advisory Committee in its note accompanying the Rule, which merely mentioned the change. Courts examining the Rule have found that it is principally designed to avoid the subtle psychological pressures upon the jurors which would arise if they were to view and hear defense counsel in a posture of apparent antagonism toward the judge. *Lovely* v. *United States, supra,* at 391; *Hodges* v. *United States, supra,* at 283–284; *United States* v. *Schartner, supra,* at 479. While that goal might be served in many cases by a sufficiently low-tone bench conference, the ultimate way to assure the goal is to comply with the Rule.

Petitioners urge that we adopt a strict approach and declare that any noncompliance with the Rule requires reversal. We think such an approach would be unduly mechanical, and would be inconsistent with interpretation

in pari materia of Rule 30 and other relevant provisions of the Federal Rules of Criminal Procedure, since Rule 52 (a) specifically provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." This provision suggests the soundness of an approach similar to that of the Court of Appeals here and the various other Courts of Appeals, *supra,* which have in some manner examined the prejudice to the defendant in deciding whether reversal is required where there is a failure to comply with Rule 30.

We conclude that the Court of Appeals did not err in refusing to reverse petitioners' convictions for the failure to comply with the provisions of Rule 30. The Court of Appeals felt that it should apply the somewhat stricter test of the *Schartner* case, *supra;* the court felt that "the rule of *Fernandez,* [456 F. 2d 638 (CA2 1972),] places a burden upon a defendant in a criminal case that he may not be able to carry." 481 F. 2d, at 324. Applying the *Schartner* test, the Court of Appeals determined that there was no prejudice to petitioners from the failure to hold the instruction-objection session out of the presence of the jury. Our independent examination of that bench conference convinces us that the holding of the Court of Appeals was correct. The bench conference was one of many at the trial and there is no indication in the record that the discussion was heard by the jury. The colloquy between petitioners' counsel and the court concerned purely legal issues, App. 257–265, and the District Court had prior to that point indicated its rulings with respect to the instructions requested by counsel. We express no view, of course, as to whether a court of appeals may follow the apparently more lenient standard of requiring the defendant to demonstrate that he was prejudiced. See *United States* v. *Fernandez,* 456 F. 2d, at 643–644.

Petitioners' second procedural contention is that the

trial jury was improperly constituted because an allegedly cognizable class of citizens, "young adults," which petitioners define as those between the ages of 18 and 24 years, were systematically excluded.[20] Petitioners therefore argue that the District Court abused its discretion in refusing to grant a continuance until a new jury, which would have presumably contained a greater ratio of young persons, was drawn.

At the time of petitioners' indictment and trial, the jury-selection plan of the Southern District of California, adopted pursuant to 28 U. S. C. §§ 1863 (b)(2) and (4), 82 Stat. 55, provided for the periodic emptying and refilling of the master jury wheel from voter registration lists. At that point, it had been slightly less than four years since the jury wheel in the District had last been filled. Petitioners' argument is that because the jury wheel had last been filled in 1968, the youngest potential juror for their trial was at least 24 years old. The petitioner called as a witness the Clerk of the Southern District of California, who testified that within one month the master wheel would be refilled with the names of persons who then appeared on the voters' registration list and that the master list would then contain the names of persons 21 years of age and over. Tr. 94–98. A 1972 amendment to 28 U. S. C. § 1863 (b)(4) (1970 ed., Supp. II) provided that the periodic emptying and refilling of the master wheel should occur at specified intervals, "not [to] exceed four years." Pub. L. No. 92–269, § 2, 86 Stat. 117. The District Court denied petitioners' motion to strike the venire, but stated that the evidence presented

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[20] In connection with their motion to strike the venire, petitioners introduced evidence which they contended established that "young persons were a cognizable group and that they were more tolerant than older persons in matters pertaining to the depiction of sexually explicit material." Brief for Petitioner Hamling 88.

indicated that "it is time to change the jury master wheel." Tr. 93. The petitioners then moved for a continuance of approximately one month, so that their jury would be drawn from a master wheel that included the names of persons 21 years of age or over. *Id.*, at 95–98. The District Court denied the motion.

The Court of Appeals assumed, without deciding, that the young do constitute a cognizable group or class, but concluded that petitioners had "failed to show, let alone establish, a purposeful systematic exclusion of the members of that class whose names, but for such systematic exclusion would otherwise be selected for the master jury wheel," and therefore that the District Court's refusal to grant a continuance was not an abuse of discretion. 481 F. 2d, at 314. We agree with the Court of Appeals.

Petitioners do not cite case authority for the proposition that the young are an identifiable group entitled to a group-based protection under our prior cases, see *Hernandez* v. *Texas*, 347 U. S. 475, 479–480 (1954); claims of exclusion of the young from juries have met with little success in the federal courts.[21] Assuming, as did the Court of Appeals, that the young are such a group, we do not believe that there is evidence in this case sufficient to make out a prima facie case of discrimination which would in turn place the burden on the Government to overcome it. The master wheel under the Southern District of California plan, as under plans in other judicial districts, is periodically emptied and then refilled with names from the available voter lists. Persons added to the voter lists subsequent to one filling of the jury

[21] See, *e. g.*, *United States* v. *Butera*, 420 F. 2d 564 (CA1 1970); *United States* v. *Camara*, 451 F. 2d 1122 (CA1 1971); *United States* v. *Gooding*, 473 F. 2d 425 (CA5 1973); *United States* v. *Kuhn*, 441 F. 2d 179 (CA5 1971); *United States* v. *Gast*, 457 F. 2d 141 (CA7), cert. denied, 406 U. S. 969 (1972).

wheel are therefore not added to the wheel until the next refilling. But some play in the joints of the jury-selection process is necessary in order to accommodate the practical problems of judicial administration. Congress could reasonably adopt procedures which, while designed to assure that "an impartial jury [is] drawn from a cross-section of the community," *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 220 (1946); *Smith* v. *Texas*, 311 U. S. 128, 130 (1940), at the same time take into account practical problems in judicial administration. Unless we were to require the daily refilling of the jury wheel, Congress may necessarily conclude that some periodic delay in updating the wheel is reasonable to permit the orderly administration of justice.[22] Invariably of course, as time goes on, the jury wheel will be more and more out of date, especially near the end of the statutorily prescribed time period for updating the wheel. But if the jury wheel is not discriminatory when completely updated at the time of each refilling, a prohibited "purposeful discrimination" does not arise near the end of the period simply because the young and other persons have belatedly become eligible for jury service by becoming registered voters. *Whitus* v. *Georgia*, 385 U. S. 545, 551 (1967); see *Avery* v. *Georgia*, 345 U. S. 559 (1953); *Alexander* v. *Louisiana*, 405 U. S. 625 (1972). Since petitioners failed to establish a discriminatory exclusion of the young from their jury, the District Court properly exercised its discretion in refusing to grant petitioners' motion for a continuance.

Petitioners' third procedural contention is that the District Court erred in refusing to ask certain questions on

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[22] Various delays in refilling jury wheels have been upheld by the federal courts. *E. g., United States* v. *Pentado*, 463 F. 2d 355 (CA5 1972) (three years); *United States* v. *Gooding*, *supra* (three years, four months); *United States* v. *Kuhn*, *supra* (five years).

voir dire concerning possible religious and other biases of the jurors.[23] Specifically, petitioners requested the court to ask questions as to whether the jurors' educational, political, and religious beliefs might affect their views on the question of obscenity. App. 78–81. The Court of Appeals concluded that the District Court's examination on the *voir dire* of the prospective jurors "was full, complete and . . . fair to the [petitioners] as contemplated by Rule 24 (a), Federal Rules of Criminal Procedure." 481 F. 2d, at 314. Noting that petitioners had requested the submission of numerous questions to the petit panel, the Court of Appeals stated:

> "The District Court asked many of the questions as submitted, many in altered and consolidated form, and declined to ask many others which were cumulative and argumentative. The handling of those questions not asked was clearly within the range of the District Court's discretion in the matter and no clear abuse of the discretion nor prejudice to the [petitioners] has been shown." *Ibid.*

We agree with the Court of Appeals. Federal Rule Crim. Proc. 24 (a) permits a district court to conduct the *voir dire* examination, making such use of questions submitted by the parties as it deems proper. The District Court here asked questions similar to many of those sub-

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[23] Petitioners also contend that certain actions of the Government's attorney before the grand jury prejudiced that body against them. The Court of Appeals, in rejecting this contention, stated:

"The record before us is totally lacking of any evidence or showing of any kind that any member of the Grand Jury was biased or prejudiced in any degree against any of the [petitioners], except only a supposition as to how the members may have reacted upon a view of the Brochure and Report. The presumption of regularity which attaches to Grand Jury proceedings still abides. . . . [T]he assignment has no merit." 481 F. 2d, at 313 (citations omitted).

We agree with the Court of Appeals.

mitted by petitioners, and its examination was clearly sufficient to test the qualifications and competency of the prospective jurors. Petitioners' reliance on this Court's decisions in *Aldridge* v. *United States*, 283 U. S. 308 (1931), and *Ham* v. *South Carolina*, 409 U. S. 524 (1973), is misplaced. Those cases held that in certain situations a judge must inquire into possible racial prejudices of the jurors in order to satisfy the demands of due process. But in *Ham* v. *South Carolina, supra*, we also rejected a claim that the trial judge had erred in refusing to ask the jurors about potential bias against beards, noting our inability "to constitutionally distinguish possible prejudice against beards from a host of other possible similar prejudices . . . ." *Id.*, at 528. Here, as in *Ham*, the trial judge made a general inquiry into the jurors' general views concerning obscenity. Failure to ask specific questions as to the possible effect of educational, political, and religious biases did "not reach the level of a constitutional violation," *ibid.*, nor was it error requiring the exercise of our supervisory authority over the administration of justice in the federal courts. We hold that the District Court acted within its discretion in refusing to ask the questions.

The judgment of the Court of Appeals for the Ninth Circuit in this case is

Affirmed.

MR. JUSTICE DOUGLAS, dissenting.

In 1970 the President's Commission on Obscenity and Pornography issued its report. Dean William D. Lockhart was chairman. Eighteen others were members. It was a 646-page report. One member, Charles H. Keating, Jr., filed a dissenting report of some 60 pages with at least as many pages of exhibits. The report contains many references to many facets of sex: *e. g.*, petting,

coitus, oral sexuality, masturbation, and homosexual activities.

What petitioners did was to supply the report with a glossary—not in dictionary terms but visually. Every item in the glossary depicted explicit sexual material within the meaning of that term as used in the report. Perhaps we should have no reports on obscenity. But imbedded in the First Amendment is the philosophy that the people have the right to know.* Sex is more important to some than to others but it is of some importance to all. If officials may constitutionally report on obscenity, I see nothing in the First Amendment that allows us to bar the use of a glossary factually to illustrate what the report discusses.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

I

Whatever the constitutional power of government to *regulate* the distribution of sexually oriented materials, the First and Fourteenth Amendments, in my view, deny the Federal and State Governments power wholly to *suppress* their distribution. For I remain of the view that, "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal

*The Constitution of India (Mar. 1, 1963) provides in Art. 19 (1) that "[a]ll citizens shall have the right—(a) to freedom of speech and expression"; but Art. 19 (2) provides that nothing in that clause bars "reasonable restrictions on the exercise" of those rights "in the interests of . . . decency or morality." Our First Amendment contains no such qualification and certainly when Jefferson and Madison drafted it, sex had as great a potential for vulgarity as for beauty. If they had wanted a federal censor to edit our publications, they certainly would have made it explicit.

552-191 O - 76 - 12

Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). Since amended 18 U. S. C. § 1461, as construed by the Court, aims at total *suppression* of distribution by mail of sexually oriented materials, it is, in my view, unconstitutionally overbroad and therefore invalid on its face. On that ground alone, I would reverse the judgment of the Court of Appeals and direct the dismissal of the indictment. Several other reasons, however, also compel the conclusion that petitioners' convictions should be set aside.

II

At least since 1962 the accepted construction of amended § 1461 has been that of Mr. Justice Harlan and MR. JUSTICE STEWART "that the proper test under this federal statute, [§ 1461,] reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency"; further, they said, "[t]he 1958 amendments . . . authorizing criminal prosecution at the place of delivery evince no purpose to make the standard less than national." *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478, 488, and n. 10 (1962). The Court today overrules that construction and construes amended § 1461 to permit a juror to "draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case." *Ante*, at 105. Apart from the questions whether the Court's new construction trespasses upon the congressional prerogative, see *Blount* v. *Rizzi*, 400 U. S. 410, 419 (1971),[1]

[1] The Court is, of course, obliged to strain to construe congressional enactments to avoid constitutional attacks. It cannot, how-

and whether constitutionally any "local" standard under amended § 1461 can properly be employed to delineate the area of expression protected by the First Amendment, see *Pennekamp* v. *Florida,* 328 U. S. 331, 335 (1946)—since "[i]t is, after all, a national Constitution we are expounding," *Jacobellis* v. *Ohio,* 378 U. S. 184, 195 (1964) (opinion of BRENNAN, J.)—the construction that a "local" standard applies in § 1461 cases raises at least another serious First Amendment problem.

The 1958 amendments to § 1461 constituted the mailing of obscene matter a continuing offense under 18 U. S. C. § 3237.[2] The practical effect of this amend-

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ever, emasculate a statute to avoid a perceived constitutional difficulty, see *Aptheker* v. *Secretary of State,* 378 U. S. 500, 515 (1964); *George Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 379 (1933). The legislative history of § 1461 gives not the slightest indication that the application of local standards was contemplated. Indeed, the remarks of an early sponsor of the provision indicate that application of a national standard was intended:

"If there be a trial in this country or anywhere else of an obscene character—of that character that a report of it would corrupt the morals of the youth and the *morals of the country generally*—then I do not think the United States should provide the means to circulate that kind of literature in whatever paper or in whatever book it may be published." 4 Cong. Rec. 696 (1876) (remarks of Rep. Cannon) (emphasis added).

[2] Prior to the amendment § 1461 read, "[w]hoever knowingly *deposits* for mailing or delivery . . ." (emphasis added). This was changed to read "[w]hoever knowingly *uses the mails* . . . ." The amendment overruled *United States* v. *Ross,* 205 F. 2d 619 (CA10 1953), which held that the unlawful act proscribed in § 1461 was "the deposit for mailing and not a use of the mails which may follow such deposit," *id.,* at 621, and thus brought § 1461 within 18 U. S. C. § 3237, which provides in relevant part that "[a]ny offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such

ment—intentionally adopted by Congress for that express purpose—is to permit prosecution "in the Federal district in which [the disseminator] mailed the obscenity, in the Federal district in which the obscenity was received, or in any Federal district through which the obscenity passed while it was on its route through the mails." 104 Cong. Rec. 15610–15611 (1958) (remarks of Rep. Hillings); see H. R. Rep. No. 2624, 85th Cong., 2d Sess. (1958); 104 Cong. Rec. 8991 (remarks of Rep. Keating); *id.*, at 17832; *id.*, at 8992 (remarks of Rep. Poff). Under today's "local" standards construction, therefore, the guilt or innocence of distributors of identical materials mailed from the same locale can now turn on the chancy course of transit or place of delivery of the materials. See *United States* v. *Palladino*, 490 F. 2d 499, 503 (CA1 1974) (Coffin, C. J.). National distributors choosing to send their products in interstate travels will be forced to cope with the community standards of every hamlet into which their goods may wander. Because these variegated standards are impossible to discern, national distributors, fearful of risking the expense and difficulty of defending against prosecution in any of several remote communities, must inevitably be led to retreat to debilitating self-censorship that abridges the First Amendment rights of the people. For it "would tend to restrict the public's access to forms [of sexually oriented materials] which the [United States] could not constitutionally suppress directly . . . a censorship . . . hardly less virulent for being privately administered[, for] [t]hrough it, the distribution of all [sexually oriented materials], both obscene and not obscene, would be impeded." *Smith* v. *California*, 361 U. S. 147, 154 (1959). Thus, the people of many communities will be "protected" far beyond gov-

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commerce or mail matter moves." See generally Note, Venue: Its Impact on Obscenity, 11 S. D. L. Rev. 363 (1966).

ernment's constitutional power to deny them access to sexually oriented materials. A construction that has such consequences necessarily renders the constitutionality of amended § 1461 facially suspect under the First Amendment.

III

But even on the assumption that amended § 1461 is invulnerable to constitutional attack, the Court's affirmance of these convictions is a patently indefensible denial to these petitioners of due process of law. The trial judge followed *Manual Enterprise*'s construction of amended § 1461 that required a determination of guilt upon the basis of a "national" standard of decency. The Court holds that under today's new "local" standards construction, this was error. Yet, says the Court, the error in effect was harmless because the references in the instructions to "national" standards could not have "materially affected [the jurors'] deliberations . . . ." *Ante,* at 108. The trial transcript lays bare the utter fallacy of that conclusion.

First, the Court appraises the trial court's references to "national" standards as "isolated," and cites *Boyd* v. *United States,* 271 U. S. 104, 107 (1926), *ante,* at 107–108, where the Court held that an ambiguous statement in a charge in a criminal case, which, interpreted one way, would be erroneous, but which considered with the charge as a whole, probably was understood by the jurors in a harmless sense, is not a ground for reversal. But to represent the references to "national" standards in the court's instructions as "isolated," and probably understood by the jury in a harmless sense, is completely to misread the instructions. The emphasis on "national" standards is the very core of the instructions, because the trial judge made "national" standards the central criterion of the determination of the obscenity of the brochure.

He referred to "national" standards in his instructions no less than 18 times, 14 of them within the space of four transcript pages.[3] Indeed, his emphasis made such an

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[3] The portion of the instructions containing the 14 references is as follows:

"Now, as to the second test, another requirement to be applied in determining whether the material in evidence is obscene, is whether the material is patently offensive in that it goes substantially beyond what is reasonably accepted according to the contemporary standards of the community as a whole, *the national community as a whole.* In applying this test you must consider each book or advertisement as a whole and not part by part. You must measure the material by contemporary or current *national community* standards and determine whether the material so exceeds the customary limits of candor in the descriptions and representations of sex and nudity which are reasonably acceptable in the *national community,* that they are patently offensive.

"Contemporary community standards means the standards generally held *throughout this country* concerning sex and matters pertaining to sex. The phrase means, as it has been aptly stated, the average conscience of the time, and the present critical point in the compromise between candor and shame, at which the community may have arrived here and now.

"You are the sole judges of the contemporary community *standards of this country.* In arriving at and applying your judgment, however, you are not to consider your own standards. That is, of what is good or what is bad. You are not to condemn by your own standards, if you know and believe them to be stricter than those generally held, and you are not to exculpate or excuse by your own standards, if you know and believe them to be more tolerant than those that are generally held. You are not to limit yourself to what you have learned while residing in your present locality or what you have learned or observed from and about people residing in your present locality. Rather, you are to call upon everything you have learned, seen, read, and observed from both the evidence presented at the trial and the experience you have gained from your own observations and experience in your affairs of life.

"If you find the materials in evidence to substantially exceed the limits of candor in the descriptions and representations of sex which

impression upon the jurors' minds that they returned from the jury room and requested that the trial judge reread them this portion of the instructions. See Tr. 4989–4990.[4]

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are acceptable in the *national community,* then you may find the material to be patently offensive.

"You will note that the book and advertisement here involved cannot be found to be obscene unless the evidence shows beyond a reasonable doubt that these materials substantially exceed customary limits of candor in *the nation as a whole* in the description and representation of sex and nudity.

"The word 'substantially' has been defined as greatly or considerably, or largely. The contemporary community *standards of the nation,* are set by what is, in fact, reasonably accepted by the *national community as a whole.* That is to say, by society at large or people in general *throughout the nation,* and not by what some persons or groups of persons may believe *the national community* as a whole ought to accept or refuse to accept. It is a matter of common knowledge of which the Court takes judicial notice, that the customs change and that *the national community as a whole* may, from time to time, find acceptable that which was formerly unacceptable.

"Now, in determining and applying contemporary *national community standards,* you must consider what appears generally in magazines, books, newspapers, television, burlesque, night clubs, novels, motion pictures, the stage, and other media of communications in *the nation as a whole,* insofar as social value is concerned." Tr. 4948–4951; App. 241–243 (emphasis supplied).

Four additional references to national standards appear at pages 4945, 4953, and 4960 of the trial transcript.

[4] Petitioners' failure to object to the national-standards instructions can hardly be used to shift to their shoulders any burden of demonstrating prejudice. See *O'Connor* v. *Ohio,* 385 U. S. 92 (1966). The Court's reliance upon *Namet* v. *United States,* 373 U. S. 179, 190–191 (1963), and *Lopez* v. *United States,* 373 U. S. 427, 436 (1963), cases in which defendants failed to object to instructions which were erroneous at the time the jury was instructed and in which the defendants were therefore required to demonstrate that the instructions constituted "plain error," are thus inapt.

Of at least as much—if not more—significance, the trial judge's refusal to permit the defense to offer proof of "local" standards evidences how utterly mistaken is the Court's surmise that the emphasis upon "national" standards in the instructions could not have "materially affected" the deliberations of the jurors. Virginia Carlsen was offered as a defense witness. Trial was in the Southern District of California which covers San Diego and Imperial Counties. Miss Carlsen testified that, under the supervision of a professor at San Diego State University, she polled San Diego residents to ascertain their reaction to the brochure. The trial judge refused to admit the results of her survey in evidence, despite a side-bar offer of proof that it would demonstrate that a substantial majority of the 718 persons interviewed had expressed the view that the brochure should be generally available to the public. Significantly, the survey was excluded by the trial judge *solely* on the ground that "[y]ou can't use a piece of a standard as the standard," thus emphasizing that guilt was to be predicated on violation of a national standard, or not at all. The colloquy at side bar was as follows:

> "MR. KATZ. . . . The questions on the survey I think are self-explanatory. She showed people the Illustrated Report; she showed people the survey—I mean the advertisement in the questionnaire, and recorded their responses and calculated them on the basis of sex and on the basis of age, and I think the jury should be entitled, your Honor, to use this as one of the tests they use in deciding what is [*sic*] community standards and what weight should be given to it is a question for the jury.
>
> "THE COURT. Well, I don't agree with you, Mr. Katz, at all.
>
> "I think you have a *national standard* here. You

are going to have to stay with your *national standard.*

"I think it does go to the admissibility. *You can't use a piece of a standard as the standard. If that were true, you would defeat the entire general standard.*

"So I am not going to permit you to go any further with this witness with respect to this." Tr. 3932–3933 (emphasis supplied).

"MR. FLEISHMAN.... I think whatever limitations your Honor would put on it would be correct, but I think it would be and should be admitted for whatever weight it has.

"THE COURT. *No. It is a national standard and I don't think this is the proper way to go about determining the national standard." Id.,* at 3937 (emphasis supplied).

The affirmance of petitioners' convictions in these circumstances plainly denies petitioners due process of law in violation of the principle of *Saunders* v. *Shaw,* 244 U. S. 317 (1917). There, the plaintiff sought to enjoin collection of a drainage tax. At trial, the trial judge ruled inadmissible plaintiff's evidence that his land would not benefit from certain drainage improvements. Defendant therefore offered no proof that the plaintiff's lands would benefit and prevailed at trial. The State Supreme Court reversed and granted a permanent injunction against the tax upon finding from the answer and testimony before it that the land had not been, and could not be, benefited. We reversed, holding that it was a violation of due process of law for a State Supreme Court to reverse a case and render judgment absolute, against a defendant who succeeded in the trial court, upon a proposition of fact that was ruled to be immaterial at the trial and concerning

which the defendant had therefore no occasion and no proper opportunity to introduce rebuttal evidence.

Petitioners' situation in this case is identical with that of the defendant in *Saunders*. Petitioners, too, were denied at trial admission of evidence upon a proposition of fact that was ruled immaterial and concerning which they therefore had no proper opportunity to introduce their proof. Had petitioners been aware that the proper criterion was the "local" standard, not only were they prepared to offer proof of the "local" standard, but obviously the strategy of their defense would have been completely different. To affirm their convictions without affording them opportunity to try the case on the "local" standards basis is a clear denial of due process. *Saunders* was, of course, a civil case. But the principle there announced surely has even greater application where, as here, criminal convictions carrying long prison sentences are involved.

> "The right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause. . . . And . . . this right becomes particularly fundamental when the proceeding allegedly results in a finding that a particular individual was guilty of a crime." *Jenkins* v. *McKeithen*, 395 U. S. 411, 429 (1969) (opinion of MARSHALL, J.).

But in addition to the palpable absurdity of the Court's surmises that introduction of the San Diego study could not have affected the jurors' deliberations, and that petitioners would not have introduced additional evidence or done anything materially different had they known the jurors would be instructed on local standards, the Court's assertion that the jurors could not have ruled differently if instructed to apply local, not national, standards evinces a claim of omniscience hardly mortal. It is the more remarkable in light of the contrary

supposition of *Miller* v. *California,* 413 U. S. 15 (1973), that a jury instructed to apply national standards could indeed reach a different conclusion from what it might if instructed to apply local standards:

> "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. . . . People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." *Id.,* at 32–33.

Indeed, *Miller* rejected the "national" standards test on the ground, *inter alia,* that a "local" standard would allow a given community to apply a more permissive test:

> "The use of 'national' standards . . . necessarily implies that materials found tolerable in some places, but not under the 'national' criteria, will nevertheless be unavailable where they are acceptable." *Id.,* at 32 n. 13.

Yet for the purpose of affirming these convictions the Court holds in effect that the local standards of jurors drawn from the Southern District of California could not possibly be more permissive than those of the Nation as a whole.[5]

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[5] It may be that the Court's unarticulated assumption is that jurors instructed to apply "national" standards will inevitably apply the standards of their local community, because national standards are simply "unascertainable." But to say that it may be difficult or even impossible to determine national standards is a far cry from saying that the jurors—instructed that it is their solemn duty to apply the law as pronounced by the Court—would not attempt to do so; or, indeed, that they would not reach a conclusion that the national standards differed from those of their local community.

The Court's affirmance, in addition to denying due process in its refusal to apply the *Saunders* principle, also denies petitioners due process in another way. It is abundantly clear that petitioners' convictions are sustained upon a charge wholly different from that upon which they were tried. They were tried upon a charge of violating "national" standards and their convictions are affirmed as if they were tried for violating "local" standards. Under the law long settled by our cases, treating a conviction as a conviction upon a charge not made is a denial of due process of law. *Cole* v. *Arkansas*, 333 U. S. 196 (1948); *Eaton* v. *Tulsa*, 415 U. S. 697 (1974). A distaste, however strong, for commercial vendors of alleged pornography is no justification for denying petitioners the application of the principle imposed upon the courts of Arkansas and Oklahoma in those cases. Ours may be the final voice, but that is the greater reason for meticulous discharge of our responsibility to dispense evenhanded justice. The least to which petitioners are entitled is vacation of their convictions and a remand for a new trial.

JENKINS *v.* GEORGIA

APPEAL FROM THE SUPREME COURT OF GEORGIA

No. 73–557. Argued April 15, 1974—Decided June 24, 1974

Appellant was convicted, prior to the announcement of *Miller* v. *California*, 413 U. S. 15, and companion cases, of violating Georgia's obscenity statute for showing the film "Carnal Knowledge" in a motion picture theater. The jury had been instructed on obscenity under that statute, which defines obscene material in terms similar to the definition in *Memoirs* v. *Massachusetts*, 383 U. S. 413, 418. The Georgia Supreme Court affirmed. *Held:*

1. Appellant, whose conviction was on appeal at the time of the announcement of *Miller*, is entitled to any benefit available thereunder. *Hamling* v. *United States*, *ante*, p. 87. P. 155.

2. There is no constitutional requirement that juries be instructed in state obscenity cases to apply the standards of a hypothetical statewide community—*Miller* approving, but not mandating, such an instruction—and jurors may properly be instructed to apply "community standards," without a specification of the "community" by the trial court. P. 157.

3. The film is not obscene under the constitutional standards announced in *Miller* and appellant's conviction therefore contravened the First and Fourteenth Amendments. Pp. 157–161.

(a) Juries do not have unbridled discretion in determining what is "patently offensive" since "no one will be subject to prosecution for the sale or exposure of obscene materials [that do not] depict or describe patently offensive 'hard core' sexual conduct . . . ." *Miller*, *supra*, at 27. Pp. 160–161.

(b) This Court's own view of the film impels the conclusion that the film's depiction of sexual conduct is not patently offensive. The camera does not focus on the bodies of actors during scenes of "ultimate sexual acts," nor are the actors' genitals exhibited during those scenes. The film shows occasional nudity, but nudity alone does not render material obscene under *Miller*'s standards. P. 161.

230 Ga. 726, 199 S. E. 2d 183, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and POWELL, JJ., joined.

DOUGLAS, J., filed a statement concurring in the result, *post*, p. 162. BRENNAN, J., filed an opinion concurring in the result, in which STEWART and MARSHALL, JJ., joined, *post*, p. 162.

Louis Nizer argued the cause for appellant. With him on the briefs were *Tench C. Coxe, William H. Schroder, Jr.*, and *James Bouras.*

Tony H. Hight argued the cause and filed a brief for appellee.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Appellant was convicted in Georgia of the crime of distributing obscene material. His conviction, in March 1972, was for showing the film "Carnal Knowledge" in a movie theater in Albany, Georgia. The jury that found appellant guilty was instructed on obscenity pursuant to the Georgia statute, which defines obscene material in language similar to that of the definition of obscenity set forth in this Court's plurality opinion in *Memoirs* v. *Massachusetts*, 383 U. S. 413, 418 (1966):

> "Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid

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*Briefs of *amici curiae* urging reversal were filed by *Peter M. Fishbein* and *Lester Pollack* for the National Association of Theatre Owners; by *Stanley Fleishman* and *Sam Rosenwein* for the Adult Film Association of America, Inc.; by *Ephraim London* for the Directors Guild of America, Inc.; by *William D. North* for the American Library Assn.; by *Maxwell J. Lillienstein* for the American Booksellers Assn., Inc., et al.; by *Michael A. Bamberger* for the Council for Periodical Distributors Assns., Inc., et al.; by *Ira M. Millstein* for the Association of American Publishers, Inc.; and by *Irwin Karp* for the Authors League of America, Inc.

Charles H. Keating, Jr., pro se, Richard M. Bertsch, James J. Clancy, and *Albert S. Johnston III* filed a brief for Charles H. Keating, Jr., as *amicus curiae* urging affirmance.

> interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters." Ga. Code Ann. § 26–2101 (b) (1972).[1]

We hold today in *Hamling* v. *United States, ante,* p. 87, that defendants convicted prior to the announcement of our *Miller* decisions but whose convictions were on direct appeal at that time should receive any benefit available to them from those decisions. We conclude here that the film "Carnal Knowledge" is not obscene under the constitutional standards announced in *Miller* v. *California,* 413 U. S. 15 (1973), and that the First and Fourteenth Amendments therefore require that the judgment of the Supreme Court of Georgia affirming appellant's conviction be reversed.

Appellant was the manager of the theater in which "Carnal Knowledge" was being shown. While he was exhibiting the film on January 13, 1972, local law enforcement officers seized it pursuant to a search warrant. Appellant was later charged by accusation, Ga. Code Ann. § 27–704 (1972), with the offense of distributing obscene material.[2] After his trial in the Superior Court of Dough-

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[1] Section 26–2101 is entitled "Distributing obscene materials." Subsection (a) of § 26–2101 provides in relevant part: "A person commits the offense of distributing obscene materials when he . . . exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof . . . ." Subsection (c) of § 26–2101 provides that "[material], not otherwise obscene, may be obscene under this section if the distribution thereof . . . is a commercial exploitation of erotica solely for the sake of their prurient appeal." Subsection (d) provides that a first offense under the section shall be punished as a misdemeanor and that any subsequent offense shall be punished by one to five years' imprisonment and/or a fine not to exceed $5,000.

[2] The accusation, App. 8, charged appellant "with the offense of Distributing Obscene Material" for knowingly ex-

erty County, the jury, having seen the film and heard testimony, returned a general verdict of guilty on March 23, 1972.[3] Appellant was fined $750 and sentenced to 12 months' probation. He appealed to the Supreme Court of Georgia, which by a divided vote affirmed the judgment of conviction on July 2, 1973. That court stated that the definition of obscenity contained in the Georgia statute was "considerably more restrictive" than the new test set forth in the recent case of *Miller* v. *California, supra,* and that the First Amendment does not protect the commercial exhibition of "hard core" pornography. The dissenting Justices, in addition to other disagreements with the court, thought that "Carnal Knowledge" was entitled to the protection of the First and Fourteenth Amendments. Appellant then appealed

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hibiting a motion picture to the general public which contained conduct showing "(a) an act of sexual intercourse, (b) a lewd exposure of the sexual organs, (c) a lewd appearance in a state of partial or complete nudity, (d) a lewd caress or indecent fondling of another person" contrary to the laws of Georgia. The latter-quoted language appears in Ga. Code Ann. § 26–2011, entitled "Public indecency," which makes performance of any of the listed acts in a public place a misdemeanor. Under Ga. Code Ann. § 26–2105, it is a crime to exhibit a motion picture portraying acts which would constitute "public indecency" under § 26–2011 if performed in a public place. Appellant's arrest warrant specified § 26–2105 as the statute he was charged with violating. In view of our holding today, we need not reach appellant's contention that he was denied due process because the warrant specified only § 26–2105, while the jury was allowed to convict under § 26–2101. However, we note that appellant's demurrer to the accusation demonstrates his awareness that he was being charged with the § 26–2101 offense, App. 9, and that he requested numerous instructions on obscenity, *id.*, at 47–49.

[3] Appellant's trial jury was alternatively instructed under subsections (a) and (c) of § 26–2101 (pandering), see n. 1, *supra,* and under § 26–2105, see n. 2, *supra.*

to this Court and we noted probable jurisdiction, 414 U. S. 1090 (1973).

We agree with the Supreme Court of Georgia's implicit ruling that the Constitution does not require that juries be instructed in state obscenity cases to apply the standards of a hypothetical statewide community. *Miller* approved the use of such instructions; it did not mandate their use. What *Miller* makes clear is that state juries need not be instructed to apply "national standards." We also agree with the Supreme Court of Georgia's implicit approval of the trial court's instructions directing jurors to apply "community standards" without specifying what "community." *Miller* held that it was constitutionally permissible to permit juries to rely on the understanding of the community from which they came as to contemporary community standards, and the States have considerable latitude in framing statutes under this element of the *Miller* decision. A State may choose to define an obscenity offense in terms of "contemporary community standards" as defined in *Miller* without further specification, as was done here, or it may choose to define the standards in more precise geographic terms, as was done by California in *Miller*.

We now turn to the question of whether appellant's exhibition of the film was protected by the First and Fourteenth Amendments, a question which appellee asserts is not properly before us because appellant did not raise it on his state appeal. But whether or not appellant argued this constitutional issue below, it is clear that the Supreme Court of Georgia reached and decided it. That is sufficient under our practice. *Raley* v. *Ohio*, 360 U. S. 423, 436 (1959). We also note that the trial court instructed the jury on charges other than the distribution charge.[4] However, the jury returned a general verdict

[4] See n. 3, *supra*.

552-191 O - 76 - 13

and appellee does not suggest that appellant's conviction can be sustained on these alternative grounds. Cf. *Stromberg* v. *California*, 283 U. S. 359, 367–368 (1931).

There is little to be found in the record about the film "Carnal Knowledge" other than the film itself.[5] However, appellant has supplied a variety of information and critical commentary, the authenticity of which appellee does not dispute. The film appeared on many "Ten Best" lists for 1971, the year in which it was released. Many but not all of the reviews were favorable. We believe that the following passage from a review which appeared in the Saturday Review is a reasonably accurate description of the film:

> "[It is basically a story] of two young college men, roommates and lifelong friends forever preoccupied with their sex lives. Both are first met as virgins. Nicholson is the more knowledgeable and attractive of the two; speaking colloquially, he is a burgeoning bastard. Art Garfunkel is his friend, the nice but troubled guy straight out of those early Feiffer cartoons, but *real*. He falls in love with the lovely Susan (Candice Bergen) and unknowingly shares her with his college buddy. As the 'safer' one of the two, he is selected by Susan for marriage.
>
> "The time changes. Both men are in their thirties, pursuing successful careers in New York. Nicholson has been running through an average of a dozen women a year but has never managed to meet the right one, the one with the full bosom, the good legs,

[5] Appellant testified that the film was "critically acclaimed as one of the ten best pictures of 1971 and Ann Margret has received an Academy Award nomination for her performance in the picture." He further testified that "Carnal Knowledge" had played in 29 towns in Georgia and that it was booked in 50 or 60 more theaters for spring and summer showing. App. 24.

> the properly rounded bottom. More than that, each and every one is a threat to his malehood and peace of mind, until at last, in a bar, he finds Ann-Margret, an aging bachelor girl with striking cleavage and, quite obviously, something of a past. 'Why don't we shack up?' she suggests. They do and a horrendous relationship ensues, complicated mainly by her paranoidal desire to marry. Meanwhile, what of Garfunkel? The sparks have gone out of his marriage, the sex has lost its savor, and Garfunkel tries once more. And later, even more foolishly, again." [6]

Appellee contends essentially that under *Miller* the obscenity *vel non* of the film "Carnal Knowledge" was a question for the jury, and that the jury having resolved the question against appellant, and there being some evidence to support its findings, the judgment of conviction should be affirmed. We turn to the language of *Miller* to evaluate appellee's contention.

Miller states that the questions of what appeals to the "prurient interest" and what is "patently offensive" under the obscenity test which it formulates are "essentially questions of fact." 413 U. S., at 30. "When triers of fact are asked to decide whether 'the average person, applying contemporary community standards' would consider certain materials 'prurient' it would be unrealistic to require that the answer be based on some abstract formulation . . . . To require a State to structure obscenity proceedings around evidence of a *national* 'community standard' would be an exercise in futility." *Ibid.* We held in *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49 (1973), decided on the same day, that expert testimony

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[6] Review of "Carnal Knowledge" by Hollis Alpert, Saturday Review, July 3, 1971, p. 18.

as to obscenity is not necessary when the films at issue are themselves placed in evidence. *Id.*, at 56.

But all of this does not lead us to agree with the Supreme Court of Georgia's apparent conclusion that the jury's verdict against appellant virtually precluded all further appellate review of appellant's assertion that his exhibition of the film was protected by the First and Fourteenth Amendments. Even though questions of appeal to the "prurient interest" or of patent offensiveness are "essentially questions of fact," it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is "patently offensive." Not only did we there say that "the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary," 413 U. S., at 25, but we made it plain that under that holding "no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct . . . ." *Id.*, at 27.

We also took pains in *Miller* to "give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced," that is, the requirement of patent offensiveness. *Id.*, at 25. These examples included "representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated," and "representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Ibid.* While this did not purport to be an exhaustive catalog of what juries might find patently offensive, it was certainly intended to fix substantive constitutional limitations, deriving from the First Amendment, on the type of material subject to such a

determination. It would be wholly at odds with this aspect of *Miller* to uphold an obscenity conviction based upon a defendant's depiction of a woman with a bare midriff, even though a properly charged jury unanimously agreed on a verdict of guilty.

Our own viewing of the film satisfies us that "Carnal Knowledge" could not be found under the *Miller* standards to depict sexual conduct in a patently offensive way. Nothing in the movie falls within either of the two examples given in *Miller* of material which may constitutionally be found to meet the "patently offensive" element of those standards, nor is there anything sufficiently similar to such material to justify similar treatment. While the subject matter of the picture is, in a broader sense, sex, and there are scenes in which sexual conduct including "ultimate sexual acts" is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. There is no exhibition whatever of the actors' genitals, lewd or otherwise, during these scenes. There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the *Miller* standards.

Appellant's showing of the film "Carnal Knowledge" is simply not the "public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain" which we said was punishable in *Miller*. *Id.*, at 35. We hold that the film could not, as a matter of constitutional law, be found to depict sexual conduct in a patently offensive way, and that it is therefore not outside the protection of the First and Fourteenth Amendments because it is obscene. No other basis appearing in the record upon which the judgment of conviction can be sustained, we reverse the judgment of the Supreme Court of Georgia.

Reversed.

MR. JUSTICE DOUGLAS, being of the view that any ban on obscenity is prohibited by the First Amendment, made applicable to the States through the Fourteenth, concurs in the reversal of this conviction. See *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 70–73 (1973) (DOUGLAS, J., dissenting).

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, concurring in the result.

Adopting a restatement of the *Roth-Memoirs** definition of "obscenity," the Court in *Miller* v. *California*, 413 U. S. 15 (1973), held that obscene material could be regulated, provided that "(a) . . . 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) . . . the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.*, at 24. It was my view then—and it remains so—that the Court's reformulation hardly represented a solution to what Mr. Justice Harlan called "the intractable obscenity problem," *Interstate Circuit, Inc.* v. *Dallas*, 390 U. S. 676, 704 (1968) (concurring and dissenting opinion). Today's decision confirms my observation in *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49 (1973), that the Court's new formulation does not extricate us from the mire of case-by-case determinations of obscenity. I there noted, in dissent:

> "Ultimately, the reformulation must fail because it still leaves in this Court the responsibility of determining in each case whether the materials are pro-

*See *Roth* v. *United States*, 354 U. S. 476 (1957), and *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966).

tected by the First Amendment. The Court concedes that even under its restated formulation, the First Amendment interests at stake require 'appellate courts to conduct an independent review of constitutional claims when necessary,' *Miller* v. *California*[, 413 U. S. 15, 25], citing Mr. Justice Harlan's opinion in *Roth*, where he stated, 'I do not understand how the Court can resolve the constitutional problems now before it without making its own independent judgment upon the character of the material upon which these convictions were based.' 354 U. S., at 498. Thus, the Court's new formulation will not relieve us of 'the awesome task of making case by case at once the criminal and the constitutional law.' And the careful efforts of state and lower federal courts to apply the standard will remain an essentially pointless exercise, in view of the need for an ultimate decision by this Court. In addition, since the status of sexually oriented material will necessarily remain in doubt until final decision by this Court, the new approach will not diminish the chill on protected expression that derives from the uncertainty of the underlying standard. I am convinced that a definition of obscenity in terms of physical conduct cannot provide sufficient clarity to afford fair notice, to avoid a chill on protected expression, and to minimize the institutional stress, so long as that definition is used to justify the outright suppression of any material that is asserted to fall within its terms." 413 U. S., at 100–101. (Footnote omitted.)

After the Court's decision today, there can be no doubt that *Miller* requires appellate courts—including this Court—to review independently the constitutional fact of obscenity. Moreover, the Court's task is not limited to

reviewing a jury finding under part (c) of the *Miller* test that "the work, taken as a whole, lack[ed] serious literary, artistic, political, or scientific value." 413 U. S., at 24. *Miller* also requires independent review of a jury's determination under part (b) of the *Miller* test that "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law." *Ibid.* As the Court notes, *ante,* at 160:

> "Even though questions of . . . patent offensiveness are 'essentially questions of fact,' it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is 'patently offensive.' Not only did we there say that 'the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary,' 413 U. S., at 25, but we made it plain that under that holding 'no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct. . . .' *Id.*, at 27."

In order to make the review mandated by *Miller,* the Court was required to screen the film "Carnal Knowledge" and make an independent determination of obscenity *vel non.* Following that review, the Court holds that "Carnal Knowledge" "could not, as a matter of constitutional law, be found to depict sexual conduct in a patently offensive way, and that it is therefore not outside the protection of the First and Fourteenth Amendments because it is obscene." *Ante,* at 161.

Thus, it is clear that as long as the *Miller* test remains in effect "one cannot say with certainty that material is obscene until at least five members of this Court, apply-

ing inevitably obscure standards, have pronounced it so." *Paris Adult Theatre I* v. *Slaton,* 413 U. S., at 92 (BRENNAN, J., dissenting). Because of the attendant uncertainty of such a process and its inevitable institutional stress upon the judiciary, I continue to adhere to my view that, "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Id.,* at 113. It is clear that, tested by that constitutional standard, the Georgia obscenity statutes under which appellant Jenkins was convicted are constitutionally overbroad and therefore facially invalid. I therefore concur in the result in the Court's reversal of Jenkins' conviction.

UNITED STATES ET AL. *v.* RICHARDSON

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

No. 72–885. Argued October 10, 1973—Decided June 25, 1974

Respondent, as a federal taxpayer, brought this suit for the purpose of obtaining a declaration of unconstitutionality of the Central Intelligence Agency Act, which permits the CIA to account for its expenditures "solely on the certificate of the Director . . . ." 50 U. S. C. § 403j (b). The complaint alleged that the Act violated Art. I, § 9, cl. 7, of the Constitution insofar as that clause requires a regular statement and account of public funds. The District Court's dismissal of the complaint for, *inter alia*, respondent's lack of standing under *Flast* v. *Cohen*, 392 U. S. 83, was reversed by the Court of Appeals. That court held that respondent had standing as a taxpayer on the ground that he satisfied *Flast*'s requirements that the allegations (1) challenge an enactment under the Taxing and Spending Clause of Art I, § 8, and show (2) a "nexus" between the plaintiff's status and a specific constitutional limitation on the taxing and spending power. *Held:* Respondent lacks standing to maintain this suit. Pp. 171–180.

(a) *Flast*, which stressed the need for meeting the requirements of Art. III, did not "undermine the salutary principle . . . established by *Frothingham* [v. *Mellon*, 262 U. S. 447] . . . that a taxpayer may not 'employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System.'" Pp. 171–174.

(b) Respondent's challenge, not being addressed to the taxing or spending power but to the statutes regulating the CIA's accounting and reporting procedures, provides no "logical nexus" between his status as "taxpayer" and the asserted failure of Congress to require more detailed reports of expenditures of the CIA. Pp. 174–175.

(c) Respondent's claim that without detailed information on the CIA's expenditures he cannot properly follow legislative or executive action and thereby fulfill his obligations as a voter is a generalized grievance insufficient under *Frothingham* or *Flast* to show that "he has sustained or is immediately in danger of

sustaining a direct injury as the result" of such action. *Ex parte Lévitt,* 302 U. S. 633, 634. Pp. 176–178.

465 F. 2d 844, reversed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. POWELL, J., filed a concurring opinion, *post,* p. 180. DOUGLAS, J., filed a dissenting opinion, *post,* p. 197. BRENNAN, J., filed a dissenting opinion, *post,* p. 235. STEWART, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post,* p. 202.

Solicitor General Bork argued the cause for the United States et al. On the brief were former *Solicitor General Griswold, Assistant Attorney General Wood, Deputy Solicitor General Lacovara, Harriet S. Shapiro, Walter H. Fleischer,* and *William D. Appler.*

Osmond K. Fraenkel argued the cause for respondent. With him on the brief were *Melvin L. Wulf, Burt Neuborne,* and *James R. Kelley.*

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

We granted certiorari in this case to determine whether the respondent has standing to bring an action as a federal taxpayer [1] alleging that certain provisions concerning public reporting of expenditures under the Central Intelligence Agency Act of 1949, 63 Stat. 208, 50

[1] Respondent's complaint alleged that he was "a member of the electorate, and a loyal citizen of the United States." At the same time, he states that he "does not challenge the formulation of the issue contained in the petition for certiorari." Brief for Respondent in Opposition to Pet. for Cert. 1. The question presented there was: "Whether a federal taxpayer has standing to challenge the provisions of the Central Intelligence Act which provide that appropriations to and expenditures by that Agency shall not be made public, on the ground that such secrecy contravenes Article I, section 9, clause 7 of the Constitution." Pet. for Cert. 2.

U. S. C. § 403a *et seq.*, violate Art. I, § 9, cl. 7, of the Constitution which provides:

> "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

Respondent brought this suit in the United States District Court on a complaint in which he recites attempts to obtain from the Government information concerning detailed expenditures of the Central Intelligence Agency. According to the complaint, respondent wrote to the Government Printing Office in 1967 and requested that he be provided with the documents "published by the Government in compliance with Article I, section 9, clause (7) of the United States Constitution." The Fiscal Service of the Bureau of Accounts of the Department of the Treasury replied, explaining that it published the document known as the Combined Statement of Receipts, Expenditures, and Balances of the United States Government. Several copies of the monthly and daily reports of the office were sent with the letter. Respondent then wrote to the same office and, quoting part of the CIA Act, asked whether this statute did not "cast reflection upon the authenticity of the Treasury's Statement." He also inquired as to how he could receive further information on the expenditures of the CIA. The Bureau of Accounts replied stating that it had no other available information.

In another letter, respondent asserted that the CIA Act was repugnant to the Constitution and requested that the Treasury Department seek an opinion of the Attorney General. The Department answered declining to seek such an opinion and this suit followed. Respondent's complaint asked the court to "issue a perma-

nent injunction enjoining the defendants from publishing their 'Combined Statement of Receipts, Expenditures and Balances of the United States Government' and representing it as the fulfillment of the mandates of Article I Section 9 Clause 7 until same fully complies with those mandates." [2] In essence, the respondent asked the federal court to declare unconstitutional that provision of the Central Intelligence Agency Act which permits the Agency to account for its expenditures "solely on the certificate of the Director . . . ." 50 U. S. C. § 403j (b). The only injury alleged by respondent was that he "cannot obtain a document that sets out the expenditures and receipts" of the CIA but on the contrary was "asked to accept a fraudulent document." The District Court granted a motion for dismissal on the ground respondent lacked standing under *Flast* v. *Cohen,* 392 U. S. 83 (1968), and that the subject matter raised political questions not suited for judicial disposition.

The Court of Appeals sitting en banc, with three judges dissenting, reversed, 465 F. 2d 844 (CA3 1972), holding that the respondent had standing to bring this action.[3] The majority relied chiefly on *Flast* v. *Cohen,*

[2] App. 15–16. Respondent's complaint also asked for a three-judge district court and this application was denied by a single District Judge with directions to place the case on the calendar in the usual manner. The Court of Appeals, in the judgment under review, ordered that, on remand, the case be considered by a three-judge court. The District Court has granted a stay of respondent's motion to convene a three-judge court, pending disposition of this petition for writ of certiorari. On September 26, 1972, the Third Circuit denied a petition for mandamus, filed by respondent, to compel the immediate convening of a three-judge court.

[3] The majority found that the respondent had standing to bring this suit as a taxpayer. One judge held that he had standing as a citizen. This case was originally argued before a panel consisting of two Circuit Judges and one District Judge sitting by designa-

supra, and its two-tier test that taxpayer standing rests on a showing of (a) a "logical link" between the status as a taxpayer and the challenged legislative enactment, *i. e.*, an attack on an enactment under the Taxing and Spending Clause of Art. I, § 8, of the Constitution; and (b) a "nexus" between the plaintiff's status and a specific constitutional limitation imposed on the taxing and spending power. 392 U. S., at 102–103. While noting that the respondent did not directly attack an appropriations act, as did the plaintiff in *Flast,* the Court of Appeals concluded that the CIA statute challenged by the respondent was "integrally related," 465 F. 2d, at 853, to his ability to challenge the appropriations since he could not question an appropriation about which he had no knowledge. The Court of Appeals seemed to rest its holding on an assumption that this case was a prelude to a later case challenging, on the basis of information obtained in this suit, some particular appropriation for or expenditure of the CIA; respondent stated no such an intention in his complaint. The dissenters took a different approach urging denial of standing principally because, in their view, respondent alleged no specific injury but only a general interest common to all members of the public.

We conclude that respondent lacks standing to maintain a suit for the relief sought and we reverse.

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tion. After a second round of briefs, the Court of Appeals determined *sua sponte* to hear the case en banc without further argument. The District Judge sat with the Court of Appeals en banc. This point was not raised in the question presented in the petition for certiorari but the Solicitor General, in a footnote, called attention to the District Judge's participation. He expressed the view that, although 28 U. S. C. § 46 (c) limits en banc hearings to circuit judges in active service (and any retired circuit judge who participated in the initial hearing), the error was harmless. Brief for United States 5–6, n. 4. In these circumstances we need not reach the question.

I

As far back as *Marbury* v. *Madison,* 1 Cranch 137 (1803), this Court held that judicial power may be exercised only in a case properly before it—a "case or controversy" not suffering any of the limitations of the political-question doctrine, not then moot or calling for an advisory opinion. In *Baker* v. *Carr,* 369 U. S. 186, 204 (1962), this limitation was described in terms that a federal court cannot

> " 'pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.' *Liverpool Steamship Co.* v. *Commissioners of Emigration,* 113 U. S. 33, 39."

Recently in *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U. S. 150 (1970), the Court, while noting that "[g]eneralizations about standing to sue are largely worthless as such," *id.,* at 151, emphasized that "[o]ne generalization is, however, necessary and that is that the question of standing in the federal courts is to be considered in the framework of Article III which restricts judicial power to 'cases' and 'controversies.' " [4]

Although the recent holding of the Court in *Flast* v. *Cohen, supra,* is a starting point in an examination of respondent's claim to prosecute this suit as a taxpayer, that case must be read with reference to its principal predecessor, *Frothingham* v. *Mellon,* 262 U. S. 447 (1923). In *Frothingham,* the injury alleged was that the congressional enactment challenged as unconstitutional would, if implemented, increase the complain-

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[4] 397 U. S., at 151. See also K. Davis, Administrative Law Treatise § 22.09–6, p. 753 (Supp. 1970).

ant's future federal income taxes.[5] Denying standing, the *Frothingham* Court rested on the "comparatively minute[,] remote, fluctuating and uncertain," *id.*, at 487, impact on the taxpayer, and the failure to allege the kind of direct injury required for standing.

> "The party who invokes the [judicial] power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Id.*, at 488.

When the Court addressed the question of standing in *Flast*, Mr. Chief Justice Warren traced what he described as the "confusion" following *Frothingham* as to whether the Court had announced a constitutional doctrine barring suits by taxpayers challenging federal expenditures as unconstitutional or simply a policy rule of judicial self-restraint. In an effort to clarify the confusion and to take into account intervening developments, of which class actions and joinder under the Federal Rules of Civil Procedure were given as examples, the Court embarked on "a fresh examination of the limitations upon standing to sue in a federal court and the application of those limitations to taxpayer suits." 392 U. S., at 94. That re-examination led, however, to the holding that a "taxpayer will have standing *consistent with Article III* to invoke federal

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[5] In *Frothingham*, the plaintiff sought to enjoin enforcement of the Federal Maternity Act of 1921, 42 Stat. 224, which provided for financial grants to States with programs for reducing maternal and infant mortality. She alleged violation of the Fifth Amendment's Due Process Clause on the ground that the legislation encroached on an area reserved to the States.

judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions *which operate to restrict the exercise of the taxing and spending power.*" *Id.*, at 105–106. (Emphasis supplied.) In so holding, the Court emphasized that Art. III requirements are the threshold inquiry:

> "The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness . . . upon which the court so largely depends for illumination of difficult constitutional questions.' " *Id.*, at 99, citing *Baker* v. *Carr*, 369 U. S., at 204.

The Court then announced a two-pronged standing test which requires allegations: (a) challenging an enactment under the Taxing and Spending Clause of Art. I, § 8, of the Constitution; and (b) claiming that the challenged enactment exceeds specific constitutional limitations imposed on the taxing and spending power. 392 U. S., at 102–103. While the "impenetrable barrier to suits against Acts of Congress brought by individuals who can assert only the interest of federal taxpayers," *id.*, at 85, had been slightly lowered, the Court made clear it was reaffirming the principle of *Frothingham* precluding a taxpayer's use of "a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System." *Id.*, at 106. The narrowness of that holding is emphasized by the concurring opinion of MR. JUSTICE STEWART in *Flast:*

> "In concluding that the appellants therefore have standing to sue, we do not undermine the salutary principle, established by *Frothingham* and reaffirmed

552-191 O - 76 - 14

> today, that a taxpayer may not 'employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System.'" *Id.*, at 114.

II

Although the Court made it very explicit in *Flast* that a "fundamental aspect of standing" is that it focuses primarily on the *party* seeking to get his complaint before the federal court rather than "on the issues he wishes to have adjudicated," *id.*, at 99, it made equally clear that

> "in ruling on [taxpayer] standing, it is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Id.*, at 102.[6]

We therefore turn to an examination of the issues sought to be raised by respondent's complaint to determine whether he is "a proper and appropriate party to invoke federal judicial power," *ibid.*, with respect to those issues.

We need not and do not reach the merits of the constitutional attack on the statute; our inquiry into the "substantive issues" is for the limited purpose indicated above. The mere recital of the respondent's claims and an examination of the statute under attack demonstrate how far he falls short of the standing criteria of *Flast* and how neatly he falls within the *Frothingham*

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[6] In some cases, the operative effect of this "look at the substantive issues" could lead to the conclusion that the "substantive issues" were nonjusticiable and in consequence no one would have standing. See *Gilligan* v. *Morgan*, 413 U. S. 1, 9 (1973); *Flast* v. *Cohen*, 392 U. S. 83, 95 (1968); *Poe* v. *Ullman*, 367 U. S. 497, 508–509 (1961).

holding left undisturbed. Although the status he rests on is that he is a taxpayer, his challenge is not addressed to the taxing or spending power, but to the statutes regulating the CIA, specifically 50 U. S. C. § 403j (b). That section provides different accounting and reporting requirements and procedures for the CIA, as is also done with respect to other governmental agencies dealing in confidential areas.[7]

Respondent makes no claim that appropriated funds are being spent in violation of a "specific constitutional limitation upon the . . . taxing and spending power . . . ." 392 U. S., at 104. Rather, he asks the courts to compel the Government to give him information on precisely how the CIA spends its funds. Thus there is no "logical nexus" between the asserted status of taxpayer and the claimed failure of the Congress to require the Executive to supply a more detailed report of the expenditures of that agency.[8]

The question presented thus is simply and narrowly whether these claims meet the standards for taxpayer standing set forth in *Flast;* we hold they do not. Respondent is seeking "to employ a federal court as a forum in which to air his generalized grievances about the conduct of government." 392 U. S., at 106. Both *Frothingham* and *Flast, supra,* reject that basis for standing.

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[7] See 28 U. S. C. § 537 (Federal Bureau of Investigation); 31 U. S. C. § 107 (foreign affairs); 42 U. S. C. § 2017 (b) (Atomic Energy Commission).

[8] Congress has taken notice of the need of the public for more information concerning governmental operations, but at the same time it has continued traditional restraints on disclosure of confidential information. See Freedom of Information Act, 5 U. S. C. § 552; *Environmental Protection Agency* v. *Mink,* 410 U. S. 73 (1973).

III

The Court of Appeals held that the basis of taxpayer standing

> "need not always be the appropriation and the spending of [taxpayer's] money for an invalid purpose. The personal stake may come from an injury in fact even if it is not directly economic in nature. Association of Data Processing Organizations, Inc. v. Camp, [397 U. S. 150,] 154 (1970)." 465 F. 2d, at 853.[9]

The respondent's claim is that without detailed information on CIA expenditures—and hence its activities—he cannot intelligently follow the actions of Congress or the Executive, nor can he properly fulfill his obligations as a member of the electorate in voting for candidates seeking national office.

This is surely the kind of a generalized grievance described in both *Frothingham* and *Flast* since the im-

[9] The Court of Appeals thus appeared to rely on *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150 (1970). Abstracting some general language of that opinion from the setting and controlling facts of that case, the Court of Appeals overlooked the crucial factor that standing in that case arose under a specific statute, Bank Service Corporation Act of 1962, 76 Stat. 1132, 12 U. S. C. § 1861. The petitioners in *Data Processing* alleged competitive economic injury to private business enterprise due to a ruling by the Comptroller of the Currency permitting national banks to sell their data processing services to other banks and to bank customers whose patronage the data processing companies sought. We recognized standing for those private business proprietors who were engaged in selling the same kind of services the Comptroller allowed banks to sell; we held only that the claims of impermissible competition were "arguably . . . within the zone of interests protected" by § 4 of the Bank Service Corporation Act. 397 U. S., at 156. In short, Congress had provided competitor standing. The Court saw no indication that Congress had sought to preclude judicial review of *administrative rulings* of the Comptroller of the Currency as to the limitations Congress placed on national banks.

pact on him is plainly undifferentiated and "common to all members of the public." *Ex parte Lévitt*, 302 U. S. 633, 634 (1937); *Laird* v. *Tatum*, 408 U. S. 1, 13 (1972). While we can hardly dispute that this respondent has a genuine interest in the use of funds and that his interest may be prompted by his status as a taxpayer, he has not alleged that, as a taxpayer, he is in danger of suffering any particular concrete injury as a result of the operation of this statute. As the Court noted in *Sierra Club* v. *Morton*, 405 U. S. 727 (1972):

> "[A] mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA." *Id.*, at 739.

Ex parte Lévitt, supra, is especially instructive. There Lévitt sought to challenge the validity of the commission of a Supreme Court Justice who had been nominated and confirmed as such while he was a member of the Senate. Lévitt alleged that the appointee had voted for an increase in the emoluments provided by Congress for Justices of the Supreme Court during the term for which he was last elected to the United States Senate. The claim was that the appointment violated the explicit prohibition of Art. I, § 6, cl. 2, of the Constitution.[10] The Court disposed of Lévitt's claim, stating:

> "It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he *has sustained or is immedi-*

[10] "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time . . . ."

> *ately in danger of sustaining a direct injury* as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public." 302 U. S., at 634. (Emphasis supplied.)

Of course, if Lévitt's allegations were true, they made out an arguable violation of an explicit prohibition of the Constitution. Yet even this was held insufficient to support standing because, whatever Lévitt's injury, it was one he shared with "all members of the public." Respondent here, like the petitioner in *Lévitt,* also fails to clear the threshold hurdle of *Baker* v. *Carr,* 369 U. S., at 204. See *supra,* at 171, and *Flast, supra.*[11]

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[11] Although we need not reach or decide precisely what is meant by "a regular Statement and Account," it is clear that Congress has plenary power to exact any reporting and accounting it considers appropriate in the public interest. It is therefore open to serious question whether the Framers of the Constitution ever imagined that general directives to the Congress or the Executive would be subject to enforcement by an individual citizen. While the available evidence is neither qualitatively nor quantitatively conclusive, historical analysis of the genesis of cl. 7 suggests that it was intended to permit some degree of secrecy of governmental operations. The ultimate weapon of enforcement available to the Congress would, of course, be the "power of the purse." Independent of the statute here challenged by respondent, Congress could grant standing to taxpayers or citizens, or both, limited, of course, by the "cases" and "controversies" provisions of Art. III.

Not controlling, but surely not unimportant, are nearly two centuries of acceptance of a reading of cl. 7 as vesting in Congress plenary power to spell out the details of precisely when and with what specificity Executive agencies must report the expenditure of appropriated funds and to exempt certain secret activities from comprehensive public reporting. See 2 M. Farrand, The Records of the Federal Convention of 1787, pp. 618–619 (1911); 3 *id.,* at 326–327; 3 J. Elliot, Debates on the Federal Constitution 462 (1836); D. Miller, Secret Statutes of the United States 10 (1918).

It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts. The Constitution created a *representative* Government with the representatives directly responsible to their constituents at stated periods of two, four, and six years; that the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the "ground rules" established by the Congress for reporting expenditures of the Executive Branch. Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls. Slow, cumbersome, and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them.

As our society has become more complex, our numbers more vast, our lives more varied, and our resources more strained, citizens increasingly request the intervention of the courts on a greater variety of issues than at any period of our national development. The acceptance of new categories of judicially cognizable injury has not eliminated the basic principle that to invoke judicial power the claimant must have a "personal stake in the outcome,"

Baker v. *Carr*, *supra*, at 204, or a "particular, concrete injury," *Sierra Club*, *supra*, at 740–741, n. 16, or "a direct injury," *Ex parte Lévitt*, *supra*, at 634; in short, something more than "generalized grievances," *Flast*, *supra*, at 106. Respondent has failed to meet these fundamental tests; accordingly, the judgment of the Court of Appeals is

Reversed.

[For dissenting opinion of MR. JUSTICE BRENNAN, see *post*, p. 235.]

MR. JUSTICE POWELL, concurring.

I join the opinion of the Court because I am in accord with most of its analysis, particularly insofar as it relies on traditional barriers against federal taxpayer or citizen standing. And I agree that *Flast* v. *Cohen*, 392 U. S. 83 (1968), which set the boundaries for the arguments of the parties before us, is the most directly relevant precedent and quite correctly absorbs a major portion of the Court's attention. I write solely to indicate that I would go further than the Court and would lay to rest the approach undertaken in *Flast*. I would not overrule *Flast* on its facts, because it is now settled that federal taxpayer standing exists in Establishment Clause cases. I would not, however, perpetuate the doctrinal confusion inherent in the *Flast* two-part "nexus" test. That test is not a reliable indicator of when a federal taxpayer has standing, and it has no sound relationship to the question whether such a plaintiff, with no other interest at stake, should be allowed to bring suit against one of the branches of the Federal Government. In my opinion, it should be abandoned.

I

My difficulties with *Flast* are several. The opinion purports to separate the question of standing from the merits, *id.*, at 99–101, yet it abruptly returns to

the substantive issues raised by a plaintiff for the purpose of determining "whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Id.*, at 102. Similarly, the opinion distinguishes between constitutional and prudential limits on standing. *Id.*, at 92–94, 97. I find it impossible, however, to determine whether the two-part "nexus" test created in *Flast* amounts to a constitutional or a prudential limitation, because it has no meaningful connection with the Court's statement of the bare-minimum constitutional requirements for standing.

Drawing upon *Baker* v. *Carr*, 369 U. S. 186, 204 (1962), the Court in *Flast* stated the " 'gist of the question of standing' " as "whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' " 392 U. S., at 99. As the Court today notes, *ante*, at 173, this is now the controlling definition of the irreducible Art. III case-or-controversy requirements for standing.[1] But, as Mr. Justice Harlan pointed out

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[1] See also, *e. g.*, *Barlow* v. *Collins*, 397 U. S. 159, 170–171 (1970) (BRENNAN, J., dissenting); Scott, Standing in the Supreme Court—A Functional Analysis, 86 Harv. L. Rev. 645, 658 (1973). The test announced in *Baker* and reiterated in *Flast* reflects how far the Court has moved in recent years in relaxing standing restraints. In *Frothingham* v. *Mellon*, 262 U. S. 447 (1923), for example, the Court declared that to permit a federal taxpayer suit "would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess." *Id.*, at 489. And in denying standing to citizens and taxpayers seeking to bring suit to invalidate the Nineteenth Amendment in *Fairchild* v. *Hughes*, 258 U. S. 126 (1922), the Court stated:

"It is frankly a proceeding to have the Nineteenth Amendment declared void. In form it is a bill in equity; but it is not a case

in his dissent in *Flast*, 392 U. S., at 116 *et seq.*, it is impossible to see how an inquiry about the existence of "concrete adverseness" is furthered by an application of the *Flast* test.

Flast announced the following two-part "nexus" test:

> "The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction." *Id.*, at 102–103.

Relying on history, the Court identified the Establishment Clause as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power

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within the meaning of § 2 of Article III of the Constitution . . . ." *Id.*, at 129.

conferred by Art. I, § 8. 392 U. S., at 103–105. On the other hand, the Tenth Amendment, and apparently the Due Process Clause of the Fifth Amendment, were determined not to be such "specific" limitations. The bases for these determinations are not wholly clear, but it appears that the Court found the Tenth Amendment addressed to the interests of the States, rather than of taxpayers, and the Due Process Clause no protection against increases in tax liability. *Id.*, at 105.

In my opinion, Mr. Justice Harlan's critique of the *Flast* "nexus" test is unanswerable. As he pointed out, "the Court's standard for the determination of standing [*i. e.*, sufficiently concrete adverseness] and its criteria for the satisfaction of that standard are entirely unrelated." *Id.*, at 122. Assuming that the relevant constitutional inquiry is the intensity of the plaintiff's concern, as the Court initially posited, *id.*, at 99, the *Flast* criteria "are not in any sense a measurement of any plaintiff's interest in the outcome of any suit." *Id.*, at 121 (Harlan, J., dissenting). A plaintiff's incentive to challenge an expenditure does not turn on the "unconnected fact" that it relates to a regulatory rather than a spending program, *id.*, at 122, or on whether the constitutional provision on which he relies is a "specific limitation" upon Congress' spending powers. *Id.*, at 123.[2]

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[2] Mr. Justice Harlan's criticisms of the Court's analysis in *Flast* have been echoed by several commentators. *E. g.*, Scott, *supra*, n. 1, at 660–662; Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 604–607 (1968). As Professor Scott notes:

"[The *Flast* 'nexus' test] can be understood as an expedient by a court retreating from the absolute barrier of *Frothingham*, but not sure of how far to go and desirous of a formula that would enable it to make case by case determinations in the future. By any other standard, however, it is untenable." 86 Harv. L. Rev., at 661.

The ambiguities inherent in the *Flast* "nexus" limitations on federal taxpayer standing are illustrated by this case. There can be little doubt about respondent's fervor in pursuing his case, both within administrative channels and at every level of the federal courts. The intensity of his interest appears to bear no relationship to the fact that, literally speaking, he is not challenging directly a congressional exercise of the taxing and spending power. On the other hand, if the involvement of the taxing and spending power has some relevance, it requires no great leap in reasoning to conclude that the Statement and Account Clause, Art. I, § 9, cl. 7, on which respondent relies, is inextricably linked to that power. And that Clause might well be seen as a "specific" limitation on congressional spending. Indeed, it could be viewed as the most democratic of limitations. Thus, although the Court's application of *Flast* to the instant case is probably literally correct, adherence to the *Flast* test in this instance suggests, as does *Flast* itself, that the test is not a sound or logical limitation on standing.

The lack of real meaning and of principled content in the *Flast* "nexus" test renders it likely that it will in time collapse of its own weight, as MR. JUSTICE DOUGLAS predicted in his concurring opinion in that case. 392 U. S., at 107. This will present several options for the Court. It may either reaffirm pre-*Flast* prudential limitations on federal and citizen taxpayer standing; attempt new doctrinal departures in this area, as would MR. JUSTICE STEWART, *post*, at 203–204; or simply drop standing barriers altogether, as, judging by his concurring opinion in *Flast*, *supra*, and his dissenting opinion today, would MR. JUSTICE DOUGLAS.[3] I believe the first option to be the

[3] But see *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U. S. 4, 18, 20–21 (1942) (DOUGLAS, J., dissenting). MR. JUSTICE BRENNAN'S

appropriate course, for reasons which may be emphasized by noting the difficulties I see with the other two. And, while I do not disagree at this late date with the *Baker* v. *Carr* statement of the constitutional indicia of standing, I further believe that constitutional limitations are not the only pertinent considerations.

II

MR. JUSTICE STEWART, joined by MR. JUSTICE MARSHALL, would grant citizen or taxpayer standing under those clauses of the Constitution that impose on the Federal Government "an affirmative duty" to do something on behalf of its citizens and taxpayers. *Post,* at 203–204. Although he distinguishes between an affirmative constitutional duty and a "constitutional prohibition" for purposes of this case, *post,* at 202, it does not follow that MR. JUSTICE STEWART would deny federal taxpayer standing in all cases involving a constitutional prohibition, as his concurring opinion in *Flast* makes clear.[4] Rather, he would find federal taxpayer standing,

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view, see *post,* at 237–238, that federal taxpayers are able to meet the "injury-in-fact" test that he articulated in *Barlow* v. *Collins,* 397 U. S., at 167–173, renders his position, for me at least, indistinguishable from that of MR. JUSTICE DOUGLAS. Furthermore, I think that MR. JUSTICE BRENNAN has modified the standard he identified in *Barlow* by finding it satisfied in this case. It is a considerable step from the "distinctive and discriminating" economic injury alleged in *Barlow,* see *id.,* at 172 n. 5, to the generalized interest of a taxpayer or citizen, as MR. JUSTICE BRENNAN appears to have acknowledged in his opinion in that case. *Ibid.*

[4] In *Flast* v. *Cohen,* 392 U. S. 83 (1968), MR. JUSTICE STEWART based his concurrence in the majority's opinion on the view that the Establishment Clause constitutes an explicit prohibition on the taxing and spending power:

"Because that clause plainly *prohibits* taxing and spending in aid of religion, every taxpayer can claim a personal constitutional right

and perhaps citizen standing, in all cases based on constitutional clauses setting forth an affirmative duty and in unspecified cases where the constitutional clause at issue may be seen as a plain or explicit prohibition.

For purposes of determining whether a taxpayer or citizen has standing to challenge the actions of the Federal Government, I fail to perceive a meaningful distinction between constitutional clauses that set forth duties and those that set forth prohibitions.[5] In either instance, the relevant inquiry is the same—may a plaintiff, relying on nothing other than citizen or taxpayer status, bring suit to adjudicate whether an entity of the Federal Government is carrying out its responsibilities in conformance with the requirements of the Constitution? A taxpayer's or citizen's interest in and willingness to pursue with vigor such a suit would not turn on whether the constitutional clause at issue imposed a duty on the Government to do something for him or prohibited the Government from doing something to him. Prohibitions and duties in this context are opposite sides of the same coin. Thus, I do not believe that the inquiry whether federal courts should entertain public actions is

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not to be taxed for the support of a religious institution. The present case is thus readily distinguishable from *Frothingham* v. *Mellon,* 262 U. S. 447, where the taxpayer did not rely on an *explicit constitutional prohibition* but instead questioned the scope of the powers delegated to the national legislature by Article I of the Constitution." 392 U. S., at 114. (Emphasis supplied.)

[5] One commentator, who espouses a broadening of standing in what he refers to as "public actions," apparently shares this difficulty. See L. Jaffe, Judicial Control of Administrative Action 484 (1965):

"[The ability of a taxpayer or citizen to bring a public action] should not depend on whether the questioned official conduct is of a positive or negative character, that is, whether it consists of the performance of an improper act or the failure to fulfill a duty."

advanced by line drawing between affirmative duties and prohibitions.[6]

In short, in my opinion my Brother STEWART's view fails to provide a meaningful stopping point between an all-or-nothing position with regard to federal taxpayer or citizen standing. In this respect, it shares certain of the deficiencies of *Flast*. I suspect that this may also be true of any intermediate position in this area. MR. JUSTICE DOUGLAS correctly discerns, I think, that the alternatives here as a matter of doctrine are essentially bipolar. His preference is clear: "I would be as liberal in allowing taxpayers standing to object to . . . violations of the First Amendment as I would in granting standing to people to complain of any invasion

[6] Such an approach might well lead to problems of classification that would divert attention from the fundamental question of whether public actions are an appropriate matter for the federal courts. And, if distinctions between constitutional prohibitions and duties are to make a difference, there are certain to be some incongruous rules as to when such a public action may be brought. This is apparent when one attempts to categorize the provisions of the Constitution primarily addressed at limiting the powers of the National Government—Art. I, § 9, and the Bill of Rights. All of the clauses of Art. I, § 9, except the seventh, which is at issue here, are stated as prohibitions. In fact the seventh clause is in part a prohibition against expenditures of public money in the absence of appropriations and in part an affirmative duty to publish periodically an account of such expenditures. The rationale for according special treatment solely to one-half of Art. I, § 9, cl. 7, and not to the other and not to the remaining clauses of Art. I, § 9, is not immediately apparent.

The same observation may be made of the Bill of Rights. The First Amendment through the Fifth, the Eighth, and possibly the Tenth are stated in terms of prohibitions. The Sixth Amendment and portions of the Seventh can be classified as duties. The Ninth defies classification. Rational rules for standing in public actions are, it seems to me, unlikely to emerge from an effort to make the format of a particular Amendment determinative.

of their rights under the Fourth Amendment or the Fourteenth or under any other guarantee in the Constitution itself or in the Bill of Rights." *Flast* v. *Cohen*, 392 U. S., at 114 (concurring opinion). My view is to the contrary.

III

Relaxation of standing requirements is directly related to the expansion of judicial power.[7] It seems to me inescapable that allowing unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government. I also believe that repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches. We should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch.[8] Moreover, the

[7] One commentator predicted this phenomenon and its possible implications at the outset of the past decade of dramatic changes in standing doctrine:

"[J]udicial power expands as the requirements of standing are relaxed. . . . [I]f the so-called public action . . . were allowed with respect to constitutional challenges to legislation, then the halls of Congress and of the state legislatures would become with regularity only Act I of any contest to enact legislation involving public officials in its enforcement or application. Act II would, with the usual brief interlude, follow in the courts. . . ." Brown, Quis Custodiet Ipsos Custodes?—The School-Prayer Cases, 1963 Sup. Ct. Rev. 1, 15–16.

[8] Cf. A. Bickel, The Least Dangerous Branch 122 (1962).

argument that the Court should allow unrestricted taxpayer or citizen standing underestimates the ability of the representative branches of the Federal Government to respond to the citizen pressure that has been responsible in large measure for the current drift toward expanded standing. Indeed, taxpayer or citizen advocacy, given its potentially broad base, is precisely the type of leverage that in a democracy ought to be employed against the branches that were intended to be responsive to public attitudes about the appropriate operation of government. "We must as judges recall that, as Mr. Justice Holmes wisely observed, the other branches of the Government '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." *Flast* v. *Cohen*, 392 U. S., at 131 (Harlan, J., dissenting).

Unrestrained standing in federal taxpayer or citizen suits would create a remarkably illogical system of judicial supervision of the coordinate branches of the Federal Government. Randolph's proposed Council of Revision, which was repeatedly rejected by the Framers, at least had the virtue of being systematic; every law passed by the legislature automatically would have been previewed by the Judiciary before the law could take effect.[9] On the other hand, since the Judiciary cannot

[9] Randolph's Resolutions, also referred to as the Virginia Plan, served as the "matrix" for the document ultimately developed by the Constitutional Convention. See 1 J. Goebel, History of the Supreme Court of the United States 204 (1971). The eighth of Mr. Randolph's 15 proposals was as follows:

"8. Resd. that the Executive and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of the said

552-191 O - 76 - 15

select the taxpayers or citizens who bring suit or the nature of the suits, the allowance of public actions would produce uneven and sporadic review, the quality of which

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Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by [an unspecified number] of the members of each branch." 1 M. Farrand, The Records of the Federal Convention of 1787, p. 21 (1911) (hereafter Farrand).

See 1 J. Elliot, Debates on the Federal Constitution 144 (1836). Madison ably supported the proposal, but it was defeated on three separate votes. 1 Farrand 140, 2 Farrand 71–72, 298.

The analogy between the proposed Council of Revision and unrestricted taxpayer or citizen standing is not complete. For example, Randolph proposed to link the Judiciary directly to the Executive, in large measure to enhance the Executive and to protect it from legislative encroachments. See, *e. g.*, 1 Farrand 108, 138; 2 Farrand 74, 79. Thus, reliance on the Framers' rejection of the Council must be approached with caution. Nevertheless, the arguments advanced at the Convention in support of and in opposition to the Council provide an interesting parallel to present contentions regarding unrestrained public actions. For example, Madison spoke of the " good" that would "proceed from the perspicuity, the conciseness, and the systematic character wch. the Code of laws wd. receive from the Judiciary talents." 1 Farrand 139. He declared that the proposal would be useful "to restrain the Legislature from encroaching on the other co-ordinate Departments, or on the rights of the people at large; or from passing laws unwise in their principle, or incorrect in their form . . . ," *ibid.*, and that such a system would be "useful to the Community at large as an additional check" against unwise legislative measures. 2 Farrand 74. Those opposed to the proposal, including Gerry, Martin, and Rutledge, preferred to rely "on the Representatives of the people as the guardians of their Rights & interests." *Id.*, at 75. Judges were not presumed "to possess any peculiar knowledge of the mere policy of public measures . . . ," *id.*, at 73, or any "higher . . . degree" of knowledge of mankind and of "Legislative affairs . . . ." *Id.*, at 76. It was "necessary that the Supreme Judiciary should have the confidence of the people . . . ," *id.*, at 76–77, and this would "soon be lost, if they are employed in the task of remonstrating

would be influenced by the resources and skill of the particular plaintiff. And issues would be presented in abstract form, contrary to the Court's recognition that "judicial review is effective largely because it is not available simply at the behest of a partisan faction, but is exercised only to remedy a particular, concrete injury." *Sierra Club* v. *Morton*, 405 U. S. 727, 740–741, n. 16 (1972).[10]

The power recognized in *Marbury* v. *Madison*, 1 Cranch 137 (1803), is a potent one. Its prudent use seems to me incompatible with unlimited notions of taxpayer and citizen standing. Were we to utilize this power as indiscriminately as is now being urged, we may witness efforts by the representative branches drastically to curb its use. Due to what many have regarded as the unresponsiveness of the Federal Government to recognized needs or serious inequities in our society, recourse to the federal courts has attained an unprecedented popularity in recent decades. Those courts have often acted as a major instrument of social reform. But this has not always been the case, as experiences under the New Deal illustrate. The public reaction to the substantive due process holdings of the federal courts during that period requires no elaboration, and it is not unusual for history to repeat itself.

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agst. popular measures of the Legislature." *Id.*, at 77. Moreover, the "Judges ought never to give their opinion on a law till it comes before them." *Id.*, at 80.

The arguments adduced at the Convention in opposition to the Council of Revision ultimately prevailed. I believe that analogous arguments should guide us in refusing as a general matter to entertain public actions.

[10] Some Western European democracies have experimented with forms of constitutional judicial review in the abstract, see, *e. g.*, M. Cappelletti, Judicial Review in the Contemporary World 71–72 (1971), but that has not been our experience, and I think for good reasons. Cf. Bickel, *supra*, n. 8, at 115–116.

Quite apart from this possibility, we risk a progressive impairment of the effectiveness of the federal courts if their limited resources are diverted increasingly from their historic role to the resolution of public-interest suits brought by litigants who cannot distinguish themselves from all taxpayers or all citizens. The irreplaceable value of the power articulated by Mr. Chief Justice Marshall lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests.

The considerations outlined above underlie, I believe, the traditional hostility of the Court to federal taxpayer or citizen standing where the plaintiff has nothing at stake other than his interest as a taxpayer or citizen. It merits noting how often and how unequivocally the Court has expressed its antipathy to efforts to convert the Judiciary into an open forum for the resolution of political or ideological disputes about the performance of government. See, *e. g., Ex parte Lévitt*, 302 U. S. 633, 634 (1937);[11] *Frothingham* v. *Mellon*, 262 U. S. 447, 488 (1923);[12] *Fairchild* v. *Hughes*, 258 U. S. 126, 129

[11] "It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public."

[12] "The party who invokes the power [of the Judiciary to declare a statute unconstitutional] must be able to show not only that the

(1922);[13] *Tyler* v. *Judges of Court of Registration,* 179 U. S. 405, 406 (1900).[14] These holdings and declarations reflect a wise view of the need for judicial restraint if we are to preserve the Judiciary as the branch "least dangerous to the political rights of the Constitution . . . ." Federalist No. 78, p. 483 (Lodge ed. 1908).

To be sure standing barriers have been substantially lowered in the last three decades. The Court has confirmed the power of Congress to open the federal courts to representatives of the public interest through specific statutory grants of standing. *E. g., FCC* v. *Sanders Bros. Radio Station,* 309 U. S. 470 (1940); *Scripps-Howard Radio, Inc.* v. *FCC,* 316 U. S. 4 (1942); *Flast* v. *Cohen,* 392 U. S., at 130–133 (Harlan, J., dissenting); *Trafficante* v. *Metropolitan Life Insurance Co.,* 409 U. S. 205, 212 (1972) (WHITE, J., concurring). Even in the absence of specific statutory grants of standing, economic interests that at one time would not have conferred standing have been re-examined and found sufficient. Compare, *e. g., Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U. S. 150 (1970), and

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statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

[13] "[Standing will be denied where a plaintiff] has only the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted."

[14] "Save in a few instances where, by statute or the settled practice of the courts, the plaintiff is permitted to sue for the benefit of another, he is bound to show an interest in the suit personal to himself, and even in a proceeding which he prosecutes for the benefit of the public, as, for example, in cases of nuisance, he must generally aver an injury peculiar to himself, as distinguished from the great body of his fellow citizens."

Barlow v. *Collins*, 397 U. S. 159 (1970), with, *e. g.*, *Tennessee Electric Power Co.* v. *TVA*, 306 U. S. 118 (1939), and *Alabama Power Co.* v. *Ickes*, 302 U. S. 464 (1938). See also *Investment Co. Institute* v. *Camp*, 401 U. S. 617 (1971); *Arnold Tours, Inc.* v. *Camp*, 400 U. S. 45 (1970). Noneconomic interests have been recognized. *E. g.*, *Baker* v. *Carr*, 369 U. S. 186 (1962); *Sierra Club* v. *Morton*, 405 U. S. 727 (1972). A stringently limited exception for federal taxpayer standing has been created. *Flast* v. *Cohen*, *supra*. The concept of particularized injury has been dramatically diluted. *E. g.*, *United States* v. *SCRAP*, 412 U. S. 669 (1973).

The revolution in standing doctrine that has occurred, particularly in the 12 years since *Baker* v. *Carr*, *supra*, has not meant, however, that standing barriers have disappeared altogether. As the Court noted in *Sierra Club*, "broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." 405 U. S., at 738. Accord, *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617 (1973).[15] Indeed, despite the diminution of standing requirements in the last decade, the Court has not broken with the traditional requirement that, in the absence of a specific statutory grant of the right of review, a plaintiff must allege some particularized injury that sets him apart from the man on the street.[16]

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[15] See *ibid.*:

"Although the law of standing has been greatly changed in the last 10 years, we have steadfastly adhered to the requirement that, at least in the absence of a statute expressly conferring standing, federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." (Footnotes omitted.)

[16] For example, as the Court noted in *Sierra Club* v. *Morton*, 405

I recognize that the Court's allegiance to a requirement of particularized injury has on occasion required a reading of the concept that threatens to transform it beyond recognition. *E. g., Baker* v. *Carr, supra; Flast* v. *Cohen, supra.*[17] But despite such occasional digressions, the requirement remains, and I think it does so for the reasons outlined above. In recognition of those considerations, we should refuse to go the last mile toward abolition of standing requirements that is implicit in broadening the "precarious opening" for federal taxpayers created by *Flast,* see 392 U. S., at 116 (Fortas, J., concurring), or in allowing a citizen *qua* citizen to invoke the power of the federal courts to negative unconstitutional acts of the Federal Government.

U. S. 727 (1972), "if any group with a bona fide 'special interest' could initiate . . . litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so." *Id.*, at 739–740. The clear implication is that allowing "any individual citizen with [a] . . . bona fide special interest" to trigger federal court litigation is a result to be avoided. All standing cases, even the most recent ones, include references to the need for particularized injury or similar language. None of them as yet has equated the interest of a taxpayer or citizen, suing in that status alone, with the particularized interest that standing doctrine has traditionally demanded. To take that step, it appears to me, would render the requirement of direct or immediate injury meaningless and would reduce the Court's consistent insistence on such an injury to mere talk.

[17] *Baker* v. *Carr* may have a special claim to *sui generis* status. It was perhaps a necessary response to the manifest distortion of democratic principles practiced by malapportioned legislatures and to abuses of the political system so pervasive as to undermine democratic processes. *Flast* v. *Cohen* may also have been a reaction to what appeared at the time as an immutable political logjam that included unsuccessful efforts to confer specific statutory grants of standing. See, *e. g.*, C. Wright, The Law of Federal Courts 40 (2d ed. 1970). Cf. 392 U. S., at 115–116 (Fortas, J., concurring).

In sum, I believe we should limit the expansion of federal taxpayer and citizen standing in the absence of specific statutory authorization to an outer boundary drawn by the *results* in *Flast* and *Baker* v. *Carr*. I think we should face up to the fact that *all* such suits are an effort "to employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government or the allocation of power in the Federal System." *Flast* v. *Cohen*, 392 U. S., at 106. The Court should explicitly reaffirm traditional prudential barriers against such public actions.[18] My reasons for this view are rooted in respect for democratic processes and in the conviction that "[t]he powers of the federal judiciary

[18] The doctrine of standing has always reflected prudential as well as constitutional limitations. Indeed, it might be said that the correct reading of the *Flast* nexus test is as a prudential limit, given the *Baker* v. *Carr* definition of the constitutional bare minima. The same is undoubtedly true of, for example, the second test created in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150, 153 (1970)—"whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." See also *Barrows* v. *Jackson*, 346 U. S. 249, 255 (1953): "Apart from the [constitutional] requirement, this Court has developed a complementary rule of self-restraint for its own governance . . . which ordinarily precludes a person from challenging the constitutionality of state action by invoking the rights of others." See *Flast* v. *Cohen*, 392 U. S., at 120, 130–133 (Harlan, J., dissenting). Whatever may have been the Court's initial perception of the intent of the Framers, see n. 1, *supra*, it is now settled that such rules of self-restraint are not required by Art. III but are "judicially created overlays that Congress may strip away. . . ." G. Gunther & N. Dowling, Cases and Materials on Constitutional Law 106 (8th ed. 1970). But where Congress does so, my objections to public actions are ameliorated by the congressional mandate. Specific statutory grants of standing in such cases alleviate the conditions that make "judicial forbearance the part of wisdom." *Flast, supra*, at 132 (Harlan, J., dissenting) (footnote omitted).

will be adequate for the great burdens placed upon them only if they are employed prudently, with recognition of the strengths as well as the hazards that go with our kind of representative government." *Id.*, at 131 (Harlan, J., dissenting).

MR. JUSTICE DOUGLAS, dissenting.

I would affirm the judgment of the Court of Appeals on the "standing" issue. My views are expressed in my dissent to the *Schlesinger* case, *post*, p. 229, decided this day. There a citizen and taxpayer raised a question concerning the Incompatibility Clause of the Constitution which bars a person from "holding any Office under the United States" if he is a Member of Congress, Art. I, § 6, cl. 2. That action was designed to bring the Pentagon into line with that constitutional requirement by requiring it to drop "reservists" who were Members of Congress.

The present action involves Art. I, § 9, cl. 7, of the Constitution which provides:

> "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

We held in *Flast* v. *Cohen*, 392 U. S. 83, that a taxpayer had "standing" to challenge the constitutionality of taxes raised to finance the establishment of a religion contrary to the command of the First and Fourteenth Amendments. A taxpayer making such outlays, we held, had sufficient "personal stake" in the controversy, *Baker* v. *Carr*, 369 U. S. 186, 204, to give the case the "concrete adverseness" necessary for the resolution of constitutional issues. *Ibid.*

Respondent in the present case claims that he has

a right to "a regular statement and account" of receipts and expenditures of public moneys for the Central Intelligence Agency. As the Court of Appeals noted, *Flast* recognizes "standing" of a taxpayer to challenge appropriations made in the face of a constitutional prohibition, and it logically asks, "how can a taxpayer make that challenge unless he knows how the money is being spent?" 465 F. 2d 844, 853.

History shows that the curse of government is not always venality; secrecy is one of the most tempting coverups to save regimes from criticism. As the Court of Appeals said:

> "The Framers of the Constitution deemed fiscal information essential if the electorate was to exercise any control over its representatives and meet their new responsibilities as citizens of the Republic; and they mandated publication, although stated in general terms, of the Government's receipts and expenditures. Whatever the ultimate scope and extent of that obligation, its elimination generates a sufficient, adverse interest in a taxpayer." *Ibid.* (Footnote omitted.)

Whatever may be the merits of the underlying claim, it seems clear that the taxpayer in the present case is not making a generalized complaint about the operation of Government. He does not even challenge the constitutionality of the Central Intelligence Agency Act. He only wants to know the amount of tax money exacted from him that goes into CIA activities. Secrecy of the Government acquires new sanctity when his claim is denied. Secrecy has, of course, some constitutional sanction. Article I, § 5, cl. 3, provides that "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy . . . ."

But the difference was great when it came to an accounting of public money. Secrecy was the evil at which Art. I, § 9, cl. 7, was aimed. At the Convention, Mason took the initiative in moving for an annual account of public expenditures. 2 M. Farrand, The Records of the Federal Convention of 1787, p. 618 (1911). Madison suggested it be "from time to time," *id.*, at 618–619, because it was thought that requiring publication at fixed intervals might lead to no publication at all. Indeed under the Articles of Confederation "[a] punctual compliance being often impossible, the practice ha[d] ceased altogether." *Id.*, at 619.

During the Maryland debates on the Constitution, McHenry said: "[T]he People who give their Money ought to know in what manner it is expended," 3 Farrand, *supra*, at 150. In the Virginia debates Mason expressed his belief that while some matters might require secrecy (*e. g.*, ongoing diplomatic negotiations and military operations) "he did not conceive that the receipts and expenditures of the public money ought ever to be concealed. The people, he affirmed, had a right to know the expenditures of their money." 3 J. Elliot, Debates on the Federal Constitution 459 (1836). Lee said that the clause "must be supposed to mean, in the common acceptation of language, short, convenient periods" and that those "who would neglect this provision would disobey the most pointed directions." *Ibid.* Madison added that an accounting from "time to time" insured that the accounts would be "more full and satisfactory to the public, and would be sufficiently frequent." *Id.*, at 460. Madison thought "this provision went farther than the constitution of any state in the Union, or perhaps in the world." *Ibid.* In New York, Livingston said: "Will not the representatives . . . consider it as essential to their popularity, to gratify their con-

stituents with full and frequent statements of the public accounts? There can be no doubt of it," 2 Elliot, *supra*, at 347.*

From the history of the clause it is apparent that the Framers inserted it in the Constitution to give the public knowledge of the way public funds are expended. No one has a greater "personal stake" in policing this protective measure than a taxpayer. Indeed, if a taxpayer may not raise the question, who may do so? The Court states that discretion to release information is in the first instance "committed to the surveillance of Congress," and that the right of the citizenry to information under Art. I, § 9, cl. 7, cannot be enforced directly, but only through the "[s]low, cumbersome, and unresponsive" electoral process. One has only to read constitutional history to realize that statement would shock Mason and Madison. Congress of course has discretion; but to say that it has the power to read the clause out of the Consti-

*Livingston used the proposed Art. I, § 9, cl. 7, to combat the idea that the new Congress would be corrupt. He said in part: "You will give up to your state legislatures everything dear and valuable; but you will give no power to Congress, because it may be abused; you will give them no revenue, because the public treasures may be squandered. But do you not see here a capital check? Congress are to publish, from time to time, an account of their receipts and expenditures. These may be compared together; and if the former, year after year, exceed the latter, the corruption will be detected, and the people may use the constitutional mode of redress. The gentleman admits that corruption will not take place immediately: its operations can only be conducted by a long series and a steady system of measures. These measures will be easily defeated, even if the people are unapprized of them. They will be defeated by that continual change of members, which naturally takes place in free governments, arising from the disaffection and inconstancy of the people. A changeable assembly will be entirely incapable of conducting a system of mischief; they will meet with obstacles and embarrassments on every side." 2 Elliot, *supra*, at 345–346.

tution when it comes to one or two or three agencies is astounding. That is the bare-bones issue in the present case. Does Art. I, § 9, cl. 7, of the Constitution permit Congress to withhold "a regular Statement and Account" respecting any agency it chooses? Respecting all federal agencies? What purpose, what function is the clause to perform under the Court's construction? The electoral process already permits the removal of legislators for any reason. Allowing their removal at the polls for failure to comply with Art. I, § 9, cl. 7, effectively reduces that clause to a nullity, giving it no purpose at all.

The sovereign in this Nation is the people, not the bureaucracy. The statement of accounts of public expenditures goes to the heart of the problem of sovereignty. If taxpayers may not ask that rudimentary question, their sovereignty becomes an empty symbol and a secret bureaucracy is allowed to run our affairs.

The resolution of that issue has not been entrusted to one of the other coordinate branches of government—the test of the "political question" under *Baker* v. *Carr*, 369 U. S., at 217. The question is "political" if there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department," *ibid.* The mandate runs to the Congress and to the agencies it creates to make "a regular Statement and Account of the Receipts and Expenditures of all public Money." The beneficiary—as is abundantly clear from the constitutional history—is the public. The public cannot intelligently know how to exercise the franchise unless it has a basic knowledge concerning at least the generality of the accounts under every head of government. No greater crisis in confidence can be generated than today's decision. Its consequences are grave because it relegates to secrecy vast operations of government and keeps the

public from knowing what secret plans concerning this Nation or other nations are afoot. The fact that the result is serious does not, of course, make the issue "justiciable." But resolutions of any doubts or ambiguities should be toward protecting an individual's stake in the integrity of constitutional guarantees rather than turning him away without even a chance to be heard.

I would affirm the judgment below.

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

The Court's decisions in *Flast* v. *Cohen,* 392 U. S. 83 (1968), and *Frothingham* v. *Mellon,* 262 U. S. 447 (1923), throw very little light on the question at issue in this case. For, unlike the plaintiffs in those cases, Richardson did not bring this action asking a court to invalidate a federal statute on the ground that it was beyond the delegated power of Congress to enact or that it contravened some constitutional prohibition. Richardson's claim is of an entirely different order. It is that Art. I, § 9, cl. 7, of the Constitution, the Statement and Account Clause, gives him a right to receive, and imposes on the Government a corresponding affirmative duty to supply, a periodic report of the receipts and expenditures "of all public Money."[1] In support of his standing to litigate this claim, he has asserted his status both as a taxpayer and as a citizen-voter. Whether the Statement and Account Clause imposes upon the Government an affirmative duty to supply the information requested and whether that duty runs to every taxpayer or citizen are questions that go to the substantive merits of this liti-

[1] "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

gation. Those questions are not now before us, but I think that the Court is quite wrong in holding that the respondent was without standing to raise them in the trial court.

Seeking a determination that the Government owes him a duty to supply the information he has requested, the respondent is in the position of a traditional Hohfeldian plaintiff.[2] He contends that the Statement and Account Clause gives him a right to receive the information and burdens the Government with a correlative duty to supply it. Courts of law exist for the resolution of such right-duty disputes. When a party is seeking a judicial determination that a defendant owes him an affirmative duty, it seems clear to me that he has standing to litigate the issue of the existence *vel non* of this duty once he shows that the defendant has declined to honor his claim. If the duty in question involved the payment of a sum of money, I suppose that all would agree that a plaintiff asserting the duty would have standing to litigate the issue of his entitlement to the money upon a showing that he had not been paid. I see no reason for a different result when the defendant is a Government official and the asserted duty relates not to the payment of money, but to the disclosure of items of information.

When the duty relates to a very particularized and explicit performance by the asserted obligor, such as the payment of money or the rendition of specific items of information, there is no necessity to resort to any extended analysis, such as the *Flast* nexus tests, in order to find standing in the obligee. Under such circumstances, the duty itself, running as it does from the defendant to the

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[2] Jaffe, The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff, 116 U. Pa. L. Rev. 1033 (1968). See Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L. J. 16 (1913).

plaintiff, provides fully adequate assurance that the plaintiff is not seeking to "employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System." *Flast, supra,* at 106. If such a duty arose in the context of a contract between private parties, no one would suggest that the obligee should be barred from the courts. It seems to me that when the asserted duty is, as here, as particularized, palpable, and explicit as those which courts regularly recognize in private contexts, it should make no difference that the obligor is the Government and the duty is embodied in our organic law. Certainly after *United States* v. *SCRAP,* 412 U. S. 669 (1973), it does not matter that those to whom the duty is owed may be many. "[S]tanding is not to be denied simply because many people suffer the same injury." *Id.,* at 687.

For example, the Freedom of Information Act creates a private cause of action for the benefit of persons who have requested certain records from a public agency and whose request has been denied. 5 U. S. C. § 552 (a) (3). The statute requires nothing more than a request and the denial of that request as a predicate to a suit in the district court. The provision purports to create a duty in the Government agency involved to make those records covered by the statute available to "any person." Correspondingly, it confers a right on "any person" to receive those records, subject to published regulations regarding time, place, fees, and procedure. The analogy, of course, is clear. If the Court is correct in this case in holding that Richardson lacks standing under Art. III to litigate his claim that the Statement and Account Clause imposes an affirmative duty that runs in his favor, it would follow that a person whose request under 5 U. S. C. § 552 has been denied would similarly lack standing under Art. III de-

spite the clear intent of Congress to confer a right of action to compel production of the information.

The issue in *Flast* and its predecessor, *Frothingham, supra,* related solely to the standing of a federal taxpayer to challenge allegedly unconstitutional exercises of the taxing and spending power. The question in those cases was under what circumstances a federal taxpayer whose interest stemmed solely from the taxes he paid to the Treasury "[would] be deemed to have the personal stake and interest that impart the necessary concrete adverseness to such litigation so that standing can be conferred on the taxpayer *qua* taxpayer consistent with the constitutional limitations of Article III." 392 U. S., at 101. But the "nexus" criteria developed in *Flast* were not intended as a litmus test to resolve all conceivable standing questions in the federal courts; they were no more than a response to the problem of taxpayer standing to challenge federal legislation enacted in the exercise of the taxing and spending power of Congress.

Richardson is not asserting that a taxing and spending program exceeds Congress' delegated power or violates a constitutional limitation on such power. Indeed, the constitutional provision that underlies his claim does not purport to limit the power of the Federal Government in any respect, but, according to Richardson, simply imposes an affirmative duty on the Government with respect to all taxpayers or citizen-voters of the Republic. Thus, the nexus analysis of *Flast* is simply not relevant to the standing question raised in this case.

The Court also seems to say that this case is not justiciable because it involves a political question. *Ante,* at 179. This is an issue that is not before us. The "Question Presented" in the Government's petition for certiorari was the respondent's "standing to challenge the provisions of the Central Intelligence Agency

552-191 O - 76 - 16

Act which provide that appropriations to and expenditures by that Agency shall not be made public, on the ground that such secrecy contravenes Article I, section 9, clause 7 of the Constitution." [3] The issue of the justiciability of the respondent's claim was thus not presented in the petition for certiorari, and it was not argued in the briefs.[4] At oral argument, in response to questions about whether the Government was asking this Court to rule on the justiciability of the respondent's claim, the following colloquy occurred between the Court and the Solicitor General:

> "MR. BORK: . . . I think the Court of Appeals was correct that the political question issue could be resolved much more effectively if we were in the full merits of the case than we can at this stage. I think standing is all that really can be effectively discussed in the posture of the case now.
>
> . . . . . .
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> "Q: . . . [I]f we disagree with you on standing, the Government agrees then that the case should go back to the District Court?
>
> "MR. BORK: I think that is correct."

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[3] The Court has often indicated that, except in the most extraordinary circumstances, it will not consider questions that have not been presented in the petition for certiorari. *E. g., General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 177–178 (1938); *National Licorice Co.* v. *NLRB*, 309 U. S. 350, 357 n. 2 (1940); *Irvine* v. *California*, 347 U. S. 128, 129 (1954) (opinion of Jackson, J.); *Mazer* v. *Stein*, 347 U. S. 201, 206 n. 5 (1954).

[4] The District Court dismissed the complaint on the alternative grounds of lack of standing and nonjusticiability (because the court thought that the question involved was a political one). The Court of Appeals reversed the standing holding, but concluded that the justiciability issue was so intertwined with the merits that it should await consideration of the merits by the District Court on remand. The Government then brought the case here on petition for certiorari.

The Solicitor General's answer was clearly right. "[W]hen standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." *Flast, supra,* at 99–100.

On the merits, I presume that the Government's position would be that the Statement and Account Clause of the Constitution does not impose an affirmative duty upon it; that any such duty does not in any event run to Richardson; that any such duty is subject to legislative qualifications, one of which is applicable here; and that the question involved is political and thus not justiciable. Richardson might ultimately be thrown out of court on any one of these grounds, or some other. But to say that he might ultimately lose his lawsuit certainly does not mean that he had no standing to bring it.

For the reasons expressed, I believe that Richardson had standing to bring this action. Accordingly, I would affirm the judgment of the Court of Appeals.

SCHLESINGER, SECRETARY OF DEFENSE, ET AL. *v.* RESERVISTS COMMITTEE TO STOP THE WAR ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72–1188. Argued January 14, 1974—Decided June 25, 1974

Respondents—an association of present and former members of the Armed Forces Reserve opposing United States involvement in Vietnam, and five association members who were United States citizens and taxpayers—brought a class action on behalf, *inter alia*, of all United States citizens and taxpayers against petitioners, the Secretary of Defense and the three Service Secretaries, challenging the Reserve membership of Members of Congress as violating the Incompatibility Clause of Art. I, § 6, cl. 2, of the Constitution, which provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." The District Court held that respondents had standing to sue as citizens but not as taxpayers, and on the merits granted partial relief. The Court of Appeals affirmed. *Held:*

1. Respondents had no standing to sue as citizens, since the claimed nonobservance of the Incompatibility Clause which they assert deprives citizens of the faithful discharge of the legislative duties of reservist Members of Congress implicates only the generalized interest of all citizens in constitutional governance and is thus merely an abstract injury rather than the concrete injury that is essential to satisfy Art. III's "case or controversy" requirement. Pp. 216–227.

2. Respondents also lacked standing to sue as taxpayers, since they failed to establish the required "logical nexus between the [taxpayer] status asserted and the claim sought to be adjudicated." *Flast* v. *Cohen*, 392 U. S. 83, 102. Pp. 227–228.

162 U. S. App. D. C. 19, 495 F. 2d 1075, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEWART, J., filed a concurring opinion, *post*, p. 228. DOUGLAS, J.,

filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 229. BRENNAN, J., *post*, p. 235, and MARSHALL, J., *post*, p. 238, filed dissenting opinions.

Solicitor General Bork argued the cause for petitioners. With him on the brief were *Acting Assistant Attorney General Jaffe, Deputy Solicitor General Friedman, Leonard Schaitman,* and *William D. Appler.*

William A. Dobrovir argued the cause and filed a brief for respondents.*

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

We granted certiorari, *sub nom. Richardson* v. *Reservists Committee to Stop the War,* 411 U. S. 947 (1973), to review the judgment of the Court of Appeals affirming, without opinion, the District Court's partial summary judgment for respondents declaring that "Article I, Section 6, Clause 2 of the Constitution renders a member of Congress ineligible to hold a commission in the Armed Forces Reserve during his continuance in office." *Reservists Committee to Stop the War* v. *Laird,* 323 F. Supp. 833, 843 (DC 1971). We hold that respondents do not have standing to sue as citizens or taxpayers. The judgment of the Court of Appeals is therefore reversed.

I

Article I, § 6, cl. 2, of the Federal Constitution provides:

> "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments

**Thomas H. King, Maurice F. Biddle,* and *Harold Shapiro* filed a brief for the Reserve Officers Association of the United States as *amicus curiae.*

> whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

The Constitution thereby makes Members of Congress ineligible for appointment to certain offices through the limitation of the Ineligibility Clause, and prohibits Members of Congress from holding other offices through the latter limitation, the Incompatibility Clause.

Respondents, the Reservists Committee to Stop the War and certain named members thereof,[1] challenged the Reserve membership of Members of Congress [2] as being

[1] The Committee, located in California, is a national unincorporated association of present and former officers and enlisted members of the Reserves, organized for the purpose of opposing the military involvement of the United States in Vietnam and of using all lawful means to end that involvement, including efforts by its members individually to take all steps necessary and appropriate to end that involvement. The five individual respondents were all members of the Committee, residents of California, and United States citizens and taxpayers. At the time suit was filed, four of the individuals were in active Ready Reserve status; the status of the fifth, then the Committee cochairman, was unspecified.

[2] At the time suit was filed, 130 Members of the 91st Congress were also members of the Reserves, which are divided into Ready, Standby, and Retired components. By the end of the 92d Congress, 119 Members were reservists. As of November 2, 1973, the 93d Congress has seen the number of its reservists reduced to 107, all but one of whom are commissioned officers, App. 5, and none of whom can occupy the Ready Reserve status of the individual respondents, *supra*, n. 1. Dept. of Defense Directive 1200.7 § v, c. 2 (July 2, 1970); 32 CFR § 125.4 (c)(2). Of the 107, 20 (including the one enlisted man) are in the active, and 12 in the inactive, Standby Reserve; and 73 are in the Retired Reserve, 16 of whom receive retirement pay. Two other Members are in the Army National Guard, and thus in the Ready Reserve, 10 U. S. C. § 269 (b), but since the governors of the various States control appointments to offices in the Guard, petitioners could not provide

in violation of the Incompatibility Clause. They commenced a class action in the District Court against petitioners, the Secretary of Defense and the three Service Secretaries, seeking (1) an order in the nature of mandamus directed to petitioners requiring them to strike from the rolls of the Reserves all Members of Congress presently thereon, to discharge any member of the Reserves who subsequently became a Member of Congress, and to seek to reclaim from Members and former Members of Congress any Reserve pay said Members received while serving as Members of Congress, (2) a permanent injunction preventing petitioners from placing on the rolls of the Reserves any Member of Congress while serving in Congress, and (3) a declaration that membership in the Reserves is an office under the United States prohibited to Members of Congress by Art. 1, § 6, cl. 2, and incompatible with membership in the Congress.

Respondents sought the above relief on behalf of four classes of persons. The Committee and the individual respondents sought to represent the interests of (1) all persons opposed to United States military involvement in Vietnam and purporting to use lawful means, including communication with and persuasion of Members of Congress, to end that involvement. The individual respondents alone sought to represent the interests of (2) all officers and enlisted members of the Reserves who were not Members of Congress, (3) all taxpayers of the United States, and (4) all citizens of the United States. The interests of these four classes were alleged to be adversely affected by the Reserve membership of Members of Congress in various ways.

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relief regarding such reservists. The judgment of the District Court did not therefore extend to this category of reservist. 323 F. Supp. 833, 838 n. 3 (DC 1971).

As relevant here, citizens and taxpayers were alleged in respondents' complaint to have suffered injury because Members of Congress holding a Reserve position in the Executive Branch were said to be subject to the possibility of undue influence by the Executive Branch,[3] in violation of the concept of the independence of Congress implicit in Art. I of the Constitution. Reserve membership was also said to place upon Members of Congress possible inconsistent obligations which might cause them to violate their duty faithfully to perform as reservists or as Members of Congress. Reserve membership by Members of Congress thus, according to respondents' complaint,

> "deprives or may deprive the individual named plaintiffs and all other citizens and taxpayers of the United States of the faithful discharge by members of Congress who are members of the Reserves of their duties as members of Congress, to which all citizens and taxpayers are entitled." Pet. for Cert. 46.

Petitioners filed a motion to dismiss respondents' complaint on the ground that respondents lacked standing to bring the action, and because the complaint failed to state a cause of action upon which relief could be granted. The latter ground was based upon the contention that the Incompatibility Clause sets forth a qualification for Membership in the Congress, U. S. Const., Art. I, § 5, cl. 1, not a qualification for a position in the Executive Branch. The power to judge that qualification was as-

[3] Respondents appear to have had reference in part to pressure that conceivably could be applied to reservist Members of Congress through such offices as the President's power to call reservists to active duty without their consent, 10 U. S. C. §§ 672–675, or his power to discharge commissioned reservists, who serve only at his pleasure. 10 U. S. C. § 593.

serted to rest exclusively with Congress, not the courts, under *Powell* v. *McCormack,* 395 U. S. 486, 550 (1969).

The District Court concluded that it first had to determine whether respondents had standing to bring the action and, without citation to authority, stated:

> "In recent years the Supreme Court has greatly expanded the concept of standing and in this Circuit the concept has now been almost completely abandoned." 323 F. Supp., at 839.

The court then held that of the four classes respondents sought to represent, "[o]nly their status as citizens" gave them standing to sue in this case. *Id.,* at 840. The District Court denied standing to respondents as reservists, as opponents of our Vietnam involvement, and as taxpayers. The court acknowledged that there were very few instances in which the assertion of "merely the undifferentiated interest of citizens," *ibid.,* would be sufficient, but was persuaded to find that interest sufficient here by several considerations it found present in the nature of the dispute before it and by the asserted abandonment of standing limitations by the Court of Appeals, whose decisions were binding on the District Court.

In response to petitioners' contention that the Incompatibility Clause sets forth a qualification only for Membership in the Congress, which Congress alone might judge, the District Court characterized the issue as whether respondents presented a nonjusticiable "political question," resolution of which by the text of the Constitution was committed to the Congress under *Baker* v. *Carr,* 369 U. S. 186, 217 (1962). The court held that the failure of the Executive Branch to remove reservist Members of Congress from their Reserve positions was justiciable.

Having resolved the issues of standing and political question in favor of respondents, the District Court held on the merits that a commission in the Reserves is an "Office under the United States" within the meaning of the Incompatibility Clause. On the basis of the foregoing, the court in its final order granted partial summary judgment for respondents by declaring that the Incompatibility Clause renders a Member of Congress ineligible, during his continuance in office, to hold a Reserve "commission"; the court denied such parts of respondents' motion for summary judgment which sought a permanent injunction and relief in the nature of mandamus.[4] 323 F. Supp., at 843.

The Court of Appeals affirmed the judgment of the District Court in an unpublished opinion "on the basis of the memorandum opinion of the District Court." The Court of Appeals added that it was "also of the view that [respondents] have the requisite standing and that their claim is judicially enforceable under the rationale of" *Flast* v. *Cohen,* 392 U. S. 83 (1968), and *Baker* v. *Carr, supra.* Petitioners present three questions for review: (1) whether respondents have standing, "either as citizens or as federal taxpayers," to bring this claim, (2) whether respondents' claim presents a "political question" not subject to judicial review, and (3) whether "membership" in the Reserves constitutes an "Office under the United States" within the meaning of the Incompatibility Clause. Pet. for Cert. 2.

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[4] Respondents did not, in the Court of Appeals, or by cross-petition here challenge the District Court's denial of injunctive and mandamus relief. In light of the ground for our disposition of the case, we need not and do not address ourselves to the validity or scope of the District Court's ruling on the merits of respondents' claim, or the relief it granted.

II

A

In *Flast* v. *Cohen, supra,* at 95, the Court noted that the concept of justiciability, which expresses the jurisdictional limitations imposed upon federal courts by the "case or controversy" requirement of Art. III, embodies both the standing and political question doctrines upon which petitioners in part rely. Each of these doctrines poses a distinct and separate limitation, *Powell* v. *McCormack,* 395 U. S., at 512; *Baker* v. *Carr, supra,* at 198, so that either the absence of standing or the presence of a political question suffices to prevent the power of the federal judiciary from being invoked by the complaining party. The more sensitive and complex task of determining whether a particular issue presents a political question causes courts, as did the District Court here, to turn initially, although not invariably,[5] to the question of standing to sue. In light of the District Court's action we turn to petitioners' contention that respondents lacked standing to bring the suit. Our conclusion that the District Court erred in holding that respondents had standing to sue as United States citizens,

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[5] The lack of a fixed rule as to the proper sequence of judicial analysis of contentions involving more than one facet of the concept of justiciability was recently exhibited by the Court of Appeals for the Second Circuit, which bypassed a determination on standing to rule that a claim was not justiciable because it presented a political question:

"[T]he standing of a party need not come into question if a court determines that for other reasons the issue raised before the bench is non-justiciable."

That court thus held in effect that if no justiciable question is presented no one has standing. *DaCosta* v. *Laird,* 471 F. 2d 1146, 1152 (1973). See also *Sierra Club* v. *Morton,* 405 U. S. 727, 731 (1972); *Flast* v. *Cohen,* 392 U. S. 83, 100 (1968).

but was correct in denying respondents' standing as taxpayers, eliminates the need to consider the other questions presented by petitioners.

The District Court considered standing as to each of the four capacities in which respondents brought suit; it rejected standing as to three of the four, holding that respondents could sue only as citizens. The Court of Appeals' judgment of affirmance, based solely upon the opinion of the District Court, did not alter the District Court's ruling on standing. The standing question presented in the petition for certiorari is addressed to the District Court's holding on citizen standing and seeks to add the question whether respondents also had standing as taxpayers.[6] Respondents do not contend that the District Court erred in denying standing to them in the other two capacities in which they sought to proceed, *i. e.*, as opponents of American military involvement in Vietnam, and as reservists. We therefore proceed to consideration of respondents' standing only as citizens and taxpayers.

B

Citizen Standing

To have standing to sue as a class representative it is essential that a plaintiff must be a part of that class, that is, he must possess the same interest and suffer the same injury shared by all members of the class he represents. *Indiana Employment Division* v. *Burney*, 409 U. S. 540 (1973); *Bailey* v. *Patterson*, 369 U. S. 31 (1962). In granting respondents standing to sue as representatives

[6] The Court of Appeals did no more than affirm the judgment of the District Court, including the latter's denial of respondents' standing as taxpayers. Petitioners may, however, have sought to raise the issue of taxpayer standing in this Court because of the ambiguous reference in the Court of Appeals' judgment of affirmance to *Flast* v. *Cohen*, *supra*, a taxpayer-standing case.

of the class of all United States citizens, the District Court therefore necessarily—and correctly—characterized respondents' interest as "undifferentiated" from that of all other citizens.

The only interest all citizens share in the claim advanced by respondents is one which presents injury in the abstract. Respondents seek to have the Judicial Branch compel the Executive Branch to act in conformity with the Incompatibility Clause, an interest shared by all citizens. The very language of respondents' complaint, *supra,* at 212, reveals that it is nothing more than a matter of speculation whether the claimed nonobservance of that Clause deprives citizens of the faithful discharge of the legislative duties of reservist Members of Congress. And that claimed nonobservance, standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance, and that is an abstract injury.[7] The Court has previously declined to treat "generalized grievances" about the conduct of Government as a basis for taxpayer standing. *Flast* v. *Cohen,* 392 U. S., at 106. We consider now whether a citizen has standing to sue under such a generalized complaint.

Our analysis begins with *Baker* v. *Carr,* 369 U. S. 186 (1962), where the Court stated that the gist of the inquiry must be whether the complaining party has

> "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which

[7] The generalized nature of respondents' claim is revealed by the scope of relief sought, *i. e.,* removal of all reservist Members of Congress from Reserve status rather than the removal of only those reservist Members who manifested by their actions that they were influenced by their Reserve status to act adversely to respondents' interest.

> the court so largely depends for illumination of difficult constitutional questions." *Id.*, at 204.

Although dealing with a case of claimed taxpayer standing, *Flast* v. *Cohen, supra,* gave further meaning to the need for a "personal stake" in noting that it was meant to assure that the complainant seeking to adjudicate his claim was the "proper party" to present the claim "in an adversary context and in a form historically viewed as capable of judicial resolution." 392 U. S., at 100, 101. In the circumstances of *Flast,* the Court held that the taxpayer-complainant before it had established a relationship between his status as a taxpayer and his claim under the Taxing and Spending Clause sufficient to give assurance

> "that the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution." *Id.*, at 106.

While *Flast* noted that the "case or controversy" limitation on the federal judicial power found in Art. III is a "blend of constitutional requirements and policy considerations," *id.*, at 97, the Court, subsequently, in the context of judicial review of regulatory agency action held that whatever else the "case or controversy" requirement embodied, its essence is a requirement of "injury in fact." *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U. S. 150, 152 (1970). Although we there noted that the categories of judicially cognizable injury were being broadened, *id.*, at 154, we have more recently stressed that the broadening of *categories* "is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury."

Sierra Club v. *Morton,* 405 U. S. 727, 738 (1972). And, in defining the nature of that injury, we have only recently stated flatly: "Abstract injury is not enough." *O'Shea* v. *Littleton,* 414 U. S. 488, 494 (1974).

Ex parte Lévitt, 302 U. S. 633 (1937), was the only other occasion in which the Court faced a question under Art. I, § 6, cl. 2, although that challenge was made under the Ineligibility Clause, not the Incompatibility Clause involved here. There a petition was filed in this Court seeking an order to show cause why one of the Justices should not be disqualified to serve as an Associate Justice. The petition asserted that the appointment and confirmation of the Justice in August 1937 was unlawful because the Act of March 1, 1937, permitting Justices to retire at full salary after a period of specified service, thereby increased the emoluments of the office and that the statute was enacted while the challenged Justice was a Senator. The appointment of the Justice by the President and his confirmation by the Senate were thus said to violate the Ineligibility Clause which provides:

> "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States . . . the Emoluments whereof shall have been encreased during such time . . . ."

The Court held:

> "The motion papers disclose no interest upon the part of the petitioner other than that of a citizen and a member of the bar of this Court. That is insufficient. It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not

sufficient that he has merely a general interest common to all members of the public." 302 U. S., at 634.[8]

The Court has today recognized the continued vitality of *Lévitt*,[9] *United States* v. *Richardson*, *ante*, at 176–179; see also *Laird* v. *Tatum*, 408 U. S. 1, 13 (1972). We reaffirm *Lévitt* in holding that standing to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share. Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally

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[8] The Court cited a number of cases in support of its holding, nearly all of which contained language similar to that quoted in the text. See *Frothingham* v. *Mellon*, 262 U. S. 447, 488 (1923) (insufficient for a party to show "merely that he suffers in some indefinite way in common with people generally"); *Fairchild* v. *Hughes*, 258 U. S. 126, 129–130 (1922) ("Plaintiff has only the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute in the federal courts a suit"); *Tyler* v. *Judges of Court of Registration*, 179 U. S. 405, 406 (1900) ("even in a proceeding which he prosecutes for the benefit of the public . . . [the plaintiff] must generally aver an injury peculiar to himself, as distinguished from the great body of his fellow citizens"). See also *Giles* v. *Harris*, 189 U. S. 475, 486 (1903) (Holmes, J.) ("The plaintiff alleges that the whole registration scheme of the Alabama constitution is a fraud upon the Constitution of the United States, and asks us to declare it void. But of course he could not maintain a bill for a mere declaration in the air"). Cf. *Newman* v. *Frizzell*, 238 U. S. 537, 550 (1915).

[9] The Court has also recently cited with approval two of the principal cases relied upon in *Ex parte Lévitt*, 302 U. S. 633 (1937). *Frothingham* v. *Mellon*, *supra*, was used for support in *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974), as was *Fairchild* v. *Hughes*, *supra*, used in *Baker* v. *Carr*, 369 U. S. 186, 208 (1962).

capable of judicial resolution. It adds the essential dimension of specificity to the dispute by requiring that the complaining party have suffered a particular injury caused by the action challenged as unlawful. This personal stake is what the Court has consistently held enables a complainant authoritatively to present to a court a complete perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance. Such authoritative presentations are an integral part of the judicial process, for a court must rely on the parties' treatment of the facts and claims before it to develop its rules of law.[10] Only concrete injury presents the factual context within which a court, aided by parties who argue within the context, is capable of making decisions.

Moreover, when a court is asked to undertake constitutional adjudication, the most important and delicate of its responsibilities, the requirement of concrete injury further serves the function of insuring that such adjudication does not take place unnecessarily. This principle is particularly applicable here, where respondents seek an interpretation of a constitutional provision which has never before been construed by the federal courts. First, concrete injury removes from the realm of speculation whether there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party.

"The desire to obtain [sweeping relief] cannot be

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[10] This is in sharp contrast to the political processes in which the Congress can initiate inquiry and action, define issues and objectives, and exercise virtually unlimited power by way of hearings and reports, thus making a record for plenary consideration and solutions. The legislative function is inherently general rather than particular and is not intended to be responsive to adversaries asserting specific claims or interests peculiar to themselves.

552-191 O - 76 - 17

> accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that his individual need requires the remedy for which he asks." *McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U. S. 151, 164 (1914).

Second, the discrete factual context within which the concrete injury occurred or is threatened insures the framing of relief no broader than required by the precise facts to which the court's ruling would be applied. This is especially important when the relief sought produces a confrontation with one of the coordinate branches of the Government; here the relief sought would, in practical effect, bring about conflict with two coordinate branches.

To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing "government by injunction."

> "The powers of the federal judiciary will be adequate for the great burdens placed upon them only if they are employed prudently, with recognition of the strengths as well as the hazards that go with our kind of representative government." *Flast* v. *Cohen*, 392 U. S., at 131 (Harlan, J., dissenting).[11]

Our conclusion that there is no citizen standing here, apart from being in accord with all other federal courts of appeals that have considered the question, until the

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[11] We have expressed apprehension about claims of standing based on "mere 'interest in a problem.'" See, *e. g.*, *Sierra Club*, 405 U. S., at 739. Earlier cases of the Court evidenced comparable concern. See, *e. g.*, *Newman* v. *Frizzell*, 238 U. S., at 552 n. 8.

Court of Appeals' holding now under review,[12] is also consistent with the recent holdings of this Court. It is one thing for a court to hear an individual's complaint that certain specific government action will cause that person private competitive injury, *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U. S. 150 (1970), or a complaint that individual enjoyment of certain natural resources has been impaired by such action, *United States* v. *SCRAP,* 412 U. S. 669, 687 (1973), but it is another matter to allow a citizen to call on the courts to resolve abstract questions.[13] The former provides the setting for a focused consideration of a concrete injury. In the latter, although allegations assert an arguable conflict with some limitation of the Constitution, it can be only a matter of speculation whether the claimed violation has caused concrete injury to the particular complainant.

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[12] *Lamm* v. *Volpe,* 449 F. 2d 1202, 1204 (CA10 1971); *Pietsch* v. *President of United States,* 434 F. 2d 861, 863 (CA2 1970) (Clark, J.); *Troutman* v. *Shriver,* 417 F. 2d 171, 174 (CA5 1969) (citing *Lévitt, supra*); *Velvel* v. *Nixon,* 415 F. 2d 236, 239 (CA10 1969); *Pauling* v. *McElroy,* 107 U. S. App. D. C. 372, 374, 278 F. 2d 252, 254 (1960); cf. *Sharrow* v. *Brown,* 447 F. 2d 94, 97 (CA2 1971). And aside from the decision under review, the only other opinion that appears to have ruled otherwise is *Atlee* v. *Laird,* 339 F. Supp. 1347 (ED Pa. 1972), which relied upon the decision of the District Court here. *Id.,* at 1357 n. 8.

[13] The Court of Appeals' reliance on *Baker* v. *Carr,* 369 U. S. 186 (1962), is inapposite. *United States* v. *SCRAP,* 412 U. S. 669 (1973), pointed out that a personal stake in a fraction of a vote in *Baker* v. *Carr* was sufficient to support standing. *Id.,* at 689 n. 14. The injury asserted in *Baker* was thus a concrete injury to fundamental voting rights, as distinguished from the abstract injury in nonobservance of the Constitution asserted by respondents as citizens.

In *Baker* v. *Carr,* the Court cited with approval the early case of *Liverpool, N. Y. & Phila. S. S. Co.* v. *Comm'rs of Emigration,* 113 U. S. 33 (1885), where it was held that a federal court can adjudge rights only "in actual controversies." *Id.,* at 39.

Finally, the several considerations advanced by the District Court in support of respondents' standing as citizens do not militate against our conclusion that it was error to grant standing to respondents as citizens. First, the District Court acknowledged that any injury resulting from the reservist status of Members of Congress was hypothetical, but stressed that the Incompatibility Clause was designed to prohibit such potential for injury.[14] 323 F. Supp., at 840. This rationale fails, however, to compensate for the respondents' failure to present a claim under that Clause which alleges concrete injury. The claims of respondents here, like the claim under the Ineligibility Clause in *Lévitt, supra,* would require courts to deal with a difficult and sensitive issue of constitutional adjudication on the complaint of one who does not allege "a personal stake in the outcome of the controversy." *Baker* v. *Carr,* 369 U. S., at 204. To support standing there must be concrete injury in a form which assures "the necessary specificity" called for by *Flast,* 392 U. S., at 106, and "that concrete adverseness . . . upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr, supra,* at 204.

[14] The District Court made analogy to conflict-of-interest statutes which, it said, are directed at avoiding circumstances of potential, not actual, impropriety. We have no doubt that if the Congress enacted a statute creating such a legal right, the requisite injury for standing would be found in an invasion of that right. *O'Shea* v. *Littleton,* 414 U. S., at 493 n. 2; *Linda R. S.* v. *Richard D.,* 410 U. S. 614, 617 n. 3 (1973); *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U. S. 150, 154 (1970). But to satisfy the Art. III prerequisite the complaining party would still be required to allege a specific invasion of the right suffered by him. Standing could not be found—as it is not here—in a citizen who alleged no more than the right of all other citizens to have government conducted without what he perceived, without himself having suffered concrete harm, to be proscribed conflicts of interest.

Standing was thus found by premature evaluation of the merits of respondents' complaint.[15]

The District Court next acknowledged this Court's longstanding reluctance to entertain "generalized grievances about the conduct of government," *Flast* v. *Cohen*, 392 U. S., at 106, but distinguished respondents' complaint from such grievances by characterizing the Incompatibility Clause as "precise [and] self-operative." 323 F. Supp., at 840. Even accepting that characterization of the Clause it is not an adequate substitute for the judicially cognizable injury not present here. Moreover, that characterization rested, as did the preceding characterization, on an interpretation of the Clause by way of the Court's preliminary appraisal of the merits of respondents' claim before standing was found. In any event, the Ineligibility Clause involved in *Lévitt, supra,* is no less specific or less "precise [and] self-operative" than the Incompatibility Clause.

The District Court further relied on the fact that the adverse parties sharply conflicted in their interests and views and were supported by able briefs and arguments. *Id.*, at 841. We have no doubt about the sincerity of respondents' stated objectives and the depth of their commitment to them. But the essence of standing

> "is not a question of motivation but of possession of the requisite . . . interest that is, or is threatened

[15] Looking "to the substantive issues" which *Flast* stated to be both "appropriate and necessary" in relation to taxpayer standing was for the express purpose of determining "whether there is a logical nexus between the [taxpayer] status asserted and the claim sought to be adjudicated." 392 U. S., at 102. This step is not appropriate on a claim of citizen standing since the *Flast* nexus test is not applicable where the taxing and spending power is not challenged. Hence there was no occasion for the District Court or the Court of Appeals to reach or evaluate what it saw as the merits of respondents' complaint.

> to be, injured by the unconstitutional conduct." *Doremus* v. *Board of Education,* 342 U. S. 429, 435 (1952).

This same theme as to the inadequacy of motivation to support standing is suggested in the Court's opinion in *Sierra Club, supra:*

> "But a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA." 405 U. S., at 739.

Respondents' motivation has indeed brought them sharply into conflict with petitioners, but as the Court has noted, motivation is not a substitute for the actual injury needed by the courts and adversaries to focus litigation efforts and judicial decisionmaking. Moreover, the evaluation of the quality of the presentation on the merits was a retrospective judgment that could have properly been arrived at only after standing had been found so as to permit the court to consider the merits. A logical corollary to this approach would be the manifestly untenable view that the inadequacy of the presentation on the merits would be an appropriate basis for denying standing.

Furthermore, to have reached the conclusion that respondents' interests as citizens were meant to be protected by the Incompatibility Clause because the primary purpose of the Clause was to insure independence of each of the branches of the Federal Government, similarly involved an appraisal of the merits before the issue of standing was resolved. All citizens, of course, share equally an interest in the independence of each branch of Government. In some fashion, every provision of the Consti-

tution was meant to serve the interests of all. Such a generalized interest, however, is too abstract to constitute a "case or controversy" appropriate for judicial resolution.[16] The proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries.

Closely linked to the idea that generalized citizen interest is a sufficient basis for standing was the District Court's observation that it was not irrelevant that if respondents could not obtain judicial review of petitioners' action, "then as a practical matter no one can." Our system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing. See *United States* v. *Richardson, ante,* at 179.

C

Taxpayer Standing

Consideration of whether respondents have standing to sue as taxpayers raises a different question from whether they may sue as citizens. *Flast* v. *Cohen, supra,* established that status as a taxpayer can, under certain limited circumstances, supply the personal stake essential to standing. There, the Court held that, in order to ensure the necessary personal stake, there must be "a logical

[16] Satisfaction of the *Data Processing* "zone of interest" requirement seemingly relied upon to find citizen standing does not support such standing for two reasons: first, that case involved judicial review under the Administrative Procedure Act of regulatory agency action alleged to have caused private competitive injury; second, *Data Processing* required a showing of injury in fact, in addition to the "zone of interest" requirement. Until a judicially cognizable injury is shown no other inquiry is relevant to consideration of citizen standing.

nexus between the [taxpayer] status asserted and the claim sought to be adjudicated," 392 U. S., at 102. In *Flast,* the Court determined that the taxpayer demonstrated such a "logical nexus" because, (1) he challenged the exercise of "congressional power under the taxing and spending clause of Art. I, § 8 . . ." and (2) "the challenged enactment exceed[ed] specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power" under Art. I, § 8. *Id.,* at 102–103.

Here, the District Court, applying the *Flast* holding, denied respondents' standing as taxpayers for failure to satisfy the nexus test. We agree with that conclusion since respondents did not challenge an enactment under Art. I, § 8, but rather the action of the Executive Branch in permitting Members of Congress to maintain their Reserve status.[17]

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE STEWART, concurring.

I agree with the Court that the respondents lack standing to sue either as citizens or taxpayers in this case. Here, unlike *United States* v. *Richardson, ante,* p. 166, the respondents do not allege that the petitioners have refused to perform an affirmative duty imposed upon

[17] As noted earlier, *supra,* at 211, respondents requested the District Court to compel petitioners to seek to reclaim Reserve pay received by reservist Members of Congress. Such relief would follow from the invalidity of Executive action in paying persons who could not lawfully have been reservists, not from the invalidity of the statutes authorizing pay to those who lawfully were Reservists.

them by the Constitution. Nor can there be taxpayer standing under *Flast* v. *Cohen,* 392 U. S. 83, since there is simply no challenge to an exercise of the taxing and spending power.

The Court's judgment in this case is wholly consistent with *United States* v. *SCRAP,* 412 U. S. 669. Standing is not today found wanting because an injury has been suffered by many, but rather because *none* of the respondents has alleged the sort of direct, palpable injury required for standing under Art. III. Like the plaintiff in *Frothingham* v. *Mellon,* 262 U. S. 447, the respondents seek only to air what we described in *Flast* as "generalized grievances about the conduct of government." 392 U. S., at 106. Our prior cases make clear that such abstract allegations cannot suffice to confer Art. III standing, and I therefore join the opinion and judgment of the Court.

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

The requirement of "standing" to sue is a judicially created instrument serving several ends: (1) It protects the status quo by reducing the challenges that may be made to it and to its institutions. It greatly restricts the classes of persons who may challenge administrative action. Its application in this case serves to make the bureaucracy of the Pentagon more and more immune from the protests of citizens. (2) It sometimes is used to bar from the courts questions which by the Constitution are left to the other two coordinate branches to resolve, *viz.,* the so-called political question. (3) It is at times a way of ridding court dockets whether of abstract questions or questions involving no concrete controversial issue.

Our leading case is *Frothingham* v. *Mellon,* 262 U. S. 447, decided in 1923, where a taxpayer challenged the constitutionality of an Act of Congress that gave grants

to States which agreed to a plan to reduce maternal and infant mortality. The Court said:

> "The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained. It is of much significance that no precedent sustaining the right to maintain suits like this has been called to our attention, although, since the formation of the government, as an examination of the acts of Congress will disclose, a large number of statutes appropriating or involving the expenditure of moneys for non-federal purposes have been enacted and carried into effect." *Id.*, at 487–488.

That ruling had in it an admixture of the "political question" because, said the Court, the only occasion when the federal court may act is when a federal law results in "some direct injury suffered or threatened, presenting a justiciable issue." *Id.*, at 488. When that element is lacking, judicial intrusion would trespass on powers granted another department of Government. "To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental

acts of another and co-equal department, an authority which plainly we do not possess." *Id.*, at 488–489.

In 1968—45 years after *Frothingham*—that case was revisited in *Flast* v. *Cohen*, 392 U. S. 83, where federal taxpayers sued to enjoin the expenditure of federal funds under an Act of Congress granting financial aid to religious schools. The Court held that those taxpayers did have "standing" to sue for two reasons. *First*, because they challenged the exercise of congressional power under the Taxing and Spending Clause of Art. I, § 8, of the Constitution, not the incidental expenditure of tax funds in the administration of an essentially regulatory statute. *Second*, because the challenged enactment exceeded the limitations imposed upon the exercise of the congressional taxing and spending power. See 392 U. S., at 102–104. Therefore, the Court concluded that the taxpayer had "the requisite personal stake," *id.*, at 101, in the litigation to have "standing" to sue and the Court went on to hold that the Establishment Clause of the First Amendment "operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8." 392 U. S., at 104.

The present case implicates two provisions of the Constitution. Article I, § 8, cl. 1, provides: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ." Article I, § 6, cl. 2, of the Constitution says that "no Person holding any Office [1] under the United

[1] I agree with the conclusion of the House Judiciary Committee, H. R. Rep. No. 885, 64th Cong., 1st Sess. (1916), that a commission in the National Guard is an "office" in the constitutional sense. A commission in the Reserves is not distinguishable. See *United States* v. *Hartwell*, 6 Wall. 385.

States, shall be a Member of either House during his Continuance in Office."

The present suit is not one to oust Members from Congress. Rather it is brought against the Secretary of Defense challenging his keeping in the Armed Services of the United States Members of Congress who hold commissions as reservists.

Various Acts of Congress make various appropriations for the services of reservists. See, *e. g.*, Pub. L. 92–145, 85 Stat. 414; Pub. L. 92–545, § 801 *et seq.*, 86 Stat. 1154.

Article I, § 6, cl. 2, is often referred to as the Incompatibility Clause. At the 1783 convention some proposed that Members of Congress be allowed to serve in the Executive Branch,[2] others were opposed; Mason apparently represented the majority view when he insisted that "ineligibility will keep out corruption, by excluding office-hunters." [3] Article I, § 6, cl. 2, like the Establishment Clause of the First Amendment, "was designed as a specific bulwark against such potential abuses . . . and . . . operates as a specific constitutional limitation upon" such expenditures. *Flast* v. *Cohen, supra,* at 104.

As stated by Hamilton in The Federalist No. 76, p. 476 (H. Lodge ed. 1888), the Incompatibility Clause had a specific purpose: to avoid "the danger of executive influence upon the legislative body."

While respondents have standing as taxpayers, their citizenship also gives them standing to challenge the appropriation acts financing activities of the reservists.

We tend to overlook the basic political and legal reality that the people, not the bureaucracy, are the sovereign. Our Federal Government was created for the security and happiness of the people. Executives, lawmakers, and

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[2] See 2 M. Farrand, The Records of the Federal Convention of 1787, pp. 283–290 (1911).

[3] *Id.*, at 491.

members of the Judiciary are inferior in the sense that they are in office only to carry out and execute the constitutional regime.

The Preamble of the Constitution states that "We the People" ordained and established the Constitution.

The Declaration of Independence stated that to insure "certain unalienable Rights," "Governments are instituted among Men, deriving their just powers from the consent of the governed" and "That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it."

The present case does not involve a restructuring of society—a procedure left to legislative action in part but mostly to constitutional conventions. All that the citizens in this case seek is to have the Constitution enforced as it is written. It is not a suit to unseat Members of Congress. Any decree that issued would run to the Secretary of Defense to take the challenged reservists off his list.

The interest of citizens is obvious. The complaint alleges injuries to the ability of the average citizen to make his political advocacy effective whenever it touches on the vast interests of the Pentagon. It is said that all who oppose the expansion of military influence in our national affairs find they are met with a powerful lobby—the Reserve Officers Association—which has strong congressional allies.

Whether that is true or not we do not know. So far as the Incompatibility Clause of the Constitution is concerned that contention is immaterial. It is as immaterial to the function of Art. I, § 6, cl. 2, of the Constitution as would be a suggestion that the establishment of a religion under the First Amendment is benign in a given case. What the Framers did in each case was to set up constitutional fences barring certain affiliations, certain kinds of appropriations. Their judgment was that the

potential for evil was so great that no appropriations of that character should be made.

The interest of citizens in guarantees written in the Constitution seems obvious. Who other than citizens has a better right to have the Incompatibility Clause enforced? It is their interests that the Incompatibility Clause was designed to protect. The Executive Branch under our regime is not a fiefdom or principality competing with the Legislative as another center of power. It operates within a constitutional framework, and it is that constitutional framework that these citizens want to keep intact. That is, in my view, their rightful concern. We have insisted that more than generalized grievances of a citizen be shown, that he must have a "personal stake in the outcome," *Baker* v. *Carr*, 369 U. S. 186, 204. But that "personal stake" need not be a monetary one. In *Baker* v. *Carr* it was the right to vote, an important badge of citizenship. The "personal stake" in the present case is keeping the Incompatibility Clause an operative force in the Government by freeing the entanglement of the federal bureaucracy with the Legislative Branch.

Ex parte Lévitt, 302 U. S. 633, is not opposed. Lévitt moved in this Court to have it declare the appointment of Mr. Justice Black unconstitutional. He alleged that Mr. Justice Black, as Senator, had voted to increase the "emoluments" of the office of Associate Justice and was therefore barred from taking office by reason of Art. I, § 6, cl. 2, of the Constitution. The Court denied the motion to file an original action stating:

> "It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury

as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public." 302 U. S., at 634.

The only "emolument" of office which Mr. Justice Black as Senator had voted to increase was the retirement compensation of federal judges as spelled out in the Act of March 1, 1937, c. 21, 50 Stat. 24. That emolument might never accrue to an appointee for he would first have to serve a designated number of years. It turned out that even though Justice Black served over 34 years he never received any benefits under the Retirement Act. Hence the Court showed wisdom in deciding that Lévitt showed no "direct injury." His claim of constitutional violation was remote, speculative, and contingent. The present suit has no such deficiency. It asserts a present, ongoing conflict between the Pentagon's policies and the Incompatibility Clause of the Constitution.

The interest of the citizen in this constitutional question is, of course, common to all citizens. But as we said in *United States* v. *SCRAP,* 412 U. S. 669, 687–688, "standing is not to be denied simply because many people suffer the same injury. . . . To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody."

I would affirm the judgment below.

MR. JUSTICE BRENNAN, dissenting.*

The "standing" of a plaintiff to be heard on a claim of invasion of his alleged legally protected right is established, in my view, by his good-faith allegation that " 'the challenged action has caused him injury in fact.' " *Bar-*

*[This opinion applies also to No. 72–885, *United States et al.* v. *Richardson, ante,* p. 166.]

low v. *Collins,* 397 U. S. 159, 167–168 (1970) (concurring in the result and dissenting). The Court's further inquiry, in each of these cases, into the connection between "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question," *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U. S. 150, 153 (1970), and the "interest sought to be protected by the complainant," *ibid.,* is relevant, not to "standing" but, if at all, only to such limitations on exercise of the judicial function as justiciability, see, *e. g., Baker* v. *Carr,* 369 U. S. 186 (1962), or reviewability, see, *e. g., Abbott Laboratories* v. *Gardner,* 387 U. S. 136, 140 (1967).

Richardson plainly alleged injury in fact. My Brother STEWART demonstrates this in his analysis of Richardson's claimed right to have the budget of the Central Intelligence Agency published. The claim was not merely that failure to publish was a violation of the Constitution. The claim went further and alleged that this violation deprived Richardson, as an individual, and not as an inseparable part of the citizenry, of a right given him by Art. I, § 9, cl. 7. Moreover, his complaint, properly construed, alleged that the violations caused him injury not only in respect of his right as a citizen to know how Congress was spending the public fisc, but also in respect of his right as a voter to receive information to aid his decision how and for whom to vote. These claims may ultimately fail on the merits, but Richardson has "standing" to assert them.

Similarly, I would hold that respondent Reservists Committee and its members have demonstrated sufficient "injury in fact" to maintain their suit. Their allegation that they are injured as taxpayers, while at first glance seeming extraordinarily difficult to prove, is neither impossible nor, on the basis of this record, made in bad faith. If the Secretary of Defense takes a contrary posi-

tion with regard to either of these requirements, it is open to him to move for summary judgment and compel respondents to establish their position. See *Barlow, supra,* at 175. More stringent requirements, such as the Court's demand that these respondents satisfy *Flast*'s "nexus" requirement, are not appropriate issues for resolution under the rubric of "standing." Since I would find the injury-in-fact requirement met by respondents' taxpayer allegation, I have no occasion to reach the question whether respondent Reservists Committee and its members' allegations of injury to their interests as citizens would be sufficient to confer standing under the circumstances of this case.

Unlike my Brother STEWART, who distinguishes these two cases, I would find that *Flast* v. *Cohen,* 392 U. S. 83 (1968), supports the conclusion that these allegations of injury-in-fact are sufficient to give respondents in both cases "standing." Speaking generally of standing, we there said:

> "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' *Baker* v. *Carr,* 369 U. S. 186, 204 (1962). In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." *Id.,* at 99–100.

552-191 O - 76 - 18

The two-pronged test fashioned by *Flast* was not a qualification upon these general principles but was fashioned solely as a determinant of standing of plaintiffs alleging only injury as taxpayers who challenge alleged violations of the Establishment and Free Exercise Clauses of the First Amendment. See *Barlow* v. *Collins, supra,* at 170–172. The extension of that test to the very different challenges here only produces the confusion evidenced by the differing views of the *Flast* test expressed in the several opinions filed today in these cases. Outside its proper sphere, as my Brother POWELL soundly observes, that test is not "a reliable indicator of when a federal taxpayer has standing." *United States* v. *Richardson, ante,* at 180. We avoid that confusion if, as I said in *Barlow, supra,* at 176, we recognize:

> "[A]lleged injury in fact, reviewability, and the merits pose questions that are largely distinct from one another, each governed by its own considerations. To fail to isolate and treat each inquiry independently of the other two, so far as possible, is to risk obscuring what is at issue in a given case, and thus to risk uninformed, poorly reasoned decisions that may result in injustice. . . .
>
> "The risk of ambiguity and injustice can be minimized by cleanly severing, so far as possible, the inquiries into reviewability and the merits from the determination of standing."

MR. JUSTICE MARSHALL, dissenting.

I agree with my Brother DOUGLAS that respondents have standing as citizens to bring this action. I cannot accept the majority's characterization of respondents' complaint as alleging only "injury in the abstract" and " 'generalized grievances' about the conduct of the Gov-

ernment." *Ante,* at 217. According to their complaint, respondents are present and former members of the various Armed Forces Reserves

> "organized for the purpose of opposing the military involvement of the United States in Vietnam and of using all lawful means to end that involvement, including efforts by its members individually to persuade the Congress of the United States and all members of the Congress to take all steps necessary and appropriate to end that involvement."

The specific interest which they thus asserted, and which they alleged had been infringed by violations of the Incompatibility Clause, though doubtless widely shared, is certainly not a "general interest common to all members of the public." *Ex parte Lévitt,* 302 U. S. 633, 634 (1937). Not all citizens desired to have the Congress take all steps necessary to terminate American involvement in Vietnam, and not all citizens who so desired sought to persuade members of Congress to that end.

Respondents nevertheless had a right under the First Amendment to attempt to persuade Congressmen to end the war in Vietnam. And respondents have alleged a right, under the Incompatibility Clause, to have their arguments considered by Congressmen not subject to a conflict of interest by virtue of their positions in the Armed Forces Reserves. Respondents' complaint therefore states, in my view, a claim of direct and concrete injury to a judicially cognizable interest. It is a sad commentary on our priorities that a litigant who contends that a violation of a federal statute has interfered with his aesthetic appreciation of natural resources can have that claim heard by a federal court, see *United States* v. *SCRAP,* 412 U. S. 669, 687 (1973), while one who contends that a violation of a specific provision of the United

States Constitution has interfered with the effectiveness of expression protected by the First Amendment is turned away without a hearing on the merits of his claim.

I respectfully dissent.

Syllabus

MIAMI HERALD PUBLISHING CO., DIVISION OF KNIGHT NEWSPAPERS, INC. *v.* TORNILLO

APPEAL FROM THE SUPREME COURT OF FLORIDA

No. 73–797. Argued April 17, 1974—Decided June 25, 1974

After appellant newspaper had refused to print appellee's replies to editorials critical of appellee's candidacy for state office, appellee brought suit in Florida Circuit Court seeking injunctive and declaratory relief and damages, based on Florida's "right of reply" statute that grants a political candidate a right to equal space to answer criticism and attacks on his record by a newspaper, and making it a misdemeanor for the newspaper to fail to comply. The Circuit Court held the statute unconstitutional as infringing on the freedom of the press and dismissed the action. The Florida Supreme Court reversed, holding that the statute did not violate constitutional guarantees, and that civil remedies, including damages, were available, and remanded to the trial court for further proceedings. *Held:*

1. The Florida Supreme Court's judgment is "final" under 28 U. S. C. § 1257, and thus is ripe for review by this Court. *North Dakota Pharmacy Bd.* v. *Snyder's Stores,* 414 U. S. 156. Pp. 246–247.

2. The statute violates the First Amendment's guarantee of a free press. Pp. 247–258.

(a) Governmental compulsion on a newspaper to publish that which "reason" tells it should not be published is unconstitutional. P. 256.

(b) The statute operates as a command by a State in the same sense as a statute or regulation forbidding appellant to publish specified matter. P. 256.

(c) The statute exacts a penalty on the basis of the content of a newspaper by imposing additional printing, composing, and materials costs and by taking up space that could be devoted to other material the newspaper may have preferred to print. Pp. 256–257.

(d) Even if a newspaper would face no additional costs to comply with the statute and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the statute still fails to clear the First Amendment's barriers because of its

intrusion into the function of editors in choosing what material goes into a newspaper and in deciding on the size and content of the paper and the treatment of public issues and officials. P. 258.

287 So. 2d 78, reversed.

BURGER, C. J., delivered the opinion for a unanimous Court. BRENNAN, J., filed a concurring statement, in which REHNQUIST, J., joined, *post*, p. 258. WHITE, J., filed a concurring opinion, *post*, p. 259.

Daniel P. S. Paul argued the cause for appellant. With him on the briefs were *James W. Beasley, Jr.*, and *Richard M. Schmidt, Jr.*

Jerome A. Barron argued the cause for appellee. With him on the brief were *Tobias Simon* and *Elizabeth duFresne.**

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*Briefs of *amici curiae* urging reversal were filed by *Joseph A. Califano, Jr.*, and *Richard M. Cooper* for Washington Post Co.; by *Robert C. Lobdell* and *Robert S. Warren* for Times Mirror Co.; by *James W. Rodgers* for New York News Inc.; by *Don H. Reuben* and *Lawrence Gunnels* for Chicago Tribune Co. et al.; by *Harold B. Wahl* for Florida Publishing Co.; by *William C. Ballard* for Times Publishing Co.; by *Spessard Lindsey Holland, Jr.*, for Gannett Florida Corp. et al.; by *Arthur B. Hanson, W. Frank Stickle, Jr.*, and *Ralph N. Albright, Jr.*, for the American Newspaper Publishers Assn.; by *William G. Mullen* for the National Newspaper Assn.; by *Leonard H. Marks* for the American Society of Newspaper Editors et al.; by *Lawrence E. Walsh* and *Guy Miller Struve* for the Reporters Committee for Freedom of the Press Legal Defense and Research Fund et al.; by *John B. Summers* for the National Association of Broadcasters; by *J. Laurent Scharff* for Radio Television News Directors Assn.; by *Floyd Abrams, Corydon B. Dunham,* and *Howard Monderer* for National Broadcasting Co., Inc.; by *Harry A. Inman* and *D. Robert Owen* for Dow Jones & Co., Inc., et al.; and by *Jonathan L. Alpert, Irma Robbins Feder,* and *Richard Yale Feder* for the American Civil Liberties Union of Florida.

Briefs of *amici curiae* urging affirmance were filed by *Albert H. Kramer* and *Thomas R. Asher* for the National Citizens Committee for Broadcasting, and by *Donald U. Sessions pro se.*

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

The issue in this case is whether a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper violates the guarantees of a free press.

I

In the fall of 1972, appellee, Executive Director of the Classroom Teachers Association, apparently a teachers' collective-bargaining agent, was a candidate for the Florida House of Representatives. On September 20, 1972, and again on September 29, 1972, appellant printed editorials critical of appellee's candidacy.[1] In

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[1] The text of the September 20, 1972, editorial is as follows:

"The State's Laws And Pat Tornillo

"LOOK who's upholding the law!

"Pat Tornillo, boss of the Classroom Teachers Association and candidate for the State Legislature in the Oct. 3 runoff election, has denounced his opponent as lacking 'the knowledge to be a legislator, as evidenced by his failure to file a list of contributions to and expenditures of his campaign as required by law.'

"Czar Tornillo calls 'violation of this law inexcusable.'

"This is the same Pat Tornillo who led the CTA strike from February 19 to March 11, 1968, against the school children and taxpayers of Dade County. Call it whatever you will, it was an illegal act against the public interest and clearly prohibited by the statutes.

"We cannot say it would be illegal but certainly it would be inexcusable of the voters if they sent Pat Tornillo to Tallahassee to occupy the seat for District 103 in the House of Representatives."

The text of the September 29, 1972, editorial is as follows:

"FROM the people who brought you this—the teacher strike of '68—come now instructions on how to vote for responsible government, i.e., against Crutcher Harrison and Ethel Beckham, for Pat Tornillo. The tracts and blurbs and bumper stickers pile up daily in teachers' school mailboxes amidst continuing pouts that the School Board should be delivering all this at your expense. The screeds

response to these editorials appellee demanded that appellant print verbatim his replies, defending the role of the Classroom Teachers Association and the organization's accomplishments for the citizens of Dade County. Appellant declined to print the appellee's replies, and appellee brought suit in Circuit Court, Dade County, seeking declaratory and injunctive relief and actual and punitive damages in excess of $5,000. The action was premised on Florida Statute § 104.38 (1973), a "right of reply" statute which provides that if a candidate for nomination or election is assailed regarding his personal character or official record by any newspaper, the candidate has the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper's charges. The reply must appear in as conspicuous a place and in the same kind of type as the charges which prompted the reply, provided it does not take up more space than the charges. Failure to comply with the statute constitutes a first-degree misdemeanor.[2]

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say the strike is not an issue. We say maybe it wouldn't be were it not a part of a continuation of disregard of any and all laws the CTA might find aggravating. Whether in defiance of zoning laws at CTA Towers, contracts and laws during the strike, or more recently state prohibitions against soliciting campaign funds amongst teachers, CTA says fie and try and sue us—what's good for CTA is good for CTA and that is natural law. Tornillo's law, maybe. For years now he has been kicking the public shin to call attention to his shakedown statesmanship. He and whichever acerbic prexy is in alleged office have always felt their private ventures so chock-full of public weal that we should leap at the chance to nab the tab, be it half the Glorious Leader's salary or the dues checkoff or anything else except perhaps mileage on the staff hydrofoil. Give him public office, says Pat, and he will no doubt live by the Golden Rule. Our translation reads that as more gold and more rule."

[2] "104.38 *Newspaper assailing candidate in an election; space for reply*—If any newspaper in its columns assails the personal charac-

Appellant sought a declaration that § 104.38 was unconstitutional. After an emergency hearing requested by appellee, the Circuit Court denied injunctive relief because, absent special circumstances, no injunction could properly issue against the commission of a crime, and held that § 104.38 was unconstitutional as an infringement on the freedom of the press under the First and Fourteenth Amendments to the Constitution. 38 Fla. Supp. 80 (1972). The Circuit Court concluded that dictating what a newspaper must print was no different from dictating what it must not print. The Circuit Judge viewed the statute's vagueness as serving "to restrict and stifle protected expression." *Id.*, at 83. Appellee's cause was dismissed with prejudice.

On direct appeal, the Florida Supreme Court reversed, holding that § 104.38 did not violate constitutional guarantees. 287 So. 2d 78 (1973).[3] It held that free speech was enhanced and not abridged by the Florida right-of-reply statute, which in that court's view, furthered the "broad societal interest in the free flow of information to the public." *Id.*, at 82. It also held that the statute is

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ter of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083."

[3] The Supreme Court did not disturb the Circuit Court's holding that injunctive relief was not proper in this case even if the statute were constitutional. According to the Supreme Court neither side took issue with that part of the Circuit Court's decision. 287 So. 2d, at 85.

not impermissibly vague; the statute informs "those who are subject to it as to what conduct on their part will render them liable to its penalties." *Id.*, at 85.[4] Civil remedies, including damages, were held to be available under this statute; the case was remanded to the trial court for further proceedings not inconsistent with the Florida Supreme Court's opinion.

We postponed consideration of the question of jurisdiction to the hearing of the case on the merits. 414 U. S. 1142 (1974).

II

Although both parties contend that this Court has jurisdiction to review the judgment of the Florida Supreme Court, a suggestion was initially made that the judgment of the Florida Supreme Court might not be "final" under 28 U. S. C. § 1257.[5] In *North Dakota State Pharmacy Bd.* v. *Snyder's Stores*, 414 U. S. 156 (1973), we reviewed a judgment of the North Dakota Supreme Court, under which the case had been remanded so that further state proceedings could be conducted respecting Snyder's application for a permit to operate a drug store. We held that to be a final judgment for purposes of our jurisdiction. Under the principles of finality enunciated in *Snyder's Stores*, the judgment of

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[4] The Supreme Court placed the following limiting construction on the statute:

"[W]e hold that the mandate of the statute refers to 'any reply' which is wholly responsive to the charge made in the editorial or other article in a newspaper being replied to and further that such reply will be neither libelous nor slanderous of the publication nor anyone else, nor vulgar nor profane." *Id.*, at 86.

[5] Appellee's Response to Appellant's Jurisdictional Statement and Motion to Affirm the Judgment Below or, in the Alternative, to Dismiss the Appeal 4–7.

the Florida Supreme Court in this case is ripe for review by this Court.[6]

III

A

The challenged statute creates a right to reply to press criticism of a candidate for nomination or election. The statute was enacted in 1913, and this is only the second recorded case decided under its provisions.[7]

Appellant contends the statute is void on its face because it purports to regulate the content of a newspaper in violation of the First Amendment. Alternatively it is urged that the statute is void for vagueness since no editor could know exactly what words would call the statute into operation. It is also contended that the statute fails to distinguish between critical comment which is and which is not defamatory.

B

The appellee and supporting advocates of an enforceable right of access to the press vigorously argue that

[6] Both appellant and appellee claim that the uncertainty of the constitutional validity of § 104.38 restricts the present exercise of First Amendment rights. Brief for Appellant 41; Brief for Appellee 79. Appellant finds urgency for the present consideration of the constitutionality of the statute in the upcoming 1974 elections. Whichever way we were to decide on the merits, it would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment; an uneasy and unsettled constitutional posture of § 104.38 could only further harm the operation of a free press. *Mills* v. *Alabama*, 384 U. S. 214, 221–222 (1966) (DOUGLAS, J., concurring). See also *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415, 418 n. (1971).

[7] In its first court test the statute was declared unconstitutional. *State* v. *News-Journal Corp.*, 36 Fla. Supp. 164 (Volusia County Judge's Court, 1972). In neither of the two suits, the instant action and the *News-Journal* action, has the Florida Attorney General defended the statute's constitutionality.

government has an obligation to ensure that a wide variety of views reach the public.[8] The contentions of access proponents will be set out in some detail.[9] It is urged that at the time the First Amendment to the Constitution [10] was ratified in 1791 as part of our Bill of Rights the press was broadly representative of the people it was serving. While many of the newspapers were intensely partisan and narrow in their views, the press collectively presented a broad range of opinions to readers. Entry into publishing was inexpensive; pamphlets and books provided meaningful alternatives to the organized press for the expression of unpopular ideas and often treated events and expressed views not covered by conventional newspapers.[11] A true marketplace of ideas existed in which there was relatively easy access to the channels of communication.

Access advocates submit that although newspapers of the present are superficially similar to those of 1791 the press of today is in reality very different from that known in the early years of our national existence. In the past half century a communications revolution has seen the introduction of radio and television into our lives, the promise of a global community through the

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[8] See generally Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967).

[9] For a good overview of the position of access advocates see Lange, The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment, 52 N. C. L. Rev. 1, 8–9 (1973) (hereinafter Lange).

[10] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[11] See Commission on Freedom of the Press, A Free and Responsible Press 14 (1947) (hereinafter sometimes Commission).

use of communications satellites, and the specter of a "wired" nation by means of an expanding cable television network with two-way capabilities. The printed press, it is said, has not escaped the effects of this revolution. Newspapers have become big business and there are far fewer of them to serve a larger literate population.[12] Chains of newspapers, national newspapers, national wire and news services, and one-newspaper towns,[13] are the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events. Major metropolitan newspapers have collaborated to establish news services national in scope.[14] Such national news organizations provide syndicated "interpretive reporting" as well as syndicated features and commentary, all of which can serve as part of the new school of "advocacy journalism."

The elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspaper's being owned by the same interests which own a television station and a radio station, are important components of this trend toward

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[12] Commission 15. Even in the last 20 years there has been a significant increase in the number of people likely to read newspapers. Bagdikian, Fat Newspapers and Slim Coverage, Columbia Journalism Review 15, 16 (Sept./Oct. 1973).

[13] "Nearly half of U. S. daily newspapers, representing some three-fifths of daily and Sunday circulation, are owned by newspaper groups and chains, including diversified business conglomerates. One-newspaper towns have become the rule, with effective competition operating in only 4 percent of our large cities." Background Paper by Alfred Balk in Twentieth Century Fund Task Force Report for a National News Council, A Free and Responsive Press 18 (1973).

[14] Report of the Task Force in Twentieth Century Fund Task Force Report for a National News Council, A Free and Responsive Press 4 (1973).

concentration of control of outlets to inform the public.

The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion.[15] Much of the editorial opinion and commentary that is printed is that of syndicated columnists distributed nationwide and, as a result, we are told, on national and world issues there tends to be a homogeneity of editorial opinion, commentary, and interpretive analysis. The abuses of bias and manipulative reportage are, likewise, said to be the result of the vast accumulations of unreviewable power in the modern media empires. In effect, it is claimed, the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues. The monopoly of the means of communication allows for little or no critical analysis of the media except in professional journals of very limited readership.

> "This concentration of nationwide news organizations—like other large institutions—has grown increasingly remote from and unresponsive to the popular constituencies on which they depend and which depend on them." Report of the Task Force in Twentieth Century Fund Task Force Report for a National News Council, A Free and Responsive Press 4 (1973).

Appellee cites the report of the Commission on Freedom of the Press, chaired by Robert M. Hutchins, in which it was stated, as long ago as 1947, that "[t]he right of free

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[15] "Local monopoly in printed news raises serious questions of diversity of information and opinion. What a local newspaper does not print about local affairs does not see general print at all. And, having the power to take initiative in reporting and enunciation of opinions, it has extraordinary power to set the atmosphere and determine the terms of local consideration of public issues." B. Bagdikian, The Information Machines 127 (1971).

public expression has . . . lost its earlier reality." Commission on Freedom of the Press, A Free and Responsible Press 15 (1947).

The obvious solution, which was available to dissidents at an earlier time when entry into publishing was relatively inexpensive, today would be to have additional newspapers. But the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers,[16] have made entry into the marketplace of ideas served by the print media almost impossible. It is urged that the claim of newspapers to be "surrogates for the public" carries with it a concomitant fiduciary obligation to account for that stewardship.[17] From this premise it is reasoned that the only effective way to insure fairness and accuracy and to provide for some accountability is for government to take affirmative action. The First Amendment interest of the public in being informed is said to be in peril because the "marketplace of ideas" is today a monopoly controlled by the owners of the market.

Proponents of enforced access to the press take comfort from language in several of this Court's decisions which suggests that the First Amendment acts as a sword as well as a shield, that it imposes obligations on the owners of the press in addition to protecting the press from government regulation. In *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945), the Court, in

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[16] The newspapers have persuaded Congress to grant them immunity from the antitrust laws in the case of "failing" newspapers for joint operations. 84 Stat. 466, 15 U. S. C. § 1801 *et seq.*

[17] "Freedom of the press is a right belonging, like all rights in a democracy, to all the people. As a practical matter, however, it can be exercised only by those who have effective access to the press. Where financial, economic, and technological conditions limit such access to a small minority, the exercise of that right by that minority takes on fiduciary or quasi-fiduciary characteristics." A. MacLeish in W. Hocking, Freedom of the Press 99 n. 4 (1947) (italics omitted).

rejecting the argument that the press is immune from the antitrust laws by virtue of the First Amendment, stated:

> "The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." (Footnote omitted.)

In *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964), the Court spoke of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." It is argued that the "uninhibited, robust" debate is not "wide-open" but open only to a monopoly in control of the press. Appellee cites the plurality opinion in *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, 47, and n. 15 (1971), which he suggests seemed to invite experimentation by the States in right-to-access regulation of the press.[18]

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[18] "If the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the

Access advocates note that MR. JUSTICE DOUGLAS a decade ago expressed his deep concern regarding the effects of newspaper monopolies:

> "Where one paper has a monopoly in an area, it seldom presents two sides of an issue. It too often hammers away on one ideological or political line using its monopoly position not to educate people, not to promote debate, but to inculcate in its readers one philosophy, one attitude—and to make money."
>
> "The newspapers that give a variety of views and news that is not slanted or contrived are few indeed. And the problem promises to get worse . . . ." The Great Rights 124–125, 127 (E. Cahn ed. 1963).

They also claim the qualified support of Professor Thomas I. Emerson, who has written that "[a] limited right of access to the press can be safely enforced,"

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direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern.[*]

"[*]Some states have adopted retraction statutes or right-of-reply statutes . . . .

"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."

552-191 O - 76 - 19

although he believes that "[g]overnment measures to encourage a multiplicity of outlets, rather than compelling a few outlets to represent everybody, seems a preferable course of action." T. Emerson, The System of Freedom of Expression 671 (1970).

IV

However much validity may be found in these arguments, at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual.[19] If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years.[20]

The Court foresaw the problems relating to government-enforced access as early as its decision in *Associated Press* v. *United States, supra.* There it carefully contrasted the private "compulsion to print" called for by the Association's bylaws with the provisions of the District Court decree against appellants which "does not compel AP or its members to permit publication of anything which their 'reason' tells them should not be published." 326 U. S., at 20 n. 18. In *Branzburg* v. *Hayes,* 408 U. S. 665, 681 (1972), we emphasized that the cases then

[19] The National News Council, an independent and voluntary body concerned with press fairness, was created in 1973 to provide a means for neutral examination of claims of press inaccuracy. The Council was created following the publication of the Twentieth Century Fund Task Force Report for a National News Council, A Free and Responsive Press. The background paper attached to the Report dealt in some detail with the British Press Council, seen by the author of the paper as having the most interest to the United States of the European press councils.

[20] Because we hold that § 104.38 violates the First Amendment's guarantee of a free press we have no occasion to consider appellant's further argument that the statute is unconstitutionally vague.

before us "involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold." In *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U. S. 94, 117 (1973), the plurality opinion as to Part III noted:

> "The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers."

An attitude strongly adverse to any attempt to extend a right of access to newspapers was echoed by other Members of this Court in their separate opinions in that case. *Id.,* at 145 (STEWART, J., concurring); *id.,* at 182 n. 12 (BRENNAN, J., joined by MARSHALL, J., dissenting). Recently, while approving a bar against employment advertising specifying "male" or "female" preference, the Court's opinion in *Pittsburgh Press Co.* v. *Human Relations Comm'n,* 413 U. S. 376, 391 (1973), took pains to limit its holding within narrow bounds:

> "Nor, *a fortiori,* does our decision authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial."

Dissenting in *Pittsburgh Press,* MR. JUSTICE STEWART, joined by MR. JUSTICE DOUGLAS, expressed the view that no "government agency—local, state, or federal—can tell

a newspaper in advance what it can print and what it cannot." *Id.*, at 400. See *Associates & Aldrich Co.* v. *Times Mirror Co.*, 440 F. 2d 133, 135 (CA9 1971).

We see that beginning with *Associated Press, supra,* the Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such a compulsion to publish that which " 'reason' tells them should not be published" is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.

Appellee's argument that the Florida statute does not amount to a restriction of appellant's right to speak because "the statute in question here has not prevented the *Miami Herald* from saying anything it wished" [21] begs the core question. Compelling editors or publishers to publish that which " 'reason' tells them should not be published" is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers. *Grosjean* v. *American Press Co.*, 297 U. S. 233, 244–245 (1936). The Florida statute exacts a penalty on the basis of the content of a newspaper. The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print. It is correct, as appellee contends, that a newspaper is not subject to the

[21] Brief for Appellee 5.

finite technological limitations of time that confront a broadcaster but it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available.[22]

Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced.[23] Government-enforced right of access inescapably "dampens the vigor and limits the variety of public debate," *New York Times Co.* v. *Sullivan,* 376 U. S., at 279. The Court, in *Mills* v. *Alabama,* 384 U. S. 214, 218 (1966), stated:

> "[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates . . . ."

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[22] "However, since the amount of space a newspaper can devote to 'live news' is finite,[*] if a newspaper is forced to publish a particular item, it must as a practical matter, omit something else.

"[*]The number of column inches available for news is predetermined by a number of financial and physical factors, including circulation, the amount of advertising, and, increasingly, the availability of newsprint. . . ." Note, 48 Tulane L. Rev. 433, 438 (1974) (one footnote omitted).

Another factor operating against the "solution" of adding more pages to accommodate the access matter is that "increasingly subscribers complain of bulky, unwieldy papers." Bagdikian, Fat Newspapers and Slim Coverage, Columbia Journalism Review 19 (Sept./Oct. 1973).

[23] See the description of the likely effect of the Florida statute on publishers, in Lange 70–71.

Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising.[24] The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. Accordingly, the judgment of the Supreme Court of Florida is reversed.

It is so ordered.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE REHNQUIST joins, concurring.

I join the Court's opinion which, as I understand it, addresses only "right of reply" statutes and implies no view upon the constitutionality of "retraction" statutes affording plaintiffs able to prove defamatory falsehoods a statutory action to require publication of a retraction.

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[24] "[L]iberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper. A journal does not merely print observed facts the way a cow is photographed through a plate-glass window. As soon as the facts are set in their context, you have interpretation and you have selection, and editorial selection opens the way to editorial suppression. Then how can the state force abstention from discrimination in the news without dictating selection?" 2 Z. Chafee, Government and Mass Communications 633 (1947).

See generally Note, Vindication of the Reputation of a Public Official, 80 Harv. L. Rev. 1730, 1739–1747 (1967).

MR. JUSTICE WHITE, concurring.

The Court today holds that the First Amendment bars a State from requiring a newspaper to print the reply of a candidate for public office whose personal character has been criticized by that newspaper's editorials. According to our accepted jurisprudence, the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content is concerned. *New York Times Co.* v. *United States,* 403 U. S. 713 (1971). A newspaper or magazine is not a public utility subject to "reasonable" governmental regulation in matters affecting the exercise of journalistic judgment as to what shall be printed. Cf. *Mills* v. *Alabama,* 384 U. S. 214, 220 (1966). We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficent-sounding the purposes of controlling the press might be, we prefer "the power of reason as applied through public discussion" [1] and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press.

> "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of

[1] *Whitney* v. *California,* 274 U. S. 357, 375 (1927) (Brandeis, J., concurring).

> government, the manner in which government is operated or should be operated, and all such matters relating to political processes. The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free." *Mills* v. *Alabama, supra,* at 218–219.

Of course, the press is not always accurate, or even responsible, and may not present full and fair debate on important public issues. But the balance struck by the First Amendment with respect to the press is that society must take the risk that occasionally debate on vital matters will not be comprehensive and that all viewpoints may not be expressed. The press would be unlicensed because, in Jefferson's words, "[w]here the press is free, and every man able to read, all is safe." [2] Any other accommodation—any other system that would supplant private control of the press with the heavy hand of government intrusion—would make the government the censor of what the people may read and know.

To justify this statute, Florida advances a concededly important interest of ensuring free and fair elections by means of an electorate informed about the issues. But

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[2] Letter to Col. Charles Yancey in 14 The Writings of Thomas Jefferson 384 (Lipscomb ed. 1904).

prior compulsion by government in matters going to the very nerve center of a newspaper—the decision as to what copy will or will not be included in any given edition—collides with the First Amendment. Woven into the fabric of the First Amendment is the unexceptionable, but nonetheless timeless, sentiment that "liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper." 2 Z. Chafee, Government and Mass Communications 633 (1947).

The constitutionally obnoxious feature of § 104.38 is not that the Florida Legislature may also have placed a high premium on the protection of individual reputational interests; for government certainly has "a pervasive and strong interest in preventing and redressing attacks upon reputation." *Rosenblatt* v. *Baer*, 383 U. S. 75, 86 (1966). Quite the contrary, this law runs afoul of the elementary First Amendment proposition that government may not force a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor. Whatever power may reside in government to influence the publishing of certain narrowly circumscribed categories of material, see, *e. g.*, *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. 376 (1973); *New York Times Co.* v. *United States*, 403 U. S., at 730 (WHITE, J., concurring), we have never thought that the First Amendment permitted public officials to dictate to the press the contents of its news columns or the slant of its editorials.

But though a newspaper may publish without government censorship, it has never been entirely free from liability for what it chooses to print. See *ibid.* Among other things, the press has not been wholly at liberty to publish falsehoods damaging to individual reputation. At least until today, we have cherished the average citizen's

reputation interest enough to afford him a fair chance to vindicate himself in an action for libel characteristically provided by state law. He has been unable to force the press to tell his side of the story or to print a retraction, but he has had at least the opportunity to win a judgment if he has been able to prove the falsity of the damaging publication, as well as a fair chance to recover reasonable damages for his injury.

Reaffirming the rule that the press cannot be forced to print an answer to a personal attack made by it, however, throws into stark relief the consequences of the new balance forged by the Court in the companion case also announced today. *Gertz* v. *Robert Welch, Inc.*, *post*, p. 323, goes far toward eviscerating the effectiveness of the ordinary libel action, which has long been the only potent response available to the private citizen libeled by the press. Under *Gertz*, the burden of proving liability is immeasurably increased, proving damages is made exceedingly more difficult, and vindicating reputation by merely proving falsehood and winning a judgment to that effect are wholly foreclosed. Needlessly, in my view, the Court trivializes and denigrates the interest in reputation by removing virtually all the protection the law has always afforded.

Of course, these two decisions do not mean that because government may not dictate what the press is to print, neither can it afford a remedy for libel in any form. *Gertz* itself leaves a putative remedy for libel intact, albeit in severely emaciated form; and the press certainly remains liable for knowing or reckless falsehoods under *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), and its progeny, however improper an injunction against publication might be.

One need not think less of the First Amendment to sustain reasonable methods for allowing the average citi-

zen to redeem a falsely tarnished reputation. Nor does one have to doubt the genuine decency, integrity, and good sense of the vast majority of professional journalists to support the right of any individual to have his day in court when he has been falsely maligned in the public press. The press is the servant, not the master, of the citizenry, and its freedom does not carry with it an unrestricted hunting license to prey on the ordinary citizen.

> "In plain English, freedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise." "Without . . . a lively sense of responsibility a free press may readily become a powerful instrument of injustice." *Pennekamp* v. *Florida*, 328 U. S. 331, 356, 365 (1946) (Frankfurter, J., concurring) (footnote omitted).

To me it is a near absurdity to so deprecate individual dignity, as the Court does in *Gertz*, and to leave the people at the complete mercy of the press, at least in this stage of our history when the press, as the majority in this case so well documents, is steadily becoming more powerful and much less likely to be deterred by threats of libel suits.

OLD DOMINION BRANCH NO. 496, NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL–CIO, ET AL. *v.* AUSTIN ET AL.

APPEAL FROM SUPREME COURT OF VIRGINIA

No. 72–1180. Argued November 14, 1973—
Decided June 25, 1974

As part of its ongoing efforts to organize the remainder of letter carriers, appellant union, the carriers' collective-bargaining representative in Richmond, Virginia, published a "List of Scabs" in its newsletter, including the names of appellees, together with a pejorative definition of "scab" using words like "traitor." Appellees brought libel actions. Though recognizing that the case involved the publications of a labor union that were relevant to the union's organizational campaign, the trial court overruled appellants' motions to dismiss based on the ground that the publication had First Amendment and federal labor law protection. The court interpreted *Linn* v. *Plant Guard Workers*, 383 U. S. 53, to permit application of state libel laws as long as the challenged statements were made with "actual malice," defined as being "actuated by some sinister or corrupt motive such as hatred, personal spite, ill will, or desire to injure the plaintiff . . . or . . . with such gross indifference and recklessness as to amount to a wanton or wilful disregard of the rights of the plaintiff." The jury awarded appellees damages, and the State Supreme Court affirmed. *Held:*

1. Although *Linn* v. *Plant Guard Workers*, *supra*, held that federal labor law does not completely pre-empt the application of state laws to libels published during labor disputes, that decision recognized that federal law does pre-empt state law to the extent that the State seeks to make actionable defamatory statements in labor disputes published without knowledge of their falsity or reckless disregard of the truth. Pp. 270–273.

2. Federal labor laws favor uninhibited, robust, and wide-open debate in labor disputes. Pp. 273–279.

(a) The relevant law here is Executive Order No. 11491, governing labor relations in federal employment. The basic provisions of the Executive Order are like those of the National Labor Relations Act, and similarly afford wide latitude for union freedom

of speech. The partial pre-emption of *Linn* is thus equally applicable here. Pp. 273–279.

(b) The free speech protections afforded union organizing efforts extend to post-recognition organizing activity to the same degree as to pre-recognition activity. P. 279.

3. The trial court's instruction defining malice in common-law terms was erroneous and reflected a misunderstanding of *Linn*, which adopted the reckless-or-knowing-falsehood test of *New York Times Co.* v. *Sullivan*, 376 U. S. 254. Pp. 280–282.

4. The state libel award arising out of the publication of the union newsletter here did not comport with the protection for freedom of speech in labor disputes recognized in *Linn*. The use of the epithet "scab," which was literally and factually true and is common parlance in labor disputes, was protected under federal law. Publication of the pejorative definition was likewise not actionable, since the use of words like "traitor" cannot be construed as representations of fact and their use in a figurative sense to manifest the union's strong disagreement with the views of workers opposing unionization is also protected by federal law. Cf. *Greenbelt Cooperative Publishing Assn.* v. *Bresler*, 398 U. S. 6. Pp. 282–287.

213 Va. 377, 192 S. E. 2d 737, reversed.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, and BLACKMUN, JJ., joined. DOUGLAS, J., filed an opinion concurring in the result, *post*, p. 287. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 291.

Mozart G. Ratner argued the cause for appellants. With him on the brief were *George B. Driesen* and *Israel Steingold*.

Parker E. Cherry and *Stephen M. Kapral* argued the cause and filed a brief for appellees.*

*Briefs of *amici curiae* urging reversal were filed by *J. Albert Woll*, *Laurence Gold*, and *Thomas E. Harris* for the American Federation of Labor and Congress of Industrial Organizations, and by *Melvin L. Wulf* and *Joel M. Gora* for the American Civil Liberties Union.

James Newton Wilhoit III, *Rex H. Reed*, and *John L. Kilcullen* filed a brief for the National Right to Work Legal Defense Foundation as *amicus curiae* urging affirmance.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case involves three state libel judgments imposing liability of $165,000 on a labor union as a result of statements made in a union newsletter during a continuing organizational drive. The question presented is whether these libel judgments can be squared with the freedom of speech in labor disputes guaranteed under federal law.

I

Appellant Old Dominion Branch No. 496 is a local union affiliated with the appellant National Association of Letter Carriers, AFL–CIO. At all times relevant to this case, the Branch was recognized by postal authorities as the exclusive local collective-bargaining representative of letter carriers in the Richmond, Virginia, area in accordance with § 10 of Executive Order No. 11491,[1] governing labor-management relations in the Executive Branch of the Federal Government. Appellees, Henry M.

[1] 34 Fed. Reg. 17605 (1969), 3 CFR 861 (1966–1970 Compilation), as amended, 3 CFR 254 (1974). The Executive Order was promulgated on October 29, 1969, and became effective on January 1, 1970. It remains in effect with respect to most employees in the Executive Branch today. Postal employees, however, are no longer covered by the Executive Order. The Postal Reorganization Act of 1970, 84 Stat. 719, converted the cabinet-level Post Office Department into the United States Postal Service, an "independent establishment of the executive branch," 39 U. S. C. § 201. As part of this reorganization, labor-management relations in the Postal Service were largely placed under the regulation of the National Labor Relations Act and the NLRB, effective July 1, 1971. See 39 U. S. C. §§ 1201–1209. While the Branch apparently remains the exclusive bargaining representative for letter carriers in Richmond under the Postal Reorganization Act, this case arose during the brief period when the Executive Order was controlling.

Austin, L. D. Brown, and Roy P. Ziegengeist, were letter carriers in Richmond who neither were members of the Union nor paid any dues or fees to the Union.[2]

Although it had already been selected as bargaining representative by a majority of the postal workers in the unit, the Branch in the spring of 1970 was engaged in an ongoing effort to organize the remainder of the letter carriers. As part of this campaign, the Branch periodically published in its monthly newsletter, the Carrier's Corner, a list of those who had not yet joined the Union, under the heading "List of Scabs." After his name twice appeared in the "List of Scabs," appellee Austin complained to the Richmond Postmaster and the President of the Branch that the Union was trying to coerce him into joining. Austin said that he did not know what a scab was, but that he was going to sue the Union if he was called a scab again.

Several weeks later, the June issue of the Carrier's Corner was distributed to Branch members. Once again the newsletter contained a "List of Scabs," including the names of the three appellees, as well as 12 others. Just above the list of names, the newsletter noted that "[s]ome co-workers are in a quandary as to what a scab is" and said "we submit the following." There followed

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[2] Section 12 (c) of the Executive Order provides:

"[N]othing in the agreement [between an agency and a labor organization] shall require an employee to become or to remain a member of a labor organization, or to pay money to the organization . . . ."

The Postal Reorganization Act continues this prohibition of union security agreements, 39 U. S. C. § 1209 (c). The NLRA, of course, permits certain union security agreements, § 8 (a)(3), 61 Stat. 140, 29 U. S. C. § 158 (a)(3), except insofar as they may violate state law, § 14 (b), 29 U. S. C. § 164 (b). See *Retail Clerks* v. *Schermerhorn*, 375 U. S. 96 (1963).

a well-known piece of trade union literature, generally attributed to author Jack London, which purported to supply a definition:

"The Scab

"After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which He made a *scab.*

"A scab is a two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles.

"When a scab comes down the street, men turn their backs and Angels weep in Heaven, and the Devil shuts the gates of hell to keep him out.

"No man (or woman) has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas was a gentleman compared with a scab. For betraying his Master, he had character enough to hang himself. A scab has not.

"Esau sold his birthright for a mess of pottage. Judas sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. *The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer.*

"Esau was a traitor to himself; Judas was a traitor to his God; Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class." App. 8–9. (Emphasis supplied.)

Appellees filed these defamation actions against the Branch and the National Association shortly after the

June newsletter was published.[3] Appellants sought dismissal of the actions on the ground that the publication was protected speech under the First Amendment and under federal labor law. The trial judge recognized that this case involved the "publications of a labor union which [were] relevant to and in the course of a campaign to organize federal employees." App. 20. Nevertheless, he overruled the demurrers, interpreting this Court's decision in *Linn* v. *Plant Guard Workers,* 383 U. S. 53 (1966), to permit application of state libel laws in such circumstances as long as the statements were made with "actual malice." The judge defined "actual malice" in his instructions to the jury as follows:

> "The term 'actual malice' is that conduct which shows in fact that at the time the words were printed they were actuated by some sinister or corrupt motive such as hatred, personal spite, ill will, or desire to injure the plaintiff; or that the communication was made with such gross indifference and recklessness as to amount to a wanton or wilful disregard of the rights of the plaintiff." App. 93.

The jury returned a verdict awarding each of the appellees $10,000 in compensatory damages and $45,000 in punitive damages.[4]

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[3] These actions are actually based on Virginia's "insulting words" statute, Va. Code Ann. § 8–630 (1957), which provides:

"All words which from their usual construction and common acceptation are construed as insults and tend to violence and breach of the peace shall be actionable."

However, the Virginia courts have held that "[a]n action for insulting words under Code, § 8–630 is treated precisely as an action for slander or libel, for words actionable *per se*" with one exception not relevant here. *Carwile* v. *Richmond Newspapers, Inc.,* 196 Va. 1, 6, 82 S. E. 2d 588, 591 (1954). See opinion below in 213 Va. 377, 381, 192 S. E. 2d 737, 740 (1972).

[4] At least one suit brought by one of the other 12 letter carriers

552-191 O - 76 - 20

The Supreme Court of Virginia affirmed. 213 Va. 377, 192 S. E. 2d 737 (1972). In view of appellants' substantial claims that their statements in the newsletter were protected expression under the First Amendment and federal labor law, and that the state courts had erred in interpreting the pre-emptive effect of *Linn*, we noted probable jurisdiction and set this case for oral argument with No. 72–617, *Gertz* v. *Robert Welch, Inc.*, *post*, p. 323. 412 U. S. 917 (1973). We reverse.

II

As noted, this case calls upon us to determine the extent to which state libel laws may be applied to penalize statements made in the course of labor disputes without undermining the freedom of speech which has long been a basic tenet of federal labor policy. We do not approach this problem, however, with a clean slate. The Court has already performed the difficult task of reconciling the competing state and federal interests involved in this area, and established the framework for our analysis here, in *Linn* v. *Plant Guard Workers*, *supra*.

In *Linn*, an assistant general manager of Pinkerton's Detective Agency brought suit under state libel laws against the Plant Guard Workers in a diversity action in federal court. Linn alleged that statements made in a union leaflet during a campaign to organize the company's employees, which charged him with "lying" to the employees and "robbing" them of pay increases, were false and defamatory. The District Court dismissed the complaint on the ground that the National Labor Relations Board had exclusive jurisdiction over the subject

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whose names were listed in the June newsletter has been held in abeyance pending the outcome of this appeal. The potential damages liability growing out of this publication is thus greater even than the $165,000 which has already been awarded.

matter of the complaint, finding that the union's conduct would arguably be an unfair labor practice under § 8 (b) of the National Labor Relations Act, as amended, 29 U. S. C. § 158 (b), and that the Court's decision in *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236 (1959), therefore compelled dismissal on pre-emption grounds. The Court of Appeals affirmed.

A bare majority of this Court disagreed, however, and held that the NLRA did not completely pre-empt the application of state laws to libels published during labor disputes. The Court found that the exercise of state jurisdiction over such defamation actions would be a "merely peripheral concern" of the federal labor laws, within the meaning of *Garmon,* as long as appropriate substantive limitations were imposed to insure that the freedom of speech guaranteed by federal law was protected. Further, the Court recognized an " 'overriding state interest' in protecting [state] residents from malicious libels." 383 U. S., at 61. Mr. Justice Clark, writing the opinion for the Court, also pointed out that application of state law to libels occurring during labor disputes would not significantly interfere with the NLRB's role in considering arguable contemporaneous violations of the Act. As he observed, the Board has different substantive interests from state libel law, being concerned with the coercive or misleading nature of the statements, rather than their defamatory quality. And the NLRA and state laws provide quite different remedies: only state law can provide damages to compensate the libel victim; only the NLRB can order a new representation election if the libel is found to have substantially affected the outcome of an election.

On the other hand, the Court recognized the danger that unrestricted libel actions under state law could

easily interfere with federal labor policy. The Court observed:

> "Labor disputes are ordinarily heated affairs; the language that is commonplace there might well be deemed actionable *per se* in some state jurisdictions. Indeed, representation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language." 383 U. S., at 58.

This freewheeling use of the written and spoken word, we found, has been expressly fostered by Congress and approved by the NLRB. Thus, Mr. Justice Clark acknowledged that there was "a congressional intent to encourage free debate on issues dividing labor and management," *id.*, at 62, and noted that "the Board has given frequent consideration to the type of statements circulated during labor controversies, and . . . it has allowed wide latitude to the competing parties." *Id.*, at 60.

The Court therefore found it necessary to impose substantive restrictions on the state libel laws to be applied to defamatory statements in labor disputes in order to prevent "unwarranted intrusion upon free discussion envisioned by the Act." *Id.*, at 65. The Court looked to the NLRB's decisions, and found that "although the Board tolerates intemperate, abusive and inaccurate statements made by the union during attempts to organize employees, it does not interpret the Act as giving either party license to injure the other intentionally by circulating defamatory or insulting material known to be false." *Id.*, at 61. The Court therefore found it appropriate to adopt by analogy the standards of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964). Accord-

ingly, we held that libel actions under state law were pre-empted by the federal labor laws to the extent that the State sought to make actionable defamatory statements in labor disputes which were published without knowledge of their falsity or reckless disregard for the truth.

III

In this case, of course, the relevant federal law is Executive Order No. 11491 rather than the NLRA. Nevertheless, we think that the same federal policies favoring uninhibited, robust, and wide-open debate in labor disputes are applicable here, and that the same accommodation of conflicting federal and state interests necessarily follows.[5]

The basic provisions of the Executive Order establish a labor-management relations system for federal employ-

[5] The Executive Order is plainly a reasonable exercise of the President's responsibility for the efficient operation of the Executive Branch. *American Federation of Government Employees* v. *Hampton,* 77 L. R. R. M. 2977 (DC), aff'd *sub nom. Wolkomir* v. *Federal Labor Relations Council,* 79 L. R. R. M. 2634 (CADC 1971), cert. denied, 405 U. S. 920 (1972); *Manhattan-Bronx Postal Union* v. *Gronouski,* 121 U. S. App. D. C. 321, 350 F. 2d 451 (1965), cert. denied, 382 U. S. 978 (1966); cf. *CSC* v. *Letter Carriers,* 413 U. S. 548, 555 (1973). Moreover, the Executive Order finds express statutory authorization in 5 U. S. C. § 7301, which provides that "[t]he President may prescribe regulations for the conduct of employees in the executive branch." In view of the substantial federal interests in effective management of the business of the National Government and exclusive control over the conduct of federal employees, and this congressional authorization, we have no difficulty concluding that the Executive Order is valid and may create rights protected against inconsistent state laws through the Supremacy Clause. See *United States* v. *Pink,* 315 U. S. 203, 230–232 (1942); *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579, 635–637 (1952) (Jackson, J., concurring); *Farkas* v. *Texas Instruments, Inc.,* 375 F. 2d 629, 632 (CA5), cert. denied, 389 U. S. 977 (1967); *Farmer* v. *Philadelphia Electric Co.,* 329 F. 2d 3, 8 (CA3 1964).

ment which is remarkably similar to the scheme of the National Labor Relations Act.[6] Although several significant adjustments have been made to reflect the different structure and responsibilities of the governmental employer,[7] it is apparent that the Order adopted in large part the provisions and policies of the NLRA as its model.[8] Indeed, one of the primary purposes of the

[6] Section 1 of the Order grants federal employees "the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization," as well as "to refrain from any such activity," and provides that "each employee shall be protected in the exercise of this right," much as employees in the private sector are protected by § 7 of the NLRA. Sections 19 (a) and 19 (b) of the Order define unfair labor practices of agency management and unions, respectively, which are largely taken from the prohibitions of §§ 8 (a) and 8 (b) of the NLRA. And § 10 of the Executive Order establishes a system of exclusive recognition of labor organizations chosen by a majority of the employees in an appropriate unit through representation elections by secret ballot, as under § 9 (c)(1) of the NLRA.

Primary responsibility for administration of this system is given to the Assistant Secretary of Labor for Labor-Management Relations, who largely performs the role of the NLRB in the private sector. Under § 6 (a) of the Order, he is empowered to make determinations of appropriate collective-bargaining units, to supervise the conduct of representation elections, and to decide complaints alleging unfair labor practices. Upon a finding of a violation of the Order, § 6 (b) empowers the Assistant Secretary to order Government agencies or unions to cease and desist from violations of the Order, and to take appropriate affirmative action. Appeals from decisions of the Assistant Secretary are heard by the Federal Labor Relations Council, established under § 4 of the Order, which is also given a significant policymaking function.

[7] Most notable among the departures from the NLRA are the prohibition of strikes and picketing in § 19 (b)(4) of the Executive Order and the limitation of subjects of bargaining in § 11 (b). See generally Hampton, Federal Labor-Management Relations: A Program in Evolution, 21 Cath. U. L. Rev. 493 (1972).

[8] See Naumoff, Ground Rules for Recognition under Executive Order 11491, 22 Lab. L. J. 100 (1970); cf. Hart, Government

Executive Order was to "substantially strengthen the Federal labor relations system by bringing it more into line with practices in the private sector of the economy." 5 Presidential Documents 1508 (Oct. 29, 1969) (announcement of the signing of Exec. Order No. 11491). Accordingly, while decisions under the NLRA may not be binding precedent under the Executive Order, the Assistant Secretary of Labor charged with administration of the Order has held that his decisions will "take into account the experience gained in the private sector under the Labor-Management Relations Act." *Charleston Naval Shipyard,* Case Nos. 40–1940 (CA), 40–1950 (CA), A/SLMR No. 1, p. 3 (Nov. 3, 1970).

In light of this basic purpose, we see nothing in the Executive Order which indicates that it intended to restrict in any way the robust debate which has been protected under the NLRA. Such evidence as is available, rather, demonstrates that the same tolerance for union speech which has long characterized our labor relations in the private sector has been carried over under the Executive Order. For example, one of the Regional Administrators under the Executive Order program has stated, in the context of union organizing campaigns:

> "It is a cliché by now but, nonetheless, an embedded policy in labor relations that electioneering or campaigning has a broad tolerance. We do not encourage, nor do we prohibit, the exaggeration, the dissemination of half-truth or accusation. In sum, we leave it to the employee to decide." [9]

Labor's New Frontiers through Presidential Directive, 48 Va. L. Rev. 898, 904–905 (1962) (discussing Exec. Order No. 10988, predecessor of the present Order).

[9] Naumoff, *supra,* n. 8, at 103. Compare the similar language of the Board in *Stewart-Warner Corp.,* 102 N. L. R. B. 1153, 1158 (1953), quoted in *Linn* v. *Plant Guard Workers,* 383 U. S. 53, 60 (1966).

And the Assistant Secretary has held that agency censorship of union materials, even if only to delete "slanderous" or "inflammatory" material, is unlawful interference with employee rights protected under the Order and an unfair labor practice under § 19 (a)(1). *Los Angeles Air Route Traffic Control Center,* Case No. 72–CA–3014 (26), A/SLMR No. 283, App. 4 (June 30, 1973) (summarized in BNA Govt. Empl. Rel. Rep. No. 514, July 30, 1973, p. A–10).

We recognize that the Executive Order does not contain any provision corresponding to § 8 (c) of the NLRA,[10] relied on in part by the Court in *Linn.* But the Court recognized that this section was primarily intended "to prevent the Board from attributing anti-union motive to an *employer* on the basis of his past statements." 383 U. S., at 62–63, n. 5 (emphasis added). A provision corresponding to § 8 (c) was apparently thought unnecessary in the Executive Order because it directs the Government, as employer, to adopt a position of neutrality concerning unionization of its employees.[11] "Government

[10] Section 8 (c) provides:

"The expressing of any views, argument, or opinion, or the dissemination thereof, . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."

[11] This policy of agency neutrality is derived from two parts of the Executive Order. The preamble of the Order recites that

"the well-being of employees and efficient administration of the Government are benefited by providing employees an opportunity to participate in the formulation and implementation of personnel policies and practices affecting the conditions of their employment."

And § 1 (a) directs the head of each agency to

"take the action required to assure that employees in the agency are apprised of their rights under this section and that no interference, restraint, coercion, or discrimination is practiced within

officials do not mount 'vote no' campaigns." Hampton, Federal Labor-Management Relations: A Program in Evolution, 21 Cath. U. L. Rev. 493, 502 (1972).

The primary source of protection for *union* freedom of speech under the NLRA, however, particularly in an organizational context, is the guarantee in § 7 of the Act of the employees' rights "to form, join, or assist labor organizations." [12]

> "Basic to the right guaranteed to employees in § 7 to form, join or assist labor organizations, is the right to engage in concerted activities to persuade other employees to join for their mutual aid and protection. Indeed, even before the Norris-LaGuardia Act and the Wagner Act, this Court recognized a right in unions to 'use all lawful propaganda to enlarge their membership.'" *NLRB* v. *Drivers Local 639*, 362 U. S. 274, 279 (1960) (citations omitted).

Vigorous exercise of this right "to persuade other employees to join" must not be stifled by the threat of liability for the overenthusiastic use of rhetoric or the innocent mistake of fact. Thus, the Board has concluded that statements of fact or opinion relevant to a union organizing campaign are

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his agency to encourage or discourage membership in a labor organization."

See Hampton, *supra*, n. 7, at 501–502.

[12] In other contexts, other provisions of the NLRA may be sources of protection for union freedom of speech. For example, one such source would be the system of representation elections by secret ballot established by § 9 (c) (1) of the Act. Wide latitude for what is written and said in election campaigns is necessary to insure the free exchange of information and opinions, and thus to promote the informed choice by the employees needed to make the system work fairly and effectively. The same policy is applicable under the Executive Order, which establishes in § 10 a similar system of representation elections for federal employees.

protected by § 7, even if they are defamatory and prove to be erroneous, unless made with knowledege of their falsity. See, *e. g., Atlantic Towing Co.,* 75 N. L. R. B. 1169, 1171–1173 (1948). The Court in *Linn* recognized the importance of this § 7 protection, in words quite pertinent to this case:

> "Likewise, in a number of cases, the Board has concluded that epithets such as 'scab,' 'unfair,' and 'liar' are commonplace in these struggles and not so indefensible as to remove them from the protection of § 7, even though the statements are erroneous and defame one of the parties to the dispute." 383 U. S., at 60–61.

These considerations are equally applicable under the Executive Order. Section 1 of the Order guarantees federal employees these same rights.[13]

Section 7 of the NLRA and § 1 of the Executive Order also dispose of appellees' suggestion that no "labor dispute" within the meaning of *Linn* is presented on the facts of this case. It is true, as appellees point out, that there was no dispute between labor and management

[13] Section 1 of the Executive Order does not grant federal employees the right, guaranteed by § 7 of the NLRA for employees in the private sector, "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The right to attempt to persuade others to join the union, however, is derived from the rights to form, join, and assist a union, as well as from the right to engage in concerted activities. The absence of mention of a right to engage in concerted activities is obviously no more than a reflection of the fact that the Order does not permit federal employee unions to engage in strikes or picketing. The prohibition of picketing and the lack of protection for concerted activities might be thought to indicate an intention in the Executive Order to regulate the location or form of employee speech to a somewhat greater extent than under the NLRA, but we do not perceive any intention to curtail in any way the *content* of union speech.

involved here, and that the union's organizing efforts were neither during the course of a representation election campaign nor directed toward achieving recognition. But whether *Linn*'s partial pre-emption of state libel remedies is applicable obviously cannot depend on some abstract notion of what constitutes a "labor dispute"; rather, application of *Linn* must turn on whether the defamatory publication is made in a context where the policies of the federal labor laws leading to protection for freedom of speech are significantly implicated.

As noted, one of the primary reasons for the law's protection of union speech is to insure that union organizers are free to try peacefully to persuade other employees to join the union without inhibition or restraint. Accordingly, we think that any publication made during the course of union organizing efforts, which is arguably relevant to that organizational activity, is entitled to the protection of *Linn*. We see no reason to limit this protection to statements made during representation election campaigns. The protection of § 7 and § 1 is much broader. Indeed, *Linn* itself involved union organizing activity outside the election campaign context. We similarly reject any distinction between union organizing efforts leading to recognition and post-recognition organizing activity. Unions have a legitimate and substantial interest in continuing organizational efforts after recognition. Whether the goal is merely to strengthen or preserve the union's majority, or is to achieve 100% employee membership—a particularly substantial union concern where union security agreements are not permitted, as they are not here, see n. 2, *supra*—these organizing efforts are equally entitled to the protection of § 7 and § 1.[14]

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[14] Appellees argue that, rather than being entitled to the protection of *Linn*, the union's organizing efforts here were unlawful

IV

The courts below did not question the applicability of *Linn* to this case. Instead, both courts believed that *Linn* required only that the jury be instructed that it

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attempts to "coerce" them into joining the union in violation of § 19 (b)(1) of the Order. But we would expect § 19 (b)(1) to be interpreted in light of the construction the Court has given the parallel provision of the NLRA, § 8 (b)(1)(A). In *NLRB* v. *Drivers Local 639*, 362 U. S. 274 (1960), the Court held that § 8 (b)(1)(A) was "a grant of power to the Board limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof." *Id.*, at 290. MR. JUSTICE BRENNAN emphasized that there was no intention to restrict the use by unions of methods of peaceful persuasion, quoting Senator Taft's remarks during the debate on the Taft-Hartley Act:

"It seems to me very clear that so long as a union-organizing drive is conducted by persuasion, by propaganda, so long as it has every legitimate purpose, the Board cannot in any way interfere with it. . . .

"The Board may say, 'You can persuade them; you can put up signs; you can conduct any form of propaganda you want to in order to persuade them, but you cannot, by threat of force or threat of economic reprisal, prevent them from exercising their right to work.'" *Id.*, at 287–288.

It is true that the Executive Order provides that a union may not "interfere with" an employee in the exercise of his right to refrain from joining the union, as well as incorporating the wording of the NLRA making it unlawful to "restrain" or "coerce" an employee. The Court in *Drivers Local 639* pointed out, however, that even the words "interfere with," which originally appeared in a draft of the Taft-Hartley Act, were intended to have a "limited application" and to reach "reprehensible practices" like violence and threats of loss of employment, but not methods of peaceful persuasion. *Id.*, at 286. It seems likely that the Executive Order was similarly not intended to limit union propaganda or prohibit any other method of peaceful persuasion.

In any event, appellees' contention is properly addressed to the Assistant Secretary in the first instance, through an unfair labor practice complaint, and not to this Court. Even if appellees should

must find the defamatory statements to have been made with malice before it could impose liability. And both courts thought that instructions which defined malice in the common-law sense—as "hatred, personal spite, ill will, or desire to injure"—were adequate under *Linn*.

This reflects a fundamental misunderstanding of the Court's holding in *Linn*. The *Linn* Court explicitly adopted the standards of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), and the heart of the *New York Times* test is the requirement that recovery can be permitted only if the defamatory publication was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 280. The adoption in *Linn* of the reckless-or-knowing falsehood test was reiterated time and again in the Court's opinion. See 383 U. S., at 61, 63, 65.

Of course, the Court also said that recovery would be permitted if the defamatory statements were shown to have been made with malice. But the Court was obviously using "malice" in the special sense it was used in *New York Times*—as a shorthand expression of the "knowledge of falsity or reckless disregard of the truth" standard. See *New York Times Co.* v. *Sullivan, supra,* at 279–280. Instructions which permit a jury to impose liability on the basis of the defendant's hatred, spite, ill will, or desire to injure are "clearly impermissible." *Beckley Newspapers Corp.* v. *Hanks*, 389 U. S. 81, 82 (1967). "[I]ll will toward the plaintiff, or bad motives, are not elements of the *New York Times* standard." *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, 52 n. 18 (1971) (opinion of BRENNAN, J.). Accord, *Gar-*

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ultimately prove to be correct, *Linn* is still applicable here, and state libel remedies are pre-empted unless appellees can show that the publication was knowingly false or made with reckless disregard for the truth.

rison v. *Louisiana*, 379 U. S. 64, 73–74, 77–79 (1964); *Henry* v. *Collins*, 380 U. S. 356 (1965); *Rosenblatt* v. *Baer*, 383 U. S. 75, 84 (1966); *Greenbelt Cooperative Publishing Assn.* v. *Bresler*, 398 U. S. 6, 9–11 (1970). It is therefore clear that the libel judgments in this case must be reversed because of the court's erroneous instructions.

This, however, cannot be the end of our inquiry. The Court has often recognized that in cases involving free expression we have the obligation, not only to formulate principles capable of general application, but also to review the facts to insure that the speech involved is not protected under federal law. *New York Times Co.* v. *Sullivan*, *supra*, at 284–285; *Pickering* v. *Board of Education*, 391 U. S. 563, 574–575 (1968); *Greenbelt Cooperative Publishing Assn.* v. *Bresler*, *supra*, at 11. "We must 'make an independent examination of the whole record,' *Edwards* v. *South Carolina*, 372 U. S. 229, 235, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times Co.* v. *Sullivan*, *supra*, at 285.

While this duty has been most often recognized in the context of claims that the expression involved was entitled to First Amendment protection, the same obligation exists in cases involving speech claimed to be protected under the federal labor laws. This obligation, derived from the supremacy of federal labor law over inconsistent state regulation, *Hill* v. *Florida ex rel. Watson*, 325 U. S. 538 (1945); *Teamsters Local 24* v. *Oliver*, 358 U. S. 283, 295–296 (1959), requires us to determine whether any state libel award arising out of the publication of the union newsletter involved here would be inconsistent with the protection for freedom of speech in labor disputes recognized in *Linn*.

It should be clear that the newsletter's use of the epithet "scab" was protected under federal law and can-

not be the basis of a state libel judgment. Rather than being a reckless or knowing falsehood, naming the appellees as scabs was literally and factually true. One of the generally accepted definitions of "scab" is "one who refuses to join a union," Webster's Third New International Dictionary (unabridged ed. 1961), and it is undisputed that the appellees had in fact refused to join the Branch. To be sure, the word is most often used as an insult or epithet. But *Linn* recognized that federal law gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point. Indeed, the Court observed that use of this particular epithet is common parlance in labor disputes and has specifically been held to be entitled to the protection of § 7 of the NLRA. 383 U. S., at 60–61.

Appellees nonetheless argue that the publication here may be actionable under state law, basing their claim on the newsletter's publication of Jack London's "definition of a scab." Appellees contend that this can be read to charge them with having "rotten principles," with lacking "character," and with being "traitor[s]"; that these charges are untrue; and that appellants knew they were untrue. The Supreme Court of Virginia upheld the damages awards here on the basis of these charges. 213 Va., at 384, 192 S. E. 2d, at 742.

We cannot agree. We believe that publication of Jack London's rhetoric is equally entitled to the protection of the federal labor laws.[15] The *sine qua non* of recovery for defamation in a labor dispute under *Linn* is the existence of falsehood. Mr. Justice Clark put it

[15] In view of our conclusion that the publication here was protected under the federal labor laws, we have no occasion to consider the First Amendment arguments advanced by appellants.

quite bluntly: "the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth." 383 U. S., at 63. Before the test of reckless or knowing falsity can be met, there must be a false statement of fact. *Gertz* v. *Robert Welch, Inc., post,* at 339–340. But, in our view, the only factual statement in the disputed publication is the claim that appellees were scabs, that is, that they had refused to join the union.

The definition's use of words like "traitor" cannot be construed as representations of fact. As the Court said long before *Linn,* in reversing a state court injunction of union picketing, "to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like 'unfair' or 'fascist'—is not to falsify facts." *Cafeteria Employees Local 302* v. *Angelos,* 320 U. S. 293, 295 (1943). Such words were obviously used here in a loose, figurative sense to demonstrate the union's strong disagreement with the views of those workers who oppose unionization. Expression of such an opinion, even in the most pejorative terms, is protected under federal labor law. Here, too, "there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz* v. *Robert Welch, Inc., post,* at 339–340.

Appellees' claim is similar to that rejected by the Court recently in *Greenbelt Cooperative Publishing Assn.* v. *Bresler,* 398 U. S. 6 (1970). There, petitioners had characterized the position of the respondent, a public figure, in certain negotiations as "blackmail," and he had recovered damages for libel on the theory that petitioners knew that he had committed no such criminal offense. The Court reversed, holding that this use of the word "blackmail" could not be the basis of a libel judgment

under the *New York Times* standard. MR. JUSTICE STEWART, writing for the Court, reasoned:

> "It is simply impossible to believe that a reader who reached the word 'blackmail' in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable." 398 U. S., at 14 (footnote omitted).

It is similarly impossible to believe that any reader of the Carrier's Corner would have understood the newsletter to be charging the appellees with committing the criminal offense of treason.[16] As in *Bresler*, Jack Lon-

[16] On the contrary, it is apparent from the record that the basis for the libel action in this case was the use of the epithet "scab" rather than the claimed charge of treason. It was the publication of the "List of Scabs" which disturbed the appellees, and which moved appellee Austin to complain prior to the June publication at issue and to threaten to sue if he was called a scab again. Moreover, it appears that the only asserted damage to appellees followed from the publication of the fact that they were "scabs." Appellees testified only that their coworkers and others became hostile to them, referring to them as the "scabs" the union was talking about, and that this made them tense and nervous and caused headaches. There is no evidence that anyone took literally the use of the word "traitor" or that appellees were in any way concerned about or affected by this charge.

Nor can it be claimed that the jury's verdict is itself some indication that the charge of "traitor" was construed as a defama-

552-191 O - 76 - 21

don's "definition of a scab" is merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join. The Court in *Linn* recognized that such exaggerated rhetoric was commonplace in labor disputes and protected by federal law. Indeed, we note that the NLRB has held that the use of this very "definition of a scab" is permissible under federal law. *Cambria Clay Products Co.*, 106 N. L. R. B. 267, 273 (1953), enforced in pertinent part, 215 F. 2d 48 (CA6 1954). It has become a familiar piece of trade union literature; according to undisputed testimony in this case, it has been published countless times in union publications over the last 30 years or more. Permitting state libel judgments based on publication of this piece of literature would be plainly inconsistent with the union's justifiable reliance on the protection of federal law.

This is not to say that there might not be situations where the use of this writing or other similar rhetoric in a labor dispute could be actionable, particularly if some of its words were taken out of context and used in such a way as to convey a false representation of fact. See *Greenbelt Cooperative Publishing Assn.* v. *Bresler, supra,* at 13. But in the context of this case, no such factual representation can reasonably be inferred, and

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tory representation of fact. There is certainly nothing in the trial court's instructions which would suggest that the newsletter's use of "scab" was not the basis for the jury's verdict. The court did not instruct the jury that the use of "scab" could not be the basis for imposing liability. The court did not even instruct the jury that a true statement of fact could not be the foundation for liability. Indeed, the trial court's instruction that "insults" made with "ill will" were sufficient to impose liability fairly invited the jury to base its verdict on the newsletter's use of "scab."

the publication is protected under the federal labor laws.[17] Accordingly, the judgments appealed from must be

Reversed.

MR. JUSTICE DOUGLAS, concurring in the result.

As the Court states, this case calls upon us to determine the extent to which state libel laws may be used to penalize statements expressed in the course of a labor dispute. In this instance Virginia's libel laws were used to impose massive damages[1] upon a labor union for publicly expressing, during the heat of an organizational drive, its highly pejorative but not too surprising opinion of "scabs." I agree that this expression is protected and that the judgments below cannot stand. Unlike the Court, however, I do not view the task of reconciling the competing state and federal interests in this area as a difficult one, nor do I view the federal interest as merely a matter of federal labor policy. I think that such expression is constitutionally protected and I cannot agree that there might be situations "where the use of

[17] Since we find that any libel award on the basis of this publication would be inconsistent with the protection of federal law, we need not rule on appellants' alternative argument that the damages awarded here were excessive. We think it important again to point out, however, that "in view of the propensity of juries to award excessive damages for defamation, the availability of libel actions may pose a threat to the stability of labor unions and smaller employers." *Linn*, 383 U. S., at 64. It is for this reason that the Court in *Linn* held that "[i]f the amount of damages awarded is excessive, it is the *duty* of the trial judge to require a remittitur or a new trial." *Id.*, at 65–66 (emphasis added).

[1] The judgments in this case awarded damages of $165,000 but the total figure might be larger since at least one other suit arising out of the same publication has been held in abeyance pending the outcome of this appeal.

this writing or other similar rhetoric in a labor dispute could be actionable."

I agree with the Court that federal labor policy, as manifested both in the NLRA and in Executive Order 11491, favors uninhibited, robust and wide open debate in labor disputes. I disagree with the Court, however, on the reach of that policy. I think that the pre-emptive effect of federal labor regulation is such that States are prohibited from interfering with those federally regulated relations by arming disputants in labor controversies with an arsenal of defamation laws. See *Linn* v. *Plant Guard Workers*, 383 U. S. 53, 69 (Fortas, J., dissenting). Though referring to this state of affairs as federal labor policy, I expressly reject any implication that the policy could be otherwise were Congress or the Executive to reassess the underlying considerations and attempt to reformulate the policy.

We said in *Thornhill* v. *Alabama*, 310 U. S. 88, 102, that, "[i]n the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." [2] Since I do

[2] The view has been expressed that the First Amendment should accord protection only to explicitly political speech. See Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L. J. 1, 20 (1971). Decisions such as *Thornhill*, however, reject any such emasculative reading of the First Amendment. As Mr. Justice Black has said: "There is nothing in the language of the First Amendment to indicate that it protects only *political* speech, although to provide such protection was no doubt a strong reason for the Amendment's passage." H. Black, A Constitutional Faith 46 (1969). The importance of free discussion in all areas was well perceived in this country before our constitutional scheme was formulated. In a letter sent to the inhabitants of Quebec in 1774, the Continental Congress spoke of "five great rights," stating in part: "The last right we shall mention, regards the freedom of the press. The importance of this consists, *besides the advancement of*

not think that discussion is free in the constitutional sense when it subjects the speaker to the penalty of libel judgments, in my view the ability of Congress or the Executive to formulate any labor policy penalizing those who might "say naughty things during labor disputes" [3] is precisely nil. I believe the Framers did all the policy-making necessary in this area when they devised the constitutional framework which binds us all. As I stated in *Gertz* v. *Robert Welch, Inc., post,* at 356–357, the First Amendment would prohibit Congress from passing any libel law [4] and the limitation on labor policy formulation is but an example of the general restriction.

If the States were not limited to the same extent as the Federal Government in restraining discussion, the pre-emptive effect of federal labor regulations would be crucial. But I have always thought that the application of the First Amendment to the States through the Fourteenth [5] leaves the States as constitutionally impo-

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truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government . . . ." 1 Journals of the Continental Congress 1774–1789, p. 108 (Ford ed. 1904) (emphasis added).

[3] See *Linn* v. *Plant Guard Workers,* 383 U. S. 53, 67 (Black, J., dissenting).

[4] See also *Rosenblatt* v. *Baer,* 383 U. S. 75, 90 (concurring). In explaining the constitutional history which led him to the same conclusion, Mr. Justice Black said of the Framers: "They knew what history was behind them; they were familiar with the sad and useless tragedies of countless people who had had their tongues plucked out, their ears cut off or their hands chopped off, or even worse things done to them, because they dared to speak or write their opinions. They wanted to ordain in this country that the new central government should not tell the people what they should believe or say or publish." H. Black, A Constitutional Faith 46 (1969).

[5] See, *e. g., Stromberg* v. *California,* 283 U. S. 359, 368–369; cases compiled in *Gertz* v. *Robert Welch, Inc., post,* at 359 n. 8 (DOUGLAS, J., dissenting).

tent as the Federal Government in enforcing such restrictions. This conclusion is compelled if freedom of speech is regarded, as I think it must be, as a privilege or immunity of United States citizenship within the meaning of that term in the Fourteenth Amendment rather than some ephemeral right protected against state intrusion only to the extent a majority of this Court might view as "implicit in the concept of ordered liberty."[6] As I stated in my dissent to *Gertz* v. *Robert Welch, Inc.*, *post*, at 358–359:

> "[T]he Court frequently has rested state free speech and free press decisions on the Fourteenth Amendment generally rather than on the Due Process Clause alone. The Fourteenth Amendment speaks not only of due process but also of 'privileges and immunities' of United States citizenship. I can conceive of no privilege or immunity with a higher claim to recognition against state abridgement than the freedoms of speech and of the press."

Since labor disputes are " 'within that area of free discussion that is guaranteed by the Constitution' " and since in my view the States and the Federal Government are equally bound to honor that guarantee, the fate of the libel award in this case is clear. "Discussion is not free . . . within the meaning of our First Amendment, if that discussion may be penalized by judgments for damages in libel actions." *Linn* v. *Plant Guard Workers*, 383 U. S., at 68 (Black, J., dissenting). The extensive damages awarded in this case well illustrate that any protection short of a complete bar to suits for defamation will be cold comfort to those who enter the arena of free discussion in labor disputes. The imaginative vituperation which is commonplace in labor strife well exceeds the "normal" levels of hyperbole to which

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[6] See *Palko* v. *Connecticut*, 302 U. S. 319.

most members of the community may be accustomed. A jury determination in a libel suit, no matter what the standard of recovery, is as likely to be influenced by community attitudes toward unionization and the often colorful individuals involved in its promotion as by any real appreciation for the damage perceived as inflicted by any alleged falsehood.

Since I do not believe that the judgments below are consistent with either federal labor policy or with constitutionally protected free speech, I concur in their reversal.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

Today the Court extends the rule of *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964), to encompass every defamatory statement made in a context that falls within the majority's expansive construction of the phrase "labor dispute." Because this decision appears to allow both unions and employers to defame individual workers with little or no risk of being held accountable for doing so, I dissent.

I

Executive Order 11491 establishes for certain federal employees a legal system for labor-management relations essentially similar to that provided employees in the private sector by the National Labor Relations Act. (NLRA). The Court acknowledges that the two schemes are not identical but finds no persuasive reason to differentiate between them for the purpose of determining their pre-emptive impact on state libel law. With this much I agree.

The majority then concludes that the instant case is controlled by *Linn* v. *Plant Guard Workers,* 383 U. S. 53 (1966). In *Linn* the Court construed the NLRA to bar state libel judgments for defamatory statements made

in a "labor dispute" covered by the Act, unless those statements were made "with knowledge of their falsity or with reckless disregard of whether they were true or false. . . ." *Id.*, at 65. Thus the Court adopted as a rule of labor law pre-emption the constitutional standard of media liability for defamation originally enunciated for libel actions by public officials in *New York Times Co., supra,* and subsequently extended to public figures in *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130 (1967). In the instant case the majority relies on the analogy to the NLRA to support its conclusion that Executive Order 11491 pre-empts the libel judgments in favor of these appellees because liability was not premised on the knowing-or-reckless falsity standard that *Linn* held applicable to defamatory statements made in a "labor dispute." I perceive no reason in law or in public policy for such a sweeping extension of *New York Times. Linn* is distinguishable on its facts and in its rationale, and the *New York Times* rule of knowledge of falsity or reckless disregard for the truth is therefore inapplicable to the case at hand.

Linn involved a classic confrontation between union and management locked in combat during an organizational campaign. Linn was assistant general manager of Pinkerton's National Detective Agency, Inc. Pinkerton's employees were then the subject of an organizational campaign by the United Plant Guard Workers. In the course of that effort the union published a leaflet urging Pinkerton's employees to join the union and allegedly accusing Linn of "lying" to the employees and "robbing" them of pay increases. Linn sued the union for libel, but the trial court held that the National Labor Relations Board had exclusive jurisdiction over the subject matter of the dispute. It found that Linn's complaint charged the union with conduct arguably constituting an unfair labor practice under the NLRA and that

San Diego Building Trades Council v. *Garmon*, 359 U. S. 236 (1959), therefore required dismissal of the suit.

This Court disagreed with that reasoning. It recognized an " 'overriding state interest' in protecting [state] residents from malicious libels . . . ," 383 U. S., at 61, and noted that federal labor law does not protect individuals against injury to reputation. Even where statements actionable as libel under state law would also constitute an unfair labor practice, the Board's interest would be limited to their coercive or misleading character, and the Board would be powerless to award damages or take any other step to redress the injury to the reputation of a defamed individual. The Court therefore held that the NLRA does not wholly pre-empt state libel law, even where the subject matter of the libel action might also constitute an unfair labor practice under the Act. Even in that circumstance, the States remain free to award damages for defamatory falsehoods published with knowledge of their falsity or in reckless disregard of the truth.

The result of *Linn* is a rule of partial pre-emption. The States may award libel judgments on the basis of the knowing-or-reckless-falsity formulation but are pre-empted from allowing defamation plaintiffs to recover under any less demanding standard of liability. The level of pre-emption is defined by *New York Times Co.* v. *Sullivan*. But the *Linn* rule of partial pre-emption has another dimension, one that distinguishes the case at hand. That is the scope of the rule—in other words, the range of circumstances in which state libel law is partially displaced by federal labor law. This is determined by the phrase "labor dispute."

In *Linn* the Court relied on the presence of a "labor dispute" to justify partial pre-emption of state libel law, but it did not delineate the boundaries of that concept. Indeed, the Court had no occasion to do so, for, as we have seen, *Linn* involved a prototypical orga-

nizational campaign confrontation between labor and management. Given that factual setting, the Court found a potential conflict between federal labor law and state libel law. One side or the other could use defamation actions as an unauthorized weapon in the battle for the loyalty of unorganized employees and possibly undermine the federal policies favoring uninhibited debate between union and management. The instant dispute is so far removed from the factual setting in *Linn* that the considerations supporting partial pre-emption of state libel law in that case simply do not obtain here.

Appellant union had long been recognized by the postal authorities as the exclusive collective-bargaining representative for the letter carriers in the Richmond area. Of a maximum of 435 letter carriers in the unit, all save 15 were active union members. Thus the union was solidly entrenched, with approximately 96% of the letter carriers signed up. The three appellees were among those 15 employees who elected not to join the union. There is no evidence of concerted action by these 15 letter carriers; they were acting individually, motivated by principle or personal conviction or perhaps, as appellant union alleges, by a desire not to pay dues. In any event, the three appellees had worked as letter carriers for 14, 13, and 12 years, respectively, without any sort of trouble either with the postal authorities or with their fellow employees. In fact, there is no evidence that the appellees were involved in a dispute with anyone until the union officials became displeased with appellees' exercise of their admitted right not to join the union and began to subject them to public ridicule and vilification.

The majority characterizes the union's actions as part of an ongoing organization campaign, *ante*, at 267, and treats this situation as a "labor dispute" within the intendment of the *Linn* rule of partial pre-emption. But

this is accurate only if federal labor law is sufficiently implicated to warrant pre-emption of state libel law whenever an employee declines an invitation to become a union member. Certainly, there was no dispute here between labor and management. There was also no conflict between competing labor organizations and no effort, either organized or otherwise, to encourage defection from appellant union. There was, in short, no dispute of any sort save the union's attempt to coerce appellees by scurrilous and defamatory statements to do what they had an admitted legal right not to do. Thus the union, *by its own coercive conduct,* created a "dispute," the presence of which, according to the majority, provides partial immunity from the consequences of its wrongdoing under state law.

In my view this is an unnecessary and unwise extension of *Linn.* Here there was no confrontation between powerful forces of labor and management, no clash of opposing economic interests that might warrant the attention of federal regulatory authorities, and hence no prospect whatever that reliance on state libel law might subvert the federal scheme for the fair and peaceful resolution of labor disputes. Yet the majority nevertheless holds that the state libel judgments entered below are pre-empted by federal labor law. This conclusion seems to me a needless denigration of the "overriding state interest" in compensating individuals for injury to reputation. Moreover, it leaves these appellees without effective remedy for the wrong done them. Far from representing a powerful economic interest that could fight for itself within the federally created system of individual self-government, these appellees were defenseless individuals.* In their "dis-

*The publication was sent in the union's paper to all members and also was posted on the bulletin board. Appellees had no means to reply or defend their reputations.

pute" with the union, appellees found themselves in that state of helpless inequality that first gave social meaning to the labor movement. And after today's decision, the individual employee's exposure to harm without effective remedy is not limited to defamation by a labor union, for presumably a corporate employer may also claim the knowing-or-reckless-falsity privilege as a bar to liability for defamatory statements concerning an employee's decision to join or remain in a union. I do not believe *Linn* can fairly be construed to warrant any such regressive result.

II

As an alternative basis for its decision, the Court concludes that appellees are prohibited from recovering because there was no libel, indeed no falsehood of any kind, in the union's publication. According to the majority, the only factual allegation contained in the article was that appellees were "scabs," as that term is used in the labor movement, and that "naming the appellees as scabs was literally and factually true." *Ante,* at 283. It is true, of course, that appellees were identified by name as "scabs" in the union newsletter, but it is also true that the use of the word "scab" was explicated by a long and vituperative article appearing immediately above appellees' names. The only fair way to read this article is to substitute each appellee's name for the word "scab" whenever it appears. So construed, the plain meaning and import of this publication was that appellees lacked character, that they had "rotten principles," and that they were traitors to their God, their country, their families, and their friends. Appellants make no attempt to prove the truth of these accusations, contending instead that they were mere hyperbole involving no statement of fact. The majority accepts this argument, in my view erroneously.

It seems to me that the majority fails to distinguish between defamatory references to an anonymous group, class, or occupation, and a similar description of a named individual. It is one thing to say that lawyers are shysters and that doctors are quacks, but it is quite another matter—indeed, it is libelous *per se*—to publish that lawyer Jones is a shyster or that Dr. Smith is a quack. Here the union did not merely voice its opinion of "scabs" generally; it identified these appellees by name and specifically impugned their character.

I would hold that federal law does not prohibit appellees from recovering from appellant union for injury to reputation. I would reverse and remand for a new trial in accord with our decision in *Gertz* v. *Robert Welch, Inc.*, *post*, p. 323.

LEHMAN *v.* CITY OF SHAKER HEIGHTS ET AL.

CERTIORARI TO THE SUPREME COURT OF OHIO

No. 73–328. Argued February 26–27, 1974—Decided June 25, 1974

Petitioner, a candidate for state office, who was refused available advertising space on vehicles of a city transit system, brought this suit challenging the constitutionality of the municipal policy on which the refusal was based of not permitting political advertising but allowing other types of public transit advertising. The state courts declined to give petitioner relief, the Ohio Supreme Court holding that the city's refusal did not violate a candidate's free speech or equal protection rights. *Held:* The judgment is affirmed. Pp. 302–308.

34 Ohio St. 2d 143, 296 N. E. 2d 683, affirmed.

MR. JUSTICE BLACKMUN, joined by THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST, concluded that car card space on a city transit system is not a First Amendment forum and that here the decision to limit transit advertisements to innocuous and less controversial commercial and service-oriented advertising—thus minimizing chances of abuse, appearances of political favoritism, and the risk of imposing upon a captive audience—is within the city's discretion and involves no First or Fourteenth Amendment violation. Pp. 302–304.

MR. JUSTICE DOUGLAS concluded that petitioner, though free to express his views to a willing audience, has no constitutional right to force his message upon a captive audience, which uses public transit vehicles, not as a place for discussion, but only as a means of transport. Pp. 305–308.

BLACKMUN, J., announced the Court's judgment and delivered an opinion, in which BURGER, C. J., and WHITE and REHNQUIST, JJ., joined. DOUGLAS, J., filed an opinion concurring in the judgment, *post*, p. 305. BRENNAN, J., filed a dissenting opinion, in which STEWART, MARSHALL, and POWELL, JJ., joined, *post*, p. 308.

Leonard J. Schwartz argued the cause for petitioner. With him on the brief were *Stanley K. Laughlin, Jr.*, *Harry J. Lehman, Melvin L. Wulf*, and *Joel M. Gora.*

Paul R. Donaldson argued the cause for respondents. With him on the brief were *Louis H. Orkin* and *H. Stephen Madsen.*

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

This case presents the question whether a city which operates a public rapid transit system and sells advertising space for car cards on its vehicles is required by the First and Fourteenth Amendments to accept paid political advertising on behalf of a candidate for public office.

In 1970, petitioner Harry J. Lehman was a candidate for the office of State Representative to the Ohio General Assembly for District 56. The district includes the city of Shaker Heights. On July 3, 1970, petitioner sought to promote his candidacy by purchasing car card space on the Shaker Heights Rapid Transit System for the months of August, September, and October. The general election was scheduled for November 3. Petitioner's proposed copy contained his picture and read:

"HARRY J. LEHMAN IS OLD-FASHIONED!
ABOUT HONESTY, INTEGRITY AND GOOD GOVERNMENT

"State Representative—District 56 [X] Harry J. Lehman." App. 39A.

Advertising space on the city's transit system is managed by respondent Metromedia, Inc., as exclusive agent under contract with the city. The agreement between the city and Metromedia provides:

"15. . . . The CONTRACTOR shall not place political advertising in or upon any of the said CARS or in,

upon or about any other additional and further space granted hereunder." [1]

When petitioner applied for space,[2] he was informed by Metromedia that, although space was then available, the management agreement with the city did not permit political advertising.[3] The system, however, accepted ads from cigarette companies, banks, savings and loan associations, liquor companies, retail and service establishments, churches, and civic and public-service oriented groups.[4] There was uncontradicted testimony at the trial that during the 26 years of public operation, the Shaker Heights system, pursuant to city council action,

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[1] Metromedia has a written Metro Transit Advertising Copy Policy setting forth the following criteria:

"(1) Metro Transit Advertising will not display advertising copy that is false, misleading, deceptive and/or offensive to the moral standards of the community, or contrary to good taste. Copy which might be contrary to the best interests of the transit systems, or which might result in public criticism of the advertising industry and/or transit advertising will not be acceptable.

"(2) Metro Transit Advertising will not accept any political copy that pictorially, graphically or otherwise states or suggests that proponents or opponents of the persons or measures advertised are vulgar, greedy, immoral, monopolistic, illegal or unfair.

. . . . . .

"(10) Political advertising will not be accepted on following systems: Shaker Rapid—Maple Heights—North Olmsted—Euclid, Ohio." Shaker Heights' Exhibit A.

[2] Mr. Lehman testified: "We are using various methods [of pro-promoting my candidacy], including newspaper advertising . . . . We plan to use direct mail advertising, postcards, and circulars of various types." App. 14A.

[3] The system operated only 55 cars, App. 15A, each with 20 advertising spaces. Tr. of Oral Arg. 23–24.

[4] Receipts from the sale of advertising amounted to $12,000 annually. Tr. of Oral Arg. 27. These receipts supplemented operating revenues generated from the fares paid by the passengers who used the system daily.

had not accepted or permitted *any* political or public issue advertising on its vehicles. App. 30A–32A.

When petitioner did not succeed in his effort to have his copy accepted, he sought declaratory and injunctive relief in the state courts of Ohio without success. The Supreme Court of Ohio concluded that "the constitutionally protected right of free speech with respect to forums for oral speech, or the dissemination of literature on a city's streets, does not extend to commercial or political advertising on rapid transit vehicles." 34 Ohio St. 2d 143, 145–146, 296 N. E. 2d 683, 685 (1973). There was no equal protection violation, the court said, because, "[a]s a class, all candidates for political office are treated alike under the Shaker Heights Rapid Transit System's commercial advertising policy." *Id.*, at 148, 296 N. E. 2d, at 686. The three dissenting justices viewed the transit system's advertising space as a free speech forum and would have held that no valid governmental interest was furthered by the differential treatment between political and other advertising. A policy excluding political advertisements, in their view, would therefore deny political advertisers the equal protection of the law. We granted certiorari in order to consider the important First and Fourteenth Amendment question the case presented.[5] 414 U. S. 1021 (1973).

It is urged that the car cards here constitute a public forum protected by the First Amendment, and that there is a guarantee of nondiscriminatory access to such publicly owned and controlled areas of communication "regardless of the primary purpose for which the area is dedicated." Brief for Petitioner 14.

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[5] Cf. *Wirta* v. *Alameda-Contra Costa Transit District,* 68 Cal. 2d 51, 434 P. 2d 982 (1967); *Kissinger* v. *New York City Transit Authority,* 274 F. Supp. 438 (SDNY 1967); *Hillside Community Church* v. *City of Tacoma,* 76 Wash. 2d 63, 455 P. 2d 350 (1969).

552-191 O - 76 - 22

We disagree. In *Packer Corp.* v. *Utah,* 285 U. S. 105, 110 (1932), Mr. Justice Brandeis, in speaking for a unanimous Court, recognized that "there is a difference which justifies the classification between display advertising and that in periodicals or newspapers." In *Packer* the Court upheld a Utah statute that made it a misdemeanor to advertise cigarettes on " 'any bill board, street car sign, street car, placard,' " but exempted dealers' signs on their places of business and cigarette advertising " 'in any newspaper, magazine, or periodical.' " *Id.,* at 107. The Court found no equal protection violation. It reasoned that viewers of billboards and streetcar signs had no "choice or volition" to observe such advertising and had the message "thrust upon them by all the arts and devices that skill can produce. . . . The radio can be turned off, but not so the billboard or street car placard." *Id.,* at 110. "The streetcar audience is a captive audience. It is there as a matter of necessity, not of choice." *Public Utilities Comm'n* v. *Pollak,* 343 U. S. 451, 468 (1952) (DOUGLAS, J., dissenting). In such situations, "[t]he legislature may recognize degrees of evil and adapt its legislation accordingly." *Packer Corp.* v. *Utah,* 285 U. S., at 110. Cf. *Breard* v. *Alexandria,* 341 U. S. 622 (1951).

These situations are different from the traditional settings where First Amendment values inalterably prevail. Lord Dunedin, in *M'Ara* v. *Magistrates of Edinburgh,* [1913] Sess. Cas. 1059, 1073–1074, said: "[T]he truth is that open spaces and public places differ very much in their character, and before you could say whether a certain thing could be done in a certain place you would have to know the history of the particular place." Although American constitutional jurisprudence, in the light of the First Amendment, has been jealous to preserve access to public places for purposes of free speech, the nature of the forum and the conflicting interests involved have

remained important in determining the degree of protection afforded by the Amendment to the speech in question. See, *e. g.*, *Cox* v. *New Hampshire*, 312 U. S. 569 (1941); *Breard* v. *Alexandria, supra; Poulos* v. *New Hampshire*, 345 U. S. 395 (1953); *Cox* v. *Louisiana*, 379 U. S. 559 (1965); *Adderley* v. *Florida*, 385 U. S. 39 (1966); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367 (1969); *Police Department of Chicago* v. *Mosley*, 408 U. S. 92 (1972); *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972); *Columbia Broadcasting* v. *Democratic National Committee*, 412 U. S. 94 (1973); *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376 (1973).

Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce. It must provide rapid, convenient, pleasant, and inexpensive service to the commuters of Shaker Heights. The car card space, although incidental to the provision of public transportation, is a part of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles. In making these choices, this Court has held that a public utility "will be sustained in its protection of activities in public places when those activities do not interfere with the general public convenience, comfort and safety." *Public Utilities Comm'n* v. *Pollak*, 343 U. S., at 464–465.

Because state action exists, however, the policies and practices governing access to the transit system's advertising space must not be arbitrary, capricious, or invidious. Here, the city has decided that "[p]urveyors

of goods and services saleable in commerce may purchase advertising space on an equal basis, whether they be house builders or butchers." 34 Ohio St. 2d, at 146, 296 N. E. 2d, at 685. This decision is little different from deciding to impose a 10-, 25-, or 35-cent fare, or from changing schedules or the location of bus stops, *Public Utilities Comm'n* v. *Pollak,* 343 U. S., at 465. Revenue earned from long-term commercial advertising could be jeopardized by a requirement that short-term candidacy or issue-oriented advertisements be displayed on car cards. Users would be subjected to the blare of political propaganda. There could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians. In these circumstances, the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation. Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require.

No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity. In these circumstances, there is no First or Fourteenth Amendment violation.

The judgment of the Supreme Court of Ohio is affirmed.

It is so ordered.

MR. JUSTICE DOUGLAS, concurring in the judgment.

Petitioner, a candidate for state office, attempted to purchase space for paid political advertising on vehicles of the Shaker Heights Rapid Transit System, a system owned and operated by the city of Shaker Heights, Ohio. Metromedia, Inc., the exclusive advertising agent for the system, refused petitioner the space on the basis of a contract with the system prohibiting the acceptance of political advertisements. Petitioner unsuccessfully sought injunctive relief in the state courts to restrain the city and Metromedia from refusing his advertising.

The petitioner contends that, by selling advertising space, the city has turned its buses into free speech forums and the city is now prohibited by the First Amendment, applicable to the States through the Fourteenth,[1] from refusing space for political advertisements.

My Brother BRENNAN would find that "[a] forum for communication was voluntarily established when the city installed the physical facilities for the advertisements and, by contract with Metromedia, created the necessary administrative machinery for regulating access to that forum." *Post,* at 314. If the streetcar or bus were a forum for communication akin to that of streets or public parks, considerable problems would be presented. "The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all . . . but it must not, in the guise of regulation, be abridged or denied." *Hague* v. *CIO,* 307 U. S. 496, 515–516.

[1] The Court has frequently rested state free speech and free press decisions on the Fourteenth Amendment generally, rather than on the Due Process Clause alone. See, *e. g., Bridges* v. *California,* 314 U. S. 252, 263 n. 6; *Saia* v. *New York,* 334 U. S. 558, 560; *Elfbrandt* v. *Russell,* 384 U. S. 11, 18; *Mills* v. *Alabama,* 384 U. S. 214, 218.

But a streetcar or bus is plainly not a park or sidewalk or other meeting place for discussion, any more than is a highway. It is only a way to get to work or back home. The fact that it is owned and operated by the city does not without more make it a forum.

Bus and streetcar placards are in the category of highway billboards which have long been used to display an array of commercial and political messages. But this particular form of communication has been significantly curtailed by state regulation adopted pursuant to the Highway Beautification Act of 1965, 23 U. S. C. § 131, which conditions certain federal highway funds upon strict regulation of highway advertising. Ohio is among the States which have sought to protect the interests of their motorists [2] by enacting regulations pursuant to the Act. Ohio Rev. Code Ann. § 5516.01 *et seq.* (Supp. 1973). The fact that land on which a billboard rests is municipal land does not curtail or enhance such regulatory schemes.

If a bus is a forum it is more akin to a newspaper than to a park. Yet if a bus is treated as a newspaper, then, as we hold this date, *Miami Herald Publishing Co.* v. *Tornillo, ante,* p. 241, the owner cannot be forced to include in his offerings news or other items which outsiders may desire but which the owner abhors. Newspaper cases are cited to support petitioner's claim. The First Amendment, however, draws no distinction between press privately owned, and press owned otherwise. And if we are to turn a bus or streetcar into either a newspaper or a park, we take great liberties with people

[2] In a survey of motorists in Ohio, 71% expressed the opinion that billboards should be banned from the interstate highway system. Hearings on S. 1467 before the Subcommittee on Roads of the Senate Committee on Public Works, 90th Cong., 1st Sess., 43–44 (1967).

who because of necessity become commuters and at the same time captive viewers or listeners.

In asking us to force the system to accept his message as a vindication of his constitutional rights, the petitioner overlooks the constitutional rights of the commuters. While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it. In my view the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.

Buses are not recreational vehicles used for Sunday chautauquas as a public park might be used on holidays for such a purpose; they are a practical necessity for millions in our urban centers. I have already stated this view in my dissent in *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, 469, involving the challenge by some passengers to the practice of broadcasting radio programs over loudspeakers in buses and streetcars: "One who tunes in on an offensive program at home can turn it off or tune in another station, as he wishes. One who hears disquieting or unpleasant programs in public places, such as restaurants, can get up and leave. But the man on the streetcar has no choice but to sit and listen, or perhaps to sit and to try *not* to listen." There is no difference when the message is visual, not auricular. In each the viewer or listener is captive.

I agree with Mr. Justice Brandeis who, quoting from a Utah State Court decision,[3] said that the visual message in streetcars is no different, for " '[a]dvertisements of this sort are constantly before the eyes of observers

[3] 77 Utah 500, 515, 297 P. 1013, 1019 (1931).

on the streets and in street cars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. . . . In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard.'" *Packer Corp.* v. *Utah*, 285 U. S. 105, 110.

I do not view the content of the message as relevant either to petitioner's right to express it or to the commuters' right to be free from it. Commercial advertisements may be as offensive and intrusive to captive audiences as any political message. But the validity of the commercial advertising program is not before us since we are not faced with one complaining of an invasion of privacy through forced exposure to commercial ads. Since I do not believe that petitioner has any constitutional right to spread his message before this captive audience, I concur in the Court's judgment.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART, MR. JUSTICE MARSHALL, and MR. JUSTICE POWELL join, dissenting.

The city of Shaker Heights owns and operates the Shaker Heights Rapid Transit System, an interurban electric railroad line consisting of approximately 55 transit cars which transport passengers between Shaker Heights and Cleveland. Each of the cars contains 20 interior advertising spaces available for lease through the Metro Transit Division of Metromedia, Inc., the transit system's exclusive advertising agent. By agreement with the city, Metromedia accepts commercial and public service advertising, but will not accept "political advertising."

Prior to Ohio's 1970 general election, Harry J. Lehman, a candidate for the office of State Representative to the

Ohio General Assembly for the 56th District, attempted to lease advertising space on the Shaker Heights Rapid Transit System, because, as he later testified, "the vast majority of its six to eight thousand riders each day are residents of the district . . . ." (App. 14A). Although advertising space was available and Lehman's proposed advertisement [1] met Metromedia's copy standards,[2] rental space was nevertheless denied Lehman on

[1] The text of the proposed advertisement read as follows:

"Harry J. Lehman Is Old Fashioned!/About Honesty, Integrity And Good Government/State Representative—District 56."

[2] The Metro Transit Advertising Copy Policy states:

"(1) Metro Transit Advertising will not display advertising copy that is false, misleading, deceptive and/or offensive to the moral standards of the community, or contrary to good taste. Copy which might be contrary to the best interests of the transit systems, or which might result in public criticism of the advertising industry and/or transit advertising will not be acceptable.

"(2) Metro Transit Advertising will not accept any political copy that pictorially, graphically or otherwise states or suggests that proponents or opponents of the persons or measures advertised are vulgar, greedy, immoral, monopolistic, illegal or unfair.

"(3) All copy subject to approval. Rough sketches with proposed copy required on all political advertising.

"(4) Metro Transit Advertising reserves the right at all times to decline both sides of any proposition and/or opposing candidates.

"(5) Political advertising must carry, visible within the advertising area of the poster, the tag-line:

"'Paid Political Advertising Sponsored by . . .' in letters sized as follows:

"Exterior: 30″ x 144″ King size posters—1″
21″ x 44″ Traveling displays—½″
21″ x 72″ Taillight spectacular—1″

"Interior: 11″ x 28″—¼″ 11″ x 56″—¼″

"(6) Contracts for political advertising space must be accompanied by check for entire amount of contract.

"(7) Posters and/or cards must be delivered, prepaid, 10 days prior to posting date.

"(8) Equal opportunity to purchase space will be offered and allotted for each opposing candidate, bond issue or referendum. If

the sole ground that Metromedia's contract with the city forbids acceptance of "political advertising."

After an unsuccessful attempt to persuade the city to alter its ban against political advertisements, Lehman commenced this action in the Court of Common Pleas for Cuyahoga County, Ohio, seeking declaratory and injunctive relief on the ground that the city's policy of prohibiting political advertisements infringed his freedom of speech and denied him equal protection of the laws. Finding no constitutional infirmities, the trial court denied relief and was affirmed by both the Cuyahoga County Court of Appeals and the Supreme Court of Ohio.

I would reverse. In my view, the city created a forum for the dissemination of information and expression of ideas when it accepted and displayed commercial and public service advertisements on its rapid transit vehicles. Having opened a forum for communication, the city is barred by the First and Fourteenth Amendments from discriminating among forum users solely on the basis of message content.

I

The message Lehman sought to convey concerning his candidacy for public office was unquestionably protected by the First Amendment. That constitutional safeguard was fashioned to encourage and nurture "uninhibited, robust, and wide-open" self-expression, particularly

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necessary, contracts for political advertising will be held until 30 days prior to the contract posting date, at which time Metro Transit Advertising will allocate the advertising space to each candidate, issue or referendum.

"(9) Minimum order acceptable for either cards or posters is at the one-[month rate].

"(10) *Political advertising will not be accepted on following systems: Shaker Rapid—Maple Heights—North Olmsted—Euclid, Ohio.*" (Emphasis added.)

in matters of governing importance. *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 270 (1964). "For speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana,* 379 U. S. 64, 74–75 (1964). "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg* v. *California,* 283 U. S. 359, 369 (1931). The fact that the message is proposed as a paid advertisement does not diminish the impregnable shelter afforded by the First Amendment. See *New York Times Co.* v. *Sullivan, supra,* at 271.

Of course, not even the right of political self-expression is completely unfettered. As we stated in *Cox* v. *Louisiana,* 379 U. S. 536, 554 (1965):

> "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy."

Accordingly, we have repeatedly recognized the constitutionality of reasonable "time, place and manner" regulations which are applied in an evenhanded fashion. See, *e. g., Police Department of Chicago* v. *Mosley,* 408 U. S. 92, 98 (1972); *Grayned* v. *City of Rockford,* 408 U. S. 104, 115 (1972); *Cox* v. *Louisiana, supra,* at 554–555; *Poulos* v. *New Hampshire,* 345 U. S. 395, 398 (1953); *Cox* v. *New Hampshire,* 312 U. S. 569, 575–576 (1941); *Schneider* v. *State,* 308 U. S. 147, 160 (1939).

Focusing upon the propriety of regulating "place," the city of Shaker Heights attempts to justify its ban against political advertising by arguing that the interior advertising space of a transit car is an inappropriate forum for political expression and debate. Brief for Respondents 7. To be sure, there are some public places which are so clearly committed to other purposes that their use as public forums for communication is anomalous. For example, "[t]here may be some instances in which assemblies and petitions for redress of grievances are not consistent with other necessary purposes of public property. A noisy meeting may be out of keeping with the serenity of the statehouse or the quiet of the courthouse. No one . . . would suggest that the Senate gallery is the proper place for a vociferous protest rally. And in other cases it may be necessary to adjust the right to petition for redress of grievances to the other interests inhering in the uses to which the public property is normally put." *Adderley* v. *Florida*, 385 U. S. 39, 54 (1966) (DOUGLAS, J., dissenting). The determination of whether a particular type of public property or facility constitutes a "public forum" requires the Court to strike a balance between the competing interests of the government, on the one hand, and the speaker and his audience, on the other.[3] Thus, the Court must assess the importance of the primary use to which the public property or facility is committed and the extent to which that use will be disrupted if access for free expression is permitted.

Applying these principles, the Court has long recognized the public's right of access to public streets and

[3] See generally Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1; Gorlick, Right to a Forum, 71 Dick. L. Rev. 273 (1967); Horning, The First Amendment Right to a Public Forum, 1969 Duke L. J. 931.

parks for expressive activity. As Mr. Justice Roberts wrote in *Hague* v. *CIO*, 307 U. S. 496, 515–516 (1939):

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."

See also *Jamison* v. *Texas*, 318 U. S. 413 (1943); *Cox* v. *Louisiana*, *supra*. More recently, the Court has added state capitol grounds to the list of public forums compatible with free speech, free assembly, and the freedom to petition for redress of grievances, *Edwards* v. *South Carolina*, 372 U. S. 229 (1963), but denied similar status to the curtilage of a jailhouse, on the ground that jails are built for security and thus need not be opened to the general public, *Adderley* v. *Florida*, 385 U. S. 39 (1966).[4]

In the circumstances of this case, however, we need not decide whether public transit cars *must* be made

[4] Public-forum status has also been extended to municipal bus terminals, see *Wolin* v. *Port of New York Authority*, 392 F. 2d 83 (CA2 1968), and railroad stations, see *In re Hoffman*, 67 Cal. 2d 845, 434 P. 2d 353 (1967).

available as forums for the exercise of First Amendment rights. By accepting commercial and public service advertising, the city effectively waived any argument that advertising in its transit cars is incompatible with the rapid transit system's primary function of providing transportation. A forum for communication was voluntarily established when the city installed the physical facilities for the advertisements and, by contract with Metromedia, created the necessary administrative machinery for regulating access to that forum.[5]

The plurality opinion, however, contends that as long as the city limits its advertising space to "innocuous and less controversial commercial and service oriented advertising," no First Amendment forum is created. *Ante,* at 304. I find no merit in that position. Certainly, noncommercial public service advertisements convey messages of public concern and are clearly protected by the First Amendment. And while it is possible that commercial advertising may be accorded *less* First Amendment protection than speech concerning political and social issues of public importance, compare *Valentine* v. *Chrestensen,* 316 U. S. 52 (1942), with *Schneider* v. *State,* 308 U. S. 147 (1939), and *Breard* v. *City of Alexandria,* 341 U. S. 622 (1951), with *Martin* v. *City of Struthers,* 319 U. S. 141 (1943), it is "speech" nonetheless, often communicating information and ideas found by many persons to be controversial.[6] There can be no question

[5] My Brother DOUGLAS' analogy to billboard and newspaper advertising, *ante,* at 306–307, is not apropos in the circumstances of this case where the advertising display space is *city* owned and operated.

[6] There is some doubt concerning whether the "commercial speech" distinction announced in *Valentine* v. *Chrestensen,* 316 U. S. 52 (1942), retains continuing validity. MR. JUSTICE DOUGLAS has remarked: "The ruling was casual, almost offhand. And it has not survived reflection." *Cammarano* v. *United States,* 358 U. S. 498,

that commercial advertisements, when skillfully employed, are powerful vehicles for the exaltation of commercial values. Once such messages have been accepted and displayed, the existence of a forum for communication cannot be gainsaid. To hold otherwise, and thus sanction the city's preference for bland commercialism and noncontroversial public service messages over "uninhibited, robust, and wide-open" debate on public issues, would reverse the traditional priorities of the First Amendment.[7]

II

Once a public forum for communication has been established, both free speech and equal protection principles prohibit discrimination based *solely* upon subject matter or content.[8] See, *e. g., Police Department of*

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514 (1959) (concurring opinion). See also *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations,* 413 U. S. 376, 393 (1973) (BURGER, C. J., dissenting); *id.,* at 398 (DOUGLAS, J., dissenting); *id.,* at 401 (STEWART, J., dissenting). That question, however, need not be decided in this case. It is sufficient for the purpose of public forum analysis merely to recognize that commercial speech enjoys at least *some* degree of protection under the First Amendment, without reaching the more difficult question concerning the *amount* of protection afforded.

[7] Other courts have reached the same conclusion on nearly identical facts. See *Kissinger* v. *New York City Transit Authority,* 274 F. Supp. 438 (SDNY 1967); *Hillside Community Church* v. *City of Tacoma,* 76 Wash. 2d 63, 455 P. 2d 350 (1969); *Wirta* v. *Alameda-Contra Costa Transit District,* 68 Cal. 2d 51, 434 P. 2d 982 (1967).

[8] The plurality opinion's reliance upon *Packer Corp.* v. *Utah,* 285 U. S. 105 (1932), is misplaced. As MR. JUSTICE DOUGLAS noted in *Cammarano* v. *United States, supra,* at 513 n. (concurring opinion): "In *Packer Corp.* v. *Utah,* 285 U. S. 105, the First Amendment problem was not raised. The extent to which such advertising could be regulated consistently with the First Amendment (cf. *Cantwell* v. *Connecticut,* 310 U. S. 296; *Martin* v. *Struthers,* 319 U. S. 141;

Chicago v. *Mosley*, 408 U. S., at 95–96; *Cox* v. *Louisiana*, 379 U. S. 559, 581 (1965) (Black, J., concurring and dissenting); *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953); *Niemotko* v. *Maryland*, 340 U. S. 268, 272–273 (1951).

> "Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." *Police Department of Chicago* v. *Mosley*, *supra*, at 96 (footnote omitted).

That the discrimination is among entire classes of ideas, rather than among points of view within a particular class, does not render it any less odious. Subject matter or content censorship in any form is forbidden.[9]

To insure that subject matter or content is not the sole basis for discrimination among forum users, all

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Breard v. *Alexandria*, 341 U. S. 622; *Roth* v. *United States*, 354 U. S. 476) has therefore never been authoritatively determined."

See also n. 6, *supra*.

[9] The existence of other public forums for the dissemination of political messages is, of course, irrelevant. As the Court said in *Schneider* v. *State*, 308 U. S. 147, 163 (1939), "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

selective exclusions from a public forum must be closely scrutinized and countenanced only in cases where the government makes a clear showing that its action was taken pursuant to neutral "time, place and manner" regulations, narrowly tailored to protect the government's substantial interest in preserving the viability and utility of the forum itself. See, *e. g., Police Department of Chicago* v. *Mosley, supra,* at 98–102; *Grayned* v. *City of Rockford,* 408 U. S., at 115–117; *Shuttlesworth* v. *Birmingham,* 394 U. S. 147, 152–153 (1969); *Tinker* v. *Des Moines School District,* 393 U. S. 503, 508, 514 (1969); *cf. Dunn* v. *Blumstein,* 405 U. S. 330, 336–337 (1972); *Williams* v. *Rhodes,* 393 U. S. 23, 31 (1968). The city has failed to discharge that heavy burden in the present case.

The Court's special vigilance is triggered in this case because of the city's undisputed ban against political advertising in its transit cars. Commercial and public service advertisements are routinely accepted for display, while political messages are absolutely prohibited. Few examples are required to illustrate the scope of the city's policy and practice. For instance, a commercial advertisement peddling snowmobiles would be accepted, while a counter-advertisement calling upon the public to support legislation controlling the environmental destruction and noise pollution caused by snowmobiles would be rejected. Alternatively, a public service ad by the League of Women Voters would be permitted, advertising the existence of an upcoming election and imploring citizens to vote, but a candidate, such as Lehman, would be barred from informing the public about his candidacy, qualifications for office, or position on particular issues. These, and other examples,[10] make perfectly clear that the selec-

[10] In declaring unconstitutional an advertising policy remarkably similar to the city's policy in the present case, the California

552-191 O - 75 - 23

tive exclusion of political advertising is not the product of evenhanded application of neutral "time, place, and manner" regulations. Rather, the operative—and constitutionally impermissible—distinction is the message on the sign. That conclusion is not dispelled by any of the city's asserted justifications for selectively excluding political advertising.

The city contends that its ban against political advertising is bottomed upon its solicitous regard for "captive riders" of the rapid transit system, who are "forced to endure the advertising thrust upon [them]." Brief for Respondents 8. Since its rapid transit system is primarily a mode of transportation, the city argues that it

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Supreme Court detailed "the paradoxical scope of the [transit] district's policy [banning political advertising]" in the following manner:

"A cigarette company is permitted to advertise the desirability of smoking its brand, but a cancer society is not entitled to caution by advertisement that cigarette smoking is injurious to health. A theater may advertise a motion picture that portrays sex and violence, but the Legion for Decency has no right to post a message calling for clean films. A lumber company may advertise its wood products, but a conservation group cannot implore citizens to write to the President or Governor about protecting our natural resources. An oil refinery may advertise its products, but a citizens' organization cannot demand enforcement of existing air pollution statutes. An insurance company may announce its available policies, but a senior citizens' club cannot plead for legislation to improve our social security program. The district would accept an advertisement from a television station that is commercially inspired, but would refuse a paid nonsolicitation message from a strictly educational television station. Advertisements for travel, foods, clothing, toiletries, automobiles, legal drugs—all these are acceptable, but the American Legion would not have the right to place a paid advertisement reading, 'Support Our Boys in Viet Nam. Send Holiday Packages.'" *Wirta* v. *Alameda-Contra Costa Transit District*, 68 Cal. 2d 51, 57–58, 434 P. 2d 982, 986–987 (1967).

may prohibit political advertising in order to shield its transit passengers from sometimes controversial or unsettling speech. Whatever merit the city's argument might have in other contexts, it has a hollow ring in the present case, where the city has voluntarily opened its rapid transit system as a forum for communication. In that circumstance, the occasional appearance of provocative speech should be expected. Indeed, the Court has recognized that "a function of free speech under our system of government is to invite dispute. . . . Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949).

The line between ideological and nonideological speech is impossible to draw with accuracy. By accepting commercial and public service advertisements, the city opened the door to "sometimes controversial or unsettling speech" and determined that such speech does not unduly interfere with the rapid transit system's primary purpose of transporting passengers. In the eyes of many passengers, certain commercial or public service messages [11] are as profoundly disturbing as some political advertisements might be to other passengers. There is certainly no evidence in the record of this case indicating that political advertisements, as a class, are so disturbing when displayed that they are more likely than commercial or public service advertisements to impair the rapid transit system's primary function of transportation. In the absence of such evidence, the city's selective exclusion of political advertising constitutes an invidious discrimina-

[11] For example, the record indicates that *church advertising* was accepted for display on the Shaker Heights Rapid Transit System. See App. 26A.

tion on the basis of subject matter, in violation of the First and Fourteenth Amendments.

Moreover, even if it were possible to draw a manageable line between controversial and noncontroversial messages, the city's practice of censorship for the benefit of "captive audiences" still would not be justified.[12] This is not a case where an unwilling or unsuspecting rapid transit rider is powerless to avoid messages he deems unsettling. The advertisements accepted by the city and Metromedia are not broadcast over loudspeakers in the transit cars. The privacy of the passengers is not, therefore, dependent upon their ability "to sit and to try *not* to listen." *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, 469 (1952) (DOUGLAS, J., dissenting); cf. *Kovacs* v. *Cooper*, 336 U. S. 77 (1949); *Saia* v. *New York*, 334 U. S. 558, 562 (1948). Rather, all advertisements accepted for display are in *written* form. Transit passengers are not forced or compelled to read any of the messages, nor are they "incapable of declining to receive [them]," *ante*, at 307 (DOUGLAS, J., concurring). Should passengers chance to glance at advertisements they find offensive, they can "effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Cohen* v. *California*, 403 U. S. 15, 21 (1971). Surely that minor inconvenience

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[12] My Brother DOUGLAS' contrary view, that "the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience," irrespective of whether the speech in question is commercial or noncommercial, *ante*, at 307, does not dispose of the First and Fourteenth Amendment issues in this case. The record reveals that the Shaker Heights Rapid Transit System provides advertising space on the *outside* as well as the inside of its cars. See App. 24A. Lehman was denied access to both. Whatever applicability a "captive audience" theory may have to interior advertising, it simply cannot justify the city's refusal to rent Lehman *exterior* advertising space.

is a small price to pay for the continued preservation of so precious a liberty as free speech.

The city's remaining justification is equally unpersuasive. The city argues that acceptance of "political advertisements in the cars of the Shaker Heights rapid transit, would suggest, on the one hand, some political favoritism is being granted to candidates who advertise, or, on the other hand, that the candidate so advertised is being supported or promoted by the government of the City." Brief for Respondents 8. Clearly, such ephemeral concerns do not provide the city with *carte blanche* authority to exclude an entire category of speech from a public forum. "These pragmatic hurdles are no more relevant to a public forum when it is a motor coach than they are to a public park or a school auditorium. The endorsement of an opinion expressed in an advertisement on a motor coach is no more attributable to the transit district than the view of a speaker in a public park is to the city administration or the tenets of an organization using school property for meetings is to the local school board." *Wirta* v. *Alameda-Contra Costa Transit District*, 68 Cal. 2d 51, 61, 434 P. 2d 982, 989 (1967). The city has introduced no evidence demonstrating that its rapid transit passengers would naively think otherwise. And though there may be "lurking doubts about favoritism," *ante*, at 304, the Court has held that "[n]o such remote danger can justify the immediate and crippling impact on the basic constitutional rights involved in this case." *Williams* v. *Rhodes*, 393 U. S., at 33.

Moreover, neutral regulations, which do not distinguish among advertisements on the basis of subject matter, can be narrowly tailored to allay the city's fears. The impression of city endorsement can be dispelled by requiring disclaimers to appear prominently on the face of

every advertisement.[13] And while problems of accommodating all potential advertisers may be vexing at times, the appearance of favoritism can be avoided by the even-handed regulation of time, place, and manner for all advertising, irrespective of subject matter.

I would, therefore, reverse the judgment of the Supreme Court of Ohio and remand this case for further proceedings not inconsistent with this opinion.

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[13] Metro's current copy policy provides for such disclaimers in those city transit systems that accept political advertisements. See n. 2, *supra*, at ¶ (5).

GERTZ *v.* ROBERT WELCH, Inc.

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

No. 72–617. Argued November 14, 1973—Decided June 25, 1974

A Chicago policeman named Nuccio was convicted of murder. The victim's family retained petitioner, a reputable attorney, to represent them in civil litigation against Nuccio. An article appearing in respondent's magazine alleged that Nuccio's murder trial was part of a Communist conspiracy to discredit the local police, and it falsely stated that petitioner had arranged Nuccio's "frame-up," implied that petitioner had a criminal record, and labeled him a "Communist-fronter." Petitioner brought this diversity libel action against respondent. After the jury returned a verdict for petitioner, the District Court decided that the standard enunciated in *New York Times Co.* v. *Sullivan,* 376 U. S. 254, which bars media liability for defamation of a public official absent proof that the defamatory statements were published with knowledge of their falsity or in reckless disregard of the truth, should apply to this suit. The court concluded that that standard protects media discussion of a public issue without regard to whether the person defamed is a public official as in *New York Times Co.* v. *Sullivan, supra,* or a public figure, as in *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130. The court found that petitioner had failed to prove knowledge of falsity or reckless disregard for the truth and therefore entered judgment *n. o. v.* for respondent. The Court of Appeals affirmed. *Held:*

1. A publisher or broadcaster of defamatory falsehoods about an individual who is neither a public official nor a public figure may not claim the *New York Times* protection against liability for defamation on the ground that the defamatory statements concern an issue of public or general interest. Pp. 339–348.

(a) Because private individuals characteristically have less effective opportunities for rebuttal than do public officials and public figures, they are more vulnerable to injury from defamation. Because they have not voluntarily exposed themselves to increased risk of injury from defamatory falsehoods, they are also more deserving of recovery. The state interest in compensat-

ing injury to the reputation of private individuals is therefore greater than for public officials and public figures. Pp. 343–345.

(b) To extend the *New York Times* standard to media defamation of private persons whenever an issue of general or public interest is involved would abridge to an unacceptable degree the legitimate state interest in compensating private individuals for injury to reputation and would occasion the additional difficulty of forcing courts to decide on an *ad hoc* basis which publications and broadcasts address issues of general or public interest and which do not. Pp. 345–346.

(c) So long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood which injures a private individual and whose substance makes substantial danger to reputation apparent. Pp. 347–348.

2. The States, however, may not permit recovery of presumed or punitive damages when liability is not based on knowledge of falsity or reckless disregard for the truth, and the private defamation plaintiff who establishes liability under a less demanding standard than the *New York Times* test may recover compensation only for actual injury. Pp. 348–350.

3. Petitioner was neither a public official nor a public figure. Pp. 351–352.

(a) Neither petitioner's past service on certain city committees nor his appearance as an attorney at the coroner's inquest into the death of the murder victim made him a public official. P. 351.

(b) Petitioner was also not a public figure. Absent clear evidence of general fame or notoriety in the community and pervasive involvement in ordering the affairs of society, an individual should not be deemed a public figure for all aspects of his life. Rather, the public-figure question should be determined by reference to the individual's participation in the particular controversy giving rise to the defamation. Petitioner's role in the Nuccio affair did not make him a public figure. Pp. 351–352.

471 F. 2d 801, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which STEWART, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 353. BURGER, C. J., *post*, p. 354, DOUGLAS, J., *post*, p. 355, BRENNAN, J., *post*, p. 361, and WHITE, J., *post*, p. 369, filed dissenting opinions.

Wayne B. Giampietro argued the cause and filed briefs for petitioner.

Clyde J. Watts argued the cause and filed a brief for respondent.

MR. JUSTICE POWELL delivered the opinion of the Court.

This Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment. With this decision we return to that effort. We granted certiorari to reconsider the extent of a publisher's constitutional privilege against liability for defamation of a private citizen. 410 U. S. 925 (1973).

I

In 1968 a Chicago policeman named Nuccio shot and killed a youth named Nelson. The state authorities prosecuted Nuccio for the homicide and ultimately obtained a conviction for murder in the second degree. The Nelson family retained petitioner Elmer Gertz, a reputable attorney, to represent them in civil litigation against Nuccio.

Respondent publishes American Opinion, a monthly outlet for the views of the John Birch Society. Early in the 1960's the magazine began to warn of a nationwide conspiracy to discredit local law enforcement agencies and create in their stead a national police force capable of supporting a Communist dictatorship. As part of the continuing effort to alert the public to this assumed danger, the managing editor of American Opinion commissioned an article on the murder trial of Officer Nuccio. For this purpose he engaged a regular contributor to the magazine. In March 1969 respondent published the resulting article under the title "FRAME-UP: Richard

Nuccio And The War On Police." The article purports to demonstrate that the testimony against Nuccio at his criminal trial was false and that his prosecution was part of the Communist campaign against the police.

In his capacity as counsel for the Nelson family in the civil litigation, petitioner attended the coroner's inquest into the boy's death and initiated actions for damages, but he neither discussed Officer Nuccio with the press nor played any part in the criminal proceeding. Notwithstanding petitioner's remote connection with the prosecution of Nuccio, respondent's magazine portrayed him as an architect of the "frame-up." According to the article, the police file on petitioner took "a big, Irish cop to lift." The article stated that petitioner had been an official of the "Marxist League for Industrial Democracy, originally known as the Intercollegiate Socialist Society, which has advocated the violent seizure of our government." It labeled Gertz a "Leninist" and a "Communist-fronter." It also stated that Gertz had been an officer of the National Lawyers Guild, described as a Communist organization that "probably did more than any other outfit to plan the Communist attack on the Chicago police during the 1968 Democratic Convention."

These statements contained serious inaccuracies. The implication that petitioner had a criminal record was false. Petitioner had been a member and officer of the National Lawyers Guild some 15 years earlier, but there was no evidence that he or that organization had taken any part in planning the 1968 demonstrations in Chicago. There was also no basis for the charge that petitioner was a "Leninist" or a "Communist-fronter." And he had never been a member of the "Marxist League for Industrial Democracy" or the "Intercollegiate Socialist Society."

The managing editor of American Opinion made no effort to verify or substantiate the charges against petitioner. Instead, he appended an editorial introduction stating that the author had "conducted extensive research into the Richard Nuccio Case." And he included in the article a photograph of petitioner and wrote the caption that appeared under it: "Elmer Gertz of Red Guild harrasses Nuccio." Respondent placed the issue of American Opinion containing the article on sale at newsstands throughout the country and distributed reprints of the article on the streets of Chicago.

Petitioner filed a diversity action for libel in the United States District Court for the Northern District of Illinois. He claimed that the falsehoods published by respondent injured his reputation as a lawyer and a citizen. Before filing an answer, respondent moved to dismiss the complaint for failure to state a claim upon which relief could be granted, apparently on the ground that petitioner failed to allege special damages. But the court ruled that statements contained in the article constituted libel *per se* under Illinois law and that consequently petitioner need not plead special damages. 306 F. Supp. 310 (1969).

After answering the complaint, respondent filed a pretrial motion for summary judgment, claiming a constitutional privilege against liability for defamation.[1] It asserted that petitioner was a public official or a public figure and that the article concerned an issue of public interest and concern. For these reasons, respondent argued, it was entitled to invoke the privilege enunciated in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964). Under this rule respondent would escape liability unless

[1] Petitioner filed a cross-motion for summary judgment on grounds not specified in the record. The court denied petitioner's cross-motion without discussion in a memorandum opinion of September 16, 1970.

petitioner could prove publication of defamatory falsehood "with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 280. Respondent claimed that petitioner could not make such a showing and submitted a supporting affidavit by the magazine's managing editor. The editor denied any knowledge of the falsity of the statements concerning petitioner and stated that he had relied on the author's reputation and on his prior experience with the accuracy and authenticity of the author's contributions to American Opinion.

The District Court denied respondent's motion for summary judgment in a memorandum opinion of September 16, 1970. The court did not dispute respondent's claim to the protection of the *New York Times* standard. Rather, it concluded that petitioner might overcome the constitutional privilege by making a factual showing sufficient to prove publication of defamatory falsehood in reckless disregard of the truth. During the course of the trial, however, it became clear that the trial court had not accepted all of respondent's asserted grounds for applying the *New York Times* rule to this case. It thought that respondent's claim to the protection of the constitutional privilege depended on the contention that petitioner was either a public official under the *New York Times* decision or a public figure under *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967), apparently discounting the argument that a privilege would arise from the presence of a public issue. After all the evidence had been presented but before submission of the case to the jury, the court ruled in effect that petitioner was neither a public official nor a public figure. It added that, if he were, the resulting application of the *New York Times* standard would require a directed verdict for respondent. Because some statements in the article constituted libel *per se*

under Illinois law, the court submitted the case to the jury under instructions that withdrew from its consideration all issues save the measure of damages. The jury awarded $50,000 to petitioner.

Following the jury verdict and on further reflection, the District Court concluded that the *New York Times* standard should govern this case even though petitioner was not a public official or public figure. It accepted respondent's contention that that privilege protected discussion of any public issue without regard to the status of a person defamed therein. Accordingly, the court entered judgment for respondent notwithstanding the jury's verdict.[2] This conclusion anticipated the reason-

[2] 322 F. Supp. 997 (1970). Petitioner asserts that the entry of judgment *n. o. v.* on the basis of his failure to show knowledge of falsity or reckless disregard for the truth constituted unfair surprise and deprived him of a full and fair opportunity to prove "actual malice" on the part of respondent. This contention is not supported by the record. It is clear that the trial court gave petitioner no reason to assume that the *New York Times* privilege would not be available to respondent. The court's memorandum opinion denying respondent's pretrial motion for summary judgment does not state that the *New York Times* standard was inapplicable to this case. Rather, it reveals that the trial judge thought it possible for petitioner to make a factual showing sufficient to overcome respondent's claim of constitutional privilege. It states in part:

"When there is a factual dispute as to the existence of actual malice, summary judgment is improper.

. . . . . .

"In the instant case a jury might infer from the evidence that [respondent's] failure to investigate the truth of the allegations, coupled with its receipt of communications challenging the factual accuracy of this author in the past, amounted to actual malice, that is, 'reckless disregard' of whether the allegations were true or not. *New York Times* [*Co.*] v. *Sullivan,* [376 U. S. 254,] 279–280 [(1964)]." Mem. Op., Sept. 16, 1970.

Thus, petitioner knew or should have known that the outcome of the trial might hinge on his ability to show by clear and convincing

ing of a plurality of this Court in *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971).

Petitioner appealed to contest the applicability of the *New York Times* standard to this case. Although the Court of Appeals for the Seventh Circuit doubted the correctness of the District Court's determination that petitioner was not a public figure, it did not overturn that finding.[3] It agreed with the District Court that respondent could assert the constitutional privilege because the article concerned a matter of public interest, citing this Court's intervening decision in *Rosenbloom* v. *Metromedia, Inc., supra.* The Court of Appeals read *Rosenbloom* to require application of the *New York Times* standard to any publication or broadcast about an issue of significant public interest, without regard to the position, fame, or anonymity of the person defamed, and it concluded that respondent's statements

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evidence that respondent acted with reckless disregard for the truth. And this question remained open throughout the trial. Although the court initially concluded that the applicability of the *New York Times* rule depended on petitioner's status as a public figure, the court did not decide that petitioner was not a public figure until all the evidence had been presented. Thus petitioner had every opportunity, indeed incentive, to prove "reckless disregard" if he could, and he in fact attempted to do so. The record supports the observation by the Court of Appeals that petitioner "did present evidence of malice (both the 'constitutional' and the 'ill will' type) to support his damage claim and no such evidence was excluded . . . ." 471 F. 2d 801, 807 n. 15 (1972).

[3] The court stated:

"[Petitioner's] considerable stature as a lawyer, author, lecturer, and participant in matters of public import undermine[s] the validity of the assumption that he is not a 'public figure' as that term has been used by the progeny of *New York Times.* Nevertheless, for purposes of decision we make that assumption and test the availability of the claim of privilege by the subject matter of the article." *Id.*, at 805.

concerned such an issue.[4] After reviewing the record, the Court of Appeals endorsed the District Court's conclusion that petitioner had failed to show by clear and

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[4] In the Court of Appeals petitioner made an ingenious but unavailing attempt to show that respondent's defamatory charge against him concerned no issue of public or general interest. He asserted that the subject matter of the article was the murder trial of Officer Nuccio and that he did not participate in that proceeding. Therefore, he argued, even if the subject matter of the article generally were protected by the *New York Times* privilege, under the opinion of the *Rosenbloom* plurality, the defamatory statements about him were not. The Court of Appeals rejected this argument. It noted that the accusations against petitioner played an integral part in respondent's general thesis of a nationwide conspiracy to harass the police:

"[W]e may also assume that the article's basic thesis is false. Nevertheless, under the reasoning of New York Times Co. v. Sullivan, even a false statement of fact made in support of a false thesis is protected unless made with knowledge of its falsity or with reckless disregard of its truth or falsity. It would undermine the rule of that case to permit the actual falsity of a statement to determine whether or not its publisher is entitled to the benefit of the rule.

"If, therefore, we put to one side the false character of the article and treat it as though its contents were entirely true, it cannot be denied that the comments about [petitioner] were integral to its central thesis. They must be tested under the *New York Times* standard." 471 F. 2d, at 806.

We think that the Court of Appeals correctly rejected petitioner's argument. Its acceptance might lead to arbitrary imposition of liability on the basis of an unwise differentiation among kinds of factual misstatements. The present case illustrates the point. Respondent falsely portrayed petitioner as an architect of the criminal prosecution against Nuccio. On its face this inaccuracy does not appear defamatory. Respondent also falsely labeled petitioner a "Leninist" and a "Communist-fronter." These accusations are generally considered defamatory. Under petitioner's interpretation of the "public or general interest" test, respondent would have enjoyed a constitutional privilege to publish defamatory falsehood if petitioner had in fact been associated with the criminal prosecution. But this would mean that the seemingly innocuous mistake of con-

convincing evidence that respondent had acted with "actual malice" as defined by *New York Times*. There was no evidence that the managing editor of American Opinion knew of the falsity of the accusations made in the article. In fact, he knew nothing about petitioner except what he learned from the article. The court correctly noted that mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth. Rather, the publisher must act with a " 'high degree of awareness of . . . probable falsity.' " *St. Amant* v. *Thompson*, 390 U. S. 727, 731 (1968); accord, *Beckley Newspapers Corp.* v. *Hanks*, 389 U. S. 81, 84–85 (1967); *Garrison* v. *Louisiana*, 379 U. S. 64, 75–76 (1964). The evidence in this case did not reveal that respondent had cause for such an awareness. The Court of Appeals therefore affirmed, 471 F. 2d 801 (1972). For the reasons stated below, we reverse.

II

The principal issue in this case is whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements. The Court considered this question on the rather different set of facts presented in *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971). Rosenbloom, a distributor of nudist magazines, was arrested for selling allegedly obscene material while mak-

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fusing petitioner's role in the litigation against Officer Nuccio would destroy the privilege otherwise available for calling petitioner a Communist-fronter. Thus respondent's privilege to publish statements whose content should have alerted it to the danger of injury to reputation would hinge on the accuracy of statements that carried with them no such warning. Assuming that none of these statements was published with knowledge of falsity or with reckless disregard for the truth, we see no reason to distinguish among the inaccuracies.

ing a delivery to a retail dealer. The police obtained a warrant and seized his entire inventory of 3,000 books and magazines. He sought and obtained an injunction prohibiting further police interference with his business. He then sued a local radio station for failing to note in two of its newscasts that the 3,000 items seized were only "reportedly" or "allegedly" obscene and for broadcasting references to "the smut literature racket" and to "girlie-book peddlers" in its coverage of the court proceeding for injunctive relief. He obtained a judgment against the radio station, but the Court of Appeals for the Third Circuit held the *New York Times* privilege applicable to the broadcast and reversed. 415 F. 2d 892 (1969).

This Court affirmed the decision below, but no majority could agree on a controlling rationale. The eight Justices [5] who participated in *Rosenbloom* announced their views in five separate opinions, none of which commanded more than three votes. The several statements not only reveal disagreement about the appropriate result in that case, they also reflect divergent traditions of thought about the general problem of reconciling the law of defamation with the First Amendment. One approach has been to extend the *New York Times* test to an expanding variety of situations. Another has been to vary the level of constitutional privilege for defamatory falsehood with the status of the person defamed. And a third view would grant to the press and broadcast media absolute immunity from liability for defamation. To place our holding in the proper context, we preface our discussion of this case with a review of the several *Rosenbloom* opinions and their antecedents.

In affirming the trial court's judgment in the instant case, the Court of Appeals relied on MR. JUSTICE BREN-

[5] MR. JUSTICE DOUGLAS did not partcipate in the consideration or decision of *Rosenbloom*.

552-191 O - 76 - 24

NAN's conclusion for the *Rosenbloom* plurality that "all discussion and communication involving matters of public or general concern," 403 U. S., at 44, warrant the protection from liability for defamation accorded by the rule originally enunciated in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964). There this Court defined a constitutional privilege intended to free criticism of public officials from the restraints imposed by the common law of defamation. The Times ran a political advertisement endorsing civil rights demonstrations by black students in Alabama and impliedly condemning the performance of local law-enforcement officials. A police commissioner established in state court that certain misstatements in the advertisement referred to him and that they constituted libel *per se* under Alabama law. This showing left the Times with the single defense of truth, for under Alabama law neither good faith nor reasonable care would protect the newspaper from liability. This Court concluded that a "rule compelling the critic of official conduct to guarantee the truth of all his factual assertions" would deter protected speech, *id.*, at 279, and announced the constitutional privilege designed to counter that effect:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 279–280.[6]

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[6] *New York Times* and later cases explicated the meaning of the new standard. In *New York Times* the Court held that under the circumstances the newspaper's failure to check the accuracy of the advertisement against news stories in its own files did not establish

Three years after *New York Times,* a majority of the Court agreed to extend the constitutional privilege to defamatory criticism of "public figures." This extension

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reckless disregard for the truth. 376 U. S., at 287–288. In *St. Amant* v. *Thompson,* 390 U. S. 727, 731 (1968), the Court equated reckless disregard of the truth with subjective awareness of probable falsity: "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." In *Beckley Newspapers Corp.* v. *Hanks,* 389 U. S. 81 (1967), the Court emphasized the distinction between the *New York Times* test of knowledge of falsity or reckless disregard of the truth and "actual malice" in the traditional sense of ill-will. *Garrison* v. *Louisiana,* 379 U. S. 64 (1964), made plain that the new standard applied to criminal libel laws as well as to civil actions and that it governed criticism directed at "anything which might touch on an official's fitness for office." *Id.,* at 77. Finally, in *Rosenblatt* v. *Baer,* 383 U. S. 75, 85 (1966), the Court stated that "the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."

In *Time, Inc.* v. *Hill,* 385 U. S. 374 (1967), the Court applied the *New York Times* standard to actions under an unusual state statute. The statute did not create a cause of action for libel. Rather, it provided a remedy for unwanted publicity. Although the law allowed recovery of damages for harm caused by exposure to public attention rather than by factual inaccuracies, it recognized truth as a complete defense. Thus, nondefamatory factual errors could render a publisher liable for something akin to invasion of privacy. The Court ruled that the defendant in such an action could invoke the *New York Times* privilege regardless of the fame or anonymity of the plaintiff. Speaking for the Court, MR. JUSTICE BRENNAN declared that this holding was not an extension of *New York Times* but rather a parallel line of reasoning applying that standard to this discrete context:

"This is neither a libel action by a private individual nor a statutory action by a public official. Therefore, although the First Amendment principles pronounced in *New York Times* guide our conclusion, we reach that conclusion only by applying these principles in this discrete context. It therefore serves no purpose to distinguish the facts here from those in *New York Times.* Were this a libel action, the distinction which has been suggested be-

was announced in *Curtis Publishing Co.* v. *Butts* and its companion, *Associated Press* v. *Walker*, 388 U. S. 130, 162 (1967). The first case involved the Saturday Evening Post's charge that Coach Wally Butts of the University of Georgia had conspired with Coach "Bear" Bryant of the University of Alabama to fix a football game between their respective schools. *Walker* involved an erroneous Associated Press account of former Major General Edwin Walker's participation in a University of Mississippi campus riot. Because Butts was paid by a private alumni association and Walker had resigned from the Army, neither could be classified as a "public official" under *New York Times*. Although Mr. Justice Harlan announced the result in both cases, a majority of the Court agreed with Mr. Chief Justice Warren's conclusion that the *New York Times* test should apply to criticism of "public figures" as well as "public officials." [7] The Court extended the con-

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tween the relative opportunities of the public official and the private individual to rebut defamatory charges might be germane. And the additional state interest in the protection of the individual against damage to his reputation would be involved. Cf. *Rosenblatt* v. *Baer*, 383 U. S. 75, 91 (STEWART, J., concurring)." 385 U. S., at 390–391.

[7] Professor Kalven once introduced a discussion of these cases with the apt heading, "You Can't Tell the Players without a Score Card." Kalven, The Reasonable Man and the First Amendment: Hill, Butts, and Walker, 1967 Sup. Ct. Rev. 267, 275. Only three other Justices joined Mr. Justice Harlan's analysis of the issues involved. In his concurring opinion, Mr. Chief Justice Warren stated the principle for which these cases stand—that the *New York Times* test reaches both public figures and public officials. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE agreed with the Chief Justice on that question. Mr. Justice Black and MR. JUSTICE DOUGLAS reiterated their view that publishers should have an absolute immunity from liability for defamation, but they acquiesced in the Chief Justice's reasoning in order to enable a majority of the Justices to agree on the question of the appropriate constitutional privilege for defamation of public figures.

stitutional privilege announced in that case to protect defamatory criticism of nonpublic persons who "are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Id.*, at 164 (Warren, C. J., concurring in result).

In his opinion for the plurality in *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971), MR. JUSTICE BRENNAN took the *New York Times* privilege one step further. He concluded that its protection should extend to defamatory falsehoods relating to private persons if the statements concerned matters of general or public interest. He abjured the suggested distinction between public officials and public figures on the one hand and private individuals on the other. He focused instead on society's interest in learning about certain issues: "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." *Id.*, at 43. Thus, under the plurality opinion, a private citizen involuntarily associated with a matter of general interest has no recourse for injury to his reputation unless he can satisfy the demanding requirements of the *New York Times* test.

Two Members of the Court concurred in the result in *Rosenbloom* but departed from the reasoning of the plurality. Mr. Justice Black restated his view, long shared by MR. JUSTICE DOUGLAS, that the First Amendment cloaks the news media with an absolute and indefeasible immunity from liability for defamation. *Id.*, at 57. MR JUSTICE WHITE concurred on a narrower ground. *Ibid.* He concluded that "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." *Id.*, at 62. He therefore declined to reach the broader questions addressed by the other Justices.

Mr. Justice Harlan dissented. Although he had joined the opinion of the Court in *New York Times*, in *Curtis Publishing Co.* he had contested the extension of the privilege to public figures. There he had argued that a public figure who held no governmental office should be allowed to recover damages for defamation "on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." 388 U. S., at 155. In his *Curtis Publishing Co.* opinion Mr. Justice Harlan had distinguished *New York Times* primarily on the ground that defamation actions by public officials "lay close to seditious libel . . . ." *Id.*, at 153. Recovery of damages by one who held no public office, however, could not "be viewed as a vindication of governmental policy." *Id.*, at 154. Additionally, he had intimated that, because most public officials enjoyed absolute immunity from liability for their own defamatory utterances under *Barr* v. *Matteo*, 360 U. S. 564 (1959), they lacked a strong claim to the protection of the courts.

In *Rosenbloom* Mr. Justice Harlan modified these views. He acquiesced in the application of the privilege to defamation of public figures but argued that a different rule should obtain where defamatory falsehood harmed a private individual. He noted that a private person has less likelihood "of securing access to channels of communication sufficient to rebut falsehoods concerning him" than do public officials and public figures, 403 U. S., at 70, and has not voluntarily placed himself in the

public spotlight. Mr. Justice Harlan concluded that the States could constitutionally allow private individuals to recover damages for defamation on the basis of any standard of care except liability without fault.

MR. JUSTICE MARSHALL dissented in *Rosenbloom* in an opinion joined by MR. JUSTICE STEWART. *Id.*, at 78. He thought that the plurality's "public or general interest" test for determining the applicability of the *New York Times* privilege would involve the courts in the dangerous business of deciding "what information is relevant to self-government." *Id.*, at 79. He also contended that the plurality's position inadequately served "society's interest in protecting private individuals from being thrust into the public eye by the distorting light of defamation." *Ibid.* MR. JUSTICE MARSHALL therefore reached the conclusion, also reached by Mr. Justice Harlan, that the States should 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," so long as the States did not impose liability without fault. *Id.*, at 86. The principal point of disagreement among the three dissenters concerned punitive damages. Whereas Mr. Justice Harlan thought that the States could allow punitive damages in amounts bearing "a reasonable and purposeful relationship to the actual harm done . . . ," *id.*, at 75, MR. JUSTICE MARSHALL concluded that the size and unpredictability of jury awards of exemplary damages unnecessarily exacerbated the problems of media self-censorship and that such damages should therefore be forbidden.

III

We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but

on the competition of other ideas.[8] But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. *New York Times Co.* v. *Sullivan,* 376 U. S., at 270. They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572 (1942).

Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. As James Madison pointed out in the Report on the Virginia Resolutions of 1798: "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." 4 J. Elliot, Debates on the Federal Constitution of 1787, p. 571 (1876). And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties. As the Court stated in *New York Times Co.* v. *Sullivan, supra,* at 279: "Allowance of the defense of truth,

[8] As Thomas Jefferson made the point in his first Inaugural Address: "If there be any among us who would wish to dissolve this Union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."

with the burden of proving it on the defendant, does not mean that only false speech will be deterred." The First Amendment requires that we protect some falsehood in order to protect speech that matters.

The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation. See *New York Times Co.* v. *Sullivan, supra,* at 293 (Black, J., concurring); *Garrison* v. *Louisiana,* 379 U. S., at 80 (DOUGLAS, J., concurring); *Curtis Publishing Co.* v. *Butts,* 388 U. S., at 170 (opinion of Black, J.). Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation.

The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose, for, as MR. JUSTICE STEWART has reminded us, the individual's right to the protection of his own good name

> "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. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system." *Rosenblatt* v. *Baer,* 383 U. S. 75, 92 (1966) (concurring opinion).

Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. As Mr. Justice Harlan stated, "some antithesis between freedom of speech and press and libel actions persists, for libel remains premised on the content of speech and limits the freedom of the publisher to express certain sentiments, at least without guaranteeing legal proof of their substantial accuracy." *Curtis Publishing Co.* v. *Butts, supra,* at 152. In our continuing effort to define the proper accommodation between these competing concerns, we have been especially anxious to assure to the freedoms of speech and press that "breathing space" essential to their fruitful exercise. *NAACP* v. *Button,* 371 U. S. 415, 433 (1963). To that end this Court has extended a measure of strategic protection to defamatory falsehood.

The *New York Times* standard defines the level of constitutional protection appropriate to the context of defamation of a public person. Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth. This standard administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander. And it exacts a correspondingly high price from the victims of defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test. Despite this

substantial abridgment of the state law right to compensation for wrongful hurt to one's reputation, the Court has concluded that the protection of the *New York Times* privilege should be available to publishers and broadcasters of defamatory falsehood concerning public officials and public figures. *New York Times Co.* v. *Sullivan, supra; Curtis Publishing Co.* v. *Butts, supra.* We think that these decisions are correct, but we do not find their holdings justified solely by reference to the interest of the press and broadcast media in immunity from liability. Rather, we believe that the *New York Times* rule states an accommodation between this concern and the limited state interest present in the context of libel actions brought by public persons. For the reasons stated below, we conclude that the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them.

Theoretically, of course, the balance between the needs of the press and the individual's claim to compensation for wrongful injury might be struck on a case-by-case basis. As Mr. Justice Harlan hypothesized, "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 transcend the legitimate state interest in protecting the particular plaintiff who prevailed." *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S., at 63 (footnote omitted). But this approach would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an *ad hoc* resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general

application. Such rules necessarily treat alike various cases involving differences as well as similarities. Thus it is often true that not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority.

With that caveat we have no difficulty in distinguishing among defamation plaintiffs. The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.[9] Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

More important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties. As the Court pointed out in *Garrison* v. *Louisiana*, 379 U. S., at 77, the public's interest extends to "anything

[9] Of course, an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie. But the fact that the self-help remedy of rebuttal, standing alone, is inadequate to its task does not mean that it is irrelevant to our inquiry.

which might touch on an official's fitness for office . . . . Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character."

Those classed as public figures stand in a similar position. Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual. He has not accepted public office or assumed an "influential role in ordering society." *Curtis Publishing Co.* v. *Butts,* 388 U. S., at 164 (Warren, C. J., concurring in result). He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.

For these reasons we conclude that the States should retain substantial latitude in their efforts to enforce a

legal remedy for defamatory falsehood injurious to the reputation of a private individual. The extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge this legitimate state interest to a degree that we find unacceptable. And it would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of "general or public interest" and which do not—to determine, in the words of MR. JUSTICE MARSHALL, "what information is relevant to self-government." *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S., at 79. We doubt the wisdom of committing this task to the conscience of judges. Nor does the Constitution require us to draw so thin a line between the drastic alternatives of the *New York Times* privilege and the common law of strict liability for defamatory error. The "public or general interest" test for determining the applicability of the *New York Times* standard to private defamation actions inadequately serves both of the competing values at stake. On the one hand, a private individual whose reputation is injured by defamatory falsehood that does concern an issue of public or general interest has no recourse unless he can meet the rigorous requirements of *New York Times*. This is true despite the factors that distinguish the state interest in compensating private individuals from the analogous interest involved in the context of public persons. On the other hand, a publisher or broadcaster of a defamatory error which a court deems unrelated to an issue of public or general interest may be held liable in damages even if it took every reasonable precaution to ensure the accuracy of its assertions. And liability may far exceed compensation for any actual injury to the plaintiff, for the jury may be permitted to presume damages without proof of loss and even to award punitive damages.

We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.[10] This approach provides a more equitable

[10] Our caveat against strict liability is the prime target of MR. JUSTICE WHITE'S dissent. He would hold that a publisher or broadcaster may be required to prove the truth of a defamatory statement concerning a private individual and, failing such proof, that the publisher or broadcaster may be held liable for defamation even though he took every conceivable precaution to ensure the accuracy of the offending statement prior to its dissemination. *Post,* at 388–392. In MR. JUSTICE WHITE'S view, one who publishes a statement that later turns out to be inaccurate can never be "without fault" in any meaningful sense, for "[i]t is he who circulated a falsehood *that he was not required to publish.*" *Post,* at 392 (emphasis added).

MR. JUSTICE WHITE characterizes *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964), as simply a case of seditious libel. *Post,* at 387. But that rationale is certainly inapplicable to *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130 (1967), where MR. JUSTICE WHITE joined four other Members of the Court to extend the knowing-or-reckless-falsity standard to media defamation of persons identified as public figures but not connected with the Government. MR. JUSTICE WHITE now suggests that he would abide by that vote, *post,* at 398, but the full thrust of his dissent—as we read it—contradicts that suggestion. Finally, in *Rosenbloom* v. *Metromedia, Inc.,* 403 U. S. 29, 57 (1971), MR. JUSTICE WHITE voted to apply the *New York Times* privilege to media defamation of an individual who was neither a public official nor a public figure. His opinion states that the knowing-or-reckless-falsity standard should apply to media "comment upon the official actions of public servants," *id.,* at 62, including defamatory falsehood about a person arrested by the police. If adopted by the Court, this conclusion would significantly extend the *New York Times* privilege.

MR. JUSTICE WHITE asserts that our decision today "trivializes and denigrates the interest in reputation," *Miami Herald Publishing Co.* v. *Tornillo, ante,* at 262 (concurring opinion), that it "scuttle[s] the libel laws of the States in . . . wholesale fashion" and renders ordinary citizens "powerless to protect themselves." *Post,* at 370. In light of the progressive extension of the knowing-or-reckless-falsity

boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation. At least this conclusion obtains where, as here, the substance of the defamatory statement "makes substantial danger to reputation apparent." [11] This phrase places in perspective the conclusion we announce today. Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential. Cf. *Time, Inc.* v. *Hill,* 385 U. S. 374 (1967). Such a case is not now before us, and we intimate no view as to its proper resolution.

IV

Our accommodation of the competing values at stake in defamation suits by private individuals allows the States to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by *New York Times.* This conclusion is not based on a belief that the considerations which prompted the adoption of the *New York Times* privilege for defamation of public officials and its extension to public figures are wholly inapplicable to the context of private individuals. Rather, we endorse this approach in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputa-

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requirement detailed in the preceding paragraph, one might have viewed today's decision allowing recovery under any standard save strict liability as a more generous accommodation of the state interest in comprehensive reputational injury to private individuals than the law presently affords.

[11] *Curtis Publishing Co.* v. *Butts, supra,* at 155.

tion. But this countervailing state interest extends no further than compensation for actual injury. For the reasons stated below, we hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved. It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. We

552-191 O - 76 - 25

need not define "actual injury," as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

We also find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation. In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence. In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.

V

Notwithstanding our refusal to extend the *New York Times* privilege to defamation of private individuals, respondent contends that we should affirm the judgment below on the ground that petitioner is either a public official or a public figure. There is little basis for the former assertion. Several years prior to the present incident, petitioner had served briefly on housing committees appointed by the mayor of Chicago, but at the time of publication he had never held any remunerative governmental position. Respondent admits this but argues that petitioner's appearance at the coroner's inquest rendered him a "de facto public official." Our cases recognize no such concept. Respondent's suggestion would sweep all lawyers under the *New York Times* rule as officers of the court and distort the plain meaning of the "public official" category beyond all recognition. We decline to follow it.

Respondent's characterization of petitioner as a public figure raises a different question. That designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

Petitioner has long been active in community and professional affairs. He has served as an officer of local civic groups and of various professional organizations, and he has published several books and articles on legal subjects. Although petitioner was consequently well known in some circles, he had achieved no general fame

or notoriety in the community. None of the prospective jurors called at the trial had ever heard of petitioner prior to this litigation, and respondent offered no proof that this response was atypical of the local population. We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.

In this context it is plain that petitioner was not a public figure. He played a minimal role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of Officer Nuccio. Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome. We are persuaded that the trial court did not err in refusing to characterize petitioner as a public figure for the purpose of this litigation.

We therefore conclude that the *New York Times* standard is inapplicable to this case and that the trial court erred in entering judgment for respondent. Because the jury was allowed to impose liability without fault and was permitted to presume damages without proof of injury, a new trial is necessary. We reverse and remand for further proceedings in accord with this opinion.

It is so ordered.

MR. JUSTICE BLACKMUN, concurring.

I joined MR. JUSTICE BRENNAN's opinion for the plurality in *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971). I did so because I concluded that, given *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), and its progeny (noted by the Court, *ante*, at 334–336, n. 6), as well as *Curtis Publishing Co.* v. *Butts* and *Associated Press* v. *Walker*, 388 U. S. 130 (1967), the step taken in *Rosenbloom*, extending the *New York Times* doctrine to an event of public or general interest, was logical and inevitable. A majority of the Court evidently thought otherwise, as is particularly evidenced by MR. JUSTICE WHITE's separate concurring opinion there and by the respective dissenting opinions of Mr. Justice Harlan and of MR. JUSTICE MARSHALL joined by MR. JUSTICE STEWART.

The Court today refuses to apply *New York Times* to the private individual, as contrasted with the public official and the public figure. It thus withdraws to the factual limits of the pre-*Rosenbloom* cases. It thereby fixes the outer boundary of the *New York Times* doctrine and says that beyond that boundary, a State is free to define for itself the appropriate standard of media liability so long as it does not impose liability without fault. As my joinder in *Rosenbloom*'s plurality opinion would intimate, I sense some illogic in this.

The Court, however, seeks today to strike a balance between competing values where necessarily uncertain assumptions about human behavior color the result. Although the Court's opinion in the present case departs from the rationale of the *Rosenbloom* plurality, in that the Court now conditions a libel action by a private person upon a showing of negligence, as contrasted with a showing of willful or reckless disregard, I am willing to

join, and do join, the Court's opinion and its judgment for two reasons:

1. By removing the specters of presumed and punitive damages in the absence of *New York Times* malice, the Court eliminates significant and powerful motives for self-censorship that otherwise are present in the traditional libel action. By so doing, the Court leaves what should prove to be sufficient and adequate breathing space for a vigorous press. What the Court has done, I believe, will have little, if any, practical effect on the functioning of responsible journalism.

2. The Court was sadly fractionated in *Rosenbloom*. A result of that kind inevitably leads to uncertainty. I feel that it is of profound importance for the Court to come to rest in the defamation area and to have a clearly defined majority position that eliminates the unsureness engendered by *Rosenbloom*'s diversity. If my vote were not needed to create a majority, I would adhere to my prior view. A definitive ruling, however, is paramount. See *Curtis Publishing Co.* v. *Butts*, 388 U. S., at 170 (Black, J., concurring); *Time, Inc.* v. *Hill*, 385 U. S. 374, 398 (1967) (Black, J., concurring); *United States* v. *Vuitch*, 402 U. S. 62, 97 (1971) (separate statement).

For these reasons, I join the opinion and the judgment of the Court.

MR. CHIEF JUSTICE BURGER, dissenting.

The doctrines of the law of defamation have had a gradual evolution primarily in the state courts. In *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), and its progeny this Court entered this field.

Agreement or disagreement with the law as it has evolved to this time does not alter the fact that it has been orderly development with a consistent basic rationale. In today's opinion the Court abandons the tradi-

tional thread so far as the ordinary private citizen is concerned and introduces the concept that the media will be liable for negligence in publishing defamatory statements with respect to such persons. Although I agree with much of what MR. JUSTICE WHITE states, I do not read the Court's new doctrinal approach in quite the way he does. I am frank to say I do not know the parameters of a "negligence" doctrine as applied to the news media. Conceivably this new doctrine could inhibit some editors, as the dissents of MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN suggest. But I would prefer to allow this area of law to continue to evolve as it has up to now with respect to private citizens rather than embark on a new doctrinal theory which has no jurisprudential ancestry.

The petitioner here was performing a professional representative role as an advocate in the highest tradition of the law, and under that tradition the advocate is not to be invidiously identified with his client. The important public policy which underlies this tradition—the right to counsel—would be gravely jeopardized if every lawyer who takes an "unpopular" case, civil or criminal, would automatically become fair game for irresponsible reporters and editors who might, for example, describe the lawyer as a "mob mouthpiece" for representing a client with a serious prior criminal record, or as an "ambulance chaser" for representing a claimant in a personal injury action.

I would reverse the judgment of the Court of Appeals and remand for reinstatement of the verdict of the jury and the entry of an appropriate judgment on that verdict.

MR. JUSTICE DOUGLAS, dissenting.

The Court describes this case as a return to the struggle of "defin[ing] the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." It is indeed a struggle, once described by Mr. Justice Black as "the same

quagmire" in which the Court "is now helplessly struggling in the field of obscenity." *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 171 (concurring opinion). I would suggest that the struggle is a quite hopeless one, for, in light of the command of the First Amendment, no "accommodation" of its freedoms can be "proper" except those made by the Framers themselves.

Unlike the right of privacy which, by the terms of the Fourth Amendment, must be accommodated with reasonable searches and seizures and warrants issued by magistrates, the rights of free speech and of a free press were protected by the Framers in verbiage whose proscription seems clear. I have stated before my view that the First Amendment would bar Congress from passing any libel law.[1] This was the view held by Thomas Jefferson [2] and it is one Congress has never challenged through enactment of a civil libel statute. The sole congressional attempt at this variety of First Amendment muzzle was in the Sedition Act of 1798—a criminal libel act never tested in this Court and one which expired by its terms three years after enactment. As President, Thomas Jefferson pardoned those who were convicted under the Act, and fines levied in its prosecution were repaid by Act of Congress.[3] The general

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[1] See, *e. g.*, *Rosenblatt* v. *Baer*, 383 U. S. 75, 90 (concurring).

[2] In 1798 Jefferson stated:

"[The First Amendment] thereby guard[s] in the same sentence, and under the same words, the freedom of religion, of speech, and of the press: insomuch, that whatever violates either, throws down the sanctuary which covers the others, *and that libels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals. . . .*" 8 The Works of Thomas Jefferson 464–465 (Ford ed. 1904) (emphasis added).

[3] See, *e. g.*, Act of July 4, 1840, c. 45, 6 Stat. 802, accompanied by H. R. Rep. No. 86, 26th Cong., 1st Sess. (1840).

consensus was that the Act constituted a regrettable legislative exercise plainly in violation of the First Amendment.[4]

With the First Amendment made applicable to the States through the Fourteenth,[5] I do not see how States have any more ability to "accommodate" freedoms of speech or of the press than does Congress. This is true whether the form of the accommodation is civil or criminal since "[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 277. Like Congress, States are without power "to use a civil libel law or any other law to impose damages for merely discussing public affairs." *Id.*, at 295 (Black, J., concurring).[6]

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[4] Senator Calhoun in reporting to Congress assumed the invalidity of the Act to be a matter "which no one now doubts." Report with Senate Bill No. 122, S. Doc. No. 118, 24th Cong., 1st Sess., 3 (1836).

[5] See *Stromberg* v. *California*, 283 U. S. 359, 368–369.

[6] Since this case involves a discussion of public affairs, I need not decide at this point whether the First Amendment prohibits all libel actions. "An unconditional right to say what one pleases about public affairs is what I consider to be the *minimum* guarantee of the First Amendment." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 297 (Black, J., concurring) (emphasis added). But "public affairs" includes a great deal more than merely political affairs. Matters of science, economics, business, art, literature, etc., are all matters of interest to the general public. Indeed, any matter of sufficient general interest to prompt media coverage may be said to be a public affair. Certainly police killings, "Communist conspiracies," and the like qualify.

A more regressive view of free speech has surfaced but it has thus far gained no judicial acceptance. Solicitor General Bork has stated:

"Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or

Continued recognition of the possibility of state libel suits for public discussion of public issues leaves the freedom of speech honored by the Fourteenth Amendment a diluted version of First Amendment protection. This view is only possible if one accepts the position that the First Amendment is applicable to the States only through the Due Process Clause of the Fourteenth, due process freedom of speech being only that freedom which this Court might deem to be "implicit in the concept of ordered liberty." [7] But the Court frequently has rested

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that variety of expression we call obscene or pornographic. Moreover, within that category of speech we ordinarly call political, there should be no constitutional obstruction to laws making criminal any speech that advocates forcible overthrow of the government or the violation of any law." Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L. J. 1, 20 (1971).

According to this view, Congress, upon finding a painting aesthetically displeasing or a novel poorly written or a revolutionary new scientific theory unsound could constitutionally prohibit exhibition of the painting, distribution of the book or discussion of the theory. Congress might also proscribe the advocacy of the violation of any law, apparently without regard to the law's constitutionality. Thus, were Congress to pass a blatantly invalid law such as one prohibiting newspaper editorials critical of the Government, a publisher might be punished for advocating its violation. Similarly, the late Dr. Martin Luther King, Jr., could have been punished for advising blacks to peacefully sit in the front of buses or to ask for service in restaurants segregated by law.

[7] See *Palko* v. *Connecticut*, 302 U. S. 319, 325. As Mr. Justice Black has noted, by this view the test becomes "whether the government has an interest in abridging the right involved and, if so, whether that interest is of sufficient importance, *in the opinion of a majority of the Supreme Court*, to justify the government's action in doing so. Such a doctrine can be used to justify almost any government suppression of First Amendment freedoms. As I have stated many times before, I cannot subscribe to this doctrine because I believe that the First Amendment's unequivocal command that there shall be no abridgement of the rights of free speech shows that the men

state free speech and free press decisions on the Fourteenth Amendment generally [8] rather than on the Due Process Clause alone. The Fourteenth Amendment speaks not only of due process but also of "privileges and immunities" of United States citizenship. I can conceive of no privilege or immunity with a higher claim to recognition against state abridgment than the freedoms of speech and of the press. In our federal system we are all subject to two governmental regimes, and freedoms of speech and of the press protected against the infringement of only one are quite illusory. The identity of the oppressor is, I would think, a matter of relative indifference to the oppressed.

There can be no doubt that a State impinges upon free and open discussion when it sanctions the imposition of damages for such discussion through its civil libel laws. Discussion of public affairs is often marked by highly charged emotions, and jurymen, not unlike us all, are subject to those emotions. It is indeed this very type of speech which is the reason for the First Amendment since speech which arouses little emotion is little in need of protection. The vehicle for publication in this case was the American Opinion, a most controversial periodical which disseminates the views of the John Birch Society, an organization which many deem to be

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who drafted our Bill of Rights did all the 'balancing' that was to be done in this field." H. Black, A Constitutional Faith 52 (1969).

[8] See, *e. g.*, *Bridges* v. *California*, 314 U. S. 252, 263 n. 6 (Black, J.); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 108 (DOUGLAS, J.); *Saia* v. *New York*, 334 U. S. 558, 560 (DOUGLAS, J.); *Talley* v. *California*, 362 U. S. 60, 62 (Black, J.); *DeGregory* v. *Attorney General of New Hampshire*, 383 U. S. 825, 828 (DOUGLAS, J.); *Elfbrandt* v. *Russell*, 384 U. S. 11, 18 (DOUGLAS, J.); *Mills* v. *Alabama*, 384 U. S. 214, 218 (Black, J.); *Mine Workers* v. *Illinois Bar Assn.*, 389 U. S. 217, 221–222, and n. 4 (Black, J.).

quite offensive. The subject matter involved "Communist plots," "conspiracies against law enforcement agencies," and the killing of a private citizen by the police. With any such amalgam of controversial elements pressing upon the jury, a jury determination, unpredictable in the most neutral circumstances, becomes for those who venture to discuss heated issues, a virtual roll of the dice separating them from liability for often massive claims of damage.

It is only the hardy publisher who will engage in discussion in the face of such risk, and the Court's preoccupation with proliferating standards in the area of libel increases the risks. It matters little whether the standard be articulated as "malice" or "reckless disregard of the truth" or "negligence," for jury determinations by any of those criteria are virtually unreviewable. This Court, in its continuing delineation of variegated mantles of First Amendment protection, is, like the potential publisher, left with only speculation on how jury findings were influenced by the effect the subject matter of the publication had upon the minds and viscera of the jury. The standard announced today leaves the States free to "define for themselves the appropriate standard of liability for a publisher or broadcaster" in the circumstances of this case. This of course leaves the simple negligence standard as an option, with the jury free to impose damages upon a finding that the publisher failed to act as "a reasonable man." With such continued erosion of First Amendment protection, I fear that it may well be the reasonable man who refrains from speaking.

Since in my view the First and Fourteenth Amendments prohibit the imposition of damages upon respondent for this discussion of public affairs, I would affirm the judgment below.

MR. JUSTICE BRENNAN, dissenting.

I agree with the conclusion, expressed in Part V of the Court's opinion, that, at the time of publication of respondent's article, petitioner could not properly have been viewed as either a "public official" or "public figure"; instead, respondent's article, dealing with an alleged conspiracy to discredit local police forces, concerned petitioner's purported involvement in "an event of public or general interest." *Roosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, 31–32 (1971); see *ante*, at 331–332, n. 4. I cannot agree, however, that free and robust debate—so essential to the proper functioning of our system of government—is permitted adequate "breathing space," *NAACP* v. *Button*, 371 U. S. 415, 433 (1963), when, as the Court holds, the States may impose all but strict liability for defamation if the defamed party is a private person and "the substance of the defamatory statement 'makes substantial danger to reputation apparent.'" *Ante*, at 348.[1] I adhere to my view expressed in *Rosenbloom* v. *Metromedia, Inc., supra*, that we strike the proper accommodation between avoidance of media self-censorship and protection of individual reputations only when we require States to apply the *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), knowing-or-reckless-falsity standard in civil libel actions concerning media reports of the involvement of private individuals in events of public or general interest.

The Court does not hold that First Amendment guarantees do not extend to speech concerning private persons' involvement in events of public or general interest. It recognizes that self-governance in this country perseveres because of our "profound national com-

[1] *A fortiori* I disagree with my Brother WHITE's view that the States should have free rein to impose strict liability for defamation in cases not involving public persons.

mitment to the principle that debate on *public issues* should be uninhibited, robust, and wide-open." *Id.*, at 270 (emphasis added). Thus, guarantees of free speech and press necessarily reach "far more than knowledge and debate about the strictly official activities of various levels of government," *Rosenbloom* v. *Metromedia, Inc., supra,* at 41; for "[f]reedom 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).

The teaching to be distilled from our prior cases is that, while public interest in events may at times be influenced by the notoriety of the individuals involved, "[t]he public's primary interest is in the event[,] . . . the conduct of the participant and the content, effect, and significance of the conduct . . . ." *Rosenbloom, supra,* at 43. Matters of public or general interest do not "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." *Ibid.* See *Time, Inc.* v. *Hill,* 385 U. S. 374, 388 (1967).

Although acknowledging that First Amendment values are of no less significance when media reports concern private persons' involvement in matters of public concern, the Court refuses to provide, in such cases, the same level of constitutional protection that has been afforded the media in the context of defamation of public persons. The accommodation that this Court has established between free speech and libel laws in cases involving public officials and public figures—that defamatory falsehood be shown by clear and convincing evidence to have been published with knowledge of falsity or with reckless disregard of truth—is not apt, the Court holds, because

the private individual does not have the same degree of access to the media to rebut defamatory comments as does the public person and he has not voluntarily exposed himself to public scrutiny.

While these arguments are forcefully and eloquently presented, I cannot accept them, for the reasons I stated in *Rosenbloom:*

> "The *New York Times* standard was applied to libel of a public official or public figure to give effect to the [First] 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 . . . , 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 [not fully defined] class of 'public figures' involved in matters of public concern will be better able to respond through the media than private individuals also involved in such matters seems too insubstantial

a reed on which to rest a constitutional distinction." 403 U. S., at 46–47.

Moreover, the argument that private persons should not be required to prove *New York Times* knowing-or-reckless falsity because they do not assume the risk of defamation by freely entering the public arena "bears little relationship either to the values protected by the First Amendment or to the nature of our society." *Id.*, at 47. Social interaction exposes all of us to some degree of public view. This Court has observed that "[t]he risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press." *Time, Inc.* v. *Hill,* 385 U. S., at 388. Therefore,

> "[v]oluntarily 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 . . . *Griswold* v. *Connecticut,* 381 U. S. 479 (1965). 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." *Rosenbloom, supra,* at 48 (footnote omitted).

To be sure, no one commends publications which defame the good name and reputation of any person: "In an ideal world, the responsibility of the press would match the freedom and public trust given it." *Id.*, at

51.[2] Rather, as the Court agrees, some abuse of First Amendment freedoms is tolerated only to insure that would-be commentators on events of public or general interest are not "deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *New York Times Co.* v. *Sullivan,* 376 U. S., at 279. The Court's holding and *a fortiori* my Brother WHITE's views, see n. 1, *supra,* simply deny free expression its needed "breathing space." Today's decision will exacerbate the rule of self-censorship of legitimate utterance as publishers "steer far wider of the unlawful zone," *Speiser* v. *Randall,* 357 U. S. 513, 526 (1958).

We recognized in *New York Times Co.* v. *Sullivan, supra,* at 279, that a rule requiring a critic of official conduct to guarantee the truth of all of his factual contentions would inevitably lead to self-censorship when

[2] A respected commentator has observed that factors other than purely legal constraints operate to control the press:

"Traditions, attitudes, and general rules of political conduct are far more important controls. The fear of opening a credibility gap, and thereby lessening one's influence, holds some participants in check. Institutional pressures in large organizations, including some of the press, have a similar effect; it is difficult for an organization to have an open policy of making intentionally false accusations." T. Emerson, The System of Freedom of Expression 538 (1970).

Typical of the press' own ongoing self-evaluation is a proposal to establish a national news council, composed of members drawn from the public and the journalism profession, to examine and report on complaints concerning the accuracy and fairness of news reporting by the largest newsgathering sources. Twentieth Century Fund Task Force Report for a National News Council, A Free and Responsive Press (1973). See also Comment, The Expanding Constitutional Protection for the News Media from Liability for Defamation: Predictability and the New Synthesis, 70 Mich. L. Rev. 1547, 1569–1570 (1972).

552-191 O - 76 - 26

publishers, fearful of being unable to prove truth or unable to bear the expense of attempting to do so, simply eschewed printing controversial articles. Adoption, by many States, of a reasonable-care standard in cases where private individuals are involved in matters of public interest—the probable result of today's decision—will likewise lead to self-censorship since publishers will be required carefully to weigh a myriad of uncertain factors before publication. The reasonable-care standard is "elusive," *Time, Inc.* v. *Hill, supra,* at 389; it saddles the press with "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." *Ibid.* Under a reasonable-care regime, publishers and broadcasters will have to make pre-publication judgments about juror assessment of such diverse considerations as the size, operating procedures, and financial condition of the newsgathering system, as well as the relative costs and benefits of instituting less frequent and more costly reporting at a higher level of accuracy. See The Supreme Court, 1970 Term, 85 Harv. L. Rev. 3, 228 (1971). Moreover, in contrast to proof by clear and convincing evidence required under the *New York Times* test, the burden of proof for reasonable care will doubtless be the preponderance of the evidence.

> "In the normal civil suit where [the preponderance of the evidence] 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 . . . 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." *Rosenbloom,* 403 U. S., at 50.

And, most hazardous, the flexibility which inheres in the reasonable-care standard will create the danger that a jury will convert it into "an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks,' . . . which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail." *Monitor Patriot Co.* v. *Roy,* 401 U. S. 265, 277 (1971).

The Court does not discount altogether the danger that jurors will punish for the expression of unpopular opinions. This probability accounts for the Court's limitation that "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *Ante,* at 349. But plainly a jury's latitude to impose liability for want of due care poses a far greater threat of suppressing unpopular views than does a possible recovery of presumed or punitive damages. Moreover, the Court's broad-ranging examples of "actual injury," including impairment of reputation and standing in the community, as well as personal humiliation, and mental anguish and suffering, inevitably allow a jury bent on punishing expression of unpopular views a formidable weapon for doing so. Finally, even a limitation of recovery to "actual injury"—however much it reduces the size or frequency of recoveries—will not provide the necessary elbowroom for First Amendment expression.

> "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, is threat enough to cause discussion and debate to 'steer far wider of the unlawful zone' thereby keeping protected discussion from public cognizance. . . . Too, a small newspaper suffers equally from a substantial damage award, whether the label of the award be 'actual' or 'punitive.'" *Rosenbloom, supra,* at 52–53.

On the other hand, the uncertainties which the media face under today's decision are largely avoided by the *New York Times* standard. I reject the argument that my *Rosenbloom* view improperly commits to judges the task of determining what is and what is not an issue of "general or public interest." [3] I noted in *Rosenbloom*

[3] The Court, taking a novel step, would not limit application of First Amendment protection to private libels involving issues of general or public interest, but would forbid the States from imposing liability without fault in any case where the substance of the defamatory statement made substantial danger to reputation apparent. As in *Rosenbloom* v. *Metromedia, Inc.,* 403 U. S. 29, 44 n. 12, 48–49, n. 17 (1971), I would leave open the question of what constitutional standard, if any, applies when defamatory falsehoods are published or broadcast concerning either a private or public person's activities not within the scope of the general or public interest.

Parenthetically, my Brother WHITE argues that the Court's view and mine will prevent a plaintiff—unable to demonstrate some degree of fault—from vindicating his reputation by securing a judgment that the publication was false. This argument overlooks the possible enactment of statutes, not requiring proof of fault, which provide for an action for retraction or for publication of a court's determination of falsity if the plaintiff is able to demonstrate that false statements have been published concerning his activities. Cf. Note, Vindication of the Reputation of a Public Official, 80 Harv. L. Rev. 1730, 1739–1747 (1967). Although it may be that questions could be raised concerning the constitutionality of such statutes, certainly nothing I have said today (and, as I read the Court's opinion, nothing said there) should be read to imply that a private plaintiff, unable to prove fault, must inevitably be denied the oppor-

that performance of this task would not always be easy. *Id.*, at 49 n. 17. But surely the courts, the ultimate arbiters of all disputes concerning clashes of constitutional values, would only be performing one of their traditional functions in undertaking this duty. Also, the difficulty of this task has been substantially lessened by that "sizable body of cases, decided both before and after *Rosenbloom*, that have employed the concept of a matter of public concern to reach decisions in . . . cases dealing with an alleged libel of a private individual that employed a public interest standard . . . and . . . cases that applied *Butts* to the alleged libel of a public figure." Comment, The Expanding Constitutional Protection for the News Media from Liability for Defamation: Predictability and the New Synthesis, 70 Mich. L. Rev. 1547, 1560 (1972). The public interest is necessarily broad; any residual self-censorship that may result from the uncertain contours of the "general or public interest" concept should be of far less concern to publishers and broadcasters than that occasioned by state laws imposing liability for negligent falsehood.

Since petitioner failed, after having been given a full and fair opportunity, to prove that respondent published the disputed article with knowledge of its falsity or with reckless disregard of the truth, see *ante*, at 329–330, n. 2, I would affirm the judgment of the Court of Appeals.

MR. JUSTICE WHITE, dissenting.

For some 200 years—from the very founding of the Nation—the law of defamation and right of the ordinary citizen to recover for false publication injurious to his reputation have been almost exclusively the business of

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tunity to secure a judgment upon the truth or falsity of statements published about him. Cf. *Rosenbloom* v. *Metromedia, Inc.*, *supra*, at 47, and n. 15.

state courts and legislatures. Under typical state defamation law, the defamed private citizen had to prove only a false publication that would subject him to hatred, contempt, or ridicule. Given such publication, general damage to reputation was presumed, while punitive damages required proof of additional facts. The law governing the defamation of private citizens remained untouched by the First Amendment because until relatively recently, the consistent view of the Court was that libelous words constitute a class of speech wholly unprotected by the First Amendment, subject only to limited exceptions carved out since 1964.

But now, using that Amendment as the chosen instrument, the Court, in a few printed pages, has federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 States. That result is accomplished by requiring the plaintiff in each and every defamation action to prove not only the defendant's culpability beyond his act of publishing defamatory material but also actual damage to reputation resulting from the publication. Moreover, punitive damages may not be recovered by showing malice in the traditional sense of ill will; knowing falsehood or reckless disregard of the truth will now be required.

I assume these sweeping changes will be popular with the press, but this is not the road to salvation for a court of law. As I see it, there are wholly insufficient grounds for scuttling the libel laws of the States in such wholesale fashion, to say nothing of deprecating the reputation interest of ordinary citizens and rendering them powerless to protect themselves. I do not suggest that the decision is illegitimate or beyond the bounds of judicial review, but it is an ill-considered exercise of the power entrusted to this Court, particularly when the

Court has not had the benefit of briefs and argument addressed to most of the major issues which the Court now decides. I respectfully dissent.

I

Lest there be any mistake about it, the changes wrought by the Court's decision cut very deeply. In 1938, the Restatement of Torts reflected the historic rule that publication in written form of defamatory material—material tending "so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him" [1]—subjected the publisher to liability although no special harm to reputation was actually proved.[2] Re-

[1] Restatement of Torts § 559 (1938); see also W. Prosser, Law of Torts § 111, p. 739 (4th ed. 1971); 1 A. Hanson, Libel and Related Torts ¶ 14, pp. 21–22 (1969); 1 F. Harper & F. James, The Law of Torts § 5.1, pp. 349–350 (1956).

[2] The observations in Part I of this opinion as to the current state of the law of defamation in the various States are partially based upon the Restatement of Torts, first published in 1938, and Tentative Drafts Nos. 11 and 12 of Restatement of Torts (Second), released in 1965 and 1966, respectively. The recent transmittal of Tentative Draft No. 20, dated April 25, 1974, to the American Law Institute for its consideration has resulted in the elimination of much of the discussion of the prevailing defamation rules and the suggested changes in many of the rules themselves previously found in the earlier Tentative Drafts. This development appears to have been largely influenced by the draftsmen's "sense for where the law of this important subject should be thought to stand." Restatement (Second) of Torts, p. vii (Tent. Draft No. 20, Apr. 25, 1974). It is evident that, to a large extent, these latest views are colored by the plurality opinion in *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971). See, *e. g.*, Restatement (Second) of Torts, *supra*, at xiii, §§ 569, 580, 581A, 581B, 621. There is no indication in the latest draft, however, that the conclusions reached in Tentative Drafts Nos. 11 and 12 are not an accurate reflection of the case law in the States in the mid-1960's prior to the developments occasioned by the plurality opinion in *Rosenbloom*. See *infra*, at 374–375.

statement of Torts § 569 (1938).[3] Truth was a defense, and some libels were privileged; but, given a false circulation, general damage to reputation was presumed and damages could be awarded by the jury, along with any special damages such as pecuniary loss and emotional distress. At the very least, the rule allowed the recovery of nominal damages for any defamatory publication actionable *per se* and thus performed

> "a vindicatory function by enabling the plaintiff publicly to brand the defamatory publication as false. The salutary social value of this rule is preventive in character since it often permits a defamed person to expose the groundless character of a defamatory rumor before harm to the reputation has resulted therefrom." *Id.*, § 569, comment b, p. 166.

If the defamation was not libel but slander, it was actionable *per se* only if it imputed a criminal offense; a venereal or loathsome and communicable disease; improper conduct of a lawful business; or unchastity by a woman. *Id.*, § 570. To be actionable, all other types of slanderous statements required proof of special damage other than actual loss of reputation or emotional distress, that special damage almost always being in the form of material or pecuniary loss of some kind. *Id.*, § 575 and comment b, pp. 185–187.

Damages for libel or slander *per se* included "harm caused thereby to the reputation of the person defamed or in the absence of proof of such harm, for the harm which normally results from such a defamation." *Id.*, § 621. At the heart of the libel-and-slander-*per-se*

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[3] See also W. Prosser, *supra*, n. 1, § 112, p. 752 and n. 85; Murnaghan, From Figment to Fiction to Philosophy—The Requirement of Proof of Damages in Libel Actions, 22 Cath. U. L. Rev. 1, 11–13 (1972).

damage scheme lay the award of general damages for loss of reputation. They were granted without special proof because the judgment of history was that the content of the publication itself was so likely to cause injury and because "in many cases the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed." *Id.*, § 621, comment a, p. 314.[4] Proof of actual injury to reputation was itself insufficient proof of that special damage necessary to support liability for slander not actionable *per se*. But if special damage in the form of material or pecuniary loss were proved, general damages for injury to reputation could be had without further proof. "The plaintiff may recover not only for the special harm so caused, but also for general loss of reputation." *Id.*, § 575, comment a, p. 185.[5] The right to recover for emotional distress depended upon the defendant's otherwise being liable for either libel or slander. *Id.*, § 623. Punitive damages were recoverable upon proof of special facts amounting to express malice. *Id.*, § 908 and comment b, p. 555.

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[4] Proof of the defamation itself established the fact of injury and the existence of some damage to the right of reputation, and the jury was permitted, even without any other evidence, to assess damages that were considered to be the natural or probable consequences of the defamatory words. Restatement of Torts § 621, comment a, p. 314 (1938); see also C. Gatley, Libel and Slander 1004 (6th ed. 1967); M. Newell, Slander and Libel § 721, p. 810 (4th ed. 1924); see generally C. McCormick, Law of Damages § 116, pp. 422–430 (1935). In this respect, therefore, the damages were presumed because of the impossibility of affixing an exact monetary amount for present and future injury to the plaintiff's reputation, wounded feelings and humiliation, loss of business, and any consequential physical illness or pain. *Ibid.*

[5] See also Prosser, *supra*, n. 1, § 112, p. 761; Harper & James, *supra*, n. 1, § 5.14, p. 388; Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 939–940 (1956).

Preparations in the mid-1960's for Restatement (Second) of Torts reflected what were deemed to be substantial changes in the law of defamation, primarily a trend toward limiting *per se* libels to those where the defamatory nature of the publication is apparent on its face, *i. e.*, where the "defamatory innuendo is apparent from the publication itself without reference to extrinsic facts by way of inducement." Restatement (Second) of Torts § 569, p. 29 (Tent. Draft No. 12, Apr. 27, 1966). Libels of this sort and slanders *per se* continued to be recognized as actionable without proof of special damage or injury to reputation.[6] All other defamations would require proof of special injury in the form of material or pecuniary loss. Whether this asserted change reflected the prevailing law was heavily debated,[7] but it was unquestioned at the time that there are recurring situations in which libel and slander are and should be actionable *per se*.

In surveying the current state of the law, the proposed Restatement (Second) observed that "[a]ll courts except Virginia agree that any libel which is defamatory upon its face is actionable without proof of damage . . . ." Restatement (Second) of Torts § 569, p. 84 (Tent. Draft No. 11, Apr. 15, 1965). Ten jurisdictions continued to support the old rule that libel not defamatory on its face and whose innuendo depends on extrinsic facts is actionable without proof of damage although slander would not be. Twenty-four jurisdictions were said to hold that libel not defamatory on its face is to be treated like slander and thus not actionable without proof of damage where

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[6] Also actionable *per se* were those libels where the imputation, although not apparent from the material itself, would have been slander *per se* if spoken rather than written.

[7] Restatement (Second) of Torts § 569, pp. 29–45, 47–48 (Tent. Draft No. 12, Apr. 27, 1966); see also Murnaghan, *supra*, n. 3.

slander would not be. *Id.*, § 569, p. 86. The law in six jurisdictions was found to be in an unsettled state but most likely consistent with the Restatement (Second). *Id.*, § 569, p. 88. The law in Virginia was thought to consider libel actionable without proof of special damage only where slander would be, regardless of whether the libel is defamatory on its face. *Id.*, § 569, p. 89. All States, therefore, were at that time thought to recognize important categories of defamation that were actionable *per se*.[8] Nor was any question apparently raised at that time that upon proof of special damage in the form of material or pecuinary loss, general damages to reputation could be recovered without further proof.

Unquestionably, state law continued to recognize some absolute, as well as some conditional, privileges to publish defamatory materials, including the privilege of fair comment in defined situations. But it remained true that in a wide range of situations, the ordinary citizen could make out a prima facie case without proving more than a defamatory publication and could recover general damages for injury to his reputation unless defeated by the defense of truth.[9]

The impact of today's decision on the traditional law of libel is immediately obvious and indisputable. No longer will the plaintiff be able to rest his case with proof of a libel defamatory on its face or proof of a slander historically actionable *per se*. In addition, he must prove some further degree of culpable conduct on the part of the

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[8] Applying settled Illinois law, the District Court in this case held that it is libel *per se* to label someone a Communist. 306 F. Supp. 310 (ND Ill. 1969).

[9] This appears to have been the law in Illinois at the time Gertz brought his libel suit. See, *e. g.*, *Brewer* v. *Hearst Publishing Co.*, 185 F. 2d 846 (CA7 1950); *Hotz* v. *Alton Telegraph Printing Co.*, 324 Ill. App. 1, 57 N. E. 2d 137 (1944); *Cooper* v. *Illinois Publishing & Printing Co.*, 218 Ill. App. 95 (1920).

publisher, such as intentional or reckless falsehood or negligence. And if he succeeds in this respect, he faces still another obstacle: recovery for loss of reputation will be conditioned upon "competent" proof of actual injury to his standing in the community. This will be true regardless of the nature of the defamation and even though it is one of those particularly reprehensible statements that have traditionally made slanderous words actionable without proof of fault by the publisher or of the damaging impact of his publication. The Court rejects the judgment of experience that some publications are so inherently capable of injury, and actual injury so difficult to prove, that the risk of falsehood should be borne by the publisher, not the victim. Plainly, with the additional burden on the plaintiff of proving negligence or other fault, it will be exceedingly difficult, perhaps impossible, for him to vindicate his reputation interest by securing a judgment for nominal damages, the practical effect of such a judgment being a judicial declaration that the publication was indeed false. Under the new rule the plaintiff can lose, not because the statement is true, but because it was not negligently made.

So too, the requirement of proving special injury to reputation before general damages may be awarded will clearly eliminate the prevailing rule, worked out over a very long period of time, that, in the case of defamations not actionable *per se,* the recovery of general damages for injury to reputation may also be had if some form of material or pecuniary loss is proved. Finally, an inflexible federal standard is imposed for the award of punitive damages. No longer will it be enough to prove ill will and an attempt to injure.

These are radical changes in the law and severe invasions of the prerogatives of the States. They should

at least be shown to be required by the First Amendment or necessitated by our present circumstances. Neither has been demonstrated.

Of course, *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964); *Rosenblatt* v. *Baer*, 383 U. S. 75 (1966), and *Curtis Publishing Co.* v. *Butts* and *Associated Press* v. *Walker*, 388 U. S. 130 (1967), have themselves worked major changes in defamation law. Public officials and public figures, if they are to recover general damages for injury to reputation, must prove knowing falsehood or reckless disregard for the truth. The States were required to conform to these decisions. Thereafter in *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971), three Members of the Court urged that the same standard be applied whenever the publication concerned an event of public or general concern. But none of these cases purported to foreclose in all circumstances recovery by the ordinary citizen on traditional standards of liability, and until today, a majority of the Court had not supported the proposition that, given liability, a court or jury may not award general damages in a reasonable amount without further proof of injury.

In the brief period since *Rosenbloom* was decided, at least 17 States and several federal courts of appeals have felt obliged to consider the *New York Times* constitutional privilege for liability as extending to, in the words of the *Rosenbloom* plurality, "all discussion and communication involving matters of public or general concern." *Id.*, at 44.[10] Apparently, however, general

[10] See, *e. g.*, *West* v. *Northern Publishing Co.*, 487 P. 2d 1304, 1305–1306 (Alaska 1971) (article linking owners of taxicab companies to illegal liquor sales to minors); *Gallman* v. *Carnes*, 254 Ark. 987, 992, 497 S. W. 2d 47, 50 (1973) (matter concerning state law school professor and assistant dean); *Belli* v. *Curtis Publishing Co.*, 25 Cal. App. 3d 384, 102 Cal. Rptr. 122 (1972) (article concerning attorney

damages still remain recoverable once that standard of liability is satisfied. Except where public officials and public figures are concerned, the Court now repudi-

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with national reputation); *Moriarty* v. *Lippe*, 162 Conn. 371, 378–379, 294 A. 2d 326, 330–331 (1972) (publication about certain police officers); *Firestone* v. *Time, Inc.*, 271 So. 2d 745, 750–751 (Fla. 1972) (divorce of prominent citizen not a matter of legitimate public concern); *State* v. *Snyder*, 277 So. 2d 660, 666–668 (La. 1973) (criminal defamation prosecution of a defeated mayoral candidate for statements made about another candidate); *Twohig* v. *Boston Herald-Traveler Corp.*, — Mass. —, —, 291 N. E. 2d 398, 400–401 (1973) (article concerning a candidate's votes in the legislature); *Priestley* v. *Hastings & Sons Publishing Co. of Lynn*, 360 Mass. 118, 271 N. E. 2d 628 (1971) (article about an architect commissioned by a town to build a school); *Harnish* v. *Herald-Mail Co., Inc.*, 264 Md. 326, 334–336, 286 A. 2d 146, 151 (1972) (article concerning substandard rental property owned by a member of a city housing authority); *Standke* v. *B. E. Darby & Sons, Inc.*, 291 Minn. 468, 476–477, 193 N. W. 2d 139, 145 (1971) (newspaper editorial concerning performance of grand jurors); *Whitmore* v. *Kansas City Star Co.*, 499 S. W. 2d 45, 49 (Mo. Ct. App. 1973) (article concerning a juvenile officer, the operation of a detention home, and a grand jury investigation); *Trails West, Inc.* v. *Wolff*, 32 N. Y. 2d 207, 214–218, 298 N. E. 2d 52, 55–58 (1973) (suit against a Congressman for an investigation into the death of schoolchildren in a bus accident); *Twenty-five East 40th Street Restaurant Corp.* v. *Forbes, Inc.*, 30 N. Y. 2d 595, 282 N. E. 2d 118 (1972) (magazine article concerning a restaurant's food); *Kent* v. *City of Buffalo*, 29 N. Y. 2d 818, 277 N. E. 2d 669 (1971) (television station film of plaintiff as a captured robber); *Frink* v. *McEldowney*, 29 N. Y. 2d 720, 275 N. E. 2d 337 (1971) (article concerning an attorney representing a town); *Mead* v. *Horvitz Publishing Co.* (9th Dist. Ohio Ct. App. June 13, 1973) (unpublished), cert. denied, 416 U. S. 985 (1974) (financial condition of participants in the development of a large apartment complex involving numerous local contractors); *Washington* v. *World Publishing Co.*, 506 P. 2d 913 (Okla. 1973) (article about contract dispute between a candidate for United States Senate and his party's county chairman); *Matus* v. *Triangle Publications, Inc.*, 445 Pa. 384, 395–399, 286 A. 2d 357, 363–365 (1971)

ates the plurality opinion in *Rosenbloom* and appears to espouse the liability standard set forth by three other Justices in that case. The States must now struggle to

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(radio "talk show" host's discussion of gross overcharging for snowplowing a driveway not considered an event of public or general concern); *Autobuses Internacionales S. De R.L., Ltd.* v. *El Continental Publishing Co.*, 483 S. W. 2d 506 (Tex. Ct. Civ. App. 1972) (newspaper article concerning a bus company's raising of fares without notice and in violation of law); *Sanders* v. *Harris*, 213 Va. 369, 372–373, 192 S. E. 2d 754, 757–758 (1972) (article concerning English professor at a community college); *Old Dominion Branch No. 496* v. *Austin*, 213 Va. 377, 192 S. E. 2d 737 (1972), rev'd, *ante*, p. 264 (plaintiff's failure to join a labor union considered not an issue of public or general concern); *Chase* v. *Daily Record, Inc.*, 83 Wash. 2d 37, 41, 515 P. 2d 154, 156 (1973) (article concerning port district commissioner); *Miller* v. *Argus Publishing Co.*, 79 Wash. 2d 816, 827, 490 P. 2d 101, 109 (1971) (article concerning the backer of political candidates); *Polzin* v. *Helmbrecht*, 54 Wis. 2d 578, 586, 196 N. W. 2d 685, 690 (1972) (letter to editor of newspaper concerning a reporter and the financing of pollution control measures).

The following United States Courts of Appeals have adopted the plurality opinion in *Rosenbloom*: *Cantrell* v. *Forest City Publishing Co.*, 484 F. 2d 150 (CA6 1973), cert. pending, No. 73–5520 (article concerning family members of the victim of a highly publicized bridge disaster not actionable absent proof of actual malice); *Porter* v. *Guam Publications, Inc.*, 475 F. 2d 744, 745 (CA9 1973) (article concerning citizen's arrest for theft of a cash box considered an event of general or public interest); *Cervantes* v. *Time, Inc.*, 464 F. 2d 986, 991 (CA8 1972) (article concerning mayor and alleged organized crime connections conceded to be a matter of public or general concern); *Firestone* v. *Time, Inc.*, 460 F. 2d 712 (CA5 1972) (magazine article concerning prominent citizen's use of detectives and electronic surveillance in connection with a divorce); *Davis* v. *National Broadcasting Co.*, 447 F. 2d 981 (CA5 1971), aff'g 320 F. Supp. 1070 (ED La. 1970) (television report about a person caught up in the events surrounding the assassination of President Kennedy considered a matter of public interest). However, at least one Court of Appeals, faced with an appeal from summary judgment in favor of a publisher in a diversity libel suit brought by a Philadelphia retailer, has expressed "discom-

discern the meaning of such ill-defined concepts as "liability without fault" and to fashion novel rules for the recovery of damages. These matters have not been briefed or argued by the parties and their workability has not been seriously explored. Nevertheless, yielding to the apparently irresistible impulse to announce a new and different interpretation of the First Amendment, the Court discards history and precedent in its rush to refashion defamation law in accordance with the inclinations of a perhaps evanescent majority of the Justices.

II

The Court does not contend, and it could hardly do so, that those who wrote the First Amendment intended to prohibit the Federal Government, within its sphere of influence in the Territories and the District of Columbia, from providing the private citizen a peaceful remedy for damaging falsehood. At the time of the adoption of the First Amendment, many of the consequences of libel law already described had developed, particularly the rule that libels and some slanders were so inherently injurious that they were actionable without special proof of damage to reputation. As the Court pointed out in *Roth* v. *United States*, 354 U. S. 476, 482 (1957), 10 of the 14 States that had ratified the Constitution by 1792 had themselves provided constitutional guarantees for free

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fort in accepting the *Rosenbloom* plurality opinion as a definitive statement of the appropriate law . . . ." *Gordon* v. *Random House, Inc.*, 486 F. 2d 1356, 1359 (CA3 1973).

As previously discussed in n. 2, *supra*, the latest proposed draft of Restatement (Second) of Torts substantially reflects the views of the *Rosenbloom* plurality. It also anticipates "that the Supreme Court will hold that strict liability for defamation is inconsistent with the free-speech provision of the First Amendment . . . ," Restatement (Second) of Torts § 569, p. 59 (Tent. Draft No. 20, Apr. 25, 1974), as well as the demise of pre-*Rosenbloom* damages rules. See *id.*, § 621, pp. 285–288.

expression, and 13 of the 14 nevertheless provided for the prosecution of libels. Prior to the Revolution, the American Colonies had adopted the common law of libel.[11] Contrary to some popular notions, freedom of the press was sharply curtailed in colonial America.[12] Seditious libel was punished as a contempt by the colonial legislatures and as a criminal offense in the colonial courts.[13]

Scant, if any, evidence exists that the First Amendment was intended to abolish the common law of libel, at least to the extent of depriving ordinary citizens of meaningful redress against their defamers. On the contrary,

> "[i]t is conceded on all sides that the common-law rules that subjected the libeler to responsibility for the private injury, or the public scandal or disorder occasioned by his conduct, are not abolished by the protection extended to the press in our constitutions." 2 T. Cooley, Constitutional Limitations 883 (8th ed. 1927).

Moreover, consistent with the Blackstone formula,[14] these

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[11] Merin, Libel and the Supreme Court, 11 Wm. & Mary L. Rev. 371, 373 (1969).

[12] A. Sutherland, Constitutionalism in America: Origin and Evolution of Its Fundamental Ideas 118–119 (1965).

[13] See generally L. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History (1960).

[14] The men who wrote and adopted the First Amendment were steeped in the common-law tradition of England. They read Blackstone, "a classic tradition of the bar in the United States" and "the oracle of the common law in the minds of the American Framers . . . ." J. Hurst, The Growth of American Law: The Law Makers 257 (1950); Levy, *supra*, n. 13, at 13; see also Sutherland, *supra*, n. 12, at 124–125; *Schick* v. *United States*, 195 U. S. 65, 69 (1904). From him they learned that the major means of accomplishing free speech and press was to prevent prior restraints, the publisher later being subject to legal action if his publication was injurious. 4 W. Blackstone, Commentaries *150–153.

552-191 O - 76 - 27

common-law actions did not abridge freedom of the press. See generally L. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History 247–248 (1960); Merin, Libel and the Supreme Court, 11 Wm. & Mary L. Rev. 371, 376 (1969); Hallen, Fair Comment, 8 Tex. L. Rev. 41, 56 (1929). Alexander Meiklejohn, who accorded generous reach to the First Amendment, nevertheless acknowledged:

> "No one can doubt that, in any well-governed society, the legislature has both the right and the duty to prohibit certain forms of speech. Libelous assertions may be, and must be, forbidden and punished. So too must slander. . . . All these necessities that speech be limited are recognized and provided for under the Constitution. They were not unknown to the writers of the First Amendment. That amendment, then, we may take it for granted, *does not forbid the abridging of speech.* But, at the same time, *it does forbid the abridging of the freedom of speech.* It is to the solving of that paradox, that apparent self-contradiction, that we are summoned if, as free men, we wish to know what the right of freedom of speech is." Political Freedom, The Constitutional Powers of the People 21 (1965).

See also Leflar, The Free-ness of Free Speech, 15 Vand. L. Rev. 1073, 1080–1081 (1962).

Professor Zechariah Chafee, a noted First Amendment scholar, has persuasively argued that conditions in 1791 "do not arbitrarily fix the division between lawful and unlawful speech for all time." Free Speech in the United States 14 (1954).[15] At the same time, however,

[15] See also Meiklejohn, The First Amendment Is An Absolute, 1961 Sup. Ct. Rev. 245, 264:

"First, the Framers initiated a political revolution whose development is still in process throughout the world. Second, like most

he notes that while the Framers may have intended to abolish seditious libels and to prevent any prosecutions by the Federal Government for criticism of the Government,[16] "the free speech clauses do not wipe out the common law as to obscenity, profanity, and defamation of individuals." [17]

The debates in Congress and the States over the Bill of Rights are unclear and inconclusive on any articulated intention of the Framers as to the free press guarantee.[18] We know that Benjamin Franklin, John Adams, and William Cushing favored limiting freedom of the press to truthful statements, while others such as James Wilson suggested a restatement of the Blackstone standard.[19]

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revolutionaries, the Framers could not foresee the specific issues which would arise as their 'novel idea' exercised its domination over the governing activities of a rapidly developing nation in a rapidly and fundamentally changing world. In that sense, the Framers did not know what they were doing. And in the same sense, it is still true that, after two centuries of experience, we do not know what they were doing, or what we ourselves are now doing.

"In a more abstract and more significant sense, however, both they and we have been aware that the adoption of the principle of self-government by 'The People' of this nation set loose upon us and upon the world at large an idea which is still transforming men's conceptions of what they are and how they may best be governed."

[16] See *Beauharnais* v. *Illinois*, 343 U. S. 250, 272 (1952) (Black, J., dissenting). Brant, who interprets the Framers' intention more liberally than Chafee, nevertheless saw the free speech protection as bearing upon criticism of government and other political speech. I. Brant, The Bill of Rights 236 (1965).

[17] Z. Chafee, Free Speech in the United States 14 (1954).

[18] See 1 Annals of Cong. 729–789 (1789). See also Brant, *supra*, n. 16, at 224; Levy, *supra*, n. 13, at 214, 224.

[19] Merin, *supra*, n. 11, at 377. Franklin, for example, observed: "If by the *Liberty of the Press* were understood merely the Liberty of discussing the Propriety of Public Measures and political opinions, let us have as much of it as you please: But if it means the Liberty of affronting, calumniating, and defaming one another, I, for my

Jefferson endorsed Madison's formula that "Congress shall make no law . . . abridging the freedom of speech or the press" only after he suggested:

> "The people shall not be deprived of their right to speak, to write, or *otherwise* to publish anything but false facts affecting injuriously the life, liberty, or reputation of others . . . ." F. Mott, Jefferson and the Press 14 (1943).[20]

Doubt has been expressed that the Members of Congress envisioned the First Amendment as reaching even this far. Merin, Libel and the Supreme Court, 11 Wm. & Mary L. Rev. 371, § 379–380 (1969).

This Court in bygone years has repeatedly dealt with libel and slander actions from the District of Columbia and from the Territories. Although in these cases First Amendment considerations were not expressly discussed, the opinions of the Court unmistakably revealed that the classic law of libel was firmly in place in those areas where federal law controlled. See, *e. g.*, *Washington Post Co.* v. *Chaloner*, 250 U. S. 290 (1919); *Baker* v. *Warner*, 231 U. S. 588 (1913); *Nalle* v. *Oyster*, 230 U. S. 165 (1913); *Dorr* v. *United States*, 195 U. S. 138 (1904); *Pollard* v. *Lyon*, 91 U. S. 225 (1876); *White* v. *Nicholls*, 3 How. 266 (1845).

The Court's consistent view prior to *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), was that defamatory

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part, own myself willing to part with my Share of it when our Legislators shall please so to alter the Law, and shall cheerfully consent to exchange my *Liberty* of Abusing others for the *Privilege* of not being abus'd myself." 10 B. Franklin, Writings 38 (Smyth ed. 1907).

[20] Jefferson's noted opposition to public prosecutions for libel of government figures did not extend to depriving them of private libel actions. Mott, *supra*, at 43. There is even a strong suggestion that he favored state prosecutions. E. Hudon, Freedom of Speech and Press in America 47–48 (1963).

utterances were wholly unprotected by the First Amendment. In *Patterson* v. *Colorado ex rel. Attorney General,* 205 U. S. 454, 462 (1907), for example, the Court said that although freedom of speech and press is protected from abridgment by the Constitution, these provisions "do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." This statement was repeated in *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697, 714 (1931), the Court adding:

> "But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions." *Id.,* at 715.

Chaplinsky v. *New Hampshire,* 315 U. S. 568, 571–572 (1942) (footnotes omitted), reflected the same view:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

Beauharnais v. *Illinois,* 343 U. S. 250, 254–257 (1952) (footnotes omitted), repeated the *Chaplinsky* statement, noting also that nowhere at the time of the adoption of

the Constitution "was there any suggestion that the crime of libel be abolished." And in *Roth* v. *United States*, 354 U. S., at 483 (footnote omitted), the Court further examined the meaning of the First Amendment:

> "In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. This phrasing did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech. *Beauharnais* v. *Illinois*, 343 U. S. 250, 266. At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press." [21]

The Court could not accept the generality of this historic view in *New York Times Co.* v. *Sullivan*, *supra*. There the Court held that the First Amendment was intended to forbid actions for seditious libel and that defamation actions by public officials were therefore not subject to the traditional law of libel and slander. If these officials (and, later, public figures occupying semi-official or influential, although private, positions) were to recover, they were required to prove not only that the publication was false but also that it was knowingly false or published with reckless disregard for its truth or falsity. This view that the First Amendment was written to for-

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[21] For further expressions of the general proposition that libels are not protected by the First Amendment, see *Konigsberg* v. *State Bar of California*, 366 U. S. 36, 49–50 and n. 10 (1961); *Times Film Corp.* v. *City of Chicago*, 365 U. S. 43, 48 (1961); *Pennekamp* v. *Florida*, 328 U. S. 331, 348–349 (1946); cf. *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 67 (1973); *Stanley* v. *Georgia*, 394 U. S. 557, 561 n. 5 (1969).

bid seditious libel reflected one side of the dispute that raged at the turn of the nineteenth century [22] and also mirrored the views of some later scholars.[23]

The central meaning of *New York Times*, and for me the First Amendment as it relates to libel laws, is that seditious libel—criticism of government and public officials—falls beyond the police power of the State. 376 U. S., at 273–276.[24] In a democratic society such as ours, the citizen has the privilege of criticizing his government and its officials. But neither *New York Times* nor its progeny suggest that the First Amendment intended in all circumstances to deprive the private citizen of his historic recourse to redress published falsehoods damaging to reputation or that, contrary to history and precedent, the Amendment should now be so interpreted. Simply put, the First Amendment did not confer a "license to defame the citizen." W. Douglas, The Right of the People 36 (1958).

I do not labor the foregoing matters to contend that the Court is foreclosed from reconsidering prior interpretations of the First Amendment.[25] But the Court apparently finds a clean slate where in fact we have instructive historical experience dating from long before

[22] See Levy, *supra*, n. 13, at 247–248.

[23] See, *e. g.*, *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting).

[24] Kalven, The New York Times Case: A Note on "The Central Meaning of the First Amendment," 1964 Sup. Ct. Rev. 191, 208–209.

[25] "The language of the First Amendment is to be read not as barren words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them. . . . As in the case of every other provision of the Constitution that is not crystallized by the nature of its technical concepts, the fact that the First Amendment is not self-defining and self-enforcing neither impairs its usefulness nor compels its paralysis as a living instrument." *Dennis* v. *United States*, 341 U. S. 494, 523 (1951) (Frankfurter, J., concurring).

the first settlers, with their notions of democratic government and human freedom, journeyed to this land. Given this rich background of history and precedent and because we deal with fundamentals when we construe the First Amendment, we should proceed with care and be presented with more compelling reasons before we jettison the settled law of the States to an even more radical extent.[26]

III

The Court concedes that the dangers of self-censorship are insufficient to override the state interest in protecting the reputation of private individuals who are both more helpless and more deserving of state concern than public persons with more access to the media to defend themselves. It therefore refuses to condition the private plaintiff's recovery on a showing of intentional or reckless falsehood as required by *New York Times*. But the Court nevertheless extends the reach of the First Amendment to all defamation actions by requiring that the ordinary

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[26] "[T]he law of defamation has been an integral part of the laws of England, the colonies and the states since time immemorial. So many actions have been maintained and judgments recovered under the various laws of libel that the Constitutional validity of libel actions could be denied only by a Court willing to hold all of its predecessors were wrong in their interpretation of the First Amendment and that two hundred years of precedents should be overruled." Rutledge, The Law of Defamation: Recent Developments, 32 Alabama Lawyer 409, 410 (1971).

The prevailing common-law libel rules in this country have remained in England and the Commonwealth nations. Pedrick, Freedom of the Press and the Law of Libel: The Modern Revised Translation, 49 Cornell L. Q. 581, 583–584 (1964). After many years of reviewing the English law of defamation, the Porter Committee concluded that "though the law as to defamation requires some modification, the basic principles upon which it is founded are not amiss." Report of the Committee on the Law of Defamation, Cmd. No. 7536, ¶ 222, p. 48 (1948).

citizen, when libeled by a publication defamatory on its face, must prove some degree of culpability on the part of the publisher beyond the circulation to the public of a damaging falsehood. A rule at least as strict would be called for where the defamatory character of the publication is not apparent from its face. *Ante,* at 348.[27] Furthermore, if this major hurdle to establish liability is surmounted, the Court requires proof of actual injury to reputation before any damages for such injury may be awarded.

The Court proceeds as though it were writing on *tabula rasa* and suggests that it must mediate between two unacceptable choices—on the one hand, the rigors of the *New York Times* rule which the Court thinks would give insufficient recognition to the interest of the private plaintiff, and, on the other hand, the prospect of imposing "liability without fault" on the press and others who are charged with defamatory utterances. Totally ignoring history and settled First Amendment law, the Court purports to arrive at an "equitable compromise," rejecting both what it considers faultless liability and *New York Times* malice, but insisting on some intermediate degree of fault. Of course, the Court necessarily discards the contrary judgment arrived at in the 50 States that the reputation interest of the private citizen is deserving of considerably more protection.

The Court evinces a deep-seated antipathy to "liability without fault." But this catch-phrase has no talismanic significance and is almost meaningless in this context where the Court appears to be addressing those libels and slanders that are defamatory on their face and where

[27] If I read the Court correctly, it clearly implies that for those publications that do not make "substantial danger to reputation apparent," the *New York Times* actual-malice standard will apply. Apparently, this would be true even where the imputation concerned conduct or a condition that would be *per se* slander.

the publisher is no doubt aware from the nature of the material that it would be inherently damaging to reputation. He publishes notwithstanding, knowing that he will inflict injury. With this knowledge, he must intend to inflict that injury, his excuse being that he is privileged to do so—that he has published the truth. But as it turns out, what he has circulated to the public is a very damaging falsehood. Is he nevertheless "faultless"? Perhaps it can be said that the mistake about his defense was made in good faith, but the fact remains that it is he who launched the publication knowing that it could ruin a reputation.

In these circumstances, the law has heretofore put the risk of falsehood on the publisher where the victim is a private citizen and no grounds of special privilege are invoked. The Court would now shift this risk to the victim, even though he has done nothing to invite the calumny, is wholly innocent of fault, and is helpless to avoid his injury. I doubt that jurisprudential resistance to liability without fault is sufficient ground for employing the First Amendment to revolutionize the law of libel, and in my view, that body of legal rules poses no realistic threat to the press and its service to the public. The press today is vigorous and robust. To me, it is quite incredible to suggest that threats of libel suits from private citizens are causing the press to refrain from publishing the truth. I know of no hard facts to support that proposition, and the Court furnishes none.

The communications industry has increasingly become concentrated in a few powerful hands operating very lucrative businesses reaching across the Nation and into almost every home.[28] Neither the industry as a whole nor

[28] A recent study has comprehensively detailed the role and impact of mass communications in this Nation. See Note, Media and the First Amendment in a Free Society, 60 Geo. L. J. 867 (1972). For example, 99% of the American households have a radio, and 77%

its individual components are easily intimidated, and we are fortunate that they are not. Requiring them to pay for the occasional damage they do to private reputation will play no substantial part in their future performance or their existence.

In any event, if the Court's principal concern is to protect the communications industry from large libel judgments, it would appear that its new requirements with respect to general and punitive damages would be ample protection. Why it also feels compelled to escalate the threshold standard of liability I cannot fathom,

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hear at least one radio newscast daily. In 1970, the yearly average home television viewing time was almost six hours per day. *Id.*, at 883 n. 53.

"Sixty years ago, 2,442 newspapers were published daily nationwide, and 689 cities had competing dailies. Today, in only 42 of the cities served by one of the 1,748 American daily papers is there a competing newspaper under separate ownership. Total daily circulation has passed 62 million copies, but over 40 percent of this circulation is controlled by only 25 ownership groups.

"Newspaper owners have profited greatly from the consolidation of the journalism industry. Several of them report yearly profits in the tens of millions of dollars, with after tax profits ranging from seven to 14 percent of gross revenues. Unfortunately, the owners have made their profits at the expense of the public interest in free expression. As the broad base of newspaper ownership narrows, the variation of facts and opinions received by the public from antagonistic sources is increasingly limited. Newspaper publication is indeed a leading American industry. Through its evolution in this direction, the press has come to be dominated by a select group whose prime interest is economic.

"The effect of consolidation within the newspaper industry is magnified by the degree of intermedia ownership. Sixty-eight cities have a radio station owned by the only local daily newspaper, and 160 television stations have newspaper affiliations. In 11 cities diversity of ownership is completely lacking with the only television station and newspaper under the same control." *Id.*, at 892–893 (footnotes omitted).

See also Congress, FCC Consider Newspaper Control of Local TV, 32 Cong. Q. 659–663 (1974).

particularly when this will eliminate in many instances the plaintiff's possibility of securing a judicial determination that the damaging publication was indeed false, whether or not he is entitled to recover money damages. Under the Court's new rules, the plaintiff must prove not only the defamatory statement but also some degree of fault accompanying it. The publication may be wholly false and the wrong to him unjustified, but his case will nevertheless be dismissed for failure to prove negligence or other fault on the part of the publisher. I find it unacceptable to distribute the risk in this manner and force the wholly innocent victim to bear the injury; for, as between the two, the defamer is the only culpable party. It is he who circulated a falsehood that he was not required to publish.

It is difficult for me to understand why the ordinary citizen should himself carry the risk of damage and suffer the injury in order to vindicate First Amendment values by protecting the press and others from liability for circulating false information. This is particularly true because such statements serve no purpose whatsoever in furthering the public interest or the search for truth but, on the contrary, may frustrate that search and at the same time inflict great injury on the defenseless individual. The owners of the press and the stockholders of the communications enterprises can much better bear the burden. And if they cannot, the public at large should somehow pay for what is essentially a public benefit derived at private expense.

IV

A

Not content with escalating the threshold requirements of establishing liability, the Court abolishes the ordinary damages rule, undisturbed by *New York Times*

and later cases, that, as to libels or slanders defamatory on their face, injury to reputation is presumed and general damages may be awarded along with whatever special damages may be sought. Apparently because the Court feels that in some unspecified and unknown number of cases, plaintiffs recover where they have suffered no injury or recover more than they deserve, it dismisses this rule as an "oddity of tort law." The Court thereby refuses in *any* case to accept the fact of wide dissemination of a *per se* libel as prima facie proof of injury sufficient to survive a motion to dismiss at the close of plaintiff's case.

I have said before, but it bears repeating, that even if the plaintiff should recover no monetary damages, he should be able to prevail and have a judgment that the publication is false. But beyond that, courts and legislatures literally for centuries have thought that in the generality of cases, libeled plaintiffs will be seriously shortchanged if they must prove the extent of the injury to their reputations. Even where libels or slanders are not on their face defamatory and special damage must be shown, when that showing is made, general damages for reputation injury are recoverable without specific proof.[29]

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[29] Having held that the defamation plaintiff is limited to recovering for "actual injury," the Court hastens to add:

"Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Ante,* at 350.

It should be pointed out that under the prevailing law, where the defamation is not actionable *per se* and proof of "special damage" is required, a showing of actual injury to reputation is insufficient; but if pecuniary loss is shown, general reputation damages are recoverable. The Court changes the latter, but not the former, rule. Also under present law, pain and suffering, although shown, do not

The Court is clearly right when at one point it states that "the law of defamation is rooted in our experience that the truth rarely catches up with a lie." *Ante*, at 344 n. 9. But it ignores what that experience teaches, *viz.*, that damage to reputation is recurringly difficult to prove and that requiring actual proof would repeatedly destroy any chance for adequate compensation. Eminent authority has warned that

> "it is clear that proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." W. Prosser, Law of Torts § 112, p. 765 (4th ed. 1971).[30]

The Court fears uncontrolled awards of damages by juries, but that not only denigrates the good sense of most jurors—it fails to consider the role of trial and appellate courts in limiting excessive jury verdicts where no reasonable relationship exists between the amount awarded and the injury sustained.[31] Available informa-

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warrant damages in any defamation action unless the plaintiff is otherwise entitled to at least nominal damages. By imposing a more difficult standard of liability and requiring proof of actual damage to reputation, recovery for pain and suffering, though real, becomes a much more remote possibility.

[30] "The harm resulting from an injury to reputation is difficult to demonstrate both because it may involve subtle differences in the conduct of the recipients toward the plaintiff and because the recipients, the only witnesses able to establish the necessary causal connection, may be reluctant to testify that the publication affected their relationships with the plaintiff. Thus some presumptions are necessary if the plaintiff is to be adequately compensated." Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 891–892 (1956).

[31] "On questions of damages, the judge plays an important role. It is, of course, for him to determine and instruct the jury as to what matters may be taken into consideration by them in arriving

tion tends to confirm that American courts have ably discharged this responsibility.[32]

The new rule with respect to general damages appears to apply to all libels or slanders, whether defamatory on their face or not, except, I gather, when the plaintiff proves intentional falsehood or reckless disregard. Although the impact of the publication on the victim is the same, in such circumstances the injury to reputation may apparently be presumed in accordance with the traditional rule. Why a defamatory statement is more apt to cause injury if the lie is intentional than when it is only negligent, I fail to understand. I suggest that judges and juries who must live by these rules will find them equally incomprehensible.

B

With a flourish of the pen, the Court also discards the prevailing rule in libel and slander actions that punitive damages may be awarded on the classic grounds of common-law malice, that is, "'[a]ctual malice' in the sense of ill will or fraud or reckless indifference to con-

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at a verdict since such questions are clearly matters of substantive law. But the judge also may and frequently does exercise a judgment as to the amount of damages the plaintiff may recover. His function here is primarily to keep the jury within bounds of reason and common sense, to guard against excessive verdicts dictated by passion and prejudice and to see to it that the amount of the verdict has some reasonable relation to the plaintiff's evidence as to his loss or the probability of loss. Thus, the trial judge may grant a new trial or the appellate court may reverse and remand the case for a new trial because of excessive damages or, as is more frequently the case, a remittitur may be ordered, the effect of which is that the plaintiff must accept a specified reduction of his damages or submit to a new trial on the issue of liability as well as damages." 1 F. Harper & F. James, The Law of Torts § 5.29, p. 467 (1956) (footnote omitted).

[32] See Pedrick, *supra,* n. 26, at 587 n. 23.

sequences." C. McCormick, Law of Damages § 118, p. 431 (1935); see also W. Prosser, *supra*, § 113, p. 772; 1 A. Hanson, Libel and Related Torts ¶ 163, p. 133 (1969); Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 938 (1956); Cal. Civ. Code § 48a (4)(d) (1954). In its stead, the Court requires defamation plaintiffs to show intentional falsehood or reckless disregard for the truth or falsity of the publication. The Court again complains about substantial verdicts and the possibility of press self-censorship, saying that punitive damages are merely "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Ante*, at 350. But I see no constitutional difference between publishing with reckless disregard for the truth, where punitive damages will be permitted, and negligent publication where they will not be allowed. It is difficult to understand what is constitutionally wrong with assessing punitive damages to deter a publisher from departing from those standards of care ordinarily followed in the publishing industry, particularly if common-law malice is also shown.

I note also the questionable premise that "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Ibid.* This represents an inaccurate view of established practice, "another of those situations in which judges, largely unfamiliar with the relatively rare actions for defamation, rely on words without really going behind them . . . ." [33] While a jury award in any type of civil case may certainly be unpredictable, trial and appellate courts have been increasingly vigilant in ensuring that the jury's result is "based upon a rational consideration of the evidence and the proper application of the

[33] Murnaghan, *supra*, n. 3, at 29.

law." *Reynolds* v. *Pegler,* 123 F. Supp. 36, 39 (SDNY 1954), aff'd, 223 F. 2d 429 (CA2), cert. denied, 350 U. S. 846 (1955). See *supra,* nn. 31–32. Moreover, some courts require that punitive damages bear a reasonable relation to the compensatory damages award.[34] Still others bar common-law punitive damages or condition their award on a refusal to print a retraction.[35]

> "The danger . . . of immoderate verdicts, is certainly a real one, and the criterion to be applied by the judge in setting or reducing the amount is concededly a vague and subjective one. Nevertheless the verdict may be twice submitted by the complaining defendant to the common sense of trained judicial minds, once on motion for new trial and again on appeal, and it must be a rare instance when an unjustifiable award escapes correction." C. McCormick, *supra,* § 77, p. 278.

The Court points to absolutely no empirical evidence to substantiate its premise. For my part, I would require something more substantial than an undifferentiated fear of unduly burdensome punitive damages awards before retooling the established common-law rule and depriving the States of the opportunity to experiment with different methods for guarding against abuses.

Even assuming the possibility that some verdicts will be "excessive," I cannot subscribe to the Court's remedy. On its face it is a classic example of judicial overkill. Apparently abandoning the salutary *New York Times* policy of case-by-case " 'independent examination of the whole record' . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on

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[34] Note, Developments in the Law—Defamation, 69 Harv. L. Rev., *supra,* at 875, 938 and n. 443.

[35] *Id.,* at 939, 941–942. See, *e. g.,* Cal. Civ. Code § 48a (2) (1954).

552-191 O - 76 - 28

the field of free expression," [36] the Court substitutes an inflexible rule barring recovery of punitive damages absent proof of constitutional malice. The First Amendment is a majestic statement of a free people's dedication to "uninhibited, robust, and wide-open" debate on public issues,[37] but we do it a grave disservice when we needlessly spend its force.[38] For almost 200 years, punitive damages and the First Amendment have peacefully coexisted. There has been no demonstration that state libel laws as they relate to punitive damages necessitate the majority's extreme response. I fear that those who read the Court's decision will find its words inaudible, for the Court speaks "only [with] a voice of power, not of reason." *Mapp* v. *Ohio,* 367 U. S. 643, 686 (1961) (Harlan, J., dissenting).

V

In disagreeing with the Court on the First Amendment's reach in the area of state libel laws protecting nonpublic persons, I do not repudiate the principle that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society." *Associated Press* v. *United States,* 326 U. S. 1, 20 (1945); see also *Miami Herald Publishing Co.* v. *Tornillo, ante,* at 260 (WHITE, J., concurring). I continue to subscribe to the *New York Times* decision and those decisions extending its protection to defamatory falsehoods about public persons. My quarrel with the Court stems

[36] 376 U. S., at 285.

[37] *Id.,* at 270.

[38] Judicial review of jury libel awards for excessiveness should be influenced by First Amendment considerations, but it makes little sense to discard an otherwise useful and time-tested rule because it might be misapplied in a few cases.

from its willingness "to sacrifice good sense to a syllogism" [39]—to find in the *New York Times* doctrine an infinite elasticity. Unfortunately, this expansion is the latest manifestation of the destructive potential of any good idea carried out to its logical extreme.

Recovery under common-law standards for defamatory falsehoods about a private individual, who enjoys no "general fame or notoriety in the community," who is not "pervasive[ly] involve[d] in the affairs of society," and who does not "thrust himself into the vortex of [a given] public issue . . . in an attempt to influence its outcome," [40] is simply not forbidden by the First Amendment. A distinguished private study group put it this way:

> "Accountability, like subjection to law, is not necessarily a net subtraction from liberty." "The First Amendment was intended to guarantee free expression, not to create a privileged industry." Commission on Freedom of the Press, A Free and Responsible Press 130, 81 (1947).

I fail to see how the quality or quantity of public debate will be promoted by further emasculation of state libel laws for the benefit of the news media.[41] If any-

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[39] O. Holmes, The Common Law 36 (1881).

[40] *Ante,* at 351, 352.

[41] Cf. Pedrick, *supra,* n. 26, at 601–602:

"A great many forces in our society operate to determine the extent to which men are free in fact to express their ideas. Whether there is a privilege for good faith defamatory misstatements on matters of public concern or whether there is strict liability for such statements may not greatly affect the course of public discussion. How different has life been in those states which heretofore followed the majority rule imposing strict liability for misstatements of fact defaming public figures from life in the minority states where the good faith privilege held sway?"

See also T. Emerson, The System of Freedom of Expression 519 (1970) (footnote omitted): "[O]n the whole the role of libel law in

thing, this trend may provoke a new and radical imbalance in the communications process. Cf. Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641, 1657 (1967). It is not at all inconceivable that virtually unrestrained defamatory remarks about private citizens will discourage them from speaking out and concerning themselves with social problems. This would turn the First Amendment on its head. Note, The Scope of First Amendment Protection for Good-Faith Defamatory Error, 75 Yale L. J. 642, 649 (1966); Merin, 11 Wm. & Mary L. Rev., at 418. David Riesman, writing in the midst of World War II on the fascists' effective use of defamatory attacks on their opponents, commented: "Thus it is that the law of libel, with its ecclesiastic background and domestic character, its aura of heart-balm suits and crusading nineteenth-century editors, becomes suddenly important for modern democratic survival." Democracy and Defamation: Fair Game and Fair Comment I, 42 Col. L. Rev. 1085, 1088 (1942).

This case ultimately comes down to the importance the Court attaches to society's "pervasive and strong interest in preventing and redressing attacks upon reputation." *Rosenblatt* v. *Baer,* 383 U. S., at 86. From all that I have seen, the Court has miscalculated and denigrates that interest at a time when escalating assaults on individuality and personal dignity counsel otherwise.[42]

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the system of freedom of expression has been relatively minor and essentially erratic."

[42] "The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to lose their

At the very least, the issue is highly debatable, and the Court has not carried its heavy burden of proof to justify tampering with state libel laws.[43]

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quality of unique personal warmth and to become the feelings of every man. Such a being, although sentient, is fungible; he is not an individual." Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N. Y. U. L. Rev. 962, 1003 (1964).

[43] With the evisceration of the common-law libel remedy for the private citizen, the Court removes from his legal arsenal the most effective weapon to combat assault on personal reputation by the press establishment. The David and Goliath nature of this relationship is all the more accentuated by the Court's holding today in *Miami Herald Publishing Co.* v. *Tornillo, ante,* p. 241, which I have joined, that an individual criticized by a newspaper's editorial is precluded by the First Amendment from requiring that newspaper to print his reply to that attack. While that case involves an announced candidate for public office, the Court's finding of a First Amendment barrier to government "intrusion into the function of editors," *ante,* at 258, does not rest on any distinction between private citizens or public officials. In fact, the Court observes that the First Amendment clearly protects from governmental restraint "the exercise of editorial control and judgment," *i. e.,* "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of *public issues and public officials*—whether fair or unfair . . . ." *Ibid.* (Emphasis added.)

We must, therefore, assume that the hapless ordinary citizen libeled by the press (a) may not enjoin in advance of publication a story about him, regardless of how libelous it may be, *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697 (1931); (b) may not compel the newspaper to print his reply; and (c) may not force the newspaper to print a retraction, because a judicially compelled retraction, like a "remedy such as an enforceable right of access," entails "governmental coercion" as to content, which "at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years." *Miami Herald Publishing Co.* v. *Tornillo, ante,* at 254; but cf. this case, *ante,* at 368 n. 3 (BRENNAN, J., dissenting).

My Brother BRENNAN also suggests that there may constitutionally be room for "the possible enactment of statutes, not requiring proof

While some risk of exposure "is a concomitant of life in a civilized community," *Time, Inc.* v. *Hill*, 385 U. S. 374, 388 (1967), the private citizen does not bargain for defamatory falsehoods. Nor is society powerless to vindicate unfair injury to his reputation.

> "It is a fallacy . . . to assume that the First Amendment is the only guidepost in the area of state defamation laws. It is not. . . .
>
> "The right of a man to the protection of his own reputation 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. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system." *Rosenblatt* v. *Baer, supra,* at 92 (STEWART, J., concurring).

The case against razing state libel laws is compelling when considered in light of the increasingly prominent role of mass media in our society and the awesome power it has placed in the hands of a select few.[44] Surely, our political "system cannot flourish if regimentation takes hold." *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, 469 (1952) (DOUGLAS, J., dissenting). Nor can it survive if our people are deprived of an effective method

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of fault, which provide . . . for publication of a court's determination of falsity if the plaintiff is able to demonstrate that false statements have been published concerning his activities." *Ibid.* The Court, however, does not even consider this less drastic alternative to its new "some fault" libel standards.

[44] See n. 28, *supra*.

of vindicating their legitimate interest in their good names.[45]

Freedom and human dignity and decency are not antithetical. Indeed, they cannot survive without each other. Both exist side-by-side in precarious balance, one always threatening to overwhelm the other. Our experience as a Nation testifies to the ability of our democratic institutions to harness this dynamic tension. One of the mechanisms seized upon by the common law to accommodate these forces was the civil libel action tried before a jury of average citizens. And it has essentially fulfilled its role. Not because it is necessarily the best or only answer, but because

> "the juristic philosophy of the common law is at bottom the philosophy of pragmatism. Its truth is relative, not absolute. The rule that functions well produces a title deed to recognition." B. Cardozo, Selected Writings 149 (Hall ed. 1947).

In our federal system, there must be room for allowing the States to take diverse approaches to these vexing questions. We should "continue to forbear from fettering the States with an adamant rule which may embarrass them in coping with their own peculiar problems . . . ." *Mapp* v. *Ohio*, 367 U. S., at 681 (Harlan, J., dissenting); see also Murnaghan, From Figment to Fiction to Philosophy—The Requirement of Proof of Damages in Libel Actions, 22 Cath. U. L. Rev. 1, 38 (1972).

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[45] "No democracy, . . . certainly not the American democracy, will indefinitely tolerate concentrations of private power irresponsible and strong enough to thwart the aspirations of the people. Eventually governmental power will be used to break up private power, or governmental power will be used to regulate private power—if private power is at once great and irresponsible." Commission on Freedom of the Press, A Free and Responsible Press 80 (1947).

Cf. *Younger* v. *Harris,* 401 U. S. 37, 44–45 (1971). Whether or not the course followed by the majority is wise, and I have indicated my doubts that it is, our constitutional scheme compels a proper respect for the role of the States in acquitting their duty to obey the Constitution. Finding no evidence that they have shirked this responsibility, particularly when the law of defamation is even now in transition, I would await some demonstration of the diminution of freedom of expression before acting.

For the foregoing reasons, I would reverse the judgment of the Court of Appeals and reinstate the jury's verdict.

SPENCE *v.* WASHINGTON

APPEAL FROM SUPREME COURT OF WASHINGTON

No. 72–1690. Argued January 9, 1974—Decided June 25, 1974

For displaying out of his apartment window a United States flag upside down with a peace symbol taped thereto, appellant was convicted under Washington's "improper use" statute forbidding the exhibition of a United States flag to which is attached or superimposed figures, symbols, or other extraneous material. He testified without contradiction at his trial that he thus displayed his flag as a protest against then-recent actions in Cambodia and fatal events at Kent State University, and that his purpose was to associate the American flag with peace instead of war and violence. The Washington Supreme Court sustained the conviction, rejecting appellant's contention, *inter alia*, that the improper-use statute, on its face and as applied, contravened the First and Fourteenth Amendments. *Held:* The statute, as applied to appellant's activity, impermissibly infringed a form of protected expression.

81 Wash. 2d 788, 506 P. 2d 293, reversed.

Peter Greenfield argued the cause for appellant. With him on the briefs were *Burt Neuborne, Melvin L. Wulf,* and *Joel M. Gora.*

James E. Warme argued the cause for appellee. With him on the brief was *Christopher T. Bayley.*

PER CURIAM.

Appellant displayed a United States flag, which he owned, out of the window of his apartment. Affixed to both surfaces of the flag was a large peace symbol fashioned of removable tape. Appellant was convicted under a Washington statute forbidding the exhibition of a United States flag to which is attached or superimposed figures, symbols, or other extraneous material. The Supreme Court of Washington affirmed appellant's

conviction. 81 Wash. 2d 788, 506 P. 2d 293 (1973). It rejected appellant's contentions that the statute under which he was charged, on its face and as applied, contravened the First Amendment, as incorporated by the Fourteenth Amendment, and was void for vagueness. We noted probable jurisdiction. 414 U. S. 815 (1973). We reverse on the ground that as applied to appellant's activity the Washington statute impermissibly infringed protected expression.

I

On May 10, 1970, appellant, a college student, hung his United States flag from the window of his apartment on private property in Seattle, Washington. The flag was upside down, and attached to the front and back was a peace symbol (*i. e.*, a circle enclosing a trident) made of removable black tape. The window was above the ground floor. The flag measured approximately three by five feet and was plainly visible to passersby. The peace symbol occupied roughly half of the surface of the flag.

Three Seattle police officers observed the flag and entered the apartment house. They were met at the main door by appellant, who said: "I suppose you are here about the flag. I didn't know there was anything wrong with it. I will take it down." Appellant permitted the officers to enter his apartment, where they seized the flag and arrested him. Appellant cooperated with the officers. There was no disruption or altercation.

Appellant was not charged under Washington's flag-desecration statute. See Wash. Rev. Code § 9.86.030, as amended.[1] Rather, the State relied on the so-called

[1] This statute provides in part:

"No person shall knowingly cast contempt upon any flag, standard, color, ensign or shield . . . by publicly mutilating, defacing, defiling,

"improper use" statute, Wash. Rev. Code § 9.86.020. This statute provides, in pertinent part:

> "No person shall, in any manner, for exhibition or display:
>
> "(1) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state . . . or
>
> "(2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement . . . ." [2]

Appellant initially was tried to the bench in a local justice court, where he was found guilty and sentenced to 90 days' confinement, with 60 days suspended. Appellant exercised his right to be tried *de novo* in King County Superior Court, where he received a jury trial.

The State based its case on the flag itself and the testimony of the three arresting officers, who testified that they had observed the flag displayed from appellant's window and that on the flag was superimposed what they identified as a peace symbol. Appellant took

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burning, or trampling upon said flag, standard, color, ensign or shield."

[2] Washington Rev. Code § 9.86.010 defines the flags and other symbols protected by the desecration and improper-use statutes as follows:

"The words flag, standard, color, ensign or shield, as used in this chapter, shall include any flag, standard, color, ensign or shield, or copy, picture or representation thereof, made of any substance or represented or produced thereon, and of any size, evidently purporting to be such flag, standard, color, ensign or shield of the United States or of this state, or a copy, picture or representation thereof."

the stand in his own defense. He testified that he put a peace symbol on the flag and displayed it to public view as a protest against the invasion of Cambodia and the killings at Kent State University, events which occurred a few days prior to his arrest. He said that his purpose was to associate the American flag with peace instead of war and violence:

> "I felt there had been so much killing and that this was not what America stood for. I felt that the flag stood for America and I wanted people to know that I thought America stood for peace."

Appellant further testified that he chose to fashion the peace symbol from tape so that it could be removed without damaging the flag. The State made no effort to controvert any of appellant's testimony.

The trial court instructed the jury in essence that the mere act of displaying the flag with the peace symbol attached, if proved beyond a reasonable doubt, was sufficient to convict. There was no requirement of specific intent to do anything more than display the flag in that manner. The jury returned a verdict of guilty. The court sentenced appellant to 10 days in jail, suspended, and to a $75 fine. The Washington Court of Appeals reversed the conviction. 5 Wash. App. 752, 490 P. 2d 1321 (1971). It held the improper-use statute overbroad and invalid on its face under the First and Fourteenth Amendments. With one justice dissenting and two concurring in the result, the Washington Supreme Court reversed and reinstated the conviction. 81 Wash. 2d 788, 506 P. 2d 293 (1973).

II

A number of factors are important in the instant case. First, this was a privately owned flag. In a technical property sense it was not the property of any govern-

ment. We have no doubt that the State or National Governments constitutionally may forbid anyone from mishandling in any manner a flag that is public property. But this is a different case. Second, appellant displayed his flag on private property. He engaged in no trespass or disorderly conduct. Nor is this a case that might be analyzed in terms of reasonable time, place, or manner restraints on access to a public area. Third, the record is devoid of proof of any risk of breach of the peace. It was not appellant's purpose to incite violence or even stimulate a public demonstration. There is no evidence that any crowd gathered or that appellant made any effort to attract attention beyond hanging the flag out of his own window. Indeed, on the facts stipulated by the parties there is no evidence that anyone other than the three police officers observed the flag.

Fourth, the State concedes, as did the Washington Supreme Court, that appellant engaged in a form of communication.[3] Although the stipulated facts fail to show that any member of the general public viewed the flag, the State's concession is inevitable on this record. The undisputed facts are that appellant "wanted people to know that I thought America stood for peace." To be sure, appellant did not choose to articulate his views through printed or spoken words. It is therefore necessary to determine whether his activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments, for as the Court noted in *United States* v. *O'Brien*, 391 U. S. 367, 376 (1968), "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." But the nature of

[3] Brief for Appellee 3; 81 Wash. 2d, at 799, 800, 506 P. 2d, at 300, 301.

appellant's activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that he engaged in a form of protected expression.

The Court for decades has recognized the communicative connotations of the use of flags. *E. g., Stromberg* v. *California,* 283 U. S. 359 (1931). In many of their uses flags are a form of symbolism comprising a "primitive but effective way of communicating ideas . . . ," and "a short cut from mind to mind." *Board of Education* v. *Barnette,* 319 U. S. 624, 632 (1943). On this record there can be little doubt that appellant communicated through the use of symbols. The symbolism included not only the flag but also the superimposed peace symbol.

Moreover, the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol. See *Tinker* v. *Des Moines School District,* 393 U. S. 503 (1969). In *Tinker,* the wearing of black armbands in a school environment conveyed an unmistakable message about a contemporaneous issue of intense public concern—the Vietnam hostilities. *Id.,* at 505–514. In this case, appellant's activity was roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy, also issues of great public moment. Cf. *Scheuer* v. *Rhodes,* 416 U. S. 232 (1974). A flag bearing a peace symbol and displayed upside down by a student today might be interpreted as nothing more than bizarre behavior, but it would have been difficult for the great majority of citizens to miss the drift of appellant's point at the time that he made it.

It may be noted, further, that this was not an act of mindless nihilism. Rather, it was a pointed expression of anguish by appellant about the then-current domestic and foreign affairs of his government. An intent to

convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.

We are confronted then with a case of prosecution for the expression of an idea through activity. Moreover, the activity occurred on private property, rather than in an environment over which the State by necessity must have certain supervisory powers unrelated to expression. Cf. *Procunier* v. *Martinez,* 416 U. S. 396 (1974); *Healy* v. *James,* 408 U. S. 169 (1972); *Tinker* v. *Des Moines School District, supra.* Accordingly, we must examine with particular care the interests advanced by appellee to support its prosecution.

We are met at the outset with something of an enigma in the manner in which the case was presented to us. The Washington Supreme Court rejected any reliance on a breach-of-the-peace rationale. 81 Wash. 2d, at 796 n. 1, 506 P. 2d, at 299 n. 1. It based its result primarily on the ground that "the nation and state both have a recognizable interest in preserving the flag as a symbol of the nation . . . ."[4] Yet counsel for the State declined to support the highest state court's principal rationale in argument before us.[5] He pursued instead the breach-of-the-peace theory discarded by the state court. Indeed, that was the only basis on which he chose to support the constitutionality of the state statute.

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[4] 81 Wash. 2d, at 799, 506 P. 2d, at 300. A subsidiary ground relied on by the Washington Supreme Court must be rejected summarily. It found the inhibition on appellant's freedom of expression "minuscule and trifling" because there are "thousands of other means available to [him] for the dissemination of his personal views . . . ." *Id.,* at 799, 800, 506 P. 2d, at 300, 301. As the Court noted in, *e. g., Schneider* v. *State,* 308 U. S. 147, 163 (1939), "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

[5] Brief for Appellee 6; Tr. of Oral Arg. 31–32.

Despite counsel's approach, we think it appropriate to review briefly the range of various state interests that might be thought to support the challenged conviction, drawing upon the arguments before us, the opinions below, and the Court's opinion in *Street* v. *New York*, 394 U. S. 576, 590–594 (1969). The first interest at issue is prevention of breach of the peace. In our view, the Washington Supreme Court correctly rejected this notion. It is totally without support in the record.

We are also unable to affirm the judgment below on the ground that the State may have desired to protect the sensibilities of passersby. "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street* v. *New York, supra,* at 592. Moreover, appellant did not impose his ideas upon a captive audience. Anyone who might have been offended could easily have avoided the display. See *Cohen* v. *California,* 403 U. S. 15 (1971). Nor may appellant be punished for failing to show proper respect for our national emblem. *Street* v. *New York, supra,* at 593; *Board of Education* v. *Barnette, supra.*[6]

We are brought, then, to the state court's thesis that Washington has an interest in preserving the national flag as an unalloyed symbol of our country. The court did not define this interest; it simply asserted it. See 81 Wash. 2d, at 799, 506 P. 2d, at 300. MR. JUSTICE REHNQUIST's dissenting opinion today, see *post,* at 420–422, adopts essentially the same approach. Presumably, this interest might be seen as an effort to prevent the appropriation of a revered national symbol by an individual, interest group, or enterprise where there was a risk that association of the symbol with a particular

[6] Counsel for the State conceded that promoting respect for the flag is not a legitimate state interest. Tr. of Oral Arg. 30.

product or viewpoint might be taken erroneously as evidence of governmental endorsement.[7] Alternatively, it might be argued that the interest asserted by the state court is based on the uniquely universal character of the national flag as a symbol. For the great majority of us, the flag is a symbol of patriotism, of pride in the history of our country, and of the service, sacrifice, and valor of the millions of Americans who in peace and war have joined together to build and to defend a Nation in which self-government and personal liberty endure. It evidences both the unity and diversity which are America. For others the flag carries in varying degrees a different message. "A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn." *Board of Education* v. *Barnette*, 319 U. S., at 632–633. It might be said that we all draw something from our national symbol, for it is capable of conveying simultaneously a spectrum of meanings. If it may be destroyed or permanently disfigured, it could be argued that it will lose its capability of mirroring the sentiments of all who view it.

But we need not decide in this case whether the interest

[7] Undoubtedly such a concern underlies that portion of the improper-use statute forbidding the utilization of representations of the flag in a commercial context. Indeed, the third subparagraph of the improper-use statute, Wash. Rev. Code § 9.86.020 (3), which is not at issue here, is aimed directly at commercial exploitation of our national symbol. There is no occasion in this case to address the application of the challenged statute to commercial behavior. Cf. *Halter* v. *Nebraska*, 205 U. S. 34 (1907). MR. JUSTICE REHNQUIST's dissent places major reliance on *Halter*, see *post*, at 418–420, despite the fact that *Halter* was decided nearly 20 years before the Court concluded that the First Amendment applies to the States by virtue of the Fourteenth Amendment. See *Gitlow* v. *New York*, 268 U. S. 652 (1925).

552-191 O - 76 - 29

advanced by the court below is valid.[8] We assume, *arguendo*, that it is. The statute is nonetheless unconstitutional as applied to appellant's activity.[9] There was no risk that appellant's acts would mislead viewers into assuming that the Government endorsed his viewpoint. To the contrary, he was plainly and peacefully [10]

[8] If this interest is valid, we note that it is directly related to expression in the context of activity like that undertaken by appellant. For that reason and because no other governmental interest unrelated to expression has been advanced or can be supported on this record, the four-step analysis of *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968), is inapplicable.

[9] Because we agree with appellant's as-applied argument, we do not reach the more comprehensive overbreadth contention he also advances. But it is worth noting the nearly limitless sweep of the Washington improper-use flag statute. Read literally, it forbids a veteran's group from attaching, *e. g.*, battalion commendations to a United States flag. It proscribes photographs of war heroes standing in front of the flag. It outlaws newspaper mastheads composed of the national flag with superimposed print. Other examples could easily be listed.

Statutes of such sweep suggest problems of selective enforcement. We are, however, unable to agree with appellant's void-for-vagueness argument. The statute's application is quite mechanical, particularly when implemented with jury instructions like the ones given in this case. The law in Washington, simply put, is that *nothing* may be affixed to or superimposed on a United States flag or a representation thereof. Thus, if selective enforcement has occurred, it has been a result of prosecutorial discretion, not the language of the statute. Accordingly, this case is unlike *Smith* v. *Goguen*, 415 U. S. 566 (1974), where the words of the statute at issue ("publicly . . . treats contemptuously") were themselves sufficiently indefinite to prompt subjective treatment by prosecutorial authorities.

[10] Appellant's activity occurred at a time of national turmoil over the introduction of United States forces into Cambodia and the deaths at Kent State University. It is difficult now, more than four years later, to recall vividly the depth of emotion that pervaded most colleges and universities at the time, and that was widely shared by young Americans everywhere. A spontaneous outpouring of feeling resulted in widespread action, not all of it rational

protesting the fact that it did not. Appellant was not charged under the desecration statute, see n. 1, *supra,* nor did he permanently disfigure the flag or destroy it. He displayed it as a flag of his country in a way closely analogous to the manner in which flags have always been used to convey ideas. Moreover, his message was direct, likely to be understood, and within the contours of the First Amendment. Given the protected character of his expression and in light of the fact that no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts, the conviction must be invalidated.[11]

The judgment is reversed.

It is so ordered.

MR. JUSTICE BLACKMUN concurs in the result.

MR. JUSTICE DOUGLAS, concurring.

I would reverse the judgment for substantially the same reasons given by the Iowa Supreme Court in *State* v. *Kool,* 212 N. W. 2d 518. In that case the de-

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when viewed in retrospect. This included the closing down of some schools, as well as other disruptions of many centers of education. It was against this highly inflamed background that appellant chose to express his own views in a manner that can fairly be described as gentle and restrained as compared to the actions undertaken by a number of his peers.

[11] The similarity of our holding to that of the Iowa Supreme Court in *State* v. *Kool,* 212 N. W. 2d 518 (1973), merits note. In that case, the defendant displayed a replica of the United States flag upside down in his window, superimposing a peace symbol to create an effect identical to that achieved by Spence. Recognizing the communicative character of the defendant's activity, the Iowa Supreme Court reversed his conviction for flag misuse and held the statute unconstitutional as applied. The court eschewed an overbreadth analysis, and it rejected a number of the state interests we have found unavailing in the instant case.

fendant hung a peace symbol made of cardboard and wrapped in tinfoil in the window of his home and hung a replica of the United States flag behind the peace symbol but in an upside-down position. The state statute made it a crime to "cast contempt upon, satirize, deride or burlesque [the] flag," Iowa Code § 32.1.

The court held that defendant's conduct constituted "symbolic speech." The court, in reversing the conviction, said:

> "Someone in Newton might be so intemperate as to disrupt the peace because of this display. But if absolute assurance of tranquility is required, we may as well forget about free speech. Under such a requirement, the only 'free' speech would consist of platitudes. That kind of speech does not need constitutional protection." 212 N. W. 2d, at 521.

That view is precisely my own. Hence I concur in reversing this judgment of conviction.

MR. CHIEF JUSTICE BURGER, dissenting.

If the constitutional role of this Court were to strike down unwise laws or restrict unwise application of some laws, I could agree with the result reached by the Court. That is not our function, however, and it should be left to each State and ultimately the common sense of its people to decide how the flag, as a symbol of national unity, should be protected.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE WHITE join, dissenting.

The Court holds that a Washington statute prohibiting persons from attaching material to the American flag was unconstitutionally applied to appellant. Although I agree with the Court that appellant's activity was a form of communication, I do not agree that the First

Amendment prohibits the State from restricting this activity in furtherance of other important interests. And I believe the rationale by which the Court reaches its conclusion is unsound.

"[T]he right of free speech is not absolute at all times and under all circumstances." *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571 (1942). This Court has long recognized, for example, that some forms of expression are not entitled to any protection at all under the First Amendment, despite the fact that they could reasonably be thought protected under its literal language. See *Roth* v. *United States,* 354 U. S. 476 (1957). The Court has further recognized that even protected speech may be subject to reasonable limitation when important countervailing interests are involved. Citizens are not completely free to commit perjury, to libel other citizens, to infringe copyrights, to incite riots, or to interfere unduly with passage through a public thoroughfare. The right of free speech, though precious, remains subject to reasonable accommodation to other valued interests.

Since a State concededly may impose some limitations on speech directly, it would seem to follow *a fortiori* that a State may legislate to protect important state interests even though an incidental limitation on free speech results. Virtually any law enacted by a State, when viewed with sufficient ingenuity, could be thought to interfere with some citizen's preferred means of expression. But no one would argue, I presume, that a State could not prevent the painting of public buildings simply because a particular class of protesters believed their message would best be conveyed through that medium. Had appellant here chosen to tape his peace symbol to a federal courthouse, I have little doubt that he could be prosecuted under a statute properly drawn to protect public property.

Yet the Court today holds that the State of Washington cannot limit use of the American flag, at least insofar as its statute prevents appellant from using a privately owned flag to convey his personal message. Expressing its willingness to assume, *arguendo*, that Washington has a valid interest in preserving the integrity of the flag, the Court nevertheless finds that interest to be insufficient in this case. To achieve this result the Court first devalues the State's interest under these circumstances, noting that "no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts . . . ." The Court takes pains to point out that appellant did not "permanently disfigure the flag or destroy it," and emphasizes that the flag was displayed "in a way closely analogous to the manner in which flags have always been used to convey ideas." The Court then restates the notion that such state interests are secondary to messages which are "direct, likely to be understood, and within the contours of the First Amendment." *Ante*, at 415. In my view the first premise demonstrates a total misunderstanding of the State's interest in the integrity of the American flag, and the second premise places the Court in the position either of ultimately favoring appellant's message because of its subject matter, a position about which almost all members of the majority have only recently expressed doubt, or, alternatively, of making the flag available for a limitless succession of political and commercial messages. I shall treat these issues in reverse order.

The statute under which appellant was convicted is no stranger to this Court, a virtually identical statute having been before the Court in *Halter* v. *Nebraska*, 205 U. S. 34 (1907). In that case the Court held that the State of Nebraska could enforce its statute to prevent use of a flag representation on beer bottles, stating flatly that "a State will be wanting in care for the well-being of its people if

it ignores the fact that they regard the flag as a symbol of their country's power and prestige . . . ." *Id.*, at 42. The Court then continued: "Such an use tends to degrade and cheapen the flag in the estimation of the people, as well as to defeat the object of maintaining it as an emblem of National power and National honor." *Ibid.*

The Court today finds *Halter* irrelevant to the present case, pointing out that it was decided almost 20 years before the First Amendment was applied to the States and further noting that it involved "commercial behavior," a form of expression the Court presumably will consider another day.[1] Insofar as *Halter* assesses the State's interest, of course, the Court's argument is simply beside the point. But even as the argument relates to appellant's interest, I find it somewhat difficult to grasp. The Court may possibly be suggesting that political expression deserves greater protection than other forms of expression, but that suggestion would seem quite inconsistent with the position taken in *Lehman* v. *Shaker Heights, ante,* p. 298,[2] by nearly all Members of the major-

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[1] The Court states in a footnote: "There is no occasion in this case to address the application of the challenged statute to commercial behavior. Cf. *Halter* v. *Nebraska,* 205 U. S. 34 (1907)." *Ante,* at 413 n. 7.

[2] The plurality opinion of MR. JUSTICE BLACKMUN took the position that a ban against political advertising on publicly owned buses was not unconstitutional since "[n]o First Amendment forum is here to be found." MR. JUSTICE DOUGLAS, concurring in the judgment, stated that petitioner in that case had no "constitutional right to spread his message before this captive audience," but specifically noted:

"I do not view the content of the message as relevant either to petitioner's right to express it or to the commuters' right to be free from it. Commercial advertisements may be as offensive and intrusive to captive audiences as any political message." MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART, MR. JUSTICE

ity in the instant case. Yet if the Court is suggesting that *Halter* would now be decided differently, and that the State's interest in the flag falls before any speech which is "direct, likely to be understood, and within the contours of the First Amendment," that view would mean the flag could be auctioned as a background to anyone willing and able to buy or copy one. I find it hard to believe the Court intends to presage that result.

Turning to the question of the State's interest in the flag, it seems to me that the Court's treatment lacks all substance. The suggestion that the State's interest somehow diminishes when the flag is decorated with *removable* tape trivializes something which is not trivial. The State of Washington is hardly seeking to protect the flag's resale value, and yet the Court's emphasis on the lack of actual damage to the flag suggests that this is a significant aspect of the State's interest. Surely the Court does not mean to imply that appellant *could* be prosecuted if he subsequently tore the flag in the process of trying to take the tape off. Unlike flag-desecration statutes, which the Court correctly notes are not at issue in this case, the Washington statute challenged here seeks to prevent personal *use* of the flag, not simply particular forms of *abuse*. The State of Washington has chosen to set the flag apart for a special purpose, and has directed that it not be turned into a common background for an

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MARSHALL, and MR. JUSTICE POWELL joined, dissenting, stated: "There is some doubt concerning whether the 'commercial speech' distinction announced in *Valentine* v. *Chrestensen*, 316 U. S. 52 (1942), retains continuing validity," referring to MR. JUSTICE DOUGLAS' concurring opinion in *Cammarano* v. *United States*, 358 U. S. 498, 514 (1959). The dissent further stated: "Once a public forum for communication has been established, both free speech and equal protection principles prohibit discrimination based *solely* upon subject matter or content." (Emphasis in original.)

endless variety of superimposed messages. The physical condition of the flag itself is irrelevant to that purpose.

The true nature of the State's interest in this case is not only one of preserving "the physical integrity of the flag," [3] but also one of preserving the flag as "an important symbol of nationhood and unity." [4] Although the Court treats this important interest with a studied inattention, it is hardly one of recent invention and has previously been accorded considerable respect by this Court. In *Halter*, for example, the Court stated:

> "As the statute in question evidently had its origin in a purpose to cultivate a feeling of patriotism among the people of Nebraska, we are unwilling to adjudge that in legislation for that purpose the State erred in duty or has infringed the constitutional right of anyone. On the contrary, it may reasonably be affirmed that a duty rests upon each State in every legal way to encourage its people to love the Union with which the State is indissolubly connected." 205 U. S., at 43.

There was no question in *Halter* of physical impairment of a flag since no actual flag was even involved. And it certainly would have made no difference to the Court's discussion of the State's interest if the plaintiff in error in that case had chosen to advertise his product by decorating the flag with beer bottles fashioned from some removable substance.[5] It is the character, not the cloth, of the flag which the State seeks to protect.

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[3] *Smith* v. *Goguen*, 415 U. S. 566, 591 (1974) (BLACKMUN, J., dissenting).

[4] *Id.*, at 587 (WHITE, J., concurring in judgment).

[5] It should be noted that *Halter* makes no mention of the argument that allowing use of the flag for a personal or commercial purpose might suggest endorsement of that purpose by the government. While this might be an *additional* state interest in appropriate cases,

The value of this interest has been emphasized in recent as well as distant times. Mr. Justice Fortas, for example, noted in *Street* v. *New York,* 394 U. S. 576, 616 (1969), that "the flag is a special kind of personalty," a form of property "burdened with peculiar obligations and restrictions." *Id.*, at 617 (dissenting opinion).[6] MR. JUSTICE WHITE has observed that "[t]he flag is a national property, and the Nation may regulate those who would make, imitate, sell, possess, or use it." *Smith* v. *Goguen,* 415 U. S., at 587 (concurring in judgment). I agree. What appellant here seeks is simply license to use the flag however he pleases, so long as the activity can be tied to a concept of speech, regardless of any state interest in having the flag used only for more limited purposes. I find no reasoning in the Court's opinion which convinces me that the Constitution requires such license to be given.

The fact that the State has a valid interest in preserving the character of the flag does not mean, of course, that it can employ all conceivable means to enforce it. It certainly could not require all citizens to own the flag or compel citizens to salute one. *Board of Education* v. *Barnette,* 319 U. S. 624 (1943). It presumably cannot punish criticism of the flag, or the principles for which it stands, any more than it could punish criticism of this country's policies or ideas. But the statute in this case demands no such allegiance. Its operation does not depend upon whether the flag is used for communicative or noncommunicative purposes; upon whether a particular message is deemed commercial or political; upon whether the use of the flag is respectful or contemptuous; or upon whether any particular seg-

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it is by no means an indispensable element of the State's concern about the integrity of the flag.

[6] The majority of the Court in *Street* stated: "We add that disrespect for our flag is to be deplored no less in these vexed times than in calmer periods of our history," 394 U. S., at 594, citing *Halter.*

ment of the State's citizenry might applaud or oppose the intended message.[7] It simply withdraws a unique national symbol from the roster of materials that may be used as a background for communications. Since I do not believe the Constitution prohibits Washington from making that decision, I dissent.

[7] It is quite apparent that the Court does have considerable sympathy for at least the *form* of appellant's message, describing his use of the flag as "a pointed expression of anguish," *ante,* at 410, and commenting that "appellant chose to express his own views in a manner that can fairly be described as gentle and restrained as compared to the actions undertaken by a number of his peers." *Ante,* at 415 n. 10. One would hope that this last observation does not introduce a doctrine of "comparative" expression, which gives more leeway to certain forms of expression when more destructive methods of expression are being employed by others.

DORSZYNSKI *v.* UNITED STATES

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

No. 73–5284. Argued March 20, 1974—Decided June 26, 1974

In sentencing a youth offender as an adult under other applicable penal statutes, § 5010 (d) of the Federal Youth Corrections Act requires a federal district court to "find" that the offender would not benefit from treatment under the Act, but does not require that such "finding" be accompanied by supporting reasons. Pp. 431–444.

(a) Section 5010 (d)'s requirement of a "no benefit" finding is not to be read as a substantive standard that must be satisfied to support a sentence outside the Act, for such a reading would not comport with the intent of the Act, as manifested by its legislative history, to increase federal trial judges' sentencing options, or with the traditional doctrine that the sentencing function is exclusively vested in the trial court and is not reviewable if within the terms of the statute. It therefore follows that requiring a statement of supporting reasons to accompany a "no benefit" finding would limit the trial court's sentencing discretion since it would only serve to facilitate appellate review of sentencing, contrary to the intent of the Act. Pp. 436–442.

(b) Section 5010 (d)'s "no benefit" finding requirement was designed to insure that the sentencing judge deliberately exercised discretion in choosing not to commit a youth offender to treatment under the Act, such a finding making it clear that the judge was not only aware of the Act's existence but also of the youth offender's eligibility for treatment thereunder. Once it is made clear that the judge has considered the option of the Act's treatment and rejected it, no appellate review is warranted. Pp. 442–443.

484 F. 2d 849, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. MARSHALL, J., filed an opinion concurring in the judgment, in which DOUGLAS, BRENNAN, and STEWART, JJ., joined, *post*, p. 445.

Robert H. Friebert, by appointment of the Court, 414 U. S. 1142, argued the cause and filed a brief for petitioner.

Gerald P. Norton argued the cause for the United States. With him on the brief were *Solicitor General Bork, Assistant Attorney General Petersen, Deputy Solicitor General Frey, Jerome M. Feit,* and *Joseph S. Davies, Jr.**

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

We granted certiorari, 414 U. S. 1091 (1973), to resolve a conflict in the Circuits concerning whether, in sentencing a youth offender under other applicable penal statutes, § 5010 (d) of the Federal Youth Corrections Act, 18 U. S. C. § 5005 *et seq.,* requires a federal district court first to make an explicit finding, supported by reasons on the record, that the offender would not benefit from treatment under subsection (b) or (c) of § 5010. The Court of Appeals held that such a finding may be implied from the record, 484 F. 2d 849 (CA7 1973). Three Circuits have taken that position,[1] and three Circuits have required an explicit finding accompanied by supporting reasons.[2] We conclude that while an express finding of no benefit must be made on the

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**Patricia M. Wald, Daniel A. Rezneck, James F. Flug, Robert Plotkin,* and *Alvin J. Bronstein* filed briefs for the National Legal Aid and Defender Assn. et al. as *amici curiae* urging reversal.

[1] *Williams* v. *United States,* 476 F. 2d 970 (CA3 1973); *Cox* v. *United States,* 473 F. 2d 334 (CA4 1973) (en banc); *United States* v. *Jarratt,* 471 F. 2d 226 (CA9 1972), cert. denied, 411 U. S. 969 (1973); cf. *United States* v. *Walker,* 469 F. 2d 1377 (CA1 1972).

[2] *Brooks* v. *United States,* 497 F. 2d 1059 (CA6 1974); *United States* v. *Kaylor,* 491 F. 2d 1133 (CA2 1974) (en banc); *United States* v. *Coefield,* 155 U. S. App. D. C. 205, 476 F. 2d 1152 (1973) (en banc); cf. *United States* v. *Schenker,* 486 F. 2d 318 (CA5 1973); see also *Small* v. *United States,* 304 A. 2d 641 (DC Ct. App. 1973).

record, the Act does not require that it be accompanied by supporting reasons. The judgment of the Court of Appeals is therefore reversed, and the case is remanded to the District Court for further proceedings.

I

On October 19, 1971, a special agent of the Federal Bureau of Narcotics and Dangerous Drugs made arrangements with petitioner's codefendant, whose case is not before this Court, to purchase approximately 1,000 tablets of lysergic acid diethylamide (LSD) the following day. At the appointed hour on October 20, 1971, the undercover agent was shown approximately 1,000 LSD tablets in the possession of petitioner's codefendant, who transferred the tablets to the agent. The exhibition and transfer took place in an automobile being driven by petitioner. After the tablets were transferred to the agent but before money had changed hands, petitioner and his codefendant were arrested. The complaint upon which the arrest warrant for petitioner issued charged him with knowingly and intentionally possessing approximately 1,000 tablets of LSD, in violation of 18 U. S. C. § 2 and 21 U. S. C. § 844 (a).[3] Subsequent to petitioner's release on his own recognizance, his counsel informed the District Court that petitioner intended to plead guilty to the charge, and requested the completion of a presentence report prior to the plea, as authorized by Fed. Rule Crim. Proc. 32 (c).

On February 14, 1972, proceedings were had in the District Court upon the filing of an information, ar-

[3] Title 18 U. S. C. § 2 made petitioner punishable as a principal for any offense against the United States committed by his codefendant. Title 21 U. S. C. § 844 (a) makes punishable the knowing or intentional possession of a controlled substance such as LSD when not obtained pursuant to a valid prescription or order, or as otherwise authorized by law.

raignment, plea, and sentence. The Government filed a one-count information charging petitioner and his codefendant with a misdemeanor offense under 18 U. S. C. § 2 and 21 U. S. C. § 844 (a). The Government informed the court that the maximum sentence petitioner and his codefendant, who were first offenders under § 844 (a), could receive was one year in prison, a fine of $5,000, or both; the court was also advised that since petitioner might have been under the age of 26, see n. 9, *infra*, he "may also be subject to the Federal Youth Corrections Act."[4] App. 6. Petitioner, who was 19

[4] The sentencing provisions of the Act, 18 U. S. C. § 5010, are as follows:

"(a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

"(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017 (c) of this chapter; or

"(c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Division prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Division as provided in section 5017 (d) of this chapter.

"(d) If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision.

"(e) If the Court desires additional information as to whether a youth offender will derive benefit from treatment under subsection

years old at the time of the proceeding and had had no prior criminal record, pleaded guilty, as did his codefendant. After inquiry as prescribed by Fed. Rule Crim. Proc. 11 to determine whether there was a basis in fact for petitioner's guilty plea, and whether it was entered voluntarily with understanding of its nature and consequences,[5] the District Court accepted the plea.

(b) or (c) it may order that he be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Division shall report to the court its findings."

The release of youth offenders committed under § 5010 is governed by 18 U. S. C. § 5017, which provides in part:

"(a) The Division may at any time after reasonable notice to the Director release conditionally under supervision a committed youth offender. When, in the judgment of the Director, a committed youth offender should be released conditionally under supervision he shall so report and recommend to the Division.

"(b) The Division may discharge a committed youth offender unconditionally at the expiration of one year from the date of conditional release.

"(c) A youth offender committed under section 5010 (b) of this chapter shall be released conditionally under supervision on or before the expiration of four years from the date of his conviction and shall be discharged unconditionally on or before six years from the date of his conviction.

"(d) A youth offender committed under section 5010 (c) of this chapter shall be released conditionally under supervision not later than two years before the expiration of the term imposed by the court. He may be discharged unconditionally at the expiration of not less than one year from the date of his conditional release. He shall be discharged unconditionally on or before the expiration of the maximum sentence imposed, computed uninterruptedly from the date of conviction."

[5] Although petitioner's complaint here is that he was *not* sentenced under the Act, following his conviction he challenged the validity of his plea in part on the ground that he was not informed that under

Since petitioner desired to be sentenced at this proceeding, the District Court recessed to consider the presentence report, which petitioner's counsel had already read. After recess and before sentencing, petitioner was given his right to allocution, and petitioner's counsel requested the court that petitioner "be placed . . . on probation under the Youth Corrections Act." App. 13. See n. 4, *supra*. Petitioner then received a split sentence which remitted him to the custody of the Attorney General for one year, to serve 90 days' confinement "in a jail-type or treatment" institution, although the judgment mentions only a "jail-type" institution; the execution of the remainder of the sentence was suspended and petitioner was placed on probation for two years upon release from custody. 18 U. S. C. § 3651.[6] At no time during the proceeding, including

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the Act he could have received a sentence of incarceration and supervision up to a period of six years, 18 U. S. C. §§ 5010 (b) and 5017 (c), see n. 4, *supra*, in asserted violation of Rule 11. The District Court denied relief on this ground; that ruling has not been challenged.

[6] There is no contention made that the District Court could not place petitioner on probation under 18 U. S. C. § 3651, as opposed to probation under the Act, 18 U. S. C. § 5010 (a). See *United States* v. *Kurzyna*, 485 F. 2d 517 (CA2 1973). Petitioner was released from confinement to probation on May 11, 1972, with the special condition that his probation terminate May 11, 1974. Although by now petitioner may have fully served his sentence, including probation, he still suffers the disabilities accompanying a criminal misdemeanor conviction under 21 U. S. C. § 844 (a). While the provision under which he was sentenced to probation, 18 U. S. C. § 3651, does not provide for relief from these disabilities, the Act does so in 18 U. S. C. § 5021, by its provision for setting aside the conviction of a youth offender:

"(a) Upon the unconditional discharge by the division of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and

552-191 O - 76 - 30

sentencing, did the District Court make any reference to the Federal Youth Corrections Act.

On May 1, 1972, after having filed numerous other post-conviction motions for relief, petitioner filed the motion at issue here, seeking relief pursuant to Fed. Rules Crim. Proc. 32 (d) and 35, and 28 U. S. C. § 2255, on two grounds. The first alleged that his guilty plea was not made understandingly; that issue is not before us. See n. 5, *supra*. The second alleged that the District Court was without jurisdiction to impose the sentence given because the court failed to make a finding that petitioner would not derive benefit from treatment under § 5010 (b) or (c), as assertedly required by § 5010 (d). See n. 4, *supra*. The District Court held an evidentiary hearing to consider this motion, as well as other motions pending at that time. All were denied without opinion. The District Court stated at the post-

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the division shall issue to the youth offender a certificate to that effect.

"(b) Where a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction, and the court shall issue to the youth offender a certificate to that effect."

Despite the expiration of petitioner's sentence, then, he may still receive the benefit of 18 U. S. C. § 5021 if he is resentenced under the Act. To be eligible to have his conviction set aside under the Act, petitioner would have to be committed under § 5010 (b) or (c), or placed on probation under § 5010 (a), and achieve the early discharge required by § 5021 (a) or (b). While this might require the imposition of a longer sentence than he originally received, petitioner represents through counsel that he would voluntarily seek resentencing which would place him back on probation. Tr. of Oral Arg. 8, 16–18. The District Court would then be able, as a matter of discretion, to provide the requisite early unconditional discharge. 18 U. S. C. § 5021 (b).

conviction hearing that the Act did not require an affirmative finding that petitioner would not benefit from treatment thereunder before the court could sentence him under other applicable penalty provisions; the court concluded that in committing petitioner for one year under a split sentence "the [District] Court impliedly [held] the Youth Corrections Act not applicable." App. 45.

The Court of Appeals affirmed, rejecting the view that trial judges must make an explicit finding that youth offenders would not benefit from treatment under the Act. The Court of Appeals held that such a determination may be implied from the record as a whole and that the imposition of the split sentence upon petitioner after his counsel had raised the possibility of sentencing under that Act satisfied § 5010 (d). 484 F. 2d, at 851.

II

The Federal Youth Corrections Act

The sole issue in this case is the validity of the sentence imposed by the District Court. Petitioner contends that before any adult sentence may be imposed § 5010 (d) requires, first, that the sentencing judge find explicitly that the convicted defendant would receive no benefit from treatment under the Act and, second, that the sentencing judge must explain the reasons for his finding. We begin with the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end.[7] *Gore* v. *United States*, 357

[7] There is no contention here that the District Court relied upon improper or inaccurate information. *United States* v. *Tucker*, 404 U. S. 443 (1972). Petitioner contends he was denied due process because he was deprived of his claimed right to be sentenced under the Act, without a reasoned explanation on the record for the asserted deprivation. We need not address this contention, for it was not raised before the District Court, the Court of Appeals, or in the

U. S. 386, 393 (1958); *Townsend* v. *Burke*, 334 U. S. 736, 741 (1948); *Blockburger* v. *United States*, 284 U. S. 299, 305 (1932). Our task, therefore, is to determine whether the sentence imposed here was permitted under § 5010 (d) of the Act.

The Federal Youth Corrections Act has been accurately described as the most comprehensive federal statute concerned with sentencing. *United States* v. *Coefield*, 155 U. S. App. D. C. 205, 209, 476 F. 2d 1152, 1156 (1973). The Act is in substantial part an outgrowth of recommendations made by the Judicial Conference of the United States more than 30 years ago.[8] The principles and procedures contained in the Conference recommendations were in turn largely based on those developed since 1894 for a system of treatment of young offenders in England, known as the Borstal system. See Criminal Justice Act of 1948, 11 & 12 Geo. 6, c. 58, and Criminal Justice Act of 1961, 9 & 10 Eliz. 2, c. 39. Statistics available at the time of the Conference study revealed the two principal motivating factors behind the enactment of the Act: first, the period of life between 16 and 22 years of age was

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questions presented in the petition for certiorari. *Phillips Co.* v. *Dumas School Dist.*, 361 U. S. 376, 386 n. 12 (1960); *Irvine* v. *California*, 347 U. S. 128, 129–130 (1954); *Radio Officers' Union* v. *NLRB*, 347 U. S. 17, 37 n. 35 (1954).

[8] In 1941 Mr. Chief Justice Stone requested the Judicial Conference to study the general subject of punishment for crime. The Chief Justice appointed four federal courts of appeals judges and three district judges to the committee which undertook the study. A subcommittee gave particular attention to the treatment of youth offenders. The committee made a report to the Judicial Conference in 1942, and developed a draft of an act to provide a correctional system for adult and youth offenders. The report as adopted by the Conference was first presented to Congress in 1943. The recommendations regarding youth offenders were largely adopted by Congress in 1949 in the bill which became the Federal Youth Corrections Act in 1950.

found to be the time when special factors operated to produce habitual criminals. Second, then-existing methods of treating criminally inclined youths were found inadequate in avoiding recidivism. H. R. Rep. No. 2979, 81st Cong., 2d Sess., 2–3 (1950) (hereinafter H. R. Rep. No. 2979). The Act was thus designed to provide a better method for treating young offenders convicted in federal courts in that vulnerable age bracket, to rehabilitate them and restore normal behavior patterns. *Ibid.*

To accomplish this objective, federal district judges were given two new alternatives to add to the array of sentencing options previously available to them, see n. 9, *infra:* first, they were enabled to commit an eligible offender to the custody of the Attorney General for treatment under the Act. 18 U. S. C. §§ 5010 (b) and (c). Second, if they believed an offender did not need commitment, they were authorized to place him on probation under the Act. 18 U. S. C. § 5010 (a). If the sentencing court chose the first alternative, the youth offender would be committed to the program of treatment created by the Act.

The objective of these options represented a departure from traditional sentencing, and focused primarily on correction and rehabilitation. All persons under 22 years of age at the time of conviction were made eligible for probation or treatment under the Act,[9] the latter de-

[9] The Act is ordinarily not applied to convicted persons under the age of 18, who are eligible for sentencing under the provisions of the Federal Juvenile Delinquency Act, 18 U. S. C. § 5031 *et seq.* And certain multiple offenders in the District of Columbia are, despite their qualifying age, barred from sentencing under the Act. D. C. Code Ann. § 22–3202 (d)(1). By contrast, convicted persons between the ages of 22 and 26, termed "young adult" offenders, may be sentenced for treatment under the Act if "the court finds that there is reasonable groun[d] to believe that the defendant will benefit from" treatment under the Act. 18 U. S. C. § 4209. Of

fined as "corrective and preventive guidance and training designed to protect the public by correcting [their] antisocial tendencies." 18 U. S. C. §§ 5006 (e) and (g). To implement the program of treatment for youth offenders committed under the Act, a Youth Correction Division was created under the Board of Parole which, in conjunction with the Bureau of Prisons and the Probation Service, operates to provide the unique features of the Act's program. 18 U. S. C. § 5005.

An important element of the program was that once a person was committed for treatment under the Act, the execution of sentence was to fit the person, not the crime for which he was convicted. Classification agencies were to be established by the Director of the Bureau of Prisons to receive and study the person committed and make recommendations to the Director as to appropriate treatment. 18 U. S. C. §§ 5014, 5015. Further, the range of treatment available was made broad to provide maximum flexibility. The Director was authorized both to adapt numerous public facilities, and to contract with public or private agencies, in order to provide institutional treatment which the Director could vary according to the committed person's progress or lack of it. 18 U. S. C. §§ 5011, 5015. An integral part of the treatment program was the segregation of the committed persons, insofar as practicable, so as to place them with those similarly committed, to avoid the influence of association with the more hardened inmates serving traditional criminal sentences. 18 U. S. C. § 5011.

In addition to institutional treatment, the Division was empowered to order conditional release under supervision at any time of those committed under the Act, with fed-

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course, adult offenders are eligible for sentencing only under statutory provisions different from those available for juveniles, youth offenders, and young adult offenders.

eral probation officers providing the supervision.[10] 18 U. S. C. §§ 5007, 5017, 5019. Conditional release was mandatory after a period of time fixed by the statutory formula. 18 U. S. C. § 5017. See n. 4, *supra*. The Division was further authorized to order the unconditional discharge of committed persons after a fixed period of treatment, and was required unconditionally to discharge them within a period also fixed by statutory formula. 18 U. S. C. § 5017. A powerful tool available to the Division was its discretion to discharge committed persons unconditionally before it was required to do so, for upon such discharge the conviction upon which the sentence rested would be automatically set aside. 18 U. S. C. § 5021 (a). See n. 5, *supra*. Similarly, if the sentencing judge chose the second alternative created by the Act, *i. e.*, placement of the youth offender on probation under its provisions, the judge himself could exercise his discretion to discharge the offender from probation unconditionally. 18 U. S. C. § 5021 (b). See n. 6, *supra*. This, too, would result in the automatic setting aside of the offender's conviction. 18 U. S. C. § 5021 (b).

The foregoing describes the new options of treatment and probation made available to the federal sentencing court under the Act.[11] Our concern is not with the op-

[10] In 1952, Congress amended § 5024 of the Act, and added §§ 5025 and 5026, in order to extend the Act's coverage to youth offenders convicted in the District of Columbia. 66 Stat. 45. In 1967, Congress further amended these sections, withdrawing from the Bureau of Prisons and the Youth Correction Division control of District of Columbia youth offenders during their commitment and after their release. Control during these periods was instead given to the Commissioner of the District of Columbia, who could in turn delegate this authority to the D. C. Department of Corrections, in order to provide continuity of treatment.

[11] In recognition of the difficulty of ascertaining whether, and if so which type of, treatment under the Act would benefit a youth offender, the Act also permits the sentencing court to commit the

eration of these alternatives, but with the decision of the court to employ them, for the Act also preserved the power of trial judges to sentence youth offenders under "any other applicable penalty provision." It is to the question of when a judge may sentence a youth offender outside the Act that we now turn.

III

Sentencing Discretion Under the Act

(A)

The language affecting the sentencing role of the judge under the Act is found in § 5010 (d), which tells us:

> "If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision."

Our concern is with the effect of the requirement of a "no benefit" finding on the judge's sentencing discretion.

The legislative history clearly indicates that the Act was meant to enlarge, not restrict, the sentencing options of federal trial courts in order to permit them to sentence youth offenders for rehabilitation of a special sort.

> "The proposed legislation is designed to make available for the *discretionary* use of the Federal judges a system for the sentencing and treatment of [youth offenders] that will promote the rehabilitation of those who *in the opinion of the sentencing judge* show promise of becoming useful citizens . . . ." H. R. Rep. No. 2979, p. 1. (Emphasis added.)

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offender to one of the above classification agencies where, following observation and study, the Youth Correction Division reports its findings to the court within 60 days. 18 U. S. C. § 5010 (e).

> "The purpose of the proposed legislation is to provide a *new alternative sentencing* and treatment procedure for [youth offenders]." S. Rep. No. 1180, 81st Cong., 1st Sess., 1 (1949) (hereinafter S. Rep. No. 1180). (Emphasis added.)

Thus, apart from the discretion vested in administrative agencies for treatment of those committed under the Act, as described in Part II, the Act was intended to broaden the scope of judicial sentencing discretion to include the alternatives of treatment or probation thereunder.

The Act was a product of studies made by a committee of federal judges under the auspices of the Judicial Conference of the United States. The views of the sponsors as to the effect of the Act on the sentencing discretion of the trial courts are thus of particular importance, and they uniformly support the view that the Act was intended to preserve the unfettered sentencing discretion of federal district judges. Most pertinent is the statement made by the Chairman of the Judicial Conference special committee appointed to study punishment for crime, see n. 8, *supra,* Chief Judge John J. Parker, who testified before the Subcommittee of the Senate Judiciary Committee, which conducted the only hearings held on the bill (S. 2609) enacted as the Federal Youth Corrections Act. Judge Parker stated:

> "[T]he act . . . does not interfere with the power of the judge [with respect to sentencing youth offenders] but gives him merely an alternative method of treatment of those people. . . . He may still give the youthful offender the punishment prescribed by existing statutes, there is nothing in the bill that prevents that. All that the bill does is to provide that if in his judgment and discretion, he thinks that the offender before the court is one that can be treated

with advantage under this bill, he can sentence him under this bill instead of under the existing law.

. . . . . .

". . . I do not see any possible objection [to the Act]. They say that there are some of these fellows that ought to be given serious punishment notwithstanding their being young and it [the Act] does not prevent their being given serious punishment. Nothing prevents a man from getting 25 years punishment if he deserves it. Nothing prevents his being executed if he deserves such sentence." Hearings on S. 1114 and S. 2609 before a Subcommittee of the Senate Committee on the Judiciary, 81st Cong., 1st Sess., 43–44 (1949) (hereinafter Hearings).

To the same effect is the statement made by Circuit Judge Orie L. Phillips, the Chairman of the Conference subcommittee which gave particular attention to the treatment of youth offenders. See n. 8, *supra*. In response to the statement of Senator Kilgore, sponsor of S. 2609, that the bill "takes nothing" (in terms of sentencing) "away from the court," Judge Phillips replied: "That is correct; it is purely optional." Hearings 69. Earlier Judge Phillips had said of the bill: "That is merely a flexibility and it is not a command that he send the boys up," to which Senator Kilgore replied: "I agree with you on that . . . ." *Id.*, at 67. To the extent other testimony and the debates addressed the question of sentencing discretion under the Act, they invariably reflected the same view,[12] as did the House

[12] The only other judges to testify before the Senate Subcommittee were also in accord. District Judge Carroll Hincks, who served on the Conference subcommittee studying treatment of youth offenders, stated:

"I think when the judges say they are opposed to the predecessor of this bill, if you could talk with them, you would find that . . . they

Report, quoted above, and the Department of Justice, which recommended enactment of S. 2609 and noted that the bill "would not deprive the court of any of its present functions as to sentencing." S. Rep. No. 1180, pp. 10–11. The Senate Report's language was identical to that of the Department of Justice.[13] *Id.*, at 1. The legislative his-

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would not themselves want to use it. Very well, they do not have to use it." Hearings 57.

District Judge Bolitha J. Laws, who served on the Conference special committee studying general punishment for crime, stated:

"I have already told you that this law is purely an optional situation. A judge who feels that the present system is in all respects perfect and who does not want to use the new provisions, except perhaps rarely, does not have to use them. He still may do one of two things. He may admit the man to probation, or he may send him to an institution exactly as he does now." *Id.*, at 15.

Mr. James V. Bennett, Director, Bureau of Prisons, testified similarly:

"I would like to . . . reemphasize more than Judge Laws has done, that this bill is discretionary . . . . [I]t is very difficult for me to conceive of anybody who could rightfully object to the bill because they can use it or not, as they see fit . . . ." *Id.*, at 25.

During the Senate debate over the bill, Senator Kilgore made clear his position of the matter of sentencing discretion under the bill:

"Its purpose is to grant to trial courts . . . some additional facilities . . . to try certain correctional methods. Use of the system provided by this measure would not be mandatory." 96 Cong. Rec. 8267 (1950).

There was no discussion of sentencing discretion by anyone other than Senator Kilgore in either the Senate or House debates.

[13] The Senate Report also noted that the sentencing judge may sentence a youth offender under applicable provisions other than the Act if, after receiving a pre-sentence diagnosis under 18 U. S. C. § 5010 (e), see n. 11, *supra*, he is convinced the youth is "incorrigible and would derive no help from the program." S. Rep. No. 1180, p. 5. The remark was made in the context of a discussion concerning the need sentencing judges have for additional information about youth offenders they must sentence, and indicated merely that temporary commitment under § 5010 (e) would not deprive the judge

tory of the Act confirms the conclusion that Congress did not intend to alter or circumscribe the sentencing discretion of federal district judges by requiring that any substantive standard be met before the imposition of sentence. There is virtual unanimity of opinion in the legislative history that the Act was intended to increase the sentencing options of federal trial judges, rather than to limit the exercise of their discretion whether to employ the newly created options.

To construe § 5010 (d)'s requirement of a "no benefit" finding to circumscribe that discretion would be incompatible with a clear congressional intent; such a construction would also be at odds with traditional sentencing doctrine. The intent of Congress was in accord with long-established authority in the United States vesting the sentencing function exclusively in the trial court.[14]

"If there is one rule in the federal criminal prac-

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of the discretion to sentence the youth outside the Act, citing illustratively the prototype of youth offender whom judges would not likely desire to sentence under the Act.

[14] To the extent reference was made to the English Borstal system for treating young offenders in drafting the Act, that reference did not include the English view of the trial court's discretion to make use of that system. Circuit Judge (now Chief Judge) Kaufman of the Court of Appeals for the Second Circuit has stated:

"At present the United States is the only nation in the free world where one judge can determine conclusively, decisively and finally the minimum period of time a defendant must remain in prison, without being subject to any review of his determination." Symposium, Appellate Review of Sentences, 32 F. R. D. 257, 260–261 (1962).

Professor Sanford H. Kadish also notes that in the United States, the "discretion of the judge . . . in [sentencing] matters is virtually free of substantive control or guidance," Kadish, Legal Norm and Discretion in the Police and Sentencing Processes, 75 Harv. L. Rev. 904, 916 (1962). We are unwilling to ascribe to the Congress an intent to import, *sub silentio*, sentencing doctrine contrary to traditional powers of sentencing judges.

> tice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute." *Gurera* v. *United States,* 40 F. 2d 338, 340–341 (CA8 1930).

See *Gore* v. *United States,* 357 U. S. 386 (1958); *Townsend* v. *Burke,* 334 U. S. 736 (1948); *Blockburger* v. *United States,* 284 U. S. 299 (1932).

The statutes referred to in this line of cases established a permissible range within which sentences could be imposed; if a judge imposed a sentence within that range, his exercise of discretion as to where within the permissible range sentence should be fixed was not subject to challenge. The authority to sentence a youth offender under "any other applicable penalty provision" is expressly reserved to federal trial courts by § 5010 (d), and thus is within the permissible range of sentences which may be imposed under the Act. The "no benefit" finding required by the Act is not to be read as a substantive standard which must be satisfied to support a sentence outside the Act, for such a reading would subject the sentence to appellate review even though the sentence was permitted by the Act's terms, thereby limiting the sentencing court's discretion. We will not assume Congress to have intended such a departure from well-established doctrine without a clear expression to disavow it. As our review has shown, the exclusive sentencing power of district judges was acknowledged, and Congress' intention to affirm that power was clearly indicated.

From our conclusion that a finding of "no benefit" was not intended to constitute a substantive standard, it follows that a sentence outside the Act need not be accompanied by a statement of reasons why the court chose such a sentence. The only purpose of such a requirement would be to facilitate appellate supervision of, and thus to

limit, the trial court's sentencing discretion.[15] In short, we hold that the discretion vested in a district judge under § 5010 (d) is essentially the same as the traditional discretion vested in the court, for example, to impose the minimum sentence on a first offender or a larger sentence on a recidivist. If the failure of a court to sentence a particular youth offender under the Act appears "too harsh, the remedy must be afforded by act of Congress, not by judicial legislation under the guise of construction," *Blockburger, supra,* at 305, since "[w]hatever views may be entertained regarding severity of punishment . . . [t]hese are peculiarly questions of legislative policy." *Gore, supra,* at 393.

(B)

Although the Act was not in any way intended to circumscribe the discretion of sentencing courts, it did provide a new sentencing alternative designed to prevent youthful offenders from continuing their involvement in criminal conduct after the expiration of their sentence. In the novelty of the treatment option made available, and the importance of the objective it was to serve, lies the purpose of § 5010 (d)'s requirement that the court find "no benefit" before imposing a sentence other than one under § 5010 (b) or (c).

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[15] Judge Marvin E. Frankel (SDNY) has recently stated that while judges are required to explain other rulings, see, *e. g.*, Fed. Rule Civ. Proc. 52 (a), "[t]here is no such requirement in the announcement of a prison sentence." Frankel, Lawlessness in Sentencing, 41 U. Cin. L. Rev. 1, 9 (1972). It would have been a very simple matter for Congress to have included a statement in § 5010 (d) that the sentencing court's determination of no benefit must be supported by reasons, as was required by the proposal regarding adult offenders, before the Congress in 1943, S. 895, Tit. II, § 1, 78th Cong., 1st Sess. See n. 8, *supra.* Congress' failure to so provide in § 5010 (d) strengthens our view that it intended no new appellate encumbrance upon the sentencing process.

Although well-established doctrine bars review of the exercise of sentencing discretion, limited review is available when sentencing discretion is not exercised at all. *Yates* v. *United States*, 356 U. S. 363, 366–367 (1958); *United States* v. *Daniels*, 446 F. 2d 967, 972 (CA6 1971); *United States* v. *Williams*, 407 F. 2d 940, 945 (CA4 1969). See also n. 7, *supra*. The requirement of the "no benefit" finding was designed to insure that the sentencing judge exercised his discretion in choosing not to commit a youth offender to treatment under the Act. Such a finding would make unmistakably clear that the sentencing judge was not only aware of the existence of the new Act, but also knew that the youth offender before him was eligible because of his age for the treatment it provided to accomplish its important purpose.

> "Appellate modification of a statutorily-authorized sentence . . . is an entirely different matter than the careful scrutiny of the *judicial process* by which the particular punishment was determined. Rather than an unjustified incursion into the province of the sentencing judge, this latter responsibility is, on the contrary, a necessary incident of what has always been appropriate appellate review of criminal cases." *United States* v. *Hartford*, 489 F. 2d 652, 654 (CA5 1974). (Emphasis in original.)

Once it is made clear that the sentencing judge has considered the option of treatment under the Act and rejected it, however, no appellate review is warranted.

The question whether the finding of "no benefit" must be explicit or whether it may be implicit in the record of a particular case is answered by the manifest desire of Congress to assure that treatment under the Act be considered by the court as one option whenever the youth offender is eligible for it. If the finding may be implied

from the record, appellate courts must go on to determine what constitutes a sufficient showing of the requisite implication. To hold that a "no benefit" finding is implicit each time a sentence under the Act is not chosen would render § 5010 (d) nugatory; to hold that something more is necessary to support the inference that must be found in the record would create an *ad hoc* rule. Appellate courts should not be subject to the burden of case-by-case examination of the record to make sure that the sentencing judge considered the treatment option made available by the Act. Literal compliance with the Act can be satisfied by any expression that makes clear the sentencing judge considered the alternative of sentencing under the Act and decided that the youth offender would not derive benefit from treatment under the Act.

This case provides an example of the problems arising when the required finding is left to implication. Counsel's references to the Act followed by the District Court's sentence indeed afford support for the argument that, by implication, the options of the Act were considered and rejected. However at the post-conviction hearing the District Court found from the record of the sentencing hearing the implication that the Act was "not applicable." It is thus unclear whether this meant the court believed petitioner to be legally ineligible for treatment under the Act—which would be error—or whether, realizing he was eligible, nevertheless deliberately opted to sentence him as an adult. An explicit finding that petitioner would not have benefited from treatment under the Act would have removed all doubt concerning whether the enlarged discretion Congress provided to sentencing courts was indeed exercised.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded to the end that the

District Court conduct further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE STEWART join, concurring in the judgment.

The Court is today called upon to construe the provision of the Federal Youth Corrections Act, 18 U. S. C. § 5005 *et seq.*, defining the circumstances under which a youth offender may be sentenced as an adult. The Youth Corrections Act (YCA) provides a comprehensive sentencing scheme for offenders between the ages of 18 and 22, affording trial judges four options for sentencing such offenders. The judge may suspend imposition or execution of sentence and place the offender on probation. 18 U. S. C. § 5010 (a). Alternatively, the judge may sentence the offender for treatment and supervision at a special youth facility, to be discharged in no more than 6 years, 18 U. S. C. § 5010 (b), or he may commit the offender to a youth institution for a term which may exceed 6 years, up to the maximum period authorized by law for the offense. 18 U. S. C. § 5010 (c).[1] Finally, the judge may sentence the offender as an adult, pursuant to 18 U. S. C. § 5010 (d), which provides that:

> "If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision."

I agree with the Court's holding that § 5010 (d) requires an explicit finding of "no benefit" as a condition precedent to sentencing an eligible offender as an adult,

[1] The actual duration of the treatment period is determined by the Youth Correction authorities. 18 U. S. C. § 5017.

552-191 O - 76 - 31

ante, at 444, but I find that holding patently inconsistent with the Court's assertion that a sentencing judge need only be aware of the applicability of the Act and choose to reject it in order to satisfy the clear admonition of § 5010 (d). As construed by the Court, the "no benefit" finding is not a finding at all.

I am convinced that the Act was meant to "provide a *preferred* sentencing alternative which must be used in sentencing a youthful offender unless, in the language of § 5010 (d), 'the court shall find that the youth offender *will not derive benefit* from treatment . . .' " under the Act. *Cox* v. *United States,* 473 F. 2d 334, 337 (CA4 1973) (en banc) (emphasis added). And, I fundamentally disagree with the Court's holding that merely by tracking the statutory "no benefit" language a sentencing judge can satisfy the "finding" requirement of § 5010 (d). I would require that the explicit "no benefit" finding be augmented by a statement of the reasons for imposing an adult sentence.

I

I find no basis in either the language or history of the YCA to support the Court's observation that the Act was intended to "preserve unfettered" the discretion of the sentencing judge. *Ante,* at 437. The YCA was the product of more than 10 years of study by various groups and was modeled after the English Borstal system, which had achieved substantial success in rehabilitating young offenders.[2] The initial legislative proposal, an American Law Institute model Act, removed the power to sentence eligible offenders from the trial judges altogether and reposed that power in a correctional authority.[3] Not surprisingly, that proposal

[2] H. R. Rep. No. 2979, 81st Cong., 2d Sess., 3–6 (1950).

[3] ALI, Model Youth Correction Authority Act §§ 13 and 30 (Official Draft 1940); *id.,* comment, at 35–36.

brought swift and sharp criticism from the judges whose power was to be sharply curtailed. The next proposal, by the Judicial Conference, involved shared sentencing powers between trial judges and correctional authorities.[4] It met with similar criticism. The 1949 proposal, which was finally enacted into law, retained sentencing power in the trial judge. As the Court today points out, the drafters of the Act repeatedly emphasized that the legislation " 'does not interfere with the [sentencing] power of the judge . . . .' " *Ante,* at 437.

But even the very first Judicial Conference proposal contained a provision specifically requiring the trial judge to make a finding that a youth offender would not benefit from treatment and should not be committed under the Act, before sentencing him under any other penalty provisions.[5] This finding requirement was adapted from the similar Borstal provision which disallows a sentencing court to "impose imprisonment on a person under twenty-one years of age unless . . . no other [Borstal] method of dealing with him is appropriate . . . ." [6] The finding requirement of the Judicial Conference draft was not subject to the same criticism as the provisions which actually removed, rather than limited, the exercise of trial judges' sentencing discretion, and the finding requirement was ultimately enacted into law as § 5010 (d).

The finding requirement is an integral part of the YCA scheme. The stated premise of the Act is that young people between the ages of 18 and 22, especially, are promising subjects for rehabilitation.[7] The purpose of the legislation was, for those offenders,

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[4] H. R. 2140, Tit. II, § 3, 78th Cong., 1st Sess. (1943).

[5] *Id.,* Tit. III, § 1 (c).

[6] Criminal Justice Act of 1948, § 17 (2), 11 & 12 Geo. 6, c. 58.

[7] H. R. Rep. No. 2979, *supra,* at 1–4.

to "substitute for retributive punishment methods of training and treatment designed to correct and prevent antisocial tendencies. It departs from the mere punitive idea of dealing with criminals and looks primarily to the objective idea of rehabilitation." H. R. Rep. No. 2979, 81st Cong., 2d Sess., 3 (1950).[8] It is clear that from its very inception, the youth corrections program was intended to establish among the goals judges could consider in sentencing eligible offenders, one as paramount—that of rehabilitation.[9] And, in this limited sense, the sentencing discretion of trial judges is necessarily circumscribed in regard to youth offenders. The finding requirement of § 5010 (d) effectuates this policy by permitting eligible offenders to be deprived of the rehabilitative treatment provided under the Act only where they would not benefit therefrom.

The Senate Report accompanying the bill explained the circumstances under which adult sentencing would be proper:

> "If . . . the judge is convinced the youth is incorrigible and would derive no help from the program, he may sentence him under any applicable provision of law." S. Rep. No. 1180, 81st Cong., 1st Sess., 5 (1949).

Other aspects of the legislative history underscore Congress' intention that the Act provide a preferred sentencing alternative for eligible offenders. Senator Kilgore, one of the sponsors of the legislation, observed that given the requisite finding "only about 10 percent of [eligible

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[8] Although the rehabilitative model of corrections has recently been subject to criticism, the fact remains that Congress established a clear preference for the objective of rehabilitation in enacting the YCA.

[9] See, *e. g.*, *United States* v. *Kaylor*, 491 F. 2d 1133, 1136 (CA2 1974) (en banc); *United States* v. *Waters*, 141 U. S. App. D. C. 289, 293, 437 F. 2d 722, 726 (1970); *Carter* v. *United States*, 113 U. S. App. D. C. 123, 125, 306 F. 2d 283, 285 (1962).

offenders would] eventually have to [be] sentence[d as adults], or less." Hearing on S. 895 before a Subcommittee of the Senate Committee on the Judiciary, 78th Cong., 1st Sess., 13 (1943). The House Report concluded that even given the instances in which YCA rehabilitative treatment would fail "more than 70 percent [of eligible youth offenders] can be rehabilitated" under the Act. H. R. Rep. No. 2979, *supra*, at 10. The panoply of treatment options [10] available under the Act is but further evidence that the YCA program was intended to be sufficiently comprehensive to deal with all but the "incorrigible" youth.

This congressional intent finds clear expression in the words of the statute. Section 5010 (d) does not say the sentencing court must merely consider the treatment option provided by the Act; it says in the most uncompromising terms that the court must find the youth "will not benefit" from YCA treatment as a prerequisite to imposing an adult sentence. The use of the words "shall find" emphasizes the mandatory nature of that finding. The specific quality of the finding is underscored by § 5010 (e) which provides for an eligible offender to be temporarily committed for observation and study for the purpose of providing the sentencing court with a report on the particular question defined by § 5010 (d)—whether the youth offender would benefit from treatment under the Act.[11]

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[10] Emulating the Borstal system, Congress authorized a comprehensive youth corrections system, making a wide range of treatment options available to youth offenders. It mandated that maximum, medium, and minimum security institutions be utilized, 18 U. S. C. § 5011, that long- and short-term treatment be provided, compare 18 U. S. C. § 5010 (b) with 18 U. S. C. § 5010 (c), and that a wide range of treatment services be available. 18 U. S. C. §§ 5011, 5015.

[11] "If the court desires additional information *as to whether a youth offender will derive benefit from treatment* under subsection

Thus, while the Act does not remove a trial judge's responsibility or discretion for the sentencing determination, it does provide a preferred disposition for eligible offenders. A sentencing judge is not required to sentence a youth offender under the Act; the judge can still exercise his "sound discretion to deny such rehabilitative treatment to those youths in the exceptional cases where the judge determines that the special youth treatment afforded by the Act would be of no value." *United States* v. *Waters*, 141 U. S. App. D. C. 289, 291, 437 F. 2d 722, 724 (1970). The legislative history relied on by the Court merely emphasizes this point—that the Act was intended to be another sentencing alternative available to the trial judge and that the decision as to whether it should be employed in a particular case remains a decision committed to his discretion. That history is not, however, inconsistent with what seems to me the plain meaning of the words of the statute—that the sentencing judge's discretion is circumscribed by the affirmative finding requirement of § 5010 (d).[12] The YCA "provides a preferred sentencing alternative" which must be used in sentencing a youth unless the facts of the individual case meet the statutory requirement—

(b) or (c) it may order that he be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Division shall report to the court its findings." 18 U. S. C. § 5010 (e) (emphasis added).

[12] An unsuccessful effort to remove these bonds on the discretion of sentencing judges was made in 1972, when a bill was introduced to amend 18 U. S. C. § 5010 (d) to provide that:

"Nothing in this chapter shall be construed to preclude the court, in any case, from sentencing a youth offender under any other applicable penalty provision." S. 3290, 92d Cong., 2d Sess. (1972); see 118 Cong. Rec. 6776–6788 (1972).

The proposed amendment was not enacted.

unless, in the language of § 5010 (d), the court finds that the youth offender will not derive benefit from treatment under the Act.[13] *Cox* v. *United States*, 473 F. 2d, at 337; *United States* v. *Waters*, 141 U. S. App. D. C., at 292–293, 437 F. 2d, at 725–726. Every Court of Appeals which has considered the issue, except the court below, has agreed that the manner in which the sentencing judge exercises his discretion is thus limited. *Brooks* v. *United States*, 497 F. 2d 1059 (CA6 1974); *United States* v. *Kaylor*, 491 F. 2d 1133 (CA2 1974) (en banc); *United States* v. *Schenker*, 486 F. 2d 318 (CA5 1973); *United States* v. *Coefield*, 155 U. S. App. D. C. 205, 476 F. 2d 1152 (1973) (en banc); *Cox* v. *United States*, *supra*; *Williams* v. *United States*, 476 F. 2d 970 (CA3 1973); see *United States* v. *MacDonald*, 455 F. 2d 1259, 1265 (CA1 1972);[14] cf. *Small* v. *United States*, 304 A. 2d 641 (DC Ct. App. 1973).

In a sense, the Court today also recognizes the inherent limitation on the judge's discretion imposed by § 5010 (d) by requiring an explicit "no benefit" finding as a prerequisite to adult sentencing. As conceived by the Court, however, the required "no benefit" finding is no finding at all, but merely a ritualistic invocation of the statutory language. In explaining why the "no benefit" finding

[13] The requirement of a positive finding of "no benefit" to support an adult sentence under § 5010 (d) is merely the obverse of the requirement of 18 U. S. C. § 4209 that as a prerequisite to young adult offender sentencing the sentencing "court finds that there is reasonable grounds to believe that the defendant will benefit from [such] treatment . . . ." See *United States* v. *Kaylor*, 491 F. 2d, at 1137.

[14] Subsequently in *United States* v. *Walker*, 469 F. 2d 1377 (1972), the Court of Appeals for the First Circuit agreed that the Act precluded adult sentencing where the offender would derive benefit from treatment under the Act, but found it clear from the nature of the offenses involved that the defendant had no antisocial tendencies to be corrected, hence no benefit to be derived from YCA treatment. *Id.*, at 1381 n. 4.

must be explicit, the Court notes that "[t]o hold that a 'no benefit' finding is implicit each time a sentence under the Act is not chosen would render § 5010 (d) nugatory." *Ante,* at 444. Despite these protestations, the Court today renders the finding requirement of § 5010 (d) a nullity. By holding that the Act was intended to preserve "the unfettered sentencing discretion of federal district judges," *ante,* at 437, and that sentencing judges need only have "considered the option of treatment under the Act and rejected it," *ante,* at 443, the Court effectively reads the unambiguous mandate of a "no benefit" finding out of the Act. A mere parroting of the statutory language is hardly an affirmative finding. The Court's opinion seems to indicate that the sentencing judge need not mean what he says when he pronounces the "no benefit" litany. Although the Court requires him to go through the charade of saying that the offender would not benefit from treatment under the Act, it apparently does not require that the judge actually find no benefit but only that he be aware of the Act and reject it. I think it remarkable that this Court should approve such an empty and duplicitous ritual.

II

If the Court were to hold that the Act limited a trial judge's discretion by requiring that he actually find a youth offender would not benefit from YCA treatment before sentencing him as an adult, I would think that more than a mere recitation of the conclusory finding of "no benefit" should be required. To say that simply invoking the words of the statute satisfies the mandate of § 5010 (d) affords far too little credence both to Congress' deep concern for the rehabilitative potential of young offenders and to its obvious intention that eligible offenders be sentenced under the Act if they would benefit from its rehabilitative programs. To give effect to these concerns, I would require that the trial judge include, on the

record, a statement which makes clear that he considered the provisions of the Act, weighed the treatment option available, and decided in light of his familiarity with the offender that he would not derive benefit from treatment under the Act.[15]

The mere recitation of the "no benefit" litany can hardly bear the weight of demonstrating such compliance. By taking the unusual step of requiring a specific finding in this limited but highly important area of sentencing, Congress mandated a reasoned determination that the offender would not benefit from the rehabilitative treatment available under the Act. Accordingly, in my view, a statement of the factors which informed and shaped the sentencing decision must accompany the conclusory finding of "no benefit" if that congressional purpose is to be served.

The Borstal system, which provided the model for the youth corrections scheme in general and the requirement of § 5010 (d) in particular, envisions a trial judge stating his reasons for sentencing an eligible offender as an adult.[16] Similarly, most of the Courts of Appeals which

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[15] See *Brooks* v. *United States*, 497 F. 2d 1059, 1062–1063 (CA6 1974); *United States* v. *Kaylor*, 491 F. 2d, at 1139; *United States* v. *Coefield*, 155 U. S. App. D. C. 205, 210–211, 476 F. 2d 1152, 1157–1158 (1973) (en banc).

[16] Criminal Justice Act of 1948, § 17 (3), 11 & 12 Geo. 6, c. 58. The Court asserts, *ante*, at 440 n. 14, that the reference to the English Borstal system made in drafting the Act "did not include the English view of the trial court's discretion to make use of that system." To support this claim, the Court relies on two general descriptions of American sentencing procedures made a decade after enactment of the legislation. Those comments were not directed to the administration of the YCA, hence their validity as indicia of congressional intent in this limited context is questionable at best.

On the other hand, there is considerable evidence that the Borstal system did, in fact, provide a model on the question of the trial court's sentencing discretion, not the least of which is the marked

have faced the issue have required a statement of reasons as a necessary concomitant of the § 5010 (d) finding. A unanimous en banc decision of the Court of Appeals for the Second Circuit and a near-unanimous en banc decision of the Court of Appeals for the District of Columbia Circuit [17] have found a statement of reasons supporting the "no benefit" finding to be " 'essential to a knowledgeable administration of the Act . . . .' " *United States* v. *Kaylor,* 491 F. 2d, at 1139; *United States* v. *Coefield,* 155 U. S. App. D. C., at 210, 476 F. 2d, at 1157. The Court of Appeals for the Sixth Circuit has, more recently, held that a statement of reasons accompanying adult sentencing is "necessary to insure that the sentencing court . . . has deliberately considered whether a youth offender may benefit from the treatment provided for in the Act . . . ." *Brooks* v. *United States,* 497 F. 2d, at 1063. Similarly, the Court of Appeals for the Fourth Circuit recently remanded a case for consideration of whether treatment under the Act would be beneficial to the offender and specifically ordered the trial judge to state the reasons for his conclusion. *Cox* v. *United States,* 473 F. 2d, at 337. In fact, the court below is the only Court of Appeals to specifically disavow a requirement of reasons for a § 5010 (d) sentence.[18]

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similarity between 18 U. S. C. § 5010 (d) and the Criminal Justice Act of 1948, § 17 (2), 11 & 12 Geo. 6, c. 58, both of which require a no-benefit finding as a prerequisite to adult sentencing.

[17] Only Judge MacKinnon, of the 10 participating judges on the Court of Appeals for the District of Columbia Circuit, dissented from that court's en banc decision in *Coefield, supra.*

[18] The First Circuit in *United States* v. *MacDonald,* 455 F. 2d 1259, 1265 (1972), remanded a case to the District Court "to make the findings required by the Federal Youth Corrections Act," leaving unclear whether those findings encompassed a statement of reasons. The Third Circuit specifically reserved the issue in *Williams* v. *United States,* 476 F. 2d 970 (1973). The Fifth Circuit, in its only case on the issue, remanded for appropriate findings under

Contrary to the Court's assertion that appellate review is the only purpose to be served by a statement of reasons, that requirement serves a number of other important policies. First, it might well contribute to rationalizing the sentencing process and to decreasing disparities in sentences. Articulating reasons should assist a trial judge in developing for himself a consistent set of principles on which to base his sentencing decisions. Requiring "[s]uch a procedure would encourage the judge to clarify and justify, in his own mind, the grounds for the sentence he chooses. As a result, sentencing decisions would tend, on the whole, to be more carefully thought out." *United States* v. *Velazquez,* 482 F. 2d 139, 142 (CA2 1973); accord, *United States* v. *Brown,* 479 F. 2d 1170, 1172 (CA2 1973).

The reasons may also be of use to correctional authorities in their handling of the prisoner after sentence. The kind of correctional and rehabilitative treatment an offender receives should take into account the reasons for his sentence.

A disclosure of reasons may also aid the defendant's counsel to insure that the sentence is not premised on misinformation or inaccuracies in the material upon which the sentencing judge relies. "A Sphinx-like silence on the court's part precludes anyone (including the parties, [and] the judge . . .) from learning whether he acted in error." *Id.,* at 1173; cf. *United States* v. *Tucker,* 404 U. S. 443 (1972).

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§ 5010 (d) without explanation as to whether an ultimate finding of no benefit was alone sufficient. *United States* v. *Schenker,* 486 F. 2d 318 (1973). A case specifically dealing with the reasons requirement, *Hoyt* v. *United States,* No. 73–2435, is presently pending before the Fifth Circuit. The Ninth Circuit called for an express no-benefit finding but has not faced the question of whether reasons are required in support thereof. *United States* v. *Jarratt,* 471 F. 2d 226 (1972).

Moreover, an articulation of reasons may actually contribute to the offender's rehabilitation by avoiding any feeling that his sentence was arbitrary.[19] As MR. JUSTICE (then Judge) STEWART observed:

> "Justice is measured in many ways, but to a convicted criminal its surest measure lies in the fairness of the sentence he receives. . . . It is an anomaly that a judicial system which has developed so scrupulous a concern for the protection of a criminal defendant throughout every other stage of the proceedings against him should have so neglected this important dimension of fundamental justice." *Shepard* v. *United States,* 257 F. 2d 293, 294 (CA6 1958).

If reasons were articulated for the sentencing decision, an offender would be less apt to perceive his fate as being arbitrarily determined.[20] Reasoned decisions may even enhance the legitimacy of the sentencing process as perceived by the general public for, as noted by the Report of the American Bar Association Project on Standards for Criminal Justice:

> "It is hardly commanding of public respect for our system on the one hand to increase the alternatives of the sentencing judge so that he can shape his sentence to fit each case, and on the other hand to

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[19] A leading federal district judge has observed that "[t]he absence of any explanation or purported justification for the sentence is among the more familiar and understandable sources of bitterness among people in prison." M. Frankel, Criminal Sentences, Law Without Order 42–43 (1972).

[20] There may, of course, be circumstances in which it would not be advisable to state the reasons underlying imposition of a particular sentence in the presence of the defendant, in which case those reasons could instead be committed to writing and made part of the record.

> take the position that he need not explain why he selects a particular sentence . . . ." [21]

Although these considerations apply to sentencing decisions generally,[22] I do not mean to suggest that reasons are required in any other sentencing context. Contrary to the majority's accusations, my view of the Act does not require wholesale abandonment of "traditional sentencing doctrine." *Ante*, at 440. We are concerned here with only a limited, albeit important, area of sentencing for which Congress has established special rules. Congress' urgent concern for the rehabilitative potential of young offenders and the specific-finding requirement of § 5010 (d) make the need for reasons particularly compelling in this context. Requiring a statement of reasons would encourage trial judges to direct their attention to the crucial questions of benefit and treatment, to take a hard look at the relevant factors, and to focus on value judgments inherent in their sentencing decision. See *United States* v. *Phillips*, 156 U. S. App. D. C. 217, 479

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[21] American Bar Association Project on Standards for Criminal Justice, Appellate Review of Sentences 2–3 (Approved Draft 1968).

[22] For a general discussion of the value of a statement of the reasons underlying the imposition of sentence, see *United States* v. *Phillips*, 156 U. S. App. D. C. 217, 479 F. 2d 1200 (1973); *United States* v. *Velazquez*, 482 F. 2d 139, 142 (CA2 1973); *United States* v. *Brown*, 479 F. 2d 1170, 1172 (CA2 1973); American Bar Association Project on Standards for Criminal Justice, Sentencing Alternatives and Procedures § 5.6 (ii) and commentary (b), pp. 270–271 (Approved Draft 1968); *id.*, Appellate Review of Sentences § 2.3 (c) and commentary (e), pp. 45–47 (Approved Draft 1968); M. Frankel, Criminal Sentences, Law Without Order 39–49 (1972); R. Goldfarb & L. Singer, After Conviction 191–195 (1973); Wyzanski, A Trial Judge's Freedom and Responsibility, 65 Harv. L. Rev. 1281, 1292–1293 (1952); Youngdahl, Remarks Opening the Sentencing Institute Program, 35 F. R. D. 387, 388 (1964); cf. *North Carolina* v. *Pearce*, 395 U. S. 711, 726 (1969); *Kent* v. *United States*, 383 U. S. 541, 561 (1966).

F. 2d 1200 (1973). It is clearly consonant with the Act to require such reasoned consideration. I must agree with the perceptive observations of Senior Judge Fahy of the District of Columbia Circuit that requiring a statement of reasons is essential to assure:

> "firstly, that the District Judge manifest not only an awareness that the Act is applicable to the case, but also an accurate understanding of the scope of his discretion under the Act; secondly, that the District Judge has been informed of the pertinent facts relating to the individual defendant before him, either by evidence coming to his attention in the trial, by a presentence report, or by a recommendation and report made under section 5010 (e); and thirdly, that the District Judge, by his statement of reasons where required, has given consideration and related the facts of the individual case to the applicable law." *United States* v. *Coefield*, 155 U. S. App. D. C., at 210–211, 476 F. 2d, at 1157–1158 (footnote omitted).

Section 5010 (e) of the Act provides a mechanism for the trial judge to secure the expert assistance of correctional authorities in determining whether an eligible offender would benefit from treatment. I agree with the two Courts of Appeals which have passed on the issue that:

> "[W]hen a judge has availed himself of the assistance afforded by § 5010 (e), that is to say, where he has ordered the youth offender committed . . . for observation and study . . . and the Division has made its report to the court, and after considering the report has followed its findings or recommendation in imposing sentence, additional reasons are not required to be stated, although, of course, the

> judge is not prevented from stating his own reasons." *United States* v. *Kaylor,* 491 F. 2d, at 1139.

Accord, *United States* v. *Coefield,* 155 U. S. App. D. C., at 210, 476 F. 2d, at 1157. But the Act clearly intended that the ultimate sentencing decision remain with the trial judge. That decision should not pass by abdication to the correctional authorities who prepare the § 5010 (e) study. Thus, where a trial judge secures a § 5010 (e) report, he should adopt its reasons as his own only after assuring himself of the adequacy of the report and propriety of its recommendation.[23]

I see no reason to reach here the issue of appellate review of the District Court's imposition of an adult sentence. I believe that the Youth Corrections Act provides a preferred-sentencing alternative which can only be abandoned on the basis of a finding that an eligible offender will not benefit from treatment under the Act. The District Court imposed sentence on the assumption that the YCA was not a preferred disposition and no finding was required. The Court today finds the District Court's sentence invalid only for failure to make the required "no benefit" finding. Under either the Court's view or my own, the appellate-review question is clearly not yet presented by this case.[24]

Accordingly, I concur in the judgment of the Court insofar as it reverses and remands because the District Court failed to make the requisite "no benefit" finding. I disagree, however, with the opinion of the Court inso-

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[23] See, *e. g., United States* v. *Norcome,* 375 F. Supp. 270 (DC 1974); *United States* v. *Tillman,* 374 F. Supp. 215 (DC 1974).

[24] Respondent agrees that should this Court determine that the YCA provides a preferred-sentencing alternative for eligible offenders, then the Court need not reach in this case the issue of appellate review since the District Court never considered itself bound by such a standard. Brief for United States 40–41.

far as it suggests that a merely conclusory statement of "no benefit" satisfies the statutory requirement and insofar as it purports to pass, albeit in dicta, on the question of appellate review of a § 5010 (d) adult sentence, an issue not before this Court.

WINGO, WARDEN *v.* WEDDING

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

No. 73–846. Argued April 22, 1974—Decided June 26, 1974

Following enactment of the Federal Magistrates Act, the United States District Court for the Western District of Kentucky amended its Local Rule 16 to provide that in addition to submitting such other reports and recommendations as may be required concerning petitions for writs of habeas corpus from state prisoners the full-time magistrate shall "schedule and hear evidentiary matters . . . [to be electronically recorded] deemed by the Magistrate to be necessary and proper in the determination of . . . such petition, and to report thereon with an appropriate recommendation for the disposition thereof to the District Judge [who] . . . [u]pon . . . request . . . shall proceed to hear the recording of the testimony . . . and give it de novo consideration." Respondent, a state prisoner, whose petition for habeas corpus was assigned to a full-time Magistrate for processing, claimed that the Rule is invalid and filed a motion with the District Court that the Magistrate be disqualified from holding the habeas corpus hearing and that the hearing be assigned to a district judge. The District Court denied the motion; the Magistrate proceeded with the hearing; and thereafter he transmitted the electronic recording to the District Court along with his written findings and conclusions recommending dismissal. The District Court, following respondent's motion for a *de novo* hearing, listened to the recording, on the basis of which, together with the Magistrate's findings and conclusions, it dismissed the petition. The Court of Appeals reversed, holding that, notwithstanding a formal revision of the habeas corpus statute, 28 U. S. C. § 2243, the construction of the predecessor statute given in *Holiday* v. *Johnson,* 313 U. S. 342, still applied, to the effect that the statute plainly accorded a prisoner seeking habeas corpus relief the right of testifying before a judge. *Held:*

1. Title 28 U. S. C. § 2243, like its predecessor, Rev. Stat. § 761, requires that the district judge personally conduct evidentiary hearings in federal habeas corpus cases. *Holiday* v. *Johnson,*

552-191 O - 76 - 32

supra; United States v. *Hayman*, 342 U. S. 205, 231 n. 16; *Brown* v. *Allen*, 344 U. S. 443, 462–463. Pp. 468–469.

2. It is clear from the text and legislative history of the Magistrates Act that Congress did not intend to alter the requirements of 28 U. S. C. § 2243, and therefore Local Rule 16, insofar as it authorizes the full-time magistrate to hold habeas corpus evidentiary hearings, is invalid because it is "inconsistent with the . . . laws of the United States" under § 636 (b) of the Act, and because § 636 (b) itself precludes a district judge from assigning a magistrate the duty of conducting an evidentiary hearing and limits the magistrate's review to proposing, not holding, such a hearing. Pp. 469–473.

3. The invalidity of Local Rule 16 is not cured by the procedure relating to electronic recording, which does not enable the district judge to evaluate credibility by personally hearing and observing the witnesses. Pp. 473–474.

483 F. 2d 1131, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BURGER, C. J., filed a dissenting opinion, in which WHITE, J., joined, *post*, p. 474.

James M. Ringo, Assistant Attorney General of Kentucky, argued the cause for petitioner. With him on the brief was *Ed W. Hancock*, Attorney General.

Joseph G. Glass argued the cause and filed a brief for respondent.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question here is whether federal magistrates are authorized to conduct evidentiary hearings in federal habeas corpus cases. In 1968, Congress enacted the

**Evelle J. Younger*, Attorney General, *Jack R. Winkler*, Chief Assistant Attorney General, *S. Clark Moore*, Assistant Attorney General, and *Frederick R. Millar, Jr.*, and *Shunji Asari*, Deputy Attorneys General, filed a brief for the State of California as *amicus curiae* urging affirmance.

Federal Magistrates Act, 28 U. S. C. §§ 631–639, to upgrade and expand the former United States commissioner system. The Act authorizes magistrates to exercise all powers formerly exercised by United States commissioners,[1] and also, as a means of relieving the caseload burden of the federal district judges, empowers magistrates to try minor offenses when all parties consent,[2] and to perform such additional duties assigned by the district court as are "not inconsistent with the Constitution and laws of the United States." [3] Pursuant to

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[1] Commissioners had been empowered by the Federal Rules of Criminal Procedure to give oaths (Rule 3); issue arrest warrants (Rule 4); conduct preliminary examinations of arrestees (Rule 5); issue subpoenas (Rule 17); issue warrants of removal to another district (Rule 40); and release defendants on bail (Rule 46). In addition, commissioners were authorized to try persons accused of petty offenses (defined by 18 U. S. C. § 1 (3) as crimes for which the penalty does not exceed imprisonment for six months or a fine of not more than $500 or both) committed within the confines of federal enclaves, 62 Stat. 830. In civil cases commissioners were limited to administering oaths and taking bail, acknowledgments, affidavits, and depositions. 62 Stat. 917.

[2] Unlike the more restricted criminal trial jurisdiction of the former commissioners, see n. 1, *supra*, the authority of magistrates extends to minor offenses committed anywhere within the judicial district and includes crimes punishable by imprisonment not exceeding one year, or a fine of not more than $1,000, or both.

[3] The Federal Magistrates Act, 28 U. S. C. § 636 (b), provides:

"(b) Any district court of the United States, by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full-time United States magistrate, or, where there is no full-time magistrate reasonably available, any part-time magistrate specially designated by the court, may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States. The additional duties authorized by rule may include, but are not restricted to—

"(1) service as a special master in an appropriate civil action

the Act, the Judges of the United States District Court for the Western District of Kentucky amended Local Rule 16 of that court to provide:

> "In addition to submitting such other reports and recommendations as may be required concerning petitions for writs of habeas corpus from state prisoners the full-time Magistrate is directed to schedule and hear evidentiary matters deemed by the Magistrate to be necessary and proper in the determination of each such petition, and to report thereon with an appropriate recommendation for the disposition thereof to the District Judge having jurisdiction of the case. The Magistrate shall cause the testimony of such hearing to be recorded on suitable electronic sound recording equipment. He shall submit his proposed findings of fact and conclusions of law to the proper Judge for his consideration, copies of which shall be provided at that time to the petitioner and respondent, and the Magistrate shall expeditiously transmit the proceedings, including the recording of the testimony, to the proper District Judge. Upon written request of either party, filed within ten days from the date such is so transmitted to the District Judge having jurisdiction thereof, the District Judge shall proceed to hear the recording of the testimony given at the evidentiary hearing and give it de novo consideration."

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pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts;

"(2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and

"(3) preliminary review of applications for posttrial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing."

Respondent is a state prisoner whose petition for federal habeas corpus relief was assigned by the District Court to a full-time Magistrate for processing under the rule. The part of the rule challenged here is that which directs the full-time magistrate "to schedule and hear evidentiary matters [to be electronically recorded] deemed by the Magistrate to be necessary and proper in the determination of . . . such petition, and to report thereon with an appropriate recommendation for the disposition thereof to the District Judge [who] . . . [u]pon . . . request . . . shall proceed to hear the recording of the testimony . . . and give it de novo consideration." The question is whether this portion of the rule is invalid because "inconsistent with the . . . laws of the United States" within the meaning of the Federal Magistrates Act, 28 U. S. C. § 636 (b), or because § 636 (b) itself should be construed to preclude district courts from assigning such duties to magistrates.

I

Respondent, Carl James Wedding, is a prisoner in the Kentucky State Penitentiary serving a life sentence imposed in 1949 by the Webster Circuit Court, Commonwealth of Kentucky, after a plea of guilty to a charge of willful murder. Wedding filed this petition for habeas corpus in 1971. After the Court of Appeals for the Sixth Circuit reversed the initial dismissal of his petition, 456 F. 2d 245 (1972), and remanded for an evidentiary hearing, the District Court invoked Local Rule 16 and assigned the case to a full-time Magistrate to hold the hearing. Wedding promptly moved that the Magistrate be disqualified and the hearing be reassigned to a District Judge, on the ground that the Federal Magistrates Act did not authorize district courts to assign to magistrates the duty to hold habeas corpus evidentiary hearings. When the District Court denied the motion, the Magistrate pro-

ceeded with the hearing, and electronically recorded all testimonial evidence as required by Local Rule 16. Thereafter, the Magistrate transmitted the recording of the testimony to the District Judge and submitted written findings of fact and conclusions of law recommending that the petition be dismissed.

Wedding moved that the District Court give the matter a *de novo* hearing. The District Judge's response was to listen, as authorized by Local Rule 16, to the recording of the hearing before the Magistrate. On this basis and the Magistrate's findings and conclusions, the District Court entered an order dismissing respondent's petition.

On appeal, Wedding renewed his challenge to Local Rule 16, relying upon *Holiday* v. *Johnston*, 313 U. S. 342 (1941). *Holiday* was also a federal habeas corpus case. There, after determining that the petition for writ of habeas corpus alleged facts which, if proved, would entitle the petitioner to relief, the District Judge issued a writ compelling the respondent to produce the petitioner before a designated United States Commissioner. The Commissioner held an evidentiary hearing at which the petitioner testified and the respondent submitted the depositions of two witnesses. On the basis of the evidence received, the Commissioner made findings of fact and stated conclusions of law recommending that the writ be denied. After hearing oral argument on the Commissioner's report, the District Judge entered an order discharging the writ.

This Court reversed, holding that the factfinding procedure employed failed to conform to Congress' express command in the Habeas Corpus Act that "[t]he *court, or justice, or judge* shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require." Rev. Stat. § 761,

28 U. S. C. § 461 (1940 ed.) (emphasis added). The Court held that the statute plainly accords a prisoner the right of testifying before a *judge,* stating:

> "One of the essential elements of the determination of the crucial facts is the weighing and appraising of the testimony. Plainly it was intended that the prisoner might invoke the exercise of this appraisal by the judge himself. We cannot say that an appraisal of the truth of the prisoner's oral testimony by a master or commissioner is, in the light of the purpose and object of the proceeding, the equivalent of the judge's own exercise of the function of the trier of the facts.
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> . . . . .
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> "The District Judge should himself have heard the prisoner's testimony and, in the light of it and the other testimony, himself have found the facts and based his disposition of the cause upon his findings." *Holiday* v. *Johnston, supra,* at 352, 353–354.

Wedding contended that neither the text nor legislative history of the Federal Magistrates Act evidences a congressional intent to overrule *Holiday.* The Court of Appeals agreed and accordingly "vacate[d] the judgment of dismissal and remand[ed] the case with instructions that the [District] Court itself hold an evidentiary hearing on [Wedding's] constitutional claims." 483 F. 2d 1131, 1137 (CA6 1973). We granted certiorari, 414 U. S. 1157 (1974). We affirm.[4]

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[4] We thus agree with the Court of Appeals that this case does not require resolution of the question whether Congress constitutionally may enact legislation vesting authority, pursuant to rule or order of court, in magistrates to hold evidentiary hearings on habeas corpus petitions. We indicate no views as to the validity of investing such authority in a magistrate or other officer "outside the pale of Article III of the Constitution." 483 F. 2d 1131, 1133 n. 1 (CA6 1973).

II

Under our constitutional framework, the "great constitutional privilege" of habeas corpus, *Ex parte Bollman* 4 Cranch 75, 95 (1807) (Marshall, C. J.), has historically provided "a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release." *Fay* v. *Noia*, 372 U. S. 391, 401–402 (1963). More often than not, claims of unconstitutional detention turn upon the resolution of contested issues of fact. Accordingly, since the Judiciary Act of February 5, 1867, c. 28, § 1, 14 Stat. 385, Congress has expressly vested plenary power in the federal courts "for taking testimony and trying the facts anew in habeas hearings . . . ." [5] *Fay* v. *Noia*, *supra*, at 416. See also *Townsend* v. *Sain*, 372 U. S. 293, 312 (1963).

In connection with the 1948 revision and recodification of the Judicial Code,[6] Rev. Stat. § 761, construed in *Holiday*, and other procedural provisions of the Habeas Corpus Act were consolidated into 28 U. S. C. § 2243. The pertinent portion covering habeas corpus evidentiary hearings provides that "[t]he court shall summarily hear and determine the facts, and dispose of the matter as law and justice require." The Revisers thus deleted some

[5] The relevant portion of the Judiciary Act of February 5, 1867, c. 28, § 1, 14 Stat. 385, provides that the "court or judge shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested, and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty."

[6] 62 Stat. 869.

words from Rev. Stat. § 761, but the Revisers' Notes accompanying § 2243, together with the reports of the Committee of the Judiciary of the Senate,[7] and of the House,[8] make abundantly clear that the word changes and omissions in Rev. Stat. § 761 were intended only as changes in form.[9]

Accordingly, the construction of § 2243 has been that given § 761 in *Holiday*. *United States* v. *Hayman*, 342 U. S. 205, 213 n. 16 (1952); *Brown* v. *Allen*, 344 U. S. 443, 462–463 (1953). The Court held in the latter case:

> "A *federal judge* on a habeas corpus application is required to 'summarily hear and determine the facts, and dispose of the matter as law and justice require,' 28 U. S. C. § 2243. This has long been the law. R. S. § 761, old 28 U. S. C. § 461." *Ibid.* (emphasis added).

III

Our inquiry is thus narrowed to the question whether the Federal Magistrates Act changed the requirement of § 2243 that federal judges personally conduct habeas corpus evidentiary hearings. Certainly nothing in the text

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[7] S. Rep. No. 1559, 80th Cong., 2d Sess., 2 (1948).

[8] H. R. Rep. No. 308, 80th Cong., 1st Sess., A178 (1947).

[9] See also J. Moore, Commentary on the U. S. Judicial Code 436 n. 78 (1949); *Payne* v. *Wingo*, 442 F. 2d 1192, 1194 (CA6 1971).

Had any substantive change in the meaning of Rev. Stat. § 761, as construed in *Holiday* v. *Johnston*, been intended, the Revisers' Notes would have called attention to the change. William W. Barron, the Chief Reviser of the Code, explained: "[N]o changes of law or policy will be presumed from changes of language in revision unless an intent to make such changes is clearly expressed. Mere changes of phraseology indicate no intent to work a change of meaning but merely an effort to state in clear and simpler terms the original meaning of the statute revised." Barron, The Judicial Code 1948 Revision, 8 F. R. D. 439, 445–446. See also S. Rep. No. 1559, 80th Cong., 2d Sess., 2 (1948); H. R. Rep. No. 308, 80th Cong., 1st Sess., 7 (1947).

or legislative history of the Magistrates Act suggests that Congress meant to change that requirement.[10] Rather, both text and legislative history plainly reveal a congressional determination to retain the requirement. For, although the Act gives district judges broad authority to assign a wide range of duties to magistrates, Congress carefully circumscribed the permissible scope of assignment to only "such additional duties as are *not inconsistent with the Constitution and laws of the United States.*" 28 U. S. C. § 636 (b) (emphasis added). And in defining assignable duties, Congress decreed that the duty of holding evidentiary hearings was not assignable. This clearly emerges from the legislative history of subsection (3) of § 636 (b), which provides:

> "(3) preliminary review of applications for posttrial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case *as to whether there should be a hearing.*" (Emphasis added.)

That legislative history reveals that the Judicial Conference of the United States objected to successive phrasings of subsection (b) (3) until it was phrased to make clear that the authority given district courts to assign duties to magistrates did not include authority to hold evidentiary hearings on applications for posttrial relief.[11]

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[10] A full discussion of the legislative history of the Federal Magistrates Act will be found in *TPO, Inc.* v. *McMillen,* 460 F. 2d 348 (CA7 1972).

[11] Where Congress gave magistrates authority to conduct hearings, the authority was express and circumscribed with procedural safeguards. Thus 28 U. S. C. § 636 (a) (3) gives magistrates jurisdiction to conduct trials for minor offenses, but 18 U. S. C. § 3401 provides that any person charged with a minor offense may elect to be tried

The original draft of the subsection [12] had proposed that magistrates' duties include

> "(3) preliminary consideration of applications for post-trial relief made by individuals convicted of criminal offenses."

But because that language was susceptible of the interpretation that magistrates might conduct evidentiary hearings, the Judicial Conference of the United States objected to it.[13] Accordingly, the subsection was rewritten to provide for

> "(3) preliminary review of applications for post-trial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case . . . ."

The Committee on the Administration of the Criminal Law of the Judicial Conference objected that the revision did not "make it clear that it is the judge's responsibility to make the ultimate decisions and to hold hearings on such applications, rather than that of the

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by a district judge. Title 28 U. S. C. § 636 (b)(1) authorizes magistrates to serve as special masters—which frequently involves the conduct of hearings—but makes that service subject to the Federal Rules of Civil Procedure, which include the restrictions of Rule 53 (b) that "reference to a master shall be the exception and not the rule." See Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1189 n. 229 (1970).

[12] S. 3475, Federal Magistrates Act of 1966, 89th Cong., 2d Sess. (1966).

[13] See the Report of the Committee on the Administration of the Criminal Law, adopted by the Judicial Conference in September 1966, reprinted in the Hearings on S. 3475 and S. 945 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 89th Cong., 2d Sess. (1966) and 90th Cong., 1st Sess. (1967), pp. 241j, 241n.

magistrate." [14] The Committee therefore recommended the addition of the phrase "as to whether there should be a hearing" immediately following the word "case." [15] The proposed addition was made,[16] and subsection (b) (3) in its present form was enacted. Thus, although § 636 (b) provides that "additional duties authorized by rule may include, but are not restricted to," duties defined in subsection (b) (3), the legislative history of the subsection compels the conclusion that Congress made a deliberate choice to preclude district courts from assigning magistrates the duty to hold evidentiary hearings.

We conclude that, since § 2243 requires that the District Judge personally hold evidentiary hearings in federal habeas corpus cases, Local Rule 16, insofar as it authorizes the full-time magistrate to hold such hearings, is invalid because it is "inconsistent with the . . . laws of the United States" under § 636 (b). We conclude further that the Rule is to that extent invalid because, as we construe § 636 (b), that section itself precludes district judges from assigning magistrates the duty of conducting evidentiary hearings.[17] Review by magistrates of applications for post-trial relief is thus limited to review for the purpose of proposing, not holding, eviden-

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[14] See the Report of the Committee on the Administration of the Criminal Law, adopted by the Judicial Conference in March 1967, reprinted in the Hearings on S. 3475 and S. 945 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 89th Cong., 2d Sess. (1966) and 90th Cong., 1st Sess. (1967), pp. 244, 245.

[15] *Ibid.*

[16] S. 945, Federal Magistrates Act of 1967, 90th Cong., 1st Sess. (1967).

[17] See Shapiro, Federal Habeas Corpus: A Study in Massachusetts, 87 Harv. L. Rev. 321, 364–365 (1973); Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1188–1189 (1970).

tiary hearings.[18] In connection with the preliminary review whether or not to propose that the district judge hold an evidentiary hearing, we agree that magistrates may receive the state court record and all affidavits, stipulations, and other documents submitted by the parties.[19] Magistrates are prohibited only from conducting the actual evidentiary hearings.[20]

The invalidity of Local Rule 16 is not cured by its provision that the "District Judge shall proceed to hear

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[18] "A qualified, experienced magistrate will, it is hoped, acquire an expertise in examining these [post-conviction review] applications and summarizing their important contents for the district judge, thereby facilitating his decisions. Law clerks are presently charged with this responsibility by many judges, but judges have noted that the normal 1-year clerkship does not afford law clerks the time or experience necessary to attain real efficiency in handling such applications." S. Rep. No. 371, 90th Cong., 1st Sess., 26 (1967).

[19] To the extent that *O'Shea* v. *United States*, 491 F. 2d 774 (CA1 1974), and *Noorlander* v. *Ciccone*, 489 F. 2d 642 (CA8 1973), suggest that magistrates may also accept oral testimony, provided that each party has the right to a *de novo* hearing before the district judge, we disagree. Such a procedure is precluded by both § 2243 and § 636 (b).

[20] Since under § 636 (b) district judges may call upon magistrates to relieve them of most other details of the processing of habeas corpus applications, it does not appear that judges will be significantly overburdened by the requirement that they personally conduct evidentiary hearings. Indeed, data from the Administrative Office of the United States Courts indicate that very few habeas corpus cases ever reach the evidentiary hearing stage. In 1973, of the 10,800 prisoner petitions filed for habeas corpus or as 28 U. S. C. § 2255 motions to vacate sentence, less than 5%, or approximately 530, necessitated evidentiary hearings. See Report of the Director of the Administrative Office of United States Courts, Table C–2, p. 325, Table C–8, p. 383 (1973). When hearings were required, 88% were completed in one day or less. *Id.*, at 383. Thus, among the 400 District Judges, the burden of evidentiary hearings averages less than 1.5 hearing days per judge per year. To the extent that the 80 active Senior District Judges also participate in habeas corpus cases, the hearing burden upon each district judge is further reduced.

the recording of the testimony given at the evidentiary hearing and give it de novo consideration." *Holiday* reasoned that the command of § 761, now § 2243, was designed by Congress in recognition that "[o]ne of the essential elements of the determination of the crucial facts is the weighing and appraising of the testimony." 313 U. S., at 352. "To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied." *Speiser* v. *Randall,* 357 U. S. 513, 520 (1958). Congress, *Holiday* held, "[p]lainly . . . intended that the prisoner might invoke . . . appraisal by the judge himself." In that circumstance, we "cannot say that an appraisal of the truth of the prisoner's oral testimony" based on listening to a recording of it, "is, in the light of the purpose and object of the proceeding, the equivalent of the judge's own exercise of the function of the trier of the facts." 313 U. S., at 352.

Affirmed.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE WHITE joins, dissenting.

The Court today reads two separate statutes and our prior cases to reach a result contrary to the purposes underlying the enactment in 1968 of the Federal Magistrates Act, 28 U. S. C. § 631 *et seq.,* and to the conclusion of every other Court of Appeals which has had occasion to consider the matter.[1]

[1] Two Circuits have ruled that federal magistrates may conduct evidentiary hearings in federal habeas corpus cases, *O'Shea* v. *United*

The Federal Magistrates Act was both "designed to create an upgraded lower tier judicial office," S. Rep. No. 371, 90th Cong., 1st Sess., 11 (1967), and "intended . . . to cull from the ever-growing workload of the U. S. district courts matters that are more desirably performed by a lower tier of judicial officers." H. R. Rep. No. 1629, 90th Cong., 2d Sess., 12 (1968). The Court's holding that federal magistrates may not conduct evidentiary hearings in federal habeas corpus cases is both inconsistent with the new status of magistrates and deputy magistrates,[2] and serves to defeat the objective of the Act,

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States, 491 F. 2d 774, 778 (CA1 1974); *Noorlander* v. *Ciccone,* 489 F. 2d 642, 648 (CA8 1973); cf. *Campbell* v. *U. S. District Court,* 501 F. 2d 196, 205 (CA9 1974), while two Circuits have assumed magistrates have that power, *United States ex rel. Gonzalez* v. *Zelker,* 477 F. 2d 797, 798 (CA2 1973); *Parnell* v. *Wainwright,* 464 F. 2d 735, 736 (CA5 1972).

[2] The Court makes clear, *ante,* at 473 n. 18, that it sees the function of the magistrate in dealing with habeas corpus petitions as being no more than that previously performed by law clerks. As Chief Judge Theodore Levin, of the Eastern District of Michigan, testified before the Senate Judiciary Committee's Subcommittee on Improvements in Judicial Machinery, which under the chairmanship of Senator Joseph D. Tydings began the investigative hearings in 1965 which led to the enactment of the Act three years later, law clerks are not overworked, and are better able to perform such tasks. "In any event, this is a somewhat tedious job . . . and is not a function likely to entice a seasoned and competent lawyer to accept a magistrate's job." Hearings on S. 3475 and S. 945, 89th Cong., 2d Sess. (1966) and 90th Cong., 1st Sess. (1967), p. 61 (hereinafter Hearings). The Act specifically sought to make "the position [of magistrate] more attractive to highly qualified individuals." S. Rep. No. 371, 90th Cong., 1st Sess., 11 (1967). The Department of Justice agreed that such a limited function would be inconsistent with the Act's purpose, Hearings 130, and Chief Judge Robert C. Belloni and Dean Robert B. Yegge have noted that the magistrates "should not be simply high-paid law clerks." Reports of the Conference for District Court Judges, 59 F. R. D. 203, 221 (1973). To limit a magistrate to a law clerk's function surely undercuts what Senator Tydings

described by Senator Tydings, its principal sponsor, see n. 2, *supra*, "to provide district judges with more time to devote to the actual trial of cases and the writing of opinions." [3] Hearings 3.

I

In its two-stage analysis, the Court finds first that under the terms of the Act it would be "inconsistent with

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stated to be "[t]he first goal of the Magistrates Act . . . to [give the magistrate] qualifications and a stature higher than those of the present U. S. commissioner." Hearings 26.

[3] No one would dispute the heavy burden on district courts represented by the applications for habeas corpus writs they receive, a large volume of which has been long recognized as "repetitious and patently frivolous." *United States* v. *Hayman*, 342 U. S. 205, 212 (1952) (footnote omitted). The Court would minimize the burden of these applications at the evidentiary hearing stage, *ante*, at 473 n. 20, but the beguiling simplicity of its statistical analysis obscures reality and is antagonistic to the interests of habeas petitioners. First, to average hearing days per judge per year evenly across the country fails to recognize the uneven number of habeas corpus applications received by the various district courts. In his testimony at the Senate hearings on the bill Chief Judge Edward S. Northrop, of the District of Maryland, reflected the unevenness experienced by his court, which at one time handled more "State prisoner habeas corpus petitions . . . than any other district in the country." Hearings 52. Clearly Chief Judge Northrop's burden would have exceeded "1.5 hearing days . . . per year." Second, the habeas corpus applications which ultimately reach the hearing stage do not represent all those which might warrant a hearing. Senator Tydings stated:

"We say that the magistrate should be able to [hold] plenary, discovery hearings. Now, what happens . . . as a practical matter, you get no hearings. The law clerk reviews the papers . . . so we are giving the individual [petitioner] actually an opportunity . . . for more consideration than he gets now." *Id.*, at 113.

Finally, even if no more applications would warrant an evidentiary hearing, given the other burdens on district judges those applications which would warrant hearings would receive more prompt attention if magistrates were to hold them. The virtues of speedy justice need not be elaborated here.

the . . . laws of the United States," 28 U. S. C. § 636 (b), to permit magistrates to conduct evidentiary hearings in habeas corpus cases. This is so, it is said, because a procedural provision of the Habeas Corpus Act, Rev. Stat. § 761, was construed 33 years ago, long before the enactment of the Magistrates Act, to confine that function to judges alone. *Holiday* v. *Johnston*, 313 U. S. 342 (1941). The 1948 revision and recodification of the Judicial Code, which incorporated Rev. Stat. § 761 into 28 U. S. C. § 2243, is held to have carried forward this limitation despite a critical language change. *United States* v. *Hayman*, 342 U. S. 205 (1952); *Brown* v. *Allen*, 344 U. S. 443 (1953). Neither the new statute, its drafting history, nor these latter cases, support the Court's conclusion.

Section 2243 did, as the Court notes, import into its terms Rev. Stat. § 761, both of which provisions set forth in part what authority shall hear and determine the facts involved in an application for a writ of habeas corpus. And § 2243 changed the language of Rev. Stat. § 761, which originally read that the authority was to be the "court, or justice, or judge," now to read simply the "court." But the Court fails to note that § 2243 incorporated a second provision from the Habeas Corpus Act, Rev. Stat. § 755, which in part set forth what authority shall issue the writ of habeas corpus for which application was made. The authority to issue the writ set forth in Rev. Stat. § 755 was identical to that set forth in Rev. Stat. §761 to hear and determine the facts: the "court, or justice, or judge." Unlike the language of Rev. Stat. § 761, however, the quoted language of Rev. Stat. § 755 was incorporated into § 2243 substantially unchanged; under the present statute, it is the "court, justice or judge" who shall issue the writ.

Congress sought to make certain that only a "court, justice or judge" could issue the writ; but by changing

552-191 O - 76 - 33

the authority to hear the facts from a "court, or justice, or judge" to, simply, a "court," Congress must have intended to broaden the authority of the court, at least to the extent of permitting delegation to a magistrate to perform the preliminary hearing function, subject always to the approval of a district judge.[4] To read the language change in any other way would impute to Congress an intent to alter statutory language, the meaning of which had already been finally determined by this Court, *Holiday* v. *Johnston, supra,* without the knowledge that the alteration would raise interpretive difficulties. Moreover, to change the language of Rev. Stat. § 761, but not to change that of Rev. Stat. § 755, cannot be said, as the Court does, *ante,* at 469 n. 9, to be a "[m]ere change of phraseology," for such changes were undertaken only for purposes of uniformity. If, as Charles J. Zinn, counsel to the Law Revision Committee which revised the Judicial Code, testified, "we have changed the language to get a uniform style," [5] then within the *same* statutory provision, surely Congress would have made only "courts" able to issue writs, as well as hear the facts of the claim.

Nor do the cases cited by the Court, *ante,* at 469, support its interpretation of § 2243. *Brown* v. *Allen, supra,* is plainly inapposite. The segment of *Brown* quoted by the Court is relevant to *Brown*'s discussion of whether a petitioner under 28 U. S. C. § 2254 had a right to a plenary hearing although an earlier petition of his which presented substantially the same federal issues was refused in the state court. When the Court quotes from *Brown:*

[4] As noted in Part II, *infra,* it is not urged by anyone that the magistrate may finally decide facts after conducting an evidentiary hearing. That ultimate decision is, without question, one reserved to the district judge alone.

[5] Hearings on H. R. 1600 and H. R. 2055 before Subcommittee No. 1 of the House Committee on the Judiciary, 80th Cong., 1st Sess., 40 (1947).

"This has long been the law," *ante,* at 469, it is referring to what the *Brown* Court called the "general rule" approved in *Salinger* v. *Loisel,* 265 U. S. 224, 231 (1924). *Brown,* 344 U. S., at 463. *Salinger* in turn makes it clear that the "general rule" which has "long been the law" has nothing whatever to do with who may hear and determine the facts on an application for a writ of habeas corpus. Rather, it pertains only to that portion of § 2243 which *Brown* itself quoted, 344 U. S., at 462, and which *Salinger* also quoted, 265 U. S., at 231, that is, "to dispose of [the matter or party] as law and justice [may] require." In *Salinger,* this rule meant each application for a writ of habeas corpus could be disposed of in the exercise of judicial discretion, which could in part give controlling weight to "a prior refusal [by a federal court] to discharge on a like application." *Ibid.* In *Brown,* that rule was extended under certain circumstances to a prior state court refusal to issue the writ, in support of the Court's conclusion there that a § 2254 petitioner had no right to a plenary hearing on his application for the writ. The rule the Court relies on today is thus one of discretion to hold an evidentiary hearing "as law and justice require," which has no bearing on what official shall conduct the hearing once a decision is made to hold one. *Brown* is thus no authority for the proposition that the same limitation *Holiday* placed on Rev. Stat. § 761 ("court, or justice, or judge") applies to § 2243 ("court") enacted after *Holiday.*

The Court also relies upon *United States* v. *Hayman, supra,* to support its interpretation of § 2243. The issue in *Hayman* had nothing to do with who shall hear and determine facts upon an application for a writ of habeas corpus. Rather, the Court there was concerned solely with the question whether a district court may, upon an evidentiary hearing, decide factual issues pre-

sented by a motion under 28 U. S. C. § 2255, where the movant was not notified and was not present. In the context of discussing an earlier case which had held that a district court must decide material issues of fact by taking evidence, not by *ex parte* affidavits, *Hayman* dropped a footnote stating simply "[n]or can the factual issues be heard before a commissioner," citing *Holiday, supra.* 342 U. S., at 213 n. 16. Not only was this footnote completely irrelevant to the issue in *Hayman*, its citation to *Holiday* for support, without further discussion, makes manifest that the Court did not consider the effect of the subsequent language change in § 2243 on the statute (Rev. Stat. § 761) which *Holiday* construed. The fulfillment of the purposes of the Federal Magistrates Act should not hang on such a slim reed.

II

Even assuming that § 2243 was intended to carry forward the limitation of *Holiday*'s interpretation of its predecessor, by enacting the Magistrates Act, and particularly § 636 (b) thereof, Congress made clear its intent to eliminate that restriction. Thus, while *Hayman* may speak in terms of a "commissioner," Congress changed not only the title of that office, but also the qualifications for and the functions of the office.

Section 636 (b) permits federal magistrates to "be assigned . . . such additional duties as are not inconsistent with the Constitution and laws of the United States." The section then sets forth in three subdivisions certain duties which district courts may authorize by rule, but the duties "are not restricted to" those set forth. The third illustrative subdivision provides that district courts may authorize the additional duty of

> "preliminary review of applications for posttrial relief made by individuals convicted of criminal of-

> fenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing." 28 U. S. C. § 636 (b)(3).

Subdivision (3), suggesting additional duties that may be assigned to a magistrate in connection with federal habeas corpus cases, does not by its terms permit magistrates to conduct evidentiary hearings, but that subdivision is merely illustrative, not exclusive.

> "The mention of these three categories is intended to illustrate the general character of duties assignable to magistrates under the act, rather than to constitute an exclusive specification of duties so assignable." S. Rep. No. 371, 90th Cong., 1st Sess., 25 (1967).

The House Report virtually tracks the language of the Senate Report. H. R. Rep. No. 1629, 90th Cong., 2d Sess., 19 (1968). Thus, there being no constitutional barrier to permitting magistrates to conduct evidentiary hearings,[6] nor any other legal barrier, see Part I, *supra*, § 636 (b) enables district courts, as did the District Court here, to establish rules which so permit.

Assuming, *arguendo*, that § 2243 does constitute a possible legal barrier to such rules, the legislative history of the Act reveals Congress to have intended the elimination of that barrier. The Court determines, in the second stage of its analysis, *ante*, at 469–473, that Congress intended the opposite result, but in this matter the Court's perception is less than discriminating. The linchpin of the Court's argument is the drafting evolution of the terms of subdivision (3), quoted above. In the change of language from preliminary "consideration" to preliminary

[6] No such barrier is suggested by the Court today, and properly framed, district court rules which so permit would not contravene the constitutional rights of federal habeas corpus petitioners. See Part III, *infra*.

"review," [7] and in the addition of "as to whether there should be a hearing," [8] the Court finds an intent to bar magistrates from conducting a hearing. But the language changes in the subdivision were made only due to a fear that magistrates would be thought to have been given final adjudicatory power, not to preclude them from conducting hearings when the district judges retained such power.[9] Indeed, the latter was specifically intended. As the Senate Report stated, § 636 (b)

"contemplates assignments to magistrates under cir-

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[7] The two words were in fact used interchangeably in the legislative history. When the draft bill (S. 3475) used the word "consideration," the Subcommittee Staff Memorandum in support of the bill used the word "review." Hearings 34. When the draft bill was changed to use the word "review," the Senate Report accompanying the new bill (S. 945) used the word "consideration." S. Rep. No. 371, 90th Cong., 1st Sess., 8 (1967).

[8] Despite the addition of this language, the House Report, in setting forth the enumerated examples of § 636 (b), stated of subdivision (3) only that "[m]agistrates may also be assigned the function of reviewing and reporting to district judges upon applications for postconviction relief." H. R. Rep. No. 1629, 90th Cong., 2d Sess., 19 (1968). No limitation on the nature of the review or report was indicated. The language of the Senate Report also made no reference to decisions whether there should be hearings. S. Rep. No. 371, *supra*, at 26.

[9] The Court twice makes reference, *ante*, at 471 n. 11, and 472 n. 17, to Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1188–1189, and n. 229 (1970), in support of its position. Both references are mistakenly addressed to final decisionmaking power, not the power to conduct hearings where the district judge makes the ultimate decision. The Note itself concedes that "[i]t is possible to argue [under § 636 (b)] that a plan to have magistrates actually hear cases is valid under the Act." *Id.*, at 1189 n. 229. It then argues the other way in reference to matters as to which magistrates have final power of decision. See 28 U. S. C. § 636 (a)(3). That is the only power of magistrates circumscribed by the procedures to which the Court refers, *ante*, at 470–471, n. 11.

> cumstances where the ultimate decision of the case is reserved to the judge . . . ." S. Rep. No. 371, 90th Cong., 1st Sess., 26 (1967).

The concern about enabling magistrates to make the ultimate decision found early expression in the Senate hearings on the bill in a colloquy between Senator Tydings and then Assistant Attorney General Vinson. Mr. Vinson ultimately revealed his real concern in a letter to the Subcommittee that subdivision (3) as originally drafted would give the power of ultimate decision to the magistrate: "[I]f preliminary consideration is intended to involve adjudication, it should be handled by an Article 3 Judge." Hearings 130. That the Senate viewed Mr. Vinson's objections in this light is made clear by Senator Tydings' testimony in the hearings before a subcommittee of the House Judiciary Committee. Hearings on S. 945 et al. before Subcommittee No. 4 of the House Committee on the Judiciary, 90th Cong., 2d Sess., 72 (1968).

In response to this objection, Senator Tydings stated to Mr. Vinson at the Senate hearings:

> "We wouldn't intend for the final decision to be made by the magistrate. *But we would intend that . . . the magistrate* [be able to] *hold a preliminary* [habeas] *hearing* . . . . We certainly intend that." Hearings 112. (Emphasis added.)

Numerous other witnesses at the Senate hearings urged that the magistrates be permitted to hold hearings. See,

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To the extent the Court goes beyond the Note and argues that magistrates' service as special masters, 28 U. S. C. § 636 (b)(1), is limited by Fed. Rule Civ. Proc. 53 (b), the early strictures upon employing special masters were developed before the existence of the judicial office of magistrate and arguably should not be applied to that new office. See generally Comment, An Adjudicative Role for Federal Magistrates in Civil Cases, 40 U. Chi. L. Rev. 584 (1973).

e. g., id., at 52 (Chief Judge Northrop, *supra,* n. 3); *id.,* at 94 (Chief Judge Walter E. Hoffman, of the Eastern District of Virginia).

As the Court points out, *ante,* at 470–471, the Judicial Conference objected to the original draft bill (S. 3475), but it did not originally object to subdivision (3), as the Court states. Instead, the Conference objected to § 636 (b) altogether, fearing it so broad as to be subject to constitutional attack. Although not specified, it seems clear that by speaking in terms of "delegation" the Conference initially shared Mr. Vinson's concern about delegating the ultimate decisionmaking power of Art. III judges. Hearings 241n. The Judicial Conference therefore recommended both a modified version of § 636 (b), and the complete elimination of all three subdivisions. *Ibid.* When the revised draft bill (S. 945), which ultimately was enacted, was introduced, it did not follow the Judicial Conference recommendation, but continued to include the three subdivisions. As to subdivision (3), the Judicial Conference recommended the addition of the phrase "as to whether there should be a hearing," see n. 7, *supra,* but again stressed that its concern was, as with S. 3475, over the "delegation to magistrates." Hearings 245.

The tension established in this evolution is clear. On the one hand, Congress sought to enable district courts to authorize magistrates to conduct evidentiary hearings. On the other hand, there was apprehension that the power of authorization granted to district courts might lead to a rule permitting magistrates to exercise ultimate decisionmaking power reserved exclusively to Art. III judges. To avoid the latter but accomplish the former, Congress persisted in retaining the broad language of § 636 (b), and in retaining subdivision (3). Not only, as set

forth earlier, does the subdivision *not* limit the subsection, it was drafted in language to insure that it could not be read to preclude authorizing magistrates to conduct hearings in federal habeas corpus cases.[10]

Plainly, Congress could have used language that expressly precluded the latter. That this was not urged upon Congress by anyone, including the Judicial Conference, and that Congress did not include such language, alone suggests its intention to vest in district courts the power to authorize magistrates to hold hearings. Conversely, Congress would have taken certain risks had it expressly permitted magistrates to hold hearings, as revealed by the following colloquy between Chief Judge Hoffman and Senator Tydings at the Senate hearings:

> "Judge Hoffman. . . . And I have suggested in my statement . . . that the Federal magistrate could be assigned the task as a master to conduct plenary hearings. After all, [habeas corpus proceedings] are civil proceedings . . . not criminal proceedings.
>
> . . . . .
>
> "Senator Tydings. [S]ince we . . . don't have [in § 636 (b)] 'Including hearings' or 'Including plenary hearings,' or 'including the conducting of plenary hearings,' it is not what we should have?
>
> "Judge Hoffman. I am fearful that someone will say that this is merely an effort on the part of the judge to delegate his judicial function.
>
> "Senator Tydings. I think that is a good point, Judge Hoffman." Hearings 93–94.

In light of the need for Congress to avoid language suggesting an unconstitutional delegation of a judicial

[10] Even counsel for respondent agrees (contrary to the Court's conclusion, *ante,* at 470) that subdivision (3) "could have been more clearly expressed." Tr. of Oral Arg. 20.

function to a magistrate, the ambiguous provision of § 636 (b)—unlimited by the provisions of subdivision (3)—should be interpreted to permit magistrates to conduct evidentiary hearings in federal habeas corpus cases, § 2243 notwithstanding, because (1) to the extent the subject was expressly discussed in the legislative history, such permission was intended, and (2) such an interpretation would serve the two principal objectives of the Act. See nn. 2 and 3, *supra*.

III

The final limitation of the Act, that additional duties assigned to magistrates must not be "inconsistent with the Constitution," needs little discussion here. The Court does not suggest that the conduct of an evidentiary hearing, where the district judge retains the power to make the final decision on an application for a writ of habeas corpus, would be unconstitutional either under Art. III or as a matter of due process of law. Where this situation obtains, the magistrate's conduct of the hearing would be clearly constitutional.[11]

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[11] The commentators have generally agreed with this conclusion. Shapiro, Federal Habeas Corpus: A Study in Massachusetts, 87 Harv. L. Rev. 321, 365 (1973); Peterson, The Federal Magistrate's Act: A New Dimension in the Implementation of Justice, 56 Iowa L. Rev. 62, 98 (1970); Doyle (District Judge and Chairman of the Judicial Conference Committee charged with implementing the Act), Implementing the Federal Magistrates Act, 39 J. B. A. Kan. 25, 69 (1970); Note, Proposed Reformation of Federal Habeas Corpus Procedure: Use of Federal Magistrates, 54 Iowa L. Rev. 1147 (1969). So, too, would the Judicial Conference appear to be in agreement. Proposed Amendments to the Proposed Rules Governing Habeas Corpus Proceedings for the United States District Courts, Committee on Rules of Practice and Procedure, Rule 11 (Preliminary Draft, Jan. 1973). Congress has given the magistrates power to conduct trials of a limited nature, 28 U. S. C. § 636 (a)(3), which grant of power, carefully limited, appears not to contravene any con-

Not only would his report and recommendation to the district judge be subject to amendment or outright rejection, the district judge could, at the behest of the habeas corpus petitioner or on his own motion, conduct his own evidentiary hearing to judge for himself, for example, the credibility of witnesses if he deems their testimony essential to disposition of the application. To the extent a problem of constitutional magnitude may be foreseen in the particulars of the rules established by a district court, those rules can be construed to comport with constitutional requirements. In any event, now that the Court has construed the Magistrates Act contrary to a clear legislative intent, it is for the Congress to act to restate its intentions if its declared objectives are to be carried out.

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stitutional prohibition. Cf. *Palmore* v. *United States*, 411 U. S. 389 (1973). *A fortiori* granting magistrates the power to conduct hearings where the district judge retains ultimate decisionmaking authority comports with constitutional requirements. Cf. *Campbell* v. *U. S. District Court*, 501 F. 2d 196 (CA9 1974) (hearings on motion to suppress); *Harlem River Consumers Coop., Inc.* v. *Associated Grocers of Harlem, Inc.*, 54 F. R. D. 551 (SDNY 1972) (hearings on discovery motion).

TAYLOR *v.* HAYES, JUDGE

CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

No. 73–473. Argued March 18, 1974—Decided June 26, 1974

During a Kentucky murder trial in which petitioner was counsel for the accused, respondent trial judge informed petitioner on nine different occasions that he was in contempt of court. At the conclusion of the trial, respondent, in the jury's presence, made a statement concerning petitioner's trial conduct, and, refusing petitioner's request to respond, imposed consecutive sentences on nine counts of contempt aggregating almost four and one-half years' imprisonment, including sentences of one year's imprisonment on each of two counts. Subsequently, respondent amended the judgment to eliminate the first contempt charge and to reduce each of the latter sentences to six months' imprisonment, but was silent on whether all of the sentences were to run concurrently or consecutively. The Kentucky Court of Appeals affirmed, but ruled that, because the amended judgment did not direct that the sentences be served consecutively, they had to be served concurrently, thereby making the penalty actually imposed six months in jail and rendering constitutionally permissible the conviction and sentence without a jury trial. *Held:*

1. Since no more than a six-month sentence was actually imposed, the eight contempts, whether considered singly or collectively, constituted petty offenses and hence trial by jury was not required. It is not improper to permit the State, as in this instance, after conviction, to reduce a sentence to six months or less rather than retry the contempt with a jury, since "criminal contempt is not a crime of the sort that requires the right to jury trial regardless of the penalty involved." *Bloom* v. *Illinois*, 391 U. S. 194, 211. Pp. 495–496.

2. Respondent's conduct, in proceeding summarily after trial to punish petitioner for alleged contempt committed during the trial without giving him an opportunity to be heard in defense or mitigation before he was finally adjudged guilty and sentence was imposed, does not square with the Due Process Clause of the Fourteenth Amendment. *Groppi* v. *Leslie*, 404 U. S. 496. Reasonable notice of the specific charges and opportunity to be heard

are essential in view of the heightened potential for abuse posed by the contempt power. Pp. 496–500.

3. Because it appears from the record that "marked personal feelings were present on both sides" and that marks of "unseemly conduct [had] left personal stings," *Mayberry* v. *Pennsylvania*, 400 U. S. 455, 464, another judge should have been substituted for respondent for the purpose of finally disposing of the contempt charges. Pp. 501–503.

494 S. W. 2d 737, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, BLACKMUN, and POWELL, JJ., and in Parts II and III of which DOUGLAS and MARSHALL, JJ., joined. MARSHALL, J., filed an opinion dissenting from Part I, *post*, p. 504. REHNQUIST, J., filed a dissenting opinion, *post*, p. 523.

Robert Allen Sedler argued the cause for petitioner. With him on the briefs were *Doris Peterson* and *Morton Stavis*.

Henry A. Triplett argued the cause and filed a brief for respondent.*

MR. JUSTICE WHITE delivered the opinion of the Court.

The question in this case concerns the validity of a criminal contempt judgment entered against petitioner by reason of certain events occurring in the course of a criminal trial in the courts of the Commonwealth of Kentucky. Petitioner was retained counsel for Narvel Tinsley, a Negro, who along with his brother Michael was

*Briefs of *amici curiae* urging reversal were filed by *Burke Marshall, Leon Friedman,* and *Norman Dorsen* for the Association of the Bar of the City of New York; by *Frank E. Haddad, Jr., Joe G. Leibson,* and *Ed P. Jackson* for the Louisville Bar Assn.; by *James Larson, Arthur Kinoy,* and *Victor Rabinowitz* for the National Lawyers Guild; and by *Melvin L. Wulf* for the American Civil Liberties Union.

charged with the murders of two police officers. According to the Kentucky Court of Appeals, the "murders created some considerable sensation in Louisville . . . and . . . newspaper coverage was overly abundant." 494 S. W. 2d 737, 739 (1973). Trial before respondent trial judge began on October 18, 1971, and was completed on October 29.

On nine different occasions during this turbulent trial, respondent, out of the hearing of the jury and most often in chambers, informed petitioner that he was in contempt of court. The first charge was immediately reduced to a warning and no sentence was imposed at the time of charge in that or any other instance. Petitioner was permitted to respond to most, but not all, of the charges.[1]

At the conclusion of the trial on October 29 and after a guilty verdict had been returned, respondent, in the presence of the jury, made a statement concerning petitioner's trial conduct. Refusing petitioner's request to respond and declaring that "I have you" on nine counts, respondent proceeded to impose a jail term on each count totaling almost four and one-half years: 30 days on the first count, 60 days on the second, 90 days on the third, six months on counts four, five, six, and seven, and one year each on counts eight and nine, "all

[1] When for the sixth time petitioner was informed that he was in contempt, he sought to reply and was informed he could do so at the next recess. Nothing more appears in the record with respect to this episode. On the seventh occasion, petitioner undertook to respond but respondent left the chambers, and any further discussion of this charge was apparently ordered excluded from the record by respondent. Petitioner was denied the right to respond when he was informed of the eighth charge of contempt. As far as the record shows, there was neither a request to respond nor denial of response in connection with the ninth contempt charge.

to run consecutive." [2] A few days later, petitioner was also barred from practicing law by respondent in his division of the Criminal Branch of the Jefferson Circuit Court.

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[2] The following is the complete transcript of the proceedings on October 29, 1971, with respect to the contempt charges against petitioner:

"The Court: Mr. Taylor, the Court has something to take up with you sir, at this time.

"Mr. Taylor: Well, I'll be right here, Judge.

"The Court: I've for two weeks sit here and listen to you. Now, you're going to listen to me. Stand right here, sir.

"For two weeks I've seen you put on the worst display I've ever seen an attorney in my two years of this court and 15 years of practicing law. You've quoted that you couldn't do it any other way. You know our court system is completely based upon, particularly criminal law, the Doctrine of Reasonable Doubt. That's exactly what it means, reason. It doesn't mean that it's based upon deceit; it doesn't mean that it's based upon trickery; it doesn't mean it's based upon planned confusion.

"Sometimes I wonder really what your motive is, if you're really interested in the justice of your client, or if you have some ulterior motive, if you're interested in Dan Taylor or Narvel Tinsley.

"It's a shame that this court has to do something that the Bar Association of this State should have done a long time ago.

"As far as a lawyer is concerned, you're not. I want the jury to hear this; I want the law students of this community to hear this, that you're not the rule, you're the exception to the rule.——

"Mr. Taylor: (Interrupting) Thank you.

"The Court: I want them to understand that your actions should not be their actions because this is not the way that a court is conducted. This is not the way an officer of a court should conduct itself.

"Mr. Taylor: I would respond to you, sir——

"The Court: (Interrupting) You're not responding to me on anything.

"Mr. Taylor: (Interrupting) Oh yes, I will.

"The Court: Yes, you're not, either.

"Mr. Taylor: Yes, I will.

[*Footnote 2 is continued on p. 492*]

While petitioner's appeal was pending, on March 2, 1972, respondent entered a corrected judgment containing a "certificate" which described the nine charges of contempt [3] but eliminated the first charge as having been

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"The Court: The sentence is on Count One——

"Mr. Taylor: (Interrupting) Unless you intend to gag me——

"The Court: (Interposing) I'll do that——

"Mr. Taylor: (Interposing) My lawyers will respond to you——

"The Court: (Interposing) I'll do that, sir.

"Mr. Taylor: My lawyers will respond to you, sir.

"The Court: You be quiet, or you'll—there will be some more contempts——

"Mr. Taylor: (Interrupting) No, you heard what I said.

"The Court: I have you nine counts. First Count, 30 days in jail; Second Count, 60 days in jail; Third Count, 90 days in jail; Fourth Count, six months in jail; Fifth Count, six months in jail; Sixth Count, six months in jail; Seventh Count, six months in jail; Eighth Count, one year in jail; Ninth Count, one year in jail, all to run consecutive.

"Take him away.

"Mr. Taylor: We will answer you in court.

"The Court: I'd be glad to see you." App. 28–29.

[3] The nine charges of contempt were described in the certificate as follows:

"*Contempt 1.* Mr. Taylor, in questioning a prospective juror, on the second day of Voir Dire, repeatedly ignored the Court's order not to continue a certain line of questioning and to ask his questions of the jury as a whole, He evidenced utter disrespect for prospective jurors (T. E. 335–347).

"*Contempt 2.* The court sustained the Commonwealth objection on the use of a prior statement to cross examine Officer Hogan and not to go into the escape of Narvel Tinsley. Mr. Taylor repeatedly and completely ignored the court's ruling (T. E. 1071–1080).

"*Contempt 3.* During the playing of a tape recording of the voice of witness David White, Mr. Taylor wrote on a blackboard. After the playing of the tape it was ordered that the blackboard be removed from the court and Mr. Taylor was advised by the court that he could use it in his final summation to the jury. Mr. Taylor

reduced to a warning and reduced the sentence on each of the last two counts to six months in jail. The corrected judgment was silent as to whether the sentences were to run concurrently or consecutively.

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was disrespectful to the court by his tone of voice and manner when he replied, 'I'll certainly keep that in mind, your Honor' (T. E. 1355).

"*Contempt 4.* During cross-examination of Narvel Tinsley, by Mr. Schroering, Mr. Taylor interrupted and moved for a recess, was overruled by the court, and then became most disrespectful to the court and refused to take his seat at counsel's table as ordered.

"*Contempt 5.* Complete and utter disrespect by Mr. Taylor in the questioning of Mr. Irvin Foley, and (sic) attorney and Legal Advisor to the Louisville Police Department when he continually disobeyed the court's ruling regarding a press conference which the court had ruled on unadmissible (sic). Mr. Taylor accused the court of disallowing admittance of black persons in the courtroom during the examination of this witness and made a statement in the presence of the jury inferring that only white police officers could enter the courtroom. It has always been the rule of this court that there will be no interruption during the examination of a witness or during closing arguments by people coming and going into and from the courtroom, which rule was known to Mr. Taylor, (T. E. 1950–1955).

"*Contempt 6.* The witness Jesse Taylor, a Louisville Police Officer, read a statement by witness, David White. A Ruling was made by the court that the statement spoke for itself, had been introduced in evidence and could not be commented on by Officer Taylor, who merely took the statement. Mr. Taylor continued to disregard the court's order and ruling by continually reading parts of the statement out of context (T. E. 2008–2016).

"*Contempt 7.* Mr. Taylor in examining Mr. Norbert Brown, again referred to a press conference that the court had previously ordered him not to go into. He also waved his arms at the witness in a derogatory manner indicating the witness was not truthful and showing utter contempt of the court's ruling (T. E. 2030–2032).

"*Contempt 8.* The court directed Mr. Taylor to call his next witness. He called Lt. Garrett, Louisville Police Department. After the witness was sworn and took the stand, a deputy Sheriff advised the court that Mr. Taylor's aide was not searched, as everyone else

552-191 O - 76 - 34

The Kentucky Court of Appeals affirmed, holding that petitioner was guilty of each and every contempt charged. In its view, petitioner's actions "were deliberate, delaying, or planned disruptive tactics which did in fact create such an atmosphere in the court that he, if permitted to continue, would have appeared to be the star performer in the center ring of a three-ring circus." 494 S. W. 2d, at 740. Petitioner had committed "innumerable acts . . . which clearly reflected his contempt for the court as well as the judicial system of this Commonwealth . . ." and had been "overbearing, contemptuous, and obnoxiously persistent in his questions and objections . . . ." *Id.*, at 741. The Court of Appeals also concluded that petitioner had not launched any "personal attack" on the trial judge and that the judge had neither conducted himself as an " 'activist seeking combat' " nor had become so personally embroiled that he was disqualified to sit in judgment on the charges of contempt, although his remarks prior to entering judgment of contempt at the conclusion of the trial were "inappropriate." *Id.*, at 744–745.

The Court of Appeals further ruled that because the amended judgment did not "direct that the sentences, as amended, be served consecutively . . . they must be served concurrently." *Id.*, at 746. Thus, "[t]he penalty actually imposed on Daniel Taylor [was] six months in jail," and his conviction and sentence without a jury trial

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had been upon entering the courtroom. Mr. Taylor ordered the deputy to search his aide. The court ordered Mr. Taylor to begin his examination, which he refused to do until he was cited for contempt in the court's chamber (T. E. 2068–2069).

"*Contempt 9.* Mr. Taylor repeatedly asked the same question of witness Floyd Miller that the court had held improper. He was also disrespectful in his tone of voice when referring to a certain police officer as 'this nice police officer' (T. E. 2169–2172)." App. 24–26.

were deemed constitutionally permissible. *Id.*, at 747. The Kentucky Court of Appeals ruled, however, that it had exclusive authority to discipline or disbar attorneys and that, in any event, the rule in Kentucky since 1917 had been that suspension from practice was not a permissible punishment for criminal contempt. The order prohibiting petitioner from practicing in the Jefferson Circuit Court, Criminal Branch, Second Division, was therefore reversed. We granted certiorari limited to specified issues, 414 U. S. 1063 (1973).

I

Petitioner contends that any charge of contempt of court, without exception, must be tried to a jury. Quite to the contrary, however, our cases hold that petty contempt like other petty criminal offenses may be tried without a jury and that contempt of court is a petty offense when the penalty actually imposed does not exceed six months or a longer penalty has not been expressly authorized by statute. *Cheff* v. *Schnackenberg,* 384 U. S. 373 (1966); *Bloom* v. *Illinois,* 391 U. S. 194 (1968); *Dyke* v. *Taylor Implement Mfg. Co., Inc.,* 391 U. S. 216 (1968); *Frank* v. *United States,* 395 U. S. 147 (1969); *Baldwin* v. *New York,* 399 U. S. 66 (1970). Hence, although petitioner was ultimately found guilty and sentenced separately on eight counts of contempt, the sentences were to run concurrently and were, as the Kentucky Court of Appeals held, equivalent to a single sentence of six months. Cf. *Codispoti* v. *Pennsylvania, post,* p. 506. The original sentences imposed on the separate counts were to run consecutively and totaled almost four and one-half years, with two individual counts each carrying a year's sentence. But the trial court itself entered an amended judgment which was understood by the Kentucky Court of Appeals to impose no more than a six-

month sentence. The eight contempts, whether considered singly or collectively, thus constituted petty offenses, and trial by jury was not required.

It is argued that a State should not be permitted, after conviction, to reduce the sentence to less than six months and thereby obviate a jury trial. The thrust of our decisions, however, is to the contrary: in the absence of legislative authorization of serious penalties for contempt, a State may choose to try any contempt without a jury if it determines not to impose a sentence longer than six months. We discern no material difference between this choice and permitting the State, after conviction, to reduce a sentence to six months or less rather than to retry the contempt with a jury. Cf. *Cheff* v. *Schnackenberg, supra,* at 380. In either case, the State itself has determined that the contempt is not so serious as to warrant more than a six-month sentence. We remain firmly committed to the proposition that "criminal contempt is not a crime of the sort that requires the right to jury trial regardless of the penalty involved." *Bloom* v. *Illinois, supra,* at 211; cf. *Argersinger* v. *Hamlin,* 407 U. S. 25, 30 (1972).

II

We are more persuaded by petitioner's contention that he was entitled to more of a hearing and notice than he received prior to final conviction and sentence. In each instance during the trial when respondent considered petitioner to be in contempt, petitioner was informed of that fact and, in most instances, had opportunity to respond to the charge at that time. It is quite true, as the Kentucky Court of Appeals held, that "[t]he contempt citations and the sentences coming at the end of the trial were not and could not have been a surprise to Taylor, because upon each occasion and immediately following the charged act of contempt the court informed

Taylor that he was at that time in contempt of court." 494 S. W. 2d, at 741–742. But no sentence was imposed during the trial, and it does not appear to us that any final adjudication of contempt was entered until after the verdict was returned. It was then that the court proceeded to describe and characterize petitioner's various acts during trial as contemptuous, to find him guilty of nine acts of contempt, and to sentence him immediately for each of those acts.

It is also plain from the record that when petitioner sought to respond to what the Kentucky Court of Appeals referred to as the trial court's "declaration of a charge against Taylor based upon the judge's observations" during trial,[4] respondent informed him that "[y]ou're not responding to me on anything" and even indicated that petitioner might be gagged if he insisted on defending himself.[5] The trial court then proceeded without further formality to impose consecutive sentences totaling almost four and one-half years in the county jail and to bar petitioner forever from practicing before the court in which the case at issue had been tried.

This procedure does not square with the Due Process Clause of the Fourteenth Amendment. We are not concerned here with the trial judge's power, for the purpose of maintaining order in the courtroom, to punish summarily and without notice or hearing contemptuous conduct committed in his presence and observed by him. *Ex parte Terry,* 128 U. S. 289 (1888). The usual justification of necessity, see *Offutt* v. *United States,* 348 U. S. 11, 14 (1954), is not nearly so cogent when final adjudication and sentence are postponed until after trial.[6] Our de-

[4] 494 S. W. 2d 737, 744 (1973).

[5] App. 29.

[6] "Punishment without issue or trial [is] so contrary to the usual and ordinarily indispensable hearing before judgment, constituting

cisions establish that summary punishment need not always be imposed during trial if it is to be permitted at all. In proper circumstances, particularly where the offender is a lawyer representing a client on trial, it may be postponed until the conclusion of the proceedings. *Sacher* v. *United States*, 343 U. S. 1 (1952); cf. *Mayberry* v. *Pennsylvania*, 400 U. S. 455, 463 (1971). But *Sacher* noted that "[s]ummary punishment always, and rightly, is regarded with disfavor . . . ." 343 U. S., at 8. "[W]e have stated time and again that reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are 'basic in our system of jurisprudence.'" *Groppi* v. *Leslie*, 404 U. S. 496, 502 (1972), quoting *In re Oliver*, 333 U. S. 257, 273 (1948). Even where summary punishment for contempt is imposed during trial, "the contemnor has normally been given an opportunity to speak in his own behalf in the nature of a right of allocution." *Groppi* v. *Leslie*, *supra*, at 504 (and cases cited therein).[7]

On the other hand, where conviction and punishment are delayed, "it is much more difficult to argue that action without notice or hearing of any kind is necessary to preserve order and enable [the court] to proceed with its business." *Ibid.* As we noted in *Groppi*, the contemnors in the *Sacher* case were "given an opportunity to speak" and the "trial judge would, no doubt[,] have modified his action had their statements proved persuasive." *Id.*, at 506, and n. 11. *Groppi* counsels that before an attorney is finally adjudicated in contempt and sentenced

due process, that the assumption that the court saw everything that went on in open court [is] required to justify the exception; but the need for immediate penal vindication of the dignity of the court created it." *Cooke* v. *United States*, 267 U. S. 517, 536 (1925).

[7] *Groppi* dealt with contempt of a state legislative body, and the contempt action was not taken until several days later without notice or opportunity for Groppi to be heard.

after trial for conduct during trial, he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf. This is not to say, however, that a full-scale trial is appropriate. Usually, the events have occurred before the judge's own eyes, and a reporter's transcript is available. But the contemnor might at least urge, for example, that the behavior at issue was not contempt but the acceptable conduct of an attorney representing his client; or, he might present matters in mitigation or otherwise attempt to make amends with the court. Cf. *Groppi* v. *Leslie, supra,* at 503, 506 n. 11.[8]

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[8] The American Bar Association Advisory Committee on the Judge's Function has recommended, *inter alia:*

"Notice of charges and opportunity to be heard.

"Before imposing any punishment for criminal contempt, the judge should give the offender notice of the charges and at least a summary opportunity to adduce evidence or argument relevant to guilt or punishment.

"Commentary

"Although there is authority that in-court contempts can be punished without notice of charges or an opportunity to be heard, *Ex parte* Terry, 128 U. S. 289 (1888), such a procedure has little to commend it, is inconsistent with the basic notions of fairness, and is likely to bring disrespect upon the court. Accordingly, notice and at least a brief opportunity to be heard should be afforded as a matter of course. Nothing in this standard, however, implies that a plenary trial of contempt charges is required." American Bar Association Project on Standards for Criminal Justice, The Function of the Trial Judge § 7.4, p. 95 (Approved Draft 1972).

Cf. Fed. Rule Crim. Proc. 42 (b); *Harris* v. *United States,* 382 U. S. 162 (1965). State courts have reached a similar conclusion. See, *e. g.,* New York State Appellate Division, First and Second Departments, Special Rules Concerning Court Decorum § 609.2 (b) (1971) in N. Dorsen & L. Friedman, Disorder in the Court: Report of the Association of the Bar of the City of New York, Special Committee on Courtroom Conduct 352 (1973).

These procedures are essential in view of the heightened potential for abuse posed by the contempt power. *Bloom* v. *Illinois*, 391 U. S., at 202; *Sacher* v. *United States*, 343 U. S., at 12. The provision of fundamental due process protections for contemnors accords with our historic notions of elementary fairness. While we have no desire "to imprison the discretion of judges within rigid mechanical rules," *Offutt* v. *United States*, 348 U. S., at 15, we remain unpersuaded that "the additional time and expense possibly involved . . . will seriously handicap the effective functioning of the courts." *Bloom* v. *Illinois*, *supra*, at 208–209. Due process cannot be measured in minutes and hours or dollars and cents. For the accused contemnor facing a jail sentence, his "liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal." *Morrissey* v. *Brewer*, 408 U. S. 471, 482 (1972).

Because these minimum requirements of due process of law were not extended to petitioner in this case, the contempt judgment must be set aside.[9]

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[9] My Brother REHNQUIST's dissent insists that the Court has rejected the teaching of *Sacher* v. *United States*, 343 U. S. 1 (1952), that in a posttrial contempt proceeding, the court need not afford the contemnor the full panoply of procedures such as "the issuance of process, service of complaint and answer, holding hearings, taking evidence, listening to arguments, awaiting briefs, submission of findings, and all that goes with *a conventional court trial*." *Id.*, at 9 (emphasis added). But all we have decided today is that a contemnor is entitled to the elementary due process protections of "reasonable notice of the specific charges and opportunity to be heard in his own behalf," *supra*, at 499, neither of which petitioner received. Nowhere do we intimate that "a full-scale trial is appropriate." *Ibid.*; see also n. 8, *supra*. Moreover, whatever justifications may sometimes necessitate immediate imposition of summary punishment during trial "to maintain order in the courtroom and the integrity of the trial process in the face of an 'actual obstruction of justice,'" *Codispoti* v. *Pennsylvania*, *post*, at 513, "[r]easons for permitting straightway

III

We are also convinced that if petitioner is to be tried again, he should not be tried by respondent. We agree with the Kentucky Court of Appeals that petitioner's conduct did not constitute the kind of personal attack on respondent that, regardless of his reaction or lack of it, he would be "[un]likely to maintain that calm detachment necessary for fair adjudication." *Mayberry* v. *Pennsylvania,* 400 U. S., at 465.

But contemptuous conduct, though short of personal attack, may still provoke a trial judge and so embroil him in controversy that he cannot "hold the balance nice, clear and true between the State and the accused . . . ." *Tumey* v. *Ohio,* 273 U. S. 510, 532 (1927). In making this ultimate judgment, the inquiry must be not only whether there was actual bias on respondent's part, but also whether there was "such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused." *Ungar* v. *Sarafite,* 376 U. S. 575, 588 (1964). "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties," but due process of law requires no less. *In re Murchison,* 349 U. S. 133, 136 (1955).

With these considerations in mind, we have examined the record in this case, and it appears to us that respondent did become embroiled in a running controversy with petitioner. Moreover, as the trial progressed, there was a mounting display of an unfavorable personal attitude toward petitioner, his ability, and his motives, sufficiently

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exercise of summary power are not reasons for compelling or encouraging its immediate exercise." *Sacher* v. *United States, supra,* at 9–10.

so that the contempt issue should have been finally adjudicated by another judge.

Early in the trial respondent cautioned petitioner against "putting on a show" and added that "if you give him an inch, he'll take a mile. I might as well sit on him now." App. 31, 40. On another occasion when petitioner asserted that his purpose was to defend his case, respondent replied, "I'm not sure." *Id.*, at 61. When petitioner remarked that he had five months wrapped up in the case, respondent retorted that "[b]efore it's over, you might have a lot more than that." *Id.*, at 98. On the other hand, petitioner complained of respondent's "overbearing contentiousness in regard to me, both by phrase and by its utterances," and asserted that the court was prejudicing the trial of his case. *Id.*, at 60. Respondent was likewise said to be "using [the] brute power of your office" in saying that petitioner was damaging his client. *Id.*, at 61. On another occasion, respondent understood petitioner to be asserting that he, respondent, had rigged the jury. *Id.*, at 85–86.

That respondent had reacted strongly to petitioner's conduct throughout the 10-day trial clearly emerged in the statement which he made prior to sentencing petitioner and which the Court of Appeals characterized as "inappropriate." There he said petitioner had put on "the worst display" he had seen in many years at the bar—"[a]s far as a lawyer is concerned, you're not." *Id.*, at 28. Furthermore, respondent denied petitioner the opportunity to make any statement at that time, threatened to gag him and forthwith sentenced him to almost four and one-half years in jail, not to mention later disbarring him from further practice in his court. He also refused to grant him bail pending appeal. We assume for the purposes of this case that each of the charged acts was contemptuous; nevertheless, a sentence of this magnitude reflects the extent to which the respondent became per-

sonally involved. Cf. *Offutt* v. *United States,* 348 U. S., at 17.

From our own reading of the record, we have concluded that "marked personal feelings were present on both sides" and that the marks of "unseemly conduct [had] left personal stings," *Mayberry* v. *Pennsylvania,* 400 U. S., at 464. A fellow judge should have been substituted for the purpose of finally disposing of the charges of contempt made by respondent against petitioner. Respondent relies on *Ungar* v. *Sarafite, supra,* but we were impressed there with the fact that the judge "did not purport to proceed summarily during or at the conclusion of the trial, but gave notice and afforded an opportunity for a hearing which was conducted dispassionately and with a decorum befitting a judicial proceeding." 376 U. S., at 588.[10]

Nothing we have said here should be construed to condone the type of conduct described in the opinion of the Kentucky Court of Appeals and found by that court to have been engaged in by petitioner. Behavior of this nature has no place in the courtroom which, in a free society, is a forum for the courteous and reasoned pursuit of truth and justice.

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[10] MR. JUSTICE REHNQUIST's dissent also asserts that our decision provides the means whereby "a judge *can* be driven out of a case by any counsel sufficiently astute to read the new-found constitutional principles enunciated [here and in *Mayberry* v. *Pennsylvania,* 400 U. S. 455 (1971)]." *Post,* at 530. But this statement—perhaps dissenter's license—misconceives our holding and undervalues the import of the Due Process Clause. As expressly noted in the text, we by no means equate this case with *Mayberry* v. *Pennsylvania.* It is not petitioner's conduct, considered alone, that requires recusal in this case; rather, the critical factor, as revealed by the record before us, is the character of respondent's response to misbehavior during the course of the trial. The dissent, of course, may view the record differently, but on that issue we are in unavoidable disagreement.

The judgment of the Kentucky Court of Appeals is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

So ordered.

MR. JUSTICE DOUGLAS joins Parts II and III of the Court's opinion.

[For dissenting opinion of MR. JUSTICE REHNQUIST, see *post*, p. 523.]

MR. JUSTICE MARSHALL, dissenting in part.

I join Parts II and III of the opinion of the Court, but I cannot join the holding in Part I that petitioner was not entitled to a jury trial. Petitioner was summarily convicted of contempt and sentenced to almost four and one-half years in prison. In my view, this sentence marked the contempt charges against petitioner as "serious" rather than "petty" and called into play petitioner's Sixth Amendment right to a jury trial.

The Court, however, relies on the fact that the trial judge subsequently realized his error and reduced the sentence to six months. The Court characterizes this as a determination by the State that "the contempt is not so serious as to warrant more than a six-month sentence." *Ante*, at 496. In my view, the trial judge's reduction of petitioner's sentence was a transparent effort to circumvent this Court's Sixth Amendment decisions and to save his summary conviction of petitioner without the necessity of airing the charges before an impartial jury. It is hardly coincidence that petitioner's sentence was reduced to the maximum that our decisions would permit.

Today's decision represents an extraordinarily rigid and wooden application of the six-month rule that the Court has fashioned to determine when the Sixth Amend-

ment right is applicable. In permitting this obvious device to succeed, I think that the Court changes the nature of the six-month rule from a reasonable effort to distinguish between "serious" and "petty" contempts into an arbitrary barrier behind which judges who wish to protect their summary contempt convictions without exposing their charges to the harsh light of a jury may safely hide. The very fact that such a substantial contempt sentence was imposed, and then reduced to the six-month maximum, should be a warning to us that the fairness of the process which petitioner has received is suspect, and that the contempt charges involved here especially require the scrutiny of a jury trial. Statements in the plurality opinion in *Cheff* v. *Schnackenberg*, 384 U. S. 373, 380 (1966), to the contrary notwithstanding, I do not believe that petitioner could be deprived of his Sixth Amendment right to jury trial, once it attached through the imposition of a substantial sentence, by the subsequent action of the trial court or an appellate court in reducing the sentence.

CODISPOTI ET AL. *v.* PENNSYLVANIA

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

No. 73–5615. Argued March 25, 1974—Decided June 26, 1974

Petitioners, Codispoti and Langnes, were tried before a judge in separate proceedings for contemptuous conduct that allegedly occurred during the course of their criminal trial before another judge, and were found guilty on each of several separate charges. The judge in the contempt proceedings, who refused petitioners' request for a jury trial, imposed consecutive sentences, Codispoti receiving six months for each of six contempts and three months for the seventh (aggregating over three years), and Langnes six months for each of five contempts and two months for the sixth (aggregating close to three years). The Pennsylvania Supreme Court affirmed. This Court granted certiorari limited to questions raising the issue whether petitioners should have been afforded a jury trial. *Held:*

1. Though a crime carrying more than a six-month sentence is a serious offense triable by jury, *Frank* v. *United States*, 395 U. S. 147; *Baldwin* v. *New York*, 399 U. S. 66, an alleged contemnor is not entitled to a jury trial simply because a strong possibility exists that upon conviction he will face a substantial term of imprisonment regardless of the punishment actually imposed. See *Taylor* v. *Hayes*, *ante*, p. 488. P. 512.

2. In the case of post-verdict adjudications of various acts of contempt committed during trial, the Sixth Amendment requires a jury trial if the sentences imposed aggregate more than six months, even though no sentence for more than six months was imposed for any one act of contempt. Pp. 515–517.

453 Pa. 619, 306 A. 2d 294, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, and POWELL, JJ., joined and in Parts I and III of which MARSHALL, J., joined. MARSHALL, J., filed an opinion concurring in part, *post*, p. 518. BLACKMUN, J., filed a dissenting opinion, in which BURGER, C. J., and STEWART and REHNQUIST, JJ., joined, *post*, p. 522. REHNQUIST, J., filed a dissenting opinion, in Part II of which BURGER, C. J., joined, *post*, p. 523.

John J. Dean argued the cause for petitioners. With him on the brief was *George H. Ross*.

Robert L. Eberhardt argued the cause for respondent *pro hac vice.* With him on the brief was *Robert W. Duggan.*

Mr. JUSTICE WHITE delivered the opinion of the Court.*

In December 1966, petitioners Dominick Codispoti and Herbert Langnes were codefendants with Richard Mayberry in a criminal trial ending in a verdict of guilty. Each acted as his own counsel, although legal advice was available from appointed counsel. At the conclusion of the trial, the judge pronounced Mayberry guilty of 11 contempts committed during trial and sentenced him to one to two years for each contempt. Codispoti was given like sentences for each of seven separate contempts. Langnes was sentenced to one to two years on each of six separate citations. Mayberry's total sentence was thus 11 to 22 years, Codispoti's seven to 14 years, and Langnes' six to 12 years. The contempt convictions were affirmed by the Pennsylvania Supreme Court. This Court granted Mayberry's petition for certiorari, 397 U. S. 1020, and vacated the judgment of the Pennsylvania court, directing that "on remand another judge, not bearing the sting of these slanderous remarks and having the impersonal authority of the law, [sit] in judgment on the conduct of petitioner as shown by the record." *Mayberry* v. *Pennsylvania,* 400 U. S. 455, 466 (1971).

The contempt charges against Mayberry and petitioners were then retried in separate proceedings before another trial judge.[1] Codispoti's demand for a jury was

*Part II of the opinion is joined only by MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE POWELL.

[1] The seven contempts charged against Codispoti were:

"1. That while being tried by a jury before Albert A. Fiok, J. on November 18, 1966, he, the defendant, accused the court of

denied. He also moved to subpoena witnesses "to prove that my actions did not disrupt the proceedings, and I intend to prove that my actions [*sic*] was not contemptuous, that it was merely an answer to the provocation made by the presiding Judge." App. 47. This motion was also denied, the court remarking that "this is an issue between the Court and you, and the record will speak for the Court, and you and counsel can speak for yourself." *Ibid.*

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trying to protect the prison authorities by saying, 'Are you trying to protect the prison authorities, Your Honor? Is that your reason?'

"2. That while on trial as aforesaid on November 29, 1966, he, the defendant, accused the court of kowtowing and railroading the defendant into life imprisonment by saying '. . . it is only because the defendants in this case will not sit still and be kowtowed and be railroaded into a life imprisonment.'

"3. That while on trial as aforesaid on November 30, 1966, he, the defendant, called the judge 'Caesar' and accused the court of misconduct by saying, 'You're trying to railroad us.' and '. . . I have never come across such a tyrannical display of corruption in my life.'

"4. That while on trial as aforesaid on December 1, 1966, he, the defendant, addressed the Court in an insolent and derogatory manner by saying, 'Are you going to tell me my codefendant is not crazy? You must be crazy to try me with him.'

"5. That while on trial as aforesaid on December 2, 1966, he, the defendant, accused the Court of criminal conspiracy between it and prison officials by saying, 'I further intend to prove there is a conspiracy between the prison authorities and this Court.'

"6. That while on trial as aforesaid on December 8, 1966, he, the defendant, created a despicable scene and refused to continue with the calling of his witnesses unless the Court ordered a mistrial, and in general creating an uproar, such an uproar as to cause the termination of the trial.

"7. That while on trial as aforesaid on December 9, 1966, he, the defendant, by constant and boisterous and insolent conduct interrupted the Court in its attempts to charge the jury, thereby creating an atmosphere of utter confusion and chaos." App. 33–34.

The trial then proceeded, the State offering into evidence the relevant portions of the transcript of the 1966 criminal proceedings in the course of which the alleged contempts occurred. The State then rested. Codispoti neither testified nor called witnesses. The court found that he had committed the seven contemptuous acts as charged and sentenced him to six months in prison for each of six contempts and a term of three months for another, all of these sentences to run consecutively.

Petitioner Langnes' trial followed a very similar course.[2] He was found guilty of six separate contempts

[2] The six contempts charged against Langnes were:

"1. That while being tried by a jury before Albert A. Fiok, J. on November 28, 1966, he, the defendant, accused the court of conspiracy by saying, 'For the record, before he begins again, I want the record to show this is another proof of conspiracy between this Court and institution.'

"2. That while on trial as aforesaid on November 29, 1966, he, the defendant, threatened to blow the trial judge's head off, by saying, 'If I have to blow your head off, that's exactly what I'll do. I don't give a damn if its on the record or not. If I got to use force, I will. That's what the hell I'm going to do.'

"3. That while on trial as aforesaid on December 1, 1966, he, the defendant, accused and threatened the court by saying, 'Like I told you, you force this trial on me—you going to give me an illegal trial, I told you before what I was going to do to you, and I mean it. Now I refuse to go on with this trial if you are going to railroad me and badger my witnesses, force me to an unfair trial, that is exactly what I am going to do, punk. I'm going to blow your head off. You understand that?'

"4. That while on trial as aforesaid on December 5, 1966, he, the defendant, told the court to 'Go to hell.' and accused the court of misconduct by saying, 'One reason, you obviously have gotten in contact with the local papers to sharpen the hatchet over the heads of the defendants accusing them of causing the taxpayers fifty grand which as a result gave this hearing a prejudicial atmosphere. I would like to state here for the record, and for the papers, if need be, it is not us that is costing the taxpayers money. It is you, Mr.

552-191 O - 76 - 35

and sentenced to five terms of six months each and one term of two months, all to be served consecutively.

The trial court filed an opinion stating that "the only points at issue are the validity of the sentences. The question of guilt of contemptuous conduct has been confirmed by both the Supreme Court of Pennsylvania . . . and by the U. S. Supreme Court . . . , therefore testimony at this hearing was limited to the record." App. 35. The court also held that petitioners were not entitled to a jury trial

> "because the questions of guilt to which the juries' decisions would be limited had already been adjudicated adversely to the Defendants by two appellate courts. Furthermore, in the instant cases no term of imprisonment in excess of six months was imposed for any one offense. The offenses for which sentences were imposed occurred at different times and on different dates." *Id.*, at 36 (footnote omitted).

Maroney, and the Commonwealth that is costing the taxpayers money.'

"5. That while on trial as aforesaid on December 5, 1966, he, the defendant, made scurrilous remarks to the court by saying, 'For the record, I would like to state that as far as my personal opinion is concerned, communist Russia, communist China, and Cuba need men like you. I think wherever you came from you infiltrated the courts and the whole place might as well be communist Russia.'

"6. That while on trial as aforesaid on December 9, 1966, he, the defendant, threatened the life of the court by saying, 'I object to what you did to my two codefendants and I swear on my mother's name that I will keep my promise to you, the two threats I made. Don't worry about me interrupting during your summation. I won't even dignify these stinking proceedings, punk, go to hell, and I will shake hands in hell with you. I will be damned to you.' Also, he, the defendant, said, 'You are a dead man, stone dead. Your Honor.'" App. 30–31.

The Pennsylvania Supreme Court affirmed without opinion, one justice dissenting on the ground that petitioners were entitled to a jury trial. 453 Pa. 619, 306 A. 2d 294. We granted certiorari limited to those questions raising the issue whether petitioners should have been afforded a jury trial. 414 U. S. 1063 (1973).[3]

I

In *Duncan* v. *Louisiana,* 391 U. S. 145 (1968), the Court held that the Fourteenth Amendment guaranteed to defendants in state criminal trials the right to jury trial provided in the Sixth Amendment. In a companion case, *Bloom* v. *Illinois,* 391 U. S. 194 (1968), the Court held that while petty contempts, like other petty crimes, could be tried without a jury, serious criminal contempts had to be tried with a jury if the defendant insisted on this mode of trial. Although the judgment about the seriousness of the crime is normally heavily influenced by the penalty authorized by the legislature, the Court held that where no legislative penalty is specified and sentence is left to the discretion of the judge, as is often true in the case of criminal contempt, the pettiness or seriousness of the contempt will be judged by the penalty actually imposed. Finally, the Court recognized that sentences up to six months could be imposed for criminal

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[3] The questions on which certiorari was granted were stated in the petition, as follows:

"1. Should petitioners receive cumulative sentences for contempt of court imposed at the end of a trial where the total effective sentence received must be used rather than the individual sentences in order to determine the seriousness of the contempt and thereby determine whether the accused should be afforded the right to a jury trial?

"2. Should the strong possibility of a substantial term of imprisonment require that an accused be afforded the right to a jury trial?"

contempt without guilt or innocence being determined by a jury, but a conviction for criminal contempt in a nonjury trial could not be sustained where the penalty imposed was 24 months in prison.

Since that time, our decisions have established a fixed dividing line between petty and serious offenses: those crimes carrying a sentence of more than six months are serious crimes and those carrying a sentence of six months or less are petty crimes. *Frank* v. *United States*, 395 U. S. 147, 149–150 (1969); *Baldwin* v. *New York*, 399 U. S. 66, 69 (1970).[4] Under these cases, we plainly cannot accept petitioners' argument that a contemnor is entitled to a jury trial simply because a strong possibility exists that he will face a substantial term of imprisonment upon conviction, regardless of the punishment actually imposed. See *Taylor* v. *Hayes*, *ante*, p. 488. Our cases, however, do not expressly address petitioners' remaining argument that they were entitled to jury trials because the prison sentences imposed after posttrial convictions for contemptuous acts during trial were to be served con-

[4] In tracing the lineage of the six-month dividing line for purposes of ascertaining whether a jury trial is required under the Sixth Amendment, MR. JUSTICE REHNQUIST's dissent implicitly questions the authenticity of this rule. Putting aside whether the "constitutional rule of *Bloom*" ever "evolved" into the present rule, it is sufficient to note that although only three Members of the Court explicitly embraced the six-month demarcation point in *Baldwin* v. *New York*, 399 U. S. 66 (1970), Mr. Justice Black and MR. JUSTICE DOUGLAS concurred in the judgment. While reading the Sixth Amendment to require a jury trial for "all crimes," they expressed the view that imprisonment for more than six months would certainly necessitate a jury trial. Five Members of the Court out of the eight participating therefore agreed that, at the very least, the Sixth Amendment requires a jury trial in all criminal prosecutions where the term of imprisonment authorized by statute exceeds six months.

secutively and, although each was no more than six months, aggregated more than six months in jail.[5]

II

There are recurring situations where the trial judge, to maintain order in the courtroom and the integrity of the trial process in the face of an "actual obstruction of justice," *In re McConnell,* 370 U. S. 230, 236 (1962); see also *In re Little,* 404 U. S. 553, 555 (1972), convicts and sentences the accused or the attorneys for either side for various acts of contempt as they occur.

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[5] My Brother REHNQUIST submits that petitioners are not entitled to a jury trial because they were originally tried and convicted of contempt in 1966, two years before this Court's decisions in *Duncan* v. *Louisiana,* 391 U. S. 145 (1968), and *Bloom* v. *Illinois,* 391 U. S. 194 (1968), which we held in *DeStefano* v. *Woods,* 392 U. S. 631 (1968), should receive only prospective application. His dissent finds further support for its conclusion in *Jenkins* v. *Delaware,* 395 U. S. 213 (1969), where the Court held that *Miranda* v. *Arizona,* 384 U. S. 436 (1966), did not apply to persons whose retrials had commenced after the date of the *Miranda* decision if their original trials had begun before that date. This view, however, represents a fundamental misreading of the reach of these decisions and their applicability to the peculiar circumstances of this case. *DeStefano* unmistakably stated that "we will not reverse state convictions *for failure to grant jury trial where trials began* prior to May 20, 1968, the date of this Court's decisions in *Duncan* v. *Louisiana* and *Bloom* v. *Illinois.*" 392 U. S., at 635 (emphasis added). *DeStefano* did not exempt from the jury-trial requirement trials beginning after that date, and here petitioners' convictions occurred in a trial that began over three and one-half years after the *Duncan* and *Bloom* decisions. The boundaries for the retroactive impact of *Duncan* and *Bloom* were advisedly established, for the jury-trial requirement, by definition, relates to *trials,* not to uncorrectable police conduct which occurred prior to trial and which, if illegal, would preclude the use of perhaps critical evidence gathered in reliance on then-existing law. *Jenkins* v. *Delaware* involved the latter considerations and has little bearing here.

Undoubtedly, where the necessity of circumstances warrants, a contemnor may be summarily tried for an act of contempt during trial and punished by a term of no more than six months. Nor does the judge exhaust his power to convict and punish summarily whenever the punishment imposed for separate contemptuous acts during trial exceeds six months. Cf. *United States* v. *Seale*, 461 F. 2d 345, 355 (CA7 1972).

Bloom v. *Illinois*, *supra*, recognized, as cases in this Court have consistently done, "the need to maintain order and a deliberative atmosphere in the courtroom. The power of a judge to quell disturbance cannot attend upon the impaneling of a jury." 391 U. S., at 210.

> "[A] criminal trial, in the constitutional sense, cannot take place where the courtroom is a bedlam . . . . A courtroom is a hallowed place where trials must proceed with dignity . . . ." *Illinois* v. *Allen*, 397 U. S. 337, 351 (1970) (separate opinion of DOUGLAS, J.).

See also N. Dorsen & L. Friedman, Disorder in the Court: Report of the Association of the Bar of the City of New York, Special Committee on Courtroom Conduct 10–23 (1973); Burger, The Necessity for Civility, 52 F. R. D. 211, 214–215 (1971).

> "To allow the disruptive activities of a defendant . . . to prevent his trial is to allow him to profit from his own wrong. The Constitution would protect none of us if it prevented the courts from acting to preserve the very processes that the Constitution itself prescribes." *Illinois* v. *Allen*, *supra*, at 350 (BRENNAN, J., concurring).

More recently, in *Mayberry* v. *Pennsylvania*, *supra*, we again noted that a judge, when faced with the kind of conduct there at issue, "could, with propriety, have

instantly acted, holding petitioner in contempt . . . ." 400 U. S., at 463. That the total punishment meted out during trial exceeds six months in jail or prison would not invalidate any of the convictions or sentences, for each contempt has been dealt with as a discrete and separate matter at a different point during the trial.

III

When the trial judge, however, postpones until after trial the final conviction and punishment of the accused or his lawyer for several or many acts of contempt committed during the trial, there is no overriding necessity for instant action to preserve order and no justification for dispensing with the ordinary rudiments of due process. *Mayberry* v. *Pennsylvania, supra,* at 463–464; *Groppi* v. *Leslie,* 404 U. S. 496, 499–507 (1972); *Taylor* v. *Hayes, ante,* at 497. Moreover, it is normally the trial judge who, in retrospect, determines which and how many acts of contempt the citation will cover. It is also he or, as is the case here, another judge who will determine guilt or innocence absent a jury, who will impose the sentences and who will determine whether they will run consecutively or concurrently. In the context of the post-verdict adjudication of various acts of contempt, it appears to us that there is posed the very likelihood of arbitrary action that the requirement of jury trial was intended to avoid or alleviate. Cf. *ibid.*

The jury-trial guarantee reflects "a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." *Duncan* v. *Louisiana,* 391 U. S., at 155 (footnote omitted). The Sixth Amendment represents a "deep commitment of the Nation to the right of

jury trial in serious criminal cases as a defense against arbitrary law enforcement . . . ." *Id.*, at 156. Moreover,

> "criminal contempt is a crime in every fundamental respect . . . . [I]n terms of those considerations which make the right to jury trial fundamental in criminal cases, there is no substantial difference between serious contempts and other serious crimes. Indeed, in contempt cases an even more compelling argument can be made for providing a right to jury trial as a protection against the arbitrary exercise of official power. Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament. Even when the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority, or an interference with the judicial process or with the duties of officers of the court." *Bloom* v. *Illinois*, 391 U. S., at 201–202.

In the case before us, the original trial judge filed the contempt charges against these petitioners, while another judge tried them and imposed the sentences. Because the latter had the power to impose consecutive sentences, as he did here, guilt or innocence on the individual charges bore heavily on the ultimate sentence and was of critical importance. Here the contempts against each petitioner were tried seriatim in one proceeding, and the trial judge not only imposed a separate sentence for each contempt but also determined that the individual sentences were to run consecutively rather than concurrently, a ruling which necessarily extended the prison term to be served beyond that allowable for a petty criminal offense. As a result of this single proceeding, Codispoti was sentenced to three years and three months for his seven contemptuous acts, Langnes to two years and eight

months for his six contempts. In terms of the sentence imposed, which was obviously several times more than six months, each contemnor was tried for what was equivalent to a serious offense and was entitled to a jury trial.

We find unavailing respondent's contrary argument that petitioners' contempts were separate offenses and that, because no more than a six months' sentence was imposed for any single offense, each contempt was necessarily a petty offense triable without a jury. Notwithstanding respondent's characterization of the proceeding, the salient fact remains that the contempts arose from a single trial, were charged by a single judge, and were tried in a single proceeding. The individual sentences imposed were then aggregated, one sentence taking account of the others and not beginning until the immediately preceding sentence had expired.

Neither are we impressed with the contention that today's decision will provoke trial judges to punish summarily during trial rather than awaiting a calmer, more studied proceeding after trial and deliberating "in the cool reflection of subsequent events." *Yates* v. *United States,* 355 U. S. 66, 76 (1957) (footnote omitted). Summary convictions during trial that are unwarranted by the facts will not be invulnerable to appellate review. Cf. *Sacher* v. *United States,* 343 U. S. 1, 9, 13 (1952).[6]

Nor can we accept the trial court's view that the question of petitioners' guilt on the contempt charges had already been conclusively adjudicated in this Court. Our decision in *Mayberry* v. *Pennsylvania, supra,* although expressing strong condemnation of Mayberry's conduct,

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[6] "When constitutional rights turn on the resolution of a factual dispute we are duty bound to make an independent examination of the evidence in the record. See, *e. g., Edwards* v. *South Carolina,* 372 U. S. 229, 235; *Blackburn* v. *Alabama,* 361 U. S. 199, 205, n. 5." *Brookhart* v. *Janis,* 384 U. S. 1, 4 n. 4 (1966).

which we reaffirm, did not purport to affirm Mayberry's contempt conviction. On the contrary, the judgment affirming the conviction was vacated and a new trial required before a different judge who was to sit "in judgment on the conduct of petitioner as shown by the record." 400 U. S., at 466.

The judgment of the Pennsylvania Supreme Court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

So ordered

MR. JUSTICE MARSHALL, concurring in part.

I concur in the judgment of the Court, and in Parts I and III of the Court's opinion. However, I cannot join Part II of the opinion, which suggests that the trial judge in a situation such as we have here could impose an unlimited number of separate, consecutive six-month sentences upon a defendant "for separate contemptuous acts during trial," so long as the judge convicts and punishes summarily upon the occurrence of each contemptuous act. In my view, the Sixth Amendment right to jury trial would be equally applicable to this situation.

I

The Court's opinion observes that "[t]he Sixth Amendment represents a 'deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement.' " *Ante*, at 515–516, quoting *Duncan* v. *Louisiana*, 391 U. S. 145, 156 (1968). The opinion further recognizes that it is the trial judge who in a single proceeding acts as prosecutor, "determin[ing] which and how many acts of contempt the citation will cover"; as trier of fact, "determin[ing] guilt or innocence absent a jury"; and as judge, "impos[ing] the sentences and . . . determin[ing] whether they will run con-

secutively or concurrently." *Ante*, at 515. Thus, the Court concludes, "there is posed the very likelihood of arbitrary action that the requirement of jury trial was intended to avoid or alleviate." *Ibid.* I agree. But I completely fail to see how there is any less likelihood of such arbitrary action by a judge when he acts summarily to punish each allegedly contemptuous act by a defendant as it occurs, rather than awaiting the end of trial to try the contempts. Indeed, the suggestion provides an incentive for a trial judge to act in the heat of the moment, and thus encourages the very arbitrary action which it is the purpose of the Sixth Amendment to eliminate.

We have held that a six-month sentence is the constitutional dividing line between serious offenses for which trial by jury must be afforded and petty offenses, and that in contempt cases it is the sentence actually imposed rather than the penalty authorized by law which is determinative. Accordingly, the Court today holds that Codispoti and Langnes are constitutionally entitled to a jury trial because "[i]n terms of the sentence imposed, which was obviously several times more than six months, each contemnor was tried for what was equivalent to a serious offense." *Ante*, at 517. The Court rejects the State's argument that the individual contempts were separate offenses for Sixth Amendment purposes by pointing out that the contempts arose from a single trial, that they were charged by a single judge, and that the individual sentences were then aggregated. With all due respect, the same would be true if the judge had imposed summary punishment as the contemptuous acts occurred. Where the contemptuous acts arose out of a single course of conduct by the defendant, I think that they should be treated as a single serious offense for which the Sixth Amendment requires a jury trial, whether the judge seeks

to use his summary contempt power in individual instances during trial or tries the contempts together at the end of trial. See N. Dorsen & L. Friedman, Disorder in the Court: Report of the Association of the Bar of the City of New York, Special Committee on Courtroom Conduct 222–224 (1973).

The only justification advanced by the Court to support the contrary position is the "overriding necessity for instant action to preserve order." *Ante*, at 515. But we rejected this very argument in *Bloom* v. *Illinois*, 391 U. S. 194, 209–210 (1968). There, too, it was suggested that an exception to the constitutional rule requiring jury trial in serious contempt cases should be made for contempts committed in the presence of the judge because of "the need to maintain order and a deliberative atmosphere in the courtroom." Although we acknowledged that there was a "strong temptation" to do so, we held that the need to maintain order was not sufficient to justify an exception to the constitutional requirement.

II

Equally important, I am convinced that there is no "overriding necessity" for repeated use of the summary contempt power against a criminal defendant to maintain order in the courtroom. No clearer statement of the problem of courtroom disorder and its solution can be found than Mr. Justice Black's statement in *Illinois* v. *Allen*, 397 U. S. 337, 343–344 (1970):

> "It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly

> defiant defendants must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations. We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly."

The Court in *Allen* set out three alternative ways of dealing with courtroom disorder. Today my Brothers single out one of these three alternatives and sanction the use of seriatim judge-imposed six-month sentences to maintain order and a deliberative atmosphere in the courtroom because of the necessity for this remedy. There is nothing in *Allen,* however, that approves a succession of judge-imposed six-month contempt citations in one trial, and I have been unable to find any of our cases giving such specific authorization. This is too big a step to take where such a positive declaration of law is not necessary for the decision of the case at hand.

The availability of the other remedies set forth in *Allen* is persuasive proof that courtroom disorder can be effectively dealt with without the use of repeated summary contempts resulting in lengthy jail terms. See N. Dorsen & L. Friedman, *supra,* at 235. Indeed, repeated contempt citations are probably the least effective way to deal with the problem. The very fact that a series of contempt citations has failed to check the defendant's contemptuous acts and restore a deliberative atmosphere in the courtroom itself demonstrates that another citation is unlikely to do so. Either of the other two alternatives set forth in *Allen* would correct rather than prolong the disruptions of an orderly trial. Rather than permit the

use of repeated contempt citations resulting in a sentence of over six months, *Allen* suggests that after an initial warning, see 397 U. S., at 350 (BRENNAN, J., concurring), the next disruption could be punished with a contempt citation and a six-month sentence, plus a firm warning that any further disruption will be followed by binding or gagging the defendant or removing him from the courtroom until he promises to conduct himself properly. This approach would be more effective in maintaining that "dignity, order, and decorum" of which Mr. Justice Black spoke in *Allen* than successive contempt citations after future disruptions, without running afoul of the Sixth Amendment's right to jury trial.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST join, dissenting.

In *Bloom* v. *Illinois*, 391 U. S. 194 (1968), this Court established a constitutional right to a jury trial of a charge for a criminal contempt where the penalty imposed exceeded six months. There the contempt consisted of a lawyer's filing a spurious will for probate. It was not a direct contempt in open court. Where, as in *Bloom*, the criminal contempt takes place outside the presence of the court, there is little to distinguish the contempt, for purposes of using a jury as the factfinder, from the run-of-the-mill criminal offense. In this respect, the result in *Bloom* was a logical one.

In the present case, however, the contempt took place in open court and the incident and all its details are fully preserved on the trial record. The Court's opinion does not specify and leaves unclear what facts, if any, remain to be determined. I am at a loss, therefore, to see the role a jury is to perform. The perceived need to remove

the case from the contemned judge is fully served by assigning the case to a different judge. See *Taylor* v. *Hayes, ante,* p. 488; *Mayberry* v. *Pennsylvania,* 400 U. S. 455 (1971). And, as MR. JUSTICE REHNQUIST points out, since the new judge, not the jury, will impose the sentence, there is nothing the jury can do by way of mitigating an excessive punishment.

The determination of whether basically undisputed facts constitute a direct criminal contempt is a particularly inappropriate task for the jury. Before today, this determination has always been the exclusive province of the court, not the jury, and never before has this Court required a jury trial in a case involving a direct contempt.* Since I believe, as a practical matter, that there is no function for a jury to serve in a case such as this, I do not join the Court's extension of *Bloom* to include direct, in-court contempts. I, therefore, respectfully dissent.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins as to Part II, dissenting.†

These two cases are graphic illustrations of the manner in which constitutional limitations on the power of a trial judge to summarily punish for contempt have been fashioned virtually out of whole cloth by this Court in

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*In *Bloom* v. *Illinois,* 391 U. S. 194, 210 (1968), the Court acknowledged "a strong temptation to make exception to the rule we establish today for disorders in the courtroom." Although wholly unnecessary to its decision, the Court there resisted that temptation and declined to recognize the exception. In my opinion, the result in *Bloom,* an out-of-court contempt, does not lead inevitably to the result reached today in Codispoti's case, and I decline to follow *Bloom*'s dictum that carries the contrary implication.

†[This opinion applies also to No. 73–473, *Taylor* v. *Hayes, ante,* p. 488.]

the course of only 20-odd years. In *Sacher* v. *United States*, 343 U. S. 1 (1952), the Court, speaking through Mr. Justice Jackson, said:

> "Summary punishment always, and rightly, is regarded with disfavor and, if imposed in passion or pettiness, brings discredit to a court as certainly as the conduct it penalizes. But the very practical reasons which have led every system of law to vest a contempt power in one who presides over judicial proceedings also are the reasons which account for it being made summary. . . . The rights and immunities of accused persons would be exposed to serious and obvious abuse if the trial bench did not possess and frequently exert power to curb prejudicial and excessive zeal of prosecutors. The interests of society in the preservation of courtroom control by the judges are no more to be frustrated through unchecked improprieties by defenders." *Id.*, at 8.

The Court's decisions today are the culmination of a recent trend of constitutional innovation which virtually emasculates this historic power of a trial judge. If the Court's holdings in this area were the product of any new historical insight into the meaning of the Fourteenth Amendment, or if indeed they could be regarded as a desirable progression toward a reign of light and law, even though of dubious constitutional ancestry, there would be less occasion for concern. But from the hodgepodge of legal doctrine embodied in these decisions, which have irretrievably blended together constitutional guarantees of jury trial in criminal cases, constitutional guarantees of impartial judges, and fragments of the law of contempt in federal courts, the only consistent thread which emerges is this Court's inveterate propensity to second-guess the trial judge.

I

In *Taylor* v. *Hayes, ante,* p. 488, the Court holds, squarely contrary to the holding in *Sacher, supra,* that the respondent trial judge was not entitled to proceed summarily against petitioner, even though all of the conduct in question occurred in the presence of respondent. The Court apparently concludes that since respondent did not sentence petitioner until after the proceedings at issue were completed, and at that point refused to permit petitioner to respond, petitioner's due process rights were violated.

This conclusion is completely at odds with *Sacher.* That case involved the contempt convictions of various defense counsel as an aftermath of the trial of various Communist Party leaders on charges of violating the Smith Act. Upon receiving the guilty verdict, Judge Medina of the Southern District of New York at once filed a certificate under Fed. Rule Crim. Proc. 42 (a), finding various defense counsel, including one defendant who had represented himself, guilty of contempt. Federal Rule Crim. Proc. 42 (a) provided then, as it does now, that "[a] criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record." The contemnors argued that since Judge Medina had waited until the end of the trial to sentence them, the power of summary punishment for direct contempts under Rule 42 (a) had expired, and the provisions of Rule 42 (b) requiring notice and hearing became applicable. This Court in *Sacher* rejected that contention:

> "The Rule in question contemplates that occasions may arise when the trial judge must immediately

552-191 O - 76 - 36

arrest any conduct of such nature that its continuance would break up a trial, so it gives him power to do so summarily. But the petitioners here contend that the Rule not only permits but requires its instant exercise, so that once the emergency has been survived punishment may no longer be summary but can only be administered by the alternative method allowed by Rule 42 (b). We think 'summary' as used in this Rule does not refer to the timing of the action with reference to the offense but refers to a procedure which dispenses with the formality, delay and digression that would result from the issuance of process, service of complaint and answer, holding hearings, taking evidence, listening to arguments, awaiting briefs, submission of findings, and all that goes with a conventional court trial. The purpose of that procedure is to inform the court of events not within its own knowledge. The Rule allows summary procedure only as to offenses within the knowledge of the judge because they occurred in his presence.

". . . To summon a lawyer before the bench and pronounce him guilty of contempt is not unlikely to prejudice his client. It might be done out of the presence of the jury, but we have held that a contempt judgment must be public. Only the naive and inexperienced would assume that news of such action will not reach the jurors. If the court were required also then to pronounce sentence, a construction quite as consistent with the text of the Rule as petitioners' present contention, it would add to the prejudice. . . ." 343 U. S., at 9–10.

At no point did the Court in *Sacher* suggest that the procedures set forth in Rule 42 (a) were subject to any constitutional infirmity. Yet by the decision in *Taylor*

v. *Hayes,* the Court has now held that procedures upheld within the unitary confines of the federal court system only two decades ago may not now be constitutionally employed by a State. The decision in *Taylor* will surely come as something of a shock to federal judges who must now decide whether they may constitutionally utilize the provisions of Fed. Rule Crim. Proc. 42 (a) in punishing direct contempts.

Our prior decisions have continuously adhered to the view that "[w]here the contempt is committed directly under the eye or within the view of the court, it may proceed 'upon its own knowledge of the facts, and punish the offender, without further proof, and without issue or trial in any form.'" *In re Savin,* 131 U. S. 267, 277 (1889), quoting *Ex parte Terry,* 128 U. S. 289, 309 (1888). See *Cooke* v. *United States,* 267 U. S. 517, 535 (1925); *Fisher* v. *Pace,* 336 U. S. 155, 159–160 (1949).[1] It is only when the contempt is not a direct one, *i. e.,* observed

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[1] See also the more than 50 cases cited in *United States* v. *Barnett,* 376 U. S. 681, 694 n. 12 (1964).

The Court in *Ex parte Terry,* 128 U. S. 289 (1888), stated:

"We have seen that it is a settled doctrine in the jurisprudence both of England and of this country, never supposed to be in conflict with the liberty of the citizen, that for direct contempts committed in the face of the court, at least one of superior jurisdiction, the offender may, in its discretion, be instantly apprehended and immediately imprisoned, without trial or issue, and without other proof than its actual knowledge of what occurred; and that, according to an unbroken chain of authorities, reaching back to the earliest times, such power, although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions. Without it, judicial tribunals would be at the mercy of the disorderly and violent, who respect neither the laws enacted for the vindication of public and private rights, nor the officers charged with the duty of administering them." *Id.,* at 313.

See also *Cooke* v. *United States,* 267 U. S., at 534.

by the judge himself, that the power to proceed summarily becomes subject to some qualification. *In re Oliver*, 333 U. S. 257, 274–276 (1948).

Groppi v. *Leslie*, 404 U. S. 496 (1972), relied upon by the Court, was a wholly different case from *Taylor*. In *Groppi*, the Assembly of the Wisconsin Legislature passed a resolution citing the petitioner there for contempt of that body, which had allegedly occurred two days previously. This Court reversed that conviction because petitioner had not been afforded adequate notice and hearing. The Court in *Groppi* noted that *Sacher* was a different case because it involved courtroom contempts by lawyers, with repeated warnings by the judge, and an opportunity on their behalf to speak. *Taylor* is no different from *Sacher;* respondent judge repeatedly warned petitioner of his contemptuous conduct, and when he informed petitioner that he was in contempt permitted petitioner an opportunity to speak. Indeed, the Court in *Taylor* indicates that it agrees with the Kentucky Court of Appeals that " '[t]he contempt citations and the sentences coming at the end of the trial were not and could not have been a surprise to Taylor, because upon each occasion and immediately following the charged act of contempt the court informed Taylor that he was at that time in contempt of court.' " *Ante*, at 496–497, quoting 494 S. W. 2d 737, 741–742 (Ky. 1973).

Even were I in agreement with the Court's conclusion that Taylor's contempt conviction should be reversed, I nevertheless could not join in the holding that if petitioner is to be tried again, he may not be tried by respondent. While conceding that petitioner's conduct did not constitute the kind of personal attack on respondent that would prevent the latter from maintaining the calm detachment necessary for fair adjudication, *Mayberry* v. *Pennsylvania*, 400 U. S. 455 (1971), the Court holds that "it appears to us that respondent did become

embroiled in a running controversy with petitioner." *Ante,* at 501. This portion of the Court's holding can only be described as a total repudiation of the principle laid down in *Sacher:*

> "A construction of the Rule is advocated which would deny a judge power summarily to punish a contempt that is personal to himself except, perhaps, at a moment when it is necessary to forestall abortion of the trial. His only recourse, it is said, is to become an accuser or complaining witness in a proceeding before another judge.
>
> "The Rule itself expresses no such limitation, and the contrary inference is almost inescapable. *It is almost inevitable that any contempt of a court committed in the presence of the judge during a trial will be an offense against his dignity and authority.* At a trial the court is so much the judge and the judge so much the court that the two terms are used interchangeably in countless opinions in this Court and generally in the literature of the law, and contempt of the one is contempt of the other. *It cannot be that summary punishment is only for such minor contempts as leave the judge indifferent and may be evaded by adding hectoring, abusive and defiant conduct toward the judge as an individual. Such an interpretation would nullify, in practice, the power it purports to grant."* 343 U. S., at 11–12 (emphasis added).

The Court in *Sacher* was interpreting the language of Fed. Rule Crim. Proc. 42 (a), and, without the slightest suggestion that there might be constitutional infirmities in such procedures, refused to require retrial of the contemnors there before a different judge. Twelve years later, in a state case, *Ungar* v. *Sarafite,* 376 U. S. 575

(1964), the Court reaffirmed the principles of *Sacher*, in the face of an argument that the Constitution required something different. The Court in *Ungar* indicated that it was "unwilling to bottom a constitutional rule of disqualification solely upon . . . disobedience to court orders and criticism of its rulings during the course of a trial. . . . We cannot assume that judges are so irascible and sensitive that they cannot fairly and impartially deal with resistance to their authority or with highly charged arguments about the soundness of their decisions." *Id.*, at 584.

Taylor is not a federal case, where this Court, in the exercise of some perceived wisdom of the appropriate policy to be followed in the administration of justice in the federal courts, see *Offutt* v. *United States*, 348 U. S. 11 (1954); *Cooke* v. *United States*, 267 U. S. 517 (1925), may require retrial before another judge. By holding in *Taylor* that the respondent judge should be disqualified from trying petitioner's contempt, the Court has now adopted the very constitutional rule it disavowed in *Ungar* v. *Sarafite, supra*, and found not even worthy of mention in *Sacher*. In *Mayberry* v. *Pennsylvania, supra*, a case in which the defendant's conduct was so extraordinary that even the Court apparently concedes it affords no precedent for today's decision in *Taylor*, the Court was at pains to state that "[a] judge cannot be driven out of a case." 400 U. S., at 463. Yet the teaching of *Mayberry*, and of today's decision in *Taylor*, is precisely the opposite: a judge *can* be driven out of a case by any counsel sufficiently astute to read the new-found constitutional principles enunciated in these decisions. Whether as a matter of policy the added procedural rights conferred upon contemptuous lawyers are worth the sacrifice of the historic authority of the trial judge to control proceedings in his court may be open to debate,

the total absence of any basis in the Fourteenth Amendment for the result which the Court reaches in *Taylor* v. *Hayes,* is to me clear beyond any doubt. Accordingly, I dissent from the Court's reversal of the conviction in that case.[2]

II

The *Codispoti* litigation in this Court is worthy of a chapter in Charles Dickens' Bleak House. Codispoti and Langnes were codefendants with the petitioner in *Mayberry* v. *Pennsylvania,* 400 U. S. 455 (1971), on contempt charges in the Pennsylvania courts and were apparently beneficiaries of this Court's judgment of reversal in that case.[3] The Court's concluding language in its opinion in that case was that "on remand another judge, not

[2] I agree with the Court's conclusion that Taylor was not entitled to a jury trial on the contempt charges.

[3] These petitioners were originally convicted in 1966 of criminal contempt of a Pennsylvania state court. Their codefendant in those proceedings was Richard Mayberry, who was also convicted of contempt. From the affirmance of those convictions by the Supreme Court of Pennsylvania, 434 Pa. 478, 255 A. 2d 131 (1969), only Mayberry sought review in this Court. In *Mayberry* v. *Pennsylvania,* 400 U. S. 455 (1971), this Court reversed Mayberry's conviction and remanded for retrial before another Pennsylvania state court judge. Though the record in this Court is unclear how it came about, Pennsylvania somehow made both Codispoti and Langnes the beneficiaries of the remand in *Mayberry.* They were thus retried on newly filed charges of criminal contempt, before another judge; they were again convicted, and on subsequent appeal to the appellate courts of Pennsylvania, their convictions were affirmed. It is clear, however, that the reversal of Mayberry's conviction and remand to the Pennsylvania courts for retrial, was not intended by *this* Court to disturb the original convictions of Codispoti and Langnes, nor to award them a retrial in the Pennsylvania courts. Whether or not petitioners here may, without further trial, now be incarcerated pursuant to the sentences imposed in the first contempt trial and affirmed on appeal by the Pennsylvania courts is, presumably, a matter of Pennsylvania law.

bearing the sting of these slanderous remarks and having the impersonal authority of the law [sit] in judgment on the conduct of petitioner as shown by the record." *Id.*, at 466. Pennsylvania carried out this mandate to the letter, and, as the Court points out in its opinion, Codispoti and Langnes were tried before a different judge, and received on retrial substantially more lenient sentences than had been imposed in the first instance. Nonetheless, the Court in its *Codispoti* opinion today, without so much as batting an eye, now decides that these petitioners were entitled to a jury trial. If that were the case, and *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), and *Bloom* v. *Illinois*, 391 U. S. 194 (1968), each decided three years before *Mayberry*, require such a result, it would seem to have been appropriate to so indicate in *Mayberry*.

In holding that *Duncan* and *Bloom* require a jury trial for the petitioners in *Codispoti*, the Court does not sufficiently distinguish the analogous case of *Jenkins* v. *Delaware*, 395 U. S. 213 (1969), which at the very least strongly suggests that petitioners were not entitled to a jury trial upon their retrial for contempt. In *Jenkins*, the petitioner had been convicted in a state court of murder and burglary. During the pendency of his appeal in the Supreme Court of Delaware, this Court decided *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and *Johnson* v. *New Jersey*, 384 U. S. 719 (1966), which held that the decision in *Miranda* "applies only to cases in which the *trial* began after the date of [the *Miranda*] decision . . . ." *Id.*, at 721 (emphasis added). In reversing the petitioner's conviction on various state grounds, the Supreme Court of Delaware also determined, *sua sponte*, that under *Johnson* v. *New Jersey*, *supra*, a statement obtained from petitioner without fully advising him of his constitutional rights would be admissible at his

retrial. Petitioner was retried and convicted of second-degree murder, and the Supreme Court of Delaware again affirmed. This Court affirmed the conviction, rejecting petitioner's argument that the statement should have been excluded from evidence. We held that the *Miranda* standards do not apply to persons whose *retrials* have commenced after the date of that decision if their original trials had begun before that date.

Codispoti is a substantially similar case. Codispoti and Langnes were originally tried and convicted of criminal contempt in 1966. This Court did not decide *Duncan* v. *Louisiana, supra,* and *Bloom* v. *Illinois, supra,* until May 20, 1968. And in *DeStefano* v. *Woods,* 392 U. S. 631 (1968) (*per curiam*), the Court held that the decisions in *Duncan* and *Bloom* would not retroactively apply to "trials [begun] prior to May 20, 1968." *Id.,* at 635. Since the original trial of these petitioners began prior to the date of the decisions in *Duncan* and *Bloom,* under *DeStefano* they would not have been entitled to the benefit of those rulings at their original trials. And *Jenkins* v. *Delaware, supra,* certainly suggests that since petitioners' original trial began prior to the decisons in *Duncan* and *Bloom,* they should not receive the benefit of those cases upon their retrial. The Court's rejoinder is that *Duncan* and *Bloom* are different cases because they involve jury trials instead of "uncorrectable police conduct which occurred prior to trial and which, if illegal, would preclude the use of perhaps critical evidence gathered in reliance on then-existing law." But our decision in *Johnson* v. *New Jersey, supra,* that *Miranda* was to have only prospective application did not turn on when the police conduct at issue occurred, but instead on when the *trial of the defendant* occurred. The Court does not tell us why the retrial rule of *Jenkins* v. *Delaware, supra,* is not equally applicable to the jury-trial requirements

of *Duncan* and *Bloom*, which *DeStefano* says do not govern where the original *trial* began prior to the date of those decisions.

The Court's decision in *Bloom* v. *Illinois*, *supra*, marked a sharp departure from prior constitutional holdings under the Fourteenth Amendment. Even were it clear that petitioners were entitled to the benefit of *Bloom* on retrial, final acceptance of *Bloom*'s holding as governing *Codispoti* would first warrant examination as to its practical effects. Bloom, an attorney, was charged with contempt of a state court for having filed a spurious will for probate. *Bloom* was a classic case of "indirect contempt," one which occurred outside of the presence of the court, and Bloom was accorded a full trial before the court. Evidence was received tending to show that a third party had engaged Bloom to draw a will after the death of the putative testator; Bloom was convicted of contempt by the court, and was sentenced to two years' imprisonment. Under Illinois law, no maximum punishment was provided for convictions for criminal contempt. This Court, relying on *Duncan* v. *Louisiana*, *supra*, held that where state law did not provide a maximum punishment for criminal contempt, the Fourteenth Amendment required that the penalty actually imposed on the contemnor be the constitutional indicator of the seriousness of the offense and the right of jury trial defined by *Duncan*. Since *Duncan* held that a prosecution for a crime with a maximum penalty of two years was one for a serious offense within the terms of the Sixth and Fourteenth Amendments, the Court held that Bloom was entitled to a jury trial on the contempt charges.

As the Court's opinion today in *Taylor* v. *Hayes*, *ante*, at 495–496, makes clear, the constitutional rule of *Bloom* has now evolved into a rule whereby a contemnor must be

afforded a jury trial where either a penalty over six months is authorized by statute or where the penalty actually imposed exceeds six months. Presumably, the case-law support for this conclusion is *Duncan* v. *Louisiana, supra,* and *Baldwin* v. *New York,* 399 U. S. 66 (1970), since we deal here, not with a federal case, where this Court, in the exercise of supervisory authority over the administration of justice in the federal courts, has applied this six-month rule, see *Cheff* v. *Schnackenberg,* 384 U. S. 373 (1966), but with a state case where only the Constitution may dictate such a rule. *Duncan* v. *Louisiana, supra,* was a 7–2 opinion which held that where the crime for which a state court defendant was tried was punishable by a two-year sentence, the Fourteenth Amendment required the application of the Sixth Amendment guarantee of jury trial in serious criminal cases to state prosecutions. Mr. Justice Harlan, in dissent, joined by MR. JUSTICE STEWART, forcefully argued that there was no indication that the drafters of the Fourteenth Amendment intended to make the Sixth Amendment applicable to the States. See Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949); Morrison, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation, 2 Stan. L. Rev. 140 (1949). *Baldwin* v. *New York, supra,* of course, was a plurality opinion of three Members of this Court, which extended the constitutional jury-trial rule of *Duncan* v. *Louisiana, supra,* to any state criminal offense where the penalty permitted was over six months. Mr. Justice Harlan, MR. CHIEF JUSTICE BURGER, and MR. JUSTICE STEWART dissented.

The Court in *Codispoti* woodenly applies this six-month rule to the facts of that case, without any regard to the significant differences between *Codispoti* and

Bloom, and without regard to the import of its decision. In applying this six-month rule of dubious constitutional origin to consecutive sentences on counts of six months or less, it appears that the *Baldwin* plurality's proposition that six months is the constitutional *sine qua non* of the jury-trial requirement under the Fourteenth Amendment now commands a majority of this Court almost *sub silentio* by passage of time rather than by force of reason.

Codispoti and Langnes were convicted on their retrial of various separate contemptuous acts and were sentenced for each act to terms of six months or less, with the direction that the sentences be served consecutively. The contemnor in *Bloom* was sentenced to two years for one contemptuous act. Bloom's contempt was an indirect one, and he was entitled under Illinois law to the normal rights of any trial defendant save only the right to a jury trial. By awarding him a constitutional right to a jury trial, this Court in effect required that the fact-finding function be transferred from the judge to a jury. Whether right or wrong as a matter of constitutional law, the holding in *Bloom* was at least intelligible. But the contempts of Codispoti and Langnes were direct, committed in the presence of the trial judge. Upon retrial after our decision in *Mayberry, supra,* the case was tried before another Pennsylvania judge on the basis of the certificate of contempt filed by the judge who had presided at the original criminal trial of Mayberry, Codispoti, and Langnes. It does not appear that either Codispoti or Langnes seriously challenged the factual allegations in the certificate of contempt, and it would seem fair to surmise that this lack of factual dispute is typical of a trial based on a certificate of direct contempt.

The Court's opinion in *Bloom* spoke of the seriousness of an offense for which a sentence of more than six

months was imposed, 391 U. S., at 196–197, and it might be thought from the Court's opinion in *Codispoti* today that the jury was in some way expected to mitigate the harshness of the punishment which could be visited upon a contemnor. But there is no indication whatever in the record before us that Pennsylvania law allocates any role in the sentencing of a criminal defendant to the jury. The jury presumably will hear evidence as to relatively undisputed facts, and if it returns a verdict of guilty a sentence will be imposed by a judge trying the case. If it is the length of sentence which is to be the controlling factor in determining whether a jury trial is to be awarded, and the severity of the possible sentence to be imposed by the judge which provides the constitutional basis for requiring a jury trial, the Court's application of *Bloom* to a direct contempt seems questionable for more than one reason. The guarantee of jury trial accorded to these petitioners in no way limits the sentence which may be imposed by the trial judge in those cases where a guilty verdict is returned by the jury. The Court has succeeded only in requiring Pennsylvania to engraft onto its traditional procedures for adjudicating direct contempts a judicial "fifth wheel" without appreciably furthering the constitutional goals enunciated in *Duncan* v. *Louisiana, supra,* and *Bloom* v. *Illinois, supra.*

The application of *Bloom* to the consecutive sentences imposed for the separate contemptuous acts of Codispoti and Langnes is made even more questionable in light of the concession that the result would be different in other fact situations. It is indicated in the Part II opinion that a contemnor "may be summarily tried for an act of contempt during trial and punished by a term of no more than six months. Nor does the judge exhaust his power to convict and punish summarily whenever the

punishment imposed for separate contemptuous acts during trial exceeds six months." *Ante,* at 514. The upshot of this, of course, is that trial judges are surely to be inclined to adjudicate and punish the contempt during the trial rather than awaiting the end of the trial. The answer that is made to this obvious result of the holding is the adjuration that "[s]ummary convictions during trial that are unwarranted by the facts will not be invulnerable to appellate review." *Ante,* at 517. What this statement portends for the future of the Court's inveterate propensity to second-guess trial judges is, as they say, "anybody's guess."

I dissent from the Court's reversal of the convictions in *Codispoti* v. *Pennsylvania.*

Syllabus

WOLFF, WARDEN, ET AL. *v.* McDONNELL

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

No. 73-679. Argued April 22, 1974—Decided June 26, 1974

Respondent, on behalf of himself and other inmates at a Nebraska prison, filed a complaint for damages and injunctive relief under 42 U. S. C. § 1983, in which he alleged that disciplinary proceedings at the prison violated due process; that the inmate legal assistance program did not meet constitutional standards; and that the regulations governing inmates' mail were unconstitutionally restrictive. After an evidentiary hearing, the District Court granted partial relief. Though rejecting respondent's procedural due process claim, the court held that the prison's policy of inspecting all attorney-prisoner mail was improper but that restrictions on inmate legal assistance were not constitutionally defective. The Court of Appeals reversed with respect to the due process claim, holding that the procedural requirements outlined in the intervening decisions in *Morrissey* v. *Brewer,* 408 U. S. 471, and *Gagnon* v. *Scarpelli,* 411 U. S. 778, should be generally followed in prison disciplinary hearings, but leaving the specific requirements (including the circumstances in which counsel might be required) to be determined by the District Court on remand. The Court of Appeals further held that *Preiser* v. *Rodriguez,* 411 U. S. 475, forbade restoration of good-time credits in a § 1983 suit but ordered expunged from prison records misconduct determinations reached in proceedings that had not comported with due process. The court generally affirmed the District Court's judgment respecting correspondence with attorneys, but added some additional prescriptions and ordered further proceedings to determine whether the State was meeting its burden under *Johnson* v. *Avery,* 393 U. S. 483, to provide legal assistance to prisoners, a duty the court found to extend to civil rights cases as well as habeas corpus proceedings. Under Nebraska's disciplinary scheme forfeiture or withholding of good-time credits or confinement in a disciplinary cell is provided for serious misconduct and deprivation of privileges for less serious misconduct. To establish misconduct (1) a preliminary conference is held with the chief corrections supervisor and the charging party, where the

prisoner is orally informed of the charge and preliminarily discusses the merits; (2) a conduct report is prepared and a hearing held before the prison's disciplinary body, the Adjustment Committee (composed of three prison officials), where (3) the inmate can ask questions of the charging party. *Held:*

1. Though the Court of Appeals correctly held that restoration of good-time credits under § 1983 is foreclosed under *Preiser, supra,* damages and declaratory and other relief for improper revocation of good-time credits are cognizable under that provision. Pp. 553–555.

2. A prisoner is not wholly stripped of constitutional protections, and though prison disciplinary proceedings do not implicate the full panoply of rights due a defendant in a criminal prosecution, such proceedings must be governed by a mutual accommodation between institutional needs and generally applicable constitutional requirements. Pp. 555–556.

3. Since prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the procedure for determining whether such misconduct has occurred must observe certain minimal due process requirements (though not the full range of procedures mandated in *Morrissey, supra,* and *Scarpelli, supra,* for parole and probation revocation hearings) consonant with the unique institutional environment and therefore involving a more flexible approach reasonably accommodating the interests of the inmates and the needs of the institution. Pp. 556–572.

(a) Advance written notice of charges must be given to the disciplinary action inmate, no less than 24 hours before his appearance before the Adjustment Committee. Pp. 563–564.

(b) There must be "a written statement by the factfinders as to the evidence relied on and reasons for [the disciplinary action]." *Morrissey* v. *Brewer, supra,* at 489. Pp. 564–565.

(c) The inmate should be allowed to call witnesses and present documentary evidence in his defense if permitting him to do so will not jeopardize institutional safety or correctional goals. Pp. 566–567.

(d) The inmate has no constitutional right to confrontation and cross-examination in prison disciplinary proceedings, such procedures in the current environment, where prison disruption remains a serious concern, being discretionary with the prison officials. Pp. 567–569.

(e) Inmates have no right to retained or appointed counsel

in such proceedings, although counsel substitutes should be provided in certain cases. Pp. 569–570.

(f) On the record here it cannot be concluded that the Adjustment Committee is not sufficiently impartial to satisfy due process requirements. Pp. 570–571.

4. The Court of Appeals erred in holding that the due process requirements in prison disciplinary proceedings were to be applied retroactively by requiring the expunging of prison records of improper misconduct determinations. *Morrissey, supra,* at 490. Pp. 573–574.

5. The State may constitutionally require that mail from an attorney to a prisoner be identified as such and that his name and address appear on the communication; and—as a protection against contraband—that the authorities may open such mail in the inmate's presence. A lawyer desiring to correspond with a prisoner may also be required *first* to identify himself and his client to the prison officials to ensure that letters marked "privileged" are actually from members of the bar. Other restrictions on the attorney-prisoner mail procedure required by the courts below are disapproved. Pp. 574–577.

6. The District Court, as the Court of Appeals suggested, is to assess the adequacy of the legal assistance available for preparation of civil rights actions, applying the standard of *Johnson* v. *Avery, supra,* at 490, that "unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief," inmates could not be barred from furnishing assistance to each other. Pp. 577–580.

483 F. 2d 1059, affirmed in part, reversed in part, and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. MARSHALL, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN, J., joined, *post,* p. 580. DOUGLAS, J., filed an opinion dissenting in part and concurring in the result in part, *post,* p. 593.

Melvin Kent Kammerlohr, Assistant Attorney General of Nebraska, argued the cause for petitioners. With him on the brief was *Clarence A. H. Meyer,* Attorney General.

Douglas F. Duchek, by appointment of the Court, 415 U. S. 974, argued the cause for respondent *pro hac vice.* With him on the briefs was *Robert Plotkin.*

552-191 O - 76 - 37

Solicitor General Bork argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General Petersen, Deputy Solicitor General Frey, Gerald P. Norton,* and *Jerome M. Feit.**

MR. JUSTICE WHITE delivered the opinion of the Court.

We granted the petition for writ of certiorari in this case, 414 U. S. 1156 (1974), because it raises important questions concerning the administration of a state prison.

Respondent, on behalf of himself and other inmates of the Nebraska Penal and Correctional Complex, Lincoln, Nebraska, filed a complaint under 42 U. S. C. § 1983 [1] challenging several of the practices, rules, and regulations of the Complex. For present purposes, the pertinent

*Briefs of *amici curiae* urging reversal were filed by *Evelle J. Younger,* Attorney General, *pro se, Jack R. Winkler,* Chief Assistant Attorney General, *Edward P. O'Brien,* Assistant Attorney General, and *W. Eric Collins, Harry A. Allen, April P. Kestell,* and *H. F. Wilkinson,* Deputy Attorneys General, for the Attorney General of California, and by *William J. Scott,* Attorney General, and *James B. Zagel,* Assistant Attorney General, for the State of Illinois.

Briefs of *amici curiae* urging affirmance were filed by *Chesterfield Smith* and *Robert J. Kutak* for the American Bar Assn.; by *David Gilman* and *Richard Singer* for the National Council on Crime and Delinquency; by *William E. Hellerstein* and *Joel Berger* for the Legal Aid Society of New York; by *Alvin J. Bronstein, Barbara M. Milstein,* and *Arpiar G. Saunders, Jr.,* for the National Prison Project; and by *William H. Allen, Michael A. Schlanger,* and *David S. Weissbrodt* for the Inmates of the District of Columbia Correctional Complex.

[1] The practices, rules, and regulations of the Complex under challenge in this litigation are only in force at that institution, and are drafted by the Warden, and not by the Director of Correctional Services. Since no statewide regulation was involved there was no need to convene a three-judge court. See *Board of Regents* v. *New Left Education Project,* 404 U. S. 541 (1972).

allegations were that disciplinary proceedings did not comply with the Due Process Clause of the Fourteenth Amendment to the Federal Constitution; that the inmate legal assistance program did not meet constitutional standards, and that the regulations governing the inspection of mail to and from attorneys for inmates were unconstitutionally restrictive. Respondent requested damages and injunctive relief.

After an evidentiary hearing, the District Court granted partial relief. 342 F. Supp. 616 (Neb. 1972). Considering itself bound by prior Circuit authority, it rejected the procedural due process claim; but it went on to hold that the prison's policy of inspecting all incoming and outgoing mail to and from attorneys violated prisoners' rights of access to the courts and that the restrictions placed on inmate legal assistance were not constitutionally defective.[2]

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[2] The District Court also determined that contrary to state statutory provisions certain good time had been taken away for violations which were not "flagrant or serious" within the meaning of the controlling state statute, see n. 5, *infra*, and ordered that good time be restored for all such offenses. The Court of Appeals affirmed the holding (though not the remedy, see *infra*, at 544). Petitioners do not challenge that holding in this Court.

Certain issues originally in contest in this litigation were settled by stipulation and order in the District Court. These concerned such matters as processing inmate letters to sentencing judges, the provision for postage to mail such letters, the adequacy of and access to the prison library, and the availability of a notary service. Others were decided by the District Court, after trial, and were not taken up on appeal to the Court of Appeals. These issues included the denial of use of typewriters to inmates, reprisals against inmates who petition the courts, the number of inmates who could use the prison library at one time, the length of time which could be spent in the library, delay in receiving mail, censorship of letters to the news media and public officials, and limitations on numbers of letters which can be written. None of these issues is raised here.

The Court of Appeals reversed, 483 F. 2d 1059 (CA8 1973), with respect to the due process claim, holding that the procedural requirements outlined by this Court in *Morrissey* v. *Brewer,* 408 U. S. 471 (1972), and *Gagnon* v. *Scarpelli,* 411 U. S. 778 (1973), decided after the District Court's opinion in this case, should be generally followed in prison disciplinary hearings but left the specific requirements, including the circumstances in which counsel might be required, to be determined by the District Court on remand. With respect to a remedy, the court further held that *Preiser* v. *Rodriguez,* 411 U. S. 475 (1973), forbade the actual restoration of good-time credits in this § 1983 suit but ordered expunged from prison records any determinations of misconduct arrived at in proceedings that failed to comport with due process as defined by the court. The court generally affirmed the judgment of the District Court with respect to correspondence with attorneys,[3] but ordered further proceedings to determine whether the State was meeting its burden under *Johnson* v. *Avery,* 393 U. S. 483 (1969), to provide legal assistance to prison inmates, the court holding that the State's duty extended to civil rights cases as well as to habeas corpus proceedings.[4]

I

We begin with the due process claim. An understanding of the issues involved requires a detailing of the prison disciplinary regime set down by Nebraska statutes and prison regulations.

[3] No issues are raised here, nor were they in the Court of Appeals, as to the ruling in the District Court on restrictions on outgoing mail.

[4] The Court of Appeals found that the only person allowed to render legal assistance was the "Legal Advisor," and that the Warden did not allow prisoners to consult with other inmates. That finding, which disagreed to some extent with the District Court's, is not challenged by petitioners.

Section 16 of the Nebraska Treatment and Corrections Act, as amended, Neb. Rev. Stat. § 83–185 (Cum. Supp. 1972),[5] provides that the chief executive officer of each penal facility is responsible for the discipline of inmates

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[5] That statutory provision provides, in full:

"(1) The chief executive officer of each facility shall be responsible for the discipline of those persons committed to the Division of Corrections who reside therein. No person shall be punished except upon the order of the chief executive officer of the facility; nor shall any punishment be imposed otherwise than in accordance with this section.

"(2) Except in flagrant or serious cases, punishment for misconduct shall consist of deprivation of privileges. In cases of flagrant or serious misconduct, the chief executive officer may order that a person's reduction of term as provided in section 83–1,107 be forfeited or withheld and also that the person be confined in a disciplinary cell. The chief executive officer may order that such person, during all or part of the period in a disciplinary cell, be put on an adequate and healthful diet. A person in a disciplinary cell shall be visited at least once every eight hours. No cruel, inhuman or corporal punishment shall be used on any person.

"(3) The chief executive officer shall maintain a record of breaches of discipline, of the disposition of each case, and of the punishment, if any, for each such breach. Each breach of discipline shall be entered in the person's file, together with the disposition or punishment therefor.

"(4) The chief executive officer may recommend to the Director of Corrections that a person who is considered to be incorrigible by reason of frequent intentional breaches of discipline, or who is detrimental to the discipline or the morale of the facility, be transferred to another facility for stricter safekeeping and closer confinement, subject to the provisions of section 83–176."

At the time this litigation was commenced, the statute gave examples of "flagrant or serious misconduct"—"assault, escape, attempt to escape." Neb. Rev. Stat. § 83–185 (1971). This was the definition employed by the District Court in deciding that certain offenses were not serious within the meaning of the Act. See n. 2, *supra*. The statutory change does not affect the issues in this litigation.

in a particular institution. The statute provides for a range of possible disciplinary action. "Except in flagrant or serious cases, punishment for misconduct shall consist of deprivation of privileges. In cases of flagrant or serious misconduct, the chief executive officer may order that a person's reduction of term as provided in section 83–1,107 [good-time credit [6]] be forfeited or withheld and

[6] Section 83–1,107, Neb. Rev. Stat. (Cum. Supp. 1972), which provides for the allowance and reduction of good time, states:

"(1) The chief executive officer of a facility shall reduce, for parole purposes, for good behavior and faithful performance of duties while confined in a facility the term of a committed offender as follows: Two months on the first year, two months on the second year, three months on the third year, four months for each succeeding year of his term and pro rata for any part thereof which is less than a year. In addition, for especially meritorious behavior or exceptional performance of his duties, an offender may receive a further reduction, for parole purposes, not to exceed five days, for any month of imprisonment. The total of all such reductions shall be deducted:

"(a) From his minimum term, to determine the date of his eligibility for release on parole; and

"(b) From his maximum term, to determine the date when his release on parole becomes mandatory under the provisions of section 83–1,111.

"(2) Reductions of such terms may be forfeited, withheld and restored by the chief executive officer of the facility after the offender has been consulted regarding the charges of misconduct. No reduction of an offender's term for especially meritorious behavior or exceptional performance of his duties shall be forfeited or withheld after an offender is released on parole.

"(3) Good time or other reductions of sentence granted under the provisions of any law prior to July 6, 1972 may be forfeited, withheld, or restored in accordance with the terms of this act."

Special provisions are set up by statute dealing with the transfer of minors. See Nebraska Treatment and Corrections Act § 7, as amended by LB57, Session Laws 1973, § 1, Neb. Rev. Stat. § 83–176 (Supp. 1973).

Certain changes made in § 83–1,107, between time suit was brought and now, as related in the prior version of the provision,

also that the person be confined in a disciplinary cell." Each breach of discipline is to be entered in the person's file together with the disposition or punishment therefor.

As the statute makes clear, there are basically two kinds of punishment for flagrant or serious misconduct. The first is the forfeiture or withholding of good-time credits, which affects the term of confinement, while the second, confinement in a disciplinary cell, involves alteration of the conditions of confinement. If the misconduct is less than flagrant or serious, only deprivation of privileges results.[7]

Neb. Rev. Stat. § 83–1,107 (1971), are not important to the issues in dispute here.

Determinations of loss of good time are directly relevant to receiving parole. Under Neb. Rev. Stat. § 83–1,109 (1971), all reductions are to be reported to and considered by parole authorities.

By prison regulation, prisoners may also earn "blood time." The pertinent regulation provides:

"Anyone who donates blood to the American Red Cross receives good time credits for their donations. Anyone under the age of 18 must have the Warden's approval. Those over 18 may voluntarily give blood on the following scheduled months: MAY, AUGUST and DECEMBER. The Red Cross Bloodmobile unit is generally scheduled for the first full week of the months mentioned above.

"You will reduce from your sentence, via the Board of Parole approval, five days for the first donation, ten days for the second donation, and fifteen days for every donation thereafter.

"Should you receive a disciplinary report or below average work report any time between donations, you will be credited only five days the next time you donate blood to the Red Cross as a result of the disciplinary action."

Since "blood time" operates like good time to reduce the term of sentence, and since it represents only an additional way to accumulate good time, it is considered to be included within the meaning of that term.

[7] The record does not disclose what specific sanctions are employed at the Complex under the general heading of "deprivation of privileges."

The only statutory provision establishing procedures for the imposition of disciplinary sanctions which pertains to good time, § 38 of the Nebraska Treatment and Corrections Act, as amended, Neb. Rev. Stat. § 83–1,107 (Cum. Supp. 1972), merely requires that an inmate be "consulted regarding the charges of misconduct" in connection with the forfeiture, withholding, or restoration of credit. But prison authorities have framed written regulations dealing with procedures and policies for controlling inmate misconduct.[8] By regulation, misconduct is

[8] The regulations, in full, are:

"*Policy:* In the interest of treatment-oriented discipline, it is necessary that inmates and staff members maintain high standards of behavior, courtesy and personal conduct. It is the policy of this institution, in administering discipline, to gain voluntary acceptance of certain limitations by the inmate body. Discipline must be realistically administered in order to maintain the general welfare of the institution community and conformance to specified standards and regulations, while at the same time implementing treatment of the offender.

"*Purpose:* To set forth the institutional policy and procedures for the administration of discipline to insure that disciplinary processes are carried out as an integral part of the total treatment program, and to establish professional standards for all employees in fulfilling this responsibility.

"*Standards of Conduct.* The institution population will be kept informed through the orientation process and by written orders and memorandums as to the standards of conduct expected. When it becomes necessary to regulate and control a man's conformance to the prescribed standards, disciplinary measures consistent with treatment of the individual will be applied in appropriate degree and in an impersonal, impartial manner.

"*Misconduct.*

"a. Major Misconduct: Major misconduct is a serious violation and will be reported formally to the Adjustment Committee on the Misconduct Report Form and/or detailed narrative.

"b. Minor Misconduct: Minor misconduct is a less serious violation which may be resolved immediately and informally by the in-

classified into two categories: major misconduct is a "serious violation" and must be formally reported to an Adjustment Committee, composed of the Associate Warden

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mate's supervisor or formally reported on the Misconduct Report Form. Repeated minor misconduct should be formally reported.

"*Misconduct Reports:*

"a. Preparation: In reporting misconduct on the Misconduct Report Form, the report should be prepared carefully and accurately so as to describe events exactly as they happen. The accurate preparation of a Misconduct Report is a major contributing factor in accurate evaluation of the misconduct by the Adjustment Committee. The initial statement on the report should be a brief statement of the charge or charges, followed by a detailed report of the incident. Articles of evidence should always accompany the report.

"b. Processing of Misconduct Reports: Completed Misconduct Reports along with any articles of evidence, should be forwarded to the Chief Correction Supervisor's office for investigation. The Shift Lieutenant will conduct an investigation, note his findings, and submit to the Chief Corrections Supervisor. The Chief Corrections Supervisor will review the report, conduct additional investigation if necessary, interview the Shift Lieutenant and officer submitting report, and verify the accuracy, proper preparation of the report and assemble all information and articles regarding the misconduct report. Upon completion of this investigation, all information will be noted on the space provided on the Misconduct Report, then submitted to the Chairman of the Adjustment Committee so the case may be promptly scheduled for a committee hearing.

"*Administration of Discipline:* The administration of discipline is hereby delegated as follows:

"a. All employees will resolve immediately and informally minor violations by any inmate under their observation and/or supervision.

"b. The Chief Corrections Supervisor will initiate prompt investigation on all misconduct reports and will maintain control of any adverse situation and its inmate participants.

"c. Adjustment Committee will receive reports of misconduct, conduct hearings, and make findings and impose disciplinary actions.

"*The Adjustment Committee:*

"a. Organization: The Adjustment Committee is composed as fol-

Custody, the Correctional Industries Superintendent, and the Reception Center Director. This Committee is directed to "review and evaluate all misconduct reports"

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lows: Associate Warden Custody, Chairman; Correctional Industries Superintendent, Member; Reception Center Director, Member.

"Note: The Adjustment Committee is responsible for the preparation of meeting agenda, recording, distribution, and filing of all reports as necessary for institution requirements. Further, the committee will answer directly to the Administrative Assistant on matters of discipline, adjustment, and investigations conducted relative to the daily processing of Misconduct Reports.

"b. Committee Functions:

"(1) The Adjustment Committee will meet daily at 8:00 a. m. in the office of the Associate Warden Custody and/or the Adjustment Center, as required.

"(2) The Committee will review and evaluate all misconduct reports as to the underlying causes for the adverse behavior and will carefully consider all possible courses of action before reaching a decision. Disciplinary action in all cases will be treatment oriented.

"(3) The Committee is authorized to conduct investigations, make findings, impose disciplinary actions, refer cases for further diagnosis, recommend program changes and take any other actions deemed necessary to insure decision effectiveness.

"(4) The Committee will concern itself with institution policies and procedures which effect discipline, strive to maintain consistence in its actions, and continually evaluate the effectiveness of its decisions by appropriate follow-up.

"(5) The Committee will maintain accurate records and assure the prompt and proper completion of all required reports and forms.

"(6) The Committee will review each week or more often, the progress of all inmates housed in the Adjustment Center and initiate or recommend program changes when indicated. The Committee will document all actions, reviews, and program changes so as to provide the Classification Committee with a clear, concise picture of individual inmate adjustment.

"*Adjustment Committee Actions:*

"a. General Principles:

"(1) The decisions and recommendations of the Committee will be the result of group consensus and judgment.

"(2) Full consideration must be given to the causes for the ad-

and, among other things, to "conduct investigations, make findings, [and] impose disciplinary actions." If only minor misconduct, "a less serious violation," is involved,

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verse behavior, the setting and circumstances in which it occurred, the man's accountability, and the correctional treatment goals.

"(3) Disciplinary measures will be taken only at such times and to such degrees as are necessary to regulate and control a man's behavior within acceptable limits and will never be rendered capriciously or in the nature of retaliation or revenge.

"(4) Action will be taken as soon after the occurrence as circumstances permit.

"(5) Work assignments and program changes will not be used as disciplinary measures.

"(6) The use of corporal punishment is strictly prohibited.

"(7) Disciplinary action taken and recommended may include but not necessarily be limited to the following: reprimand, restrictions of various kinds, extra duty, confinement in the Adjustment Center, withholding of statutory good time and/or extra earned good time, or a combination of the elements listed herein.

"*Use of Segregation:* Inmates may be placed in segregation for any one of the following reasons, and documentation on either the Misconduct Report Form or in narrative must be sent to the Associate Warden Custody in each case.

"a. To insure immediate control and supervision.

"b. To protect potential victims.

"c. To insure witnesses against intimidation.

"d. As a punishment for some major institutional infraction.

"e. To control those whose violent emotions are out of control.

"f. To insure their safety or the safety of others.

"g. To insure the safety and security of the institution.

"h. Demonstrated defiance of personnel acting in the line of duty.

"i. Willful refusal to obey orders.

"Note: Inmates awaiting action of the Adjustment Committee will not routinely be placed in the Adjustment Center unless one or more of the above reasons are evident.

"No man should remain in the Adjustment Center longer than necessary, and special care must be taken to insure that this unit does not become a haven for those who persistently fail to solve their problems.

"The Adjustment Committee will conduct a review each week or

the problem may either be resolved informally by the inmate's supervisor or it can be formally reported for action to the Adjustment Committee. Repeated minor misconduct must be reported. The Adjustment Committee has available a wide range of sanctions. "Disciplinary action taken and recommended may include but not necessarily be limited to the following: reprimand, restrictions of various kinds, extra duty, confinement in the Adjustment Center [the disciplinary cell], withholding of statutory good time and/or extra earned good time, or a combination of the elements listed herein." [9]

Additional procedures have been devised by the Complex governing the actions of the Adjustment Committee. Based on the testimony, the District Court found, 342 F. Supp., at 625–626, that the following procedures were in effect when an inmate is written up or charged with a prison violation: [10]

> "(a) The chief correction supervisor reviews the 'write-ups' on the inmates by the officers of the Complex daily;

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more often, of all cases in the Adjustment Center in discipline, to consider possible treatment alternatives.

"In addition to this, the institution counselor will maintain a progress file on long-term confinement cases. The Counselor has the responsibility to maintain contact with those inmates who are housed in segregation and report their progress or lack of progress to the Adjustment Committee. These progress reports are prepared at the end of each month and are used as a tool in determining further action by the Adjustment Committee."

[9] When a prisoner is isolated in solitary confinement, there appear to be two different types of conditions to which he may be exposed. He may be incarcerated alone in the usual "disciplinary cell," with privileges severely limited, for as long as necessary, or he may be put in a "dry cell," which, unlike regular cells, contains no sink or toilet.

[10] The Warden testified that a great number of cases are resolved without contest, and that in many instances the inmate admits his guilt to the investigating officer.

"(b) the convict is called to a conference with the chief correction supervisor and the charging party;

"(c) following the conference, a conduct report is sent to the Adjustment Committee;

"(d) there follows a hearing before the Adjustment Committee and the report is read to the inmate and discussed;

"(e) if the inmate denies charge he may ask questions of the party writing him up;

"(f) the Adjustment Committee can conduct additional investigations if it desires;

"(g) punishment is imposed."

II

This class action brought by respondent alleged that the rules, practices, and procedures at the Complex which might result in the taking of good time violated the Due Process Clause of the Fourteenth Amendment. Respondent sought three types of relief: (1) restoration of good time; (2) submission of a plan by the prison authorities for a hearing procedure in connection with withholding and forfeiture of good time which complied with the requirements of due process; and (3) damages for the deprivation of civil rights resulting from the use of the allegedly unconstitutional procedures.[11]

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[11] The prayer of the amended complaint asked the court to "[a]djudicate that under the rules, practices and procedures at the Complex the taking of statutory prisoner good time from the inmates constitutes an increase in the inmates' sentence without due process of law in violation of Amendment XIV . . . ." It asked the court to "order the defendants to restore to the plaintiff Robert O. McDonnell that amount of good time taken" from him, and to "[o]rder defendants to submit a plan" which provided "[f]or a hearing procedure in connection with withholding and forfeiture of good time which complies with the requirements of due process . . . ." It

At the threshold is the issue whether under *Preiser* v. *Rodriguez*, 411 U. S. 475 (1973), the validity of the procedures for depriving prisoners of good-time credits may be considered in a civil rights suit brought under 42 U. S. C. § 1983. In *Preiser*, state prisoners brought a § 1983 suit seeking an injunction to compel restoration of good-time credits. The Court held that because the state prisoners were challenging the very fact or duration of their confinement and were seeking a speedier release, their sole federal remedy was by writ of habeas corpus, 411 U. S., at 500, with the concomitant requirement of exhausting state remedies. But the Court was careful to point out that habeas corpus is not an appropriate or available remedy for damages claims, which, if not frivolous and of sufficient substance to invoke the jurisdiction of the federal court, could be pressed under § 1983 along with suits challenging the conditions of confinement rather than the fact or length of custody. 411 U. S., at 494, 498–499.

The complaint in this case sought restoration of good-time credits, and the Court of Appeals correctly held this relief foreclosed under *Preiser*. But the complaint also sought damages; and *Preiser* expressly contemplated that claims properly brought under § 1983 could go forward while actual restoration of good-time credits is sought in state proceedings. 411 U. S., at 499 n. 14.[12] Respondent's damages claim was therefore properly before the District Court and required determination of the validity of the procedures employed for imposing sanctions, including loss of good time, for flagrant or serious miscon-

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further sought damages in the sum of $75,000 for the deprivation of the various constitutional rights involved in litigation, necessarily including the right to due process.

[12] One would anticipate that normal principles of *res judicata* would apply in such circumstances.

duct. Such a declaratory judgment as a predicate to a damages award would not be barred by *Preiser;* and because under that case only an injunction restoring good time improperly taken is foreclosed, neither would it preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the prospective enforcement of invalid prison regulations.

We therefore conclude that it was proper for the Court of Appeals and the District Court to determine the validity of the procedures for revoking good-time credits and to fashion appropriate remedies for any constitutional violations ascertained, short of ordering the actual restoration of good time already canceled.[13]

III

Petitioners assert that the procedure for disciplining prison inmates for serious misconduct is a matter of policy raising no constitutional issue. If the position implies that prisoners in state institutions are wholly without the protections of the Constitution and the Due Process Clause, it is plainly untenable. Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a "retraction justified by the considerations underlying our penal system." *Price* v. *Johnston,* 334 U. S. 266, 285 (1948). But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain

[13] It is suggested that the Court of Appeals wholly excluded the matter of good time from the proceedings on remand. It is true that the court's opinion is arguably ambiguous; but as we understand it, the District Court on remand was to determine the validity of the procedures for disciplinary hearings that may result in serious penalties, including good time, and that appropriate remedies were to be fashioned short of actual restoration of good time.

drawn between the Constitution and the prisons of this country. Prisoners have been held to enjoy substantial religious freedom under the First and Fourteenth Amendments. *Cruz* v. *Beto,* 405 U. S. 319 (1972); *Cooper* v. *Pate,* 378 U. S. 546 (1964). They retain right of access to the courts. *Younger* v. *Gilmore,* 404 U. S. 15 (1971), aff'g *Gilmore* v. *Lynch,* 319 F. Supp. 105 (ND Cal. 1970); *Johnson* v. *Avery,* 393 U. S. 483 (1969); *Ex parte Hull,* 312 U. S. 546 (1941). Prisoners are protected under the Equal Protection Clause of the Fourteenth Amendment from invidious discrimination based on race. *Lee* v. *Washington,* 390 U. S. 333 (1968). Prisoners may also claim the protections of the Due Process Clause. They may not be deprived of life, liberty, or property without due process of law. *Haines* v. *Kerner,* 404 U. S. 519 (1972); *Wilwording* v. *Swenson,* 404 U. S. 249 (1971); *Screws* v. *United States,* 325 U. S. 91 (1945).

Of course, as we have indicated, the fact that prisoners retain rights under the Due Process Clause in no way implies that these rights are not subject to restrictions imposed by the nature of the regime to which they have been lawfully committed. Cf. *CSC* v. *Letter Carriers,* 413 U. S. 548 (1973); *Broadrick* v. *Oklahoma,* 413 U. S. 601 (1973); *Parker* v. *Levy,* 417 U. S. 733 (1974). Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply. Cf. *Morrissey* v. *Brewer,* 408 U. S., at 488. In sum, there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.

We also reject the assertion of the State that whatever may be true of the Due Process Clause in general or of other rights protected by that Clause against state infringement, the interest of prisoners in disciplinary proce-

dures is not included in that "liberty" protected by the Fourteenth Amendment. It is true that the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison. But here the State itself has not only provided a statutory right to good time but also specifies that it is to be forfeited only for serious misbehavior. Nebraska may have the authority to create, or not, a right to a shortened prison sentence through the accumulation of credits for good behavior, and it is true that the Due Process Clause does not require a hearing "in every conceivable case of government impairment of private interest." *Cafeteria Workers* v. *McElroy,* 367 U. S. 886, 894 (1961). But the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated. This is the thrust of recent cases in the prison disciplinary context. In *Haines* v. *Kerner, supra,* the state prisoner asserted a "denial of due process in the steps leading to [disciplinary] confinement." 404 U. S., at 520. We reversed the dismissal of the § 1983 complaint for failure to state a claim. In *Preiser* v. *Rodriguez, supra,* the prisoner complained that he had been deprived of good-time credits without notice or hearing and without due process of law. We considered the claim a proper subject for a federal habeas corpus proceeding.

This analysis as to liberty parallels the accepted due process analysis as to property. The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property

552-191 O - 76 - 38

interests. *Anti-Fascist Committee* v. *McGrath,* 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring). The requirement for some kind of a hearing applies to the taking of private property, *Grannis* v. *Ordean,* 234 U. S. 385 (1914), the revocation of licenses, *In re Ruffalo,* 390 U. S. 544 (1968), the operation of state dispute-settlement mechanisms, when one person seeks to take property from another, or to government-created jobs held, absent "cause" for termination, *Board of Regents* v. *Roth,* 408 U. S. 564 (1972); *Arnett* v. *Kennedy,* 416 U. S. 134, 164 (1974) (POWELL, J., concurring); *id.,* at 171 (WHITE, J., concurring in part and dissenting in part); *id.,* at 206 (MARSHALL, J., dissenting). Cf. *Stanley* v. *Illinois,* 405 U. S. 645, 652–654 (1972); *Bell* v. *Burson,* 402 U. S. 535 (1971).

We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of government, *Dent* v. *West Virginia,* 129 U. S. 114, 123 (1889). Since prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed.

IV

As found by the District Court, the procedures employed are: (1) a preliminary conference with the Chief Corrections Supervisor and the charging party, where the prisoner is informed of the misconduct charge and engages in preliminary discussion on its merits; (2) the preparation of a conduct report and a hearing held before the Adjustment Committee, the disciplinary body of the prison, where the report is read to the inmate; and

(3) the opportunity at the hearing to ask questions of the charging party. The State contends that the procedures already provided are adequate. The Court of Appeals held them insufficient and ordered that the due process requirements outlined in *Morrissey* and *Scarpelli* be satisfied in serious disciplinary cases at the prison.

Morrissey held that due process imposed certain minimum procedural requirements which must be satisfied before parole could finally be revoked. These procedures were:

> "(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." 408 U. S., at 489.

The Court did not reach the question as to whether the parolee is entitled to the assistance of retained counsel or to appointed counsel, if he is indigent. Following the decision in *Morrissey,* in *Gagnon* v. *Scarpelli,* 411 U. S. 778 (1973), the Court held the requirements of due process established for parole revocation were applicable to probation revocation proceedings. The Court added to the required minimum procedures of *Morrissey* the right to counsel, where a probationer makes a request, "based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the vio-

lation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present." *Id.*, at 790. In doubtful cases, the agency was to consider whether the probationer appeared to be capable of speaking effectively for himself, *id.*, at 790–791, and a record was to be made of the grounds for refusing to appoint counsel.

We agree with neither petitioners nor the Court of Appeals: the Nebraska procedures are in some respects constitutionally deficient but the *Morrissey-Scarpelli* procedures need not in all respects be followed in disciplinary cases in state prisons.

We have often repeated that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers* v. *McElroy*, 367 U. S., at 895. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Ibid.*; *Morrissey*, 408 U. S., at 481. Viewed in this light it is immediately apparent that one cannot automatically apply procedural rules designed for free citizens in an open society, or for parolees or probationers under only limited restraints, to the very different situation presented by a disciplinary proceeding in a state prison.

Revocation of parole may deprive the parolee of only conditional liberty, but it nevertheless "inflicts a 'grievous loss' on the parolee and often on others." *Id.*, at 482. Simply put, revocation proceedings determine whether the parolee will be free or in prison, a matter of obvious great moment to him. For the prison inmate,

the deprivation of good time is not the same immediate disaster that the revocation of parole is for the parolee. The deprivation, very likely, does not then and there work any change in the conditions of his liberty. It can postpone the date of eligibility for parole and extend the maximum term to be served, but it is not certain to do so, for good time may be restored. Even if not restored, it cannot be said with certainty that the actual date of parole will be affected; and if parole occurs, the extension of the maximum term resulting from loss of good time may affect only the termination of parole, and it may not even do that. The deprivation of good time is unquestionably a matter of considerable importance. The State reserves it as a sanction for serious misconduct, and we should not unrealistically discount its significance. But it is qualitatively and quantitatively different from the revocation of parole or probation.

In striking the balance that the Due Process Clause demands, however, we think the major consideration militating against adopting the full range of procedures suggested by *Morrissey* for alleged parole violators is the very different stake the State has in the structure and content of the prison disciplinary hearing. That the revocation of parole be justified and based on an accurate assessment of the facts is a critical matter to the State as well as the parolee; but the procedures by which it is determined whether the conditions of parole have been breached do not themselves threaten other important state interests, parole officers, the police, or witnesses—at least no more so than in the case of the ordinary criminal trial. Prison disciplinary proceedings, on the other hand, take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so. Some are first offenders, but many are recidivists who

have repeatedly employed illegal and often very violent means to attain their ends. They may have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life. Although there are very many varieties of prisons with different degrees of security, we must realize that in many of them the inmates are closely supervised and their activities controlled around the clock. Guards and inmates co-exist in direct and intimate contact. Tension between them is unremitting. Frustration, resentment, and despair are commonplace. Relationships among the inmates are varied and complex and perhaps subject to the unwritten code that exhorts inmates not to inform on a fellow prisoner.

It is against this background that disciplinary proceedings must be structured by prison authorities; and it is against this background that we must make our constitutional judgments, realizing that we are dealing with the maximum security institution as well as those where security considerations are not paramount. The reality is that disciplinary hearings and the imposition of disagreeable sanctions necessarily involve confrontations between inmates and authority and between inmates who are being disciplined and those who would charge or furnish evidence against them. Retaliation is much more than a theoretical possibility; and the basic and unavoidable task of providing reasonable personal safety for guards and inmates may be at stake, to say nothing of the impact of disciplinary confrontations and the resulting escalation of personal antagonisms on the important aims of the correctional process.

Indeed, it is pressed upon us that the proceedings to ascertain and sanction misconduct themselves play a major role in furthering the institutional goal of modifying the behavior and value systems of prison inmates

sufficiently to permit them to live within the law when they are released. Inevitably there is a great range of personality and character among those who have transgressed the criminal law. Some are more amenable to suggestion and persuasion than others. Some may be incorrigible and would merely disrupt and exploit the disciplinary process for their own ends. With some, rehabilitation may be best achieved by simulating procedures of a free society to the maximum possible extent; but with others, it may be essential that discipline be swift and sure.[14] In any event, it is argued, there would be great unwisdom in encasing the disciplinary procedures in an inflexible constitutional straitjacket that would necessarily call for adversary proceedings typical of the criminal trial, very likely raise the level of confrontation between staff and inmate, and make more difficult the utilization of the disciplinary process as a tool to advance the rehabilitative goals of the institution. This consideration, along with the necessity to maintain an acceptable level of personal security in the institution, must be taken into account as we now examine in more detail the Nebraska procedures that the Court of Appeals found wanting.

V

Two of the procedures that the Court held should be extended to parolees facing revocation proceedings are not, but must be, provided to prisoners in the Nebraska Complex if the minimum requirements of procedural due process are to be satisfied. These are advance written notice of the claimed violation and a written statement of the factfinders as to the evidence relied upon and the reasons for the disciplinary action taken. As described

[14] See generally A. Bandura, Principles of Behavior Modification (1969); L. Krasner & L. Ullmann, Research in Behavior Modification (1965); B. Skinner, Science and Human Behavior (1953).

by the Warden in his oral testimony, on the basis of which the District Court made its findings, the inmate is now given oral notice of the charges against him at least as soon as the conference with the Chief Corrections Supervisor and charging party. A written record is there compiled and the report read to the inmate at the hearing before the Adjustment Committee where the charges are discussed and pursued. There is no indication that the inmate is ever given a written statement by the Committee as to the evidence or informed in writing or otherwise as to the reasons for the disciplinary action taken.

Part of the function of notice is to give the charged party a chance to marshal the facts in his defense and to clarify what the charges are, in fact. See *In re Gault*, 387 U. S. 1, 33–34, and n. 54 (1967). Neither of these functions was performed by the notice described by the Warden. Although the charges are discussed orally with the inmate somewhat in advance of the hearing, the inmate is sometimes brought before the Adjustment Committee shortly after he is orally informed of the charges. Other times, after this initial discussion, further investigation takes place which may reshape the nature of the charges or the evidence relied upon. In those instances, under procedures in effect at the time of trial, it would appear that the inmate first receives notice of the actual charges at the time of the hearing before the Adjustment Committee. We hold that written notice of the charges must be given to the disciplinary-action defendant in order to inform him of the charges and to enable him to marshal the facts and prepare a defense. At least a brief period of time after the notice, no less than 24 hours, should be allowed to the inmate to prepare for the appearance before the Adjustment Committee.

We also hold that there must be a "written statement by the factfinders as to the evidence relied on and reasons" for the disciplinary action. *Morrissey*, 408 U. S., at

489. Although Nebraska does not seem to provide administrative review of the action taken by the Adjustment Committee, the actions taken at such proceedings may involve review by other bodies. They might furnish the basis of a decision by the Director of Corrections to transfer an inmate to another institution because he is considered "to be incorrigible by reason of frequent intentional breaches of discipline," Neb. Rev. Stat. § 83–185 (4) (Cum. Supp. 1972), and are certainly likely to be considered by the state parole authorities in making parole decisions.[15] Written records of proceedings will thus protect the inmate against collateral consequences based on a misunderstanding of the nature of the original proceeding. Further, as to the disciplinary action itself, the provision for a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly. Without written records, the inmate will be at a severe disadvantage in propounding his own cause to or defending himself from others. It may be that there will be occasions when personal or institutional safety is so implicated that the statement may properly exclude certain items of evidence, but in that event the statement should indicate the fact of the omission. Otherwise, we perceive no conceivable rehabilitative objective or prospect of prison disruption that can flow from the requirement of these statements.[16]

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[15] See n. 8, *supra.*

[16] A Survey of Prison Disciplinary Practices and Procedures of the American Bar Association's Commission on Correctional Facilities and Services (1974), reveals that 98% of the 49 prison systems of the States and the United States answering the questionnaire provided written notice of the charges to an inmate. The Survey shows that 91% of the systems, out of 34 responses, make a record of the hearings.

We are also of the opinion that the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals. Ordinarily, the right to present evidence is basic to a fair hearing; but the unrestricted right to call witnesses from the prison population carries obvious potential for disruption and for interference with the swift punishment that in individual cases may be essential to carrying out the correctional program of the institution. We should not be too ready to exercise oversight and put aside the judgment of prison administrators. It may be that an individual threatened with serious sanctions would normally be entitled to present witnesses and relevant documentary evidence; but here we must balance the inmate's interest in avoiding loss of good time against the needs of the prison, and some amount of flexibility and accommodation is required. Prison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority, as well as to limit access to other inmates to collect statements or to compile other documentary evidence. Although we do not prescribe it, it would be useful for the Committee to state its reason for refusing to call a witness, whether it be for irrelevance, lack of necessity, or the hazards presented in individual cases. Any less flexible rule appears untenable as a constitutional matter, at least on the record made in this case. The operation of a correctional institution is at best an extraordinarily difficult undertaking. Many prison officials, on the spot and with the responsibility for the safety of inmates and staff, are reluctant to extend the unqualified right to call witnesses; and in our view, they must have the necessary discretion without being subject to unduly crippling constitutional

impediments. There is this much play in the joints of the Due Process Clause, and we stop short of imposing a more demanding rule with respect to witnesses and documents.

Confrontation and cross-examination present greater hazards to institutional interests.[17] If confrontation and cross-examination of those furnishing evidence against the inmate were to be allowed as a matter of course, as in criminal trials, there would be considerable potential for havoc inside the prison walls. Proceedings would inevitably be longer and tend to unmanageability. These procedures are essential in criminal trials where the accused, if found guilty, may be subjected to the most serious deprivations, *Pointer* v. *Texas,* 380 U. S. 400 (1965), or where a person may lose his job in society, *Greene* v. *McElroy,* 360 U. S. 474, 496–497 (1959). But they are not rights universally applicable to all hearings. See *Arnett* v. *Kennedy,* 416 U. S. 134 (1974). Rules of procedure may be shaped by consideration of the risks of error, *In re Winship,* 397 U. S. 358, 368 (1970) (Harlan, J., concurring); *Arnett* v. *Kennedy, supra,* p. 171 (WHITE, J., concurring in part and dissenting in part), and should also be shaped by the consequences which will follow their adoption. Although some States do seem to allow cross-examination in disciplinary hearings,[18] we are not apprised of the conditions under which

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[17] We note that though Nebraska does not as a general matter allow cross-examination of adverse witnesses at the hearing before the Adjustment Committee, the inmate is allowed to ask the charging party questions about the nature of the charges. He is also allowed to speak freely in his own defense.

[18] The Survey, see n. 16, *supra,* discloses that cross-examination of witnesses is "allowed" in 28 States, 57% of the 49 systems responding, but the Survey also discloses, that even in these 28 States—the federal system does not allow cross-examination—certain limitations are placed on the use of the procedure. *Id.,* at 19–20.

the procedure may be curtailed; and it does not appear that confrontation and cross-examination are generally required in this context. We think that the Constitution should not be read to impose the procedure at the present time and that adequate bases for decision in prison disciplinary cases can be arrived at without cross-examination.

Perhaps as the problems of penal institutions change and correctional goals are reshaped, the balance of interests involved will require otherwise. But in the current environment, where prison disruption remains a serious concern to administrators, we cannot ignore the desire and effort of many States, including Nebraska, and the Federal Government to avoid situations that may trigger deep emotions and that may scuttle the disciplinary process as a rehabilitation vehicle. To some extent, the American adversary trial presumes contestants who are able to cope with the pressures and aftermath of the battle, and such may not generally be the case of those in the prisons of this country. At least, the Constitution, as we interpret it today, does not require the contrary assumption. Within the limits set forth in this opinion we are content for now to leave the continuing development of measures to review adverse actions affecting inmates to the sound discretion of corrections officials administering the scope of such inquiries.

We recognize that the problems of potential disruption may differ depending on whom the inmate proposes to cross-examine. If he proposes to examine an unknown fellow inmate, the danger may be the greatest, since the disclosure of the identity of the accuser, and the cross-examination which will follow, may pose a high risk of reprisal within the institution. Conversely, the inmate accuser, who might freely tell his story privately to prison officials, may refuse to testify or admit any knowledge of the situation in question. Although the dangers posed by

cross-examination of known inmate accusers, or guards, may be less, the resentment which may persist after confrontation may still be substantial. Also, even where the accuser or adverse witness is known, the disclosure of third parties may pose a problem. There may be a class of cases where the facts are closely disputed, and the character of the parties minimizes the dangers involved. However, any constitutional rule tailored to meet these situations would undoubtedly produce great litigation and attendant costs in a much wider range of cases. Further, in the last analysis, even within the narrow range of cases where interest balancing may well dictate cross-examination, courts will be faced with the assessment of prison officials as to the dangers involved, and there would be a limited basis for upsetting such judgments. The better course at this time, in a period where prison practices are diverse and somewhat experimental, is to leave these matters to the sound discretion of the officials of state prisons.

As to the right to counsel, the problem as outlined in *Scarpelli* with respect to parole and probation revocation proceedings is even more pertinent here:

> "The introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding. If counsel is provided for the probationer or parolee, the State in turn will normally provide its own counsel; lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views. The role of the hearing body itself, aptly described in *Morrissey* as being 'predictive and discretionary' as well as factfinding, may become more akin to that of a judge at a trial, and less attuned to the rehabilita-

tive needs of the individual probationer or parolee. In the greater self-consciousness of its quasi-judicial role, the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to reincarcerate than to continue nonpunitive rehabilitation. Certainly, the decisionmaking process will be prolonged, and the financial cost to the State—for appointed counsel, counsel for the State, a longer record, and the possibility of judicial review—will not be insubstantial." 411 U. S., at 787–788 (footnote omitted).

The insertion of counsel into the disciplinary process would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals. There would also be delay and very practical problems in providing counsel in sufficient numbers at the time and place where hearings are to be held. At this stage of the development of these procedures we are not prepared to hold that inmates have a right to either retained or appointed counsel in disciplinary proceedings.

Where an illiterate inmate is involved, however, or where the complexity of the issue makes it unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case, he should be free to seek the aid of a fellow inmate, or if that is forbidden, to have adequate substitute aid in the form of help from the staff or from a sufficiently competent inmate designated by the staff. We need not pursue the matter further here, however, for there is no claim that respondent, McDonnell, is within the class of inmates entitled to advice or help from others in the course of a prison disciplinary hearing.

Finally, we decline to rule that the Adjustment Committee which conducts the required hearings at the Ne-

braska Prison Complex and determines whether to revoke good time is not sufficiently impartial to satisfy the Due Process Clause. The Committee is made up of the Associate Warden Custody as chairman, the Correctional Industries Superintendent, and the Reception Center Director. The Chief Corrections Supervisor refers cases to the Committee after investigation and an initial interview with the inmate involved. The Committee is not left at large with unlimited discretion. It is directed to meet daily and to operate within the principles stated in the controlling regulations, among which is the command that "[f]ull consideration must be given to the causes for the adverse behavior, the setting and circumstances in which it occurred, the man's accountability, and the correctional treatment goals," as well as the direction that "disciplinary measures will be taken only at such times and to such degrees as are necessary to regulate and control a man's behavior within acceptable limits and will never be rendered capriciously or in the nature of retaliation or revenge." We find no warrant in the record presented here for concluding that the Adjustment Committee presents such a hazard of arbitrary decisionmaking that it should be held violative of due process of law.

Our conclusion that some, but not all, of the procedures specified in *Morrissey* and *Scarpelli* must accompany the deprivation of good time by state prison authorities [19] is

[19] Although the complaint put at issue the procedures employed with respect to the deprivation of good time, under the Nebraska system, the same procedures are employed where disciplinary confinement is imposed. The deprivation of good time and imposition of "solitary" confinement are reserved for instances where serious misbehavior has occurred. This appears a realistic approach, for it would be difficult for the purposes of procedural due process to distinguish between the procedures that are required where good time is forfeited and those that must be extended when solitary confinement is at issue. The latter represents a major change in the conditions

not graven in stone. As the nature of the prison disciplinary process changes in future years, circumstances may then exist which will require further consideration and reflection of this Court. It is our view, however, that the procedures we have now required in prison disciplinary proceedings represent a reasonable accommodation between the interests of the inmates and the needs of the institution.[20]

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of confinement and is normally imposed only when it is claimed and proved that there has been a major act of misconduct. Here, as in the case of good time, there should be minimum procedural safeguards as a hedge against arbitrary determination of the factual predicate for imposition of the sanction. We do not suggest, however, that the procedures required by today's decision for the deprivation of good time would also be required for the imposition of lesser penalties such as the loss of privileges.

[20] The Courts of Appeals, which have ruled on procedures required in prison disciplinary proceedings, have been split. Two Circuits have required written notice in advance, *Clutchette* v. *Procunier,* 497 F. 2d 809 (CA9 1974); *United States ex rel. Miller* v. *Twomey,* 479 F. 2d 701 (CA7 1973), while two have held that oral notice is sufficient, *Meyers* v. *Alldredge,* 492 F. 2d 296 (CA3 1974); *Braxton* v. *Carlson,* 483 F. 2d 933 (CA3 1973); *Sostre* v. *McGinnis,* 442 F. 2d 178 (CA2 1971) (en banc), cert. denied *sub nom. Oswald* v. *Sostre,* 405 U. S. 978 (1972). The Ninth Circuit, *Clutchette* v. *Procunier, supra,* has held that a written statement of reasons and a written record of the proceedings must be provided, while the Second and Third Circuits have held to the contrary, *Braxton* v. *Carlson, supra; Sostre* v. *McGinnis, supra.* Two Circuits have held that there is no right to present witnesses at a hearing, *Braxton* v. *Carlson, supra; Sostre* v. *McGinnis, supra,* while one has held that there must be an opportunity to *request* the calling of witnesses, *United States ex rel. Miller* v. *Twomey, supra.* Only the Ninth Circuit, *Clutchette* v. *Procunier, supra,* has held that there is the full power and right of an inmate to call witnesses. As to cross-examination, two Circuits have stated that due process does not require this procedure, *Braxton* v. *Carlson, supra; Sostre* v. *McGinnis, supra.* The First Circuit has held that where prison authorities had already extended the right to confront and cross-examine witnesses, there is no reason

VI

The Court of Appeals held that the due process requirements in prison disciplinary proceedings were to apply retroactively so as to require that prison records containing determinations of misconduct, not in accord with required procedures, be expunged. We disagree and reverse on this point.

The question of retroactivity of new procedural rules affecting inquiries into infractions of prison discipline is effectively foreclosed by this Court's ruling in *Morrissey* that the due process requirements there announced were to be "applicable to *future* revocations of parole," 408 U. S., at 490 (emphasis supplied). Despite the fact that procedures are related to the integrity of the factfinding

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to force the authorities to call adverse witnesses when the inmate could have, *Palmigiano* v. *Baxter*, 487 F. 2d 1280 (1973). Only the Ninth Circuit, *Clutchette* v. *Procunier*, *supra*, has held that there is a general right of cross-examination, but even that case holds that the right may be limited where there is a legitimate fear that retribution will result. As to counsel, two Circuits have held that there is no right even to lay substitutes, *Braxton* v. *Carlson*, *supra*; *Sostre* v. *McGinnis*, *supra*, while the Third Circuit, *Meyers* v. *Alldredge*, *supra*, has held that there is no right to counsel where counsel substitute is provided. The First Circuit, *Palmigiano* v. *Baxter*, *supra*, holds there is a right to retained counsel, even where a staff assistant is available, while the Ninth Circuit, *Clutchette* v. *Procunier*, *supra*, envisions some sanctions at disciplinary proceedings calling for provision of counsel, and has determined that counsel must be provided where a prison rule violation may be punishable by state law. An impartial hearing board has been required, to the extent that a member of the board may not participate in a case as an investigating or reviewing officer, or be a witness, *Clutchette* v. *Procunier*, *supra*; *Braxton* v. *Carlson*, *supra*; *United States ex rel. Miller* v. *Twomey*, *supra*. The Third Circuit, *Meyers* v. *Alldredge*, *supra*, has also held, in the context of the federal system where a prisoner whose good time is taken away goes first to a disciplinary committee and then to the Good Time Forfeiture Board, that an associate warden could not sit on both committees.

552-191 O - 76 - 39

process, in the context of disciplinary proceedings, where less is generally at stake for an individual than at a criminal trial, great weight should be given to the significant impact a retroactivity ruling would have on the administration of all prisons in the country, and the reliance prison officials placed, in good faith, on prior law not requiring such procedures. During 1973, the Federal Government alone conducted 19,000 misconduct hearings, as compared with 1,173 parole revocation hearings, and 2,023 probation revocation hearings. If *Morrissey-Scarpelli* rules are not retroactive out of consideration for the burden of federal and state officials, this case is *a fortiori*. We also note that a contrary holding would be very troublesome for the parole system since performance in prison is often a relevant criterion for parole. On the whole, we do not think that error was so pervasive in the system under the old procedures as to warrant this cost or result.

VII

The issue of the extent to which prison authorities can open and inspect incoming mail from attorneys to inmates, has been considerably narrowed in the course of this litigation. The prison regulation under challenge provided that "[a]ll incoming and outgoing mail will be read and inspected," and no exception was made for attorney-prisoner mail. The District Court held that incoming mail from attorneys might be opened if normal contraband detection techniques failed to disclose contraband, and if there was a reasonable possibility that contraband would be included in the mail. It further held that if an incoming letter was marked "privileged," thus identifying it as from an attorney, the letter could not be opened except in the presence of the inmate. Prison authorities were not to read the mail from attorneys. The Court of Appeals affirmed the District Court order,

but placed additional restrictions on prison authorities. If there was doubt that a letter was actually from an attorney, "a simple telephone call should be enough to settle the matter," 483 F. 2d, at 1067, the court thus implying that officials might have to go beyond the face of the envelope, and the "privileged" label, in ascertaining what kind of communication was involved. The court further stated that "the danger that a letter from an attorney, an officer of the court, will contain contraband is ordinarily too remote and too speculative to justify the [petitioners'] regulation permitting the opening and inspection of all legal mail." *Ibid.* While methods to detect contraband could be employed, a letter was to be opened only "in the appropriate circumstances" in the presence of the inmate.

Petitioners now concede that they cannot open and *read* mail from attorneys to inmates, but contend that they may open all letters from attorneys as long as it is done in the presence of the prisoners. The narrow issue thus presented is whether letters determined or found to be from attorneys may be opened by prison authorities in the presence of the inmate or whether such mail must be delivered unopened if normal detection techniques fail to indicate contraband.

Respondent asserts that his First, Sixth, and Fourteenth Amendment rights are infringed, under a procedure whereby the State may open mail from his attorney, even though in his presence and even though it may not be read. To begin with, the constitutional status of the rights asserted, as applied in this situation, is far from clear. While First Amendment rights of correspondents with prisoners may protect against the censoring of inmate mail, when not necessary to protect legitimate governmental interests, see *Procunier* v. *Martinez,* 416 U. S. 396 (1974), this Court has not yet recognized First

Amendment rights of prisoners in this context, cf. *Cruz* v. *Beto*, 405 U. S. 319 (1972); *Cooper* v. *Pate*, 378 U. S. 546 (1964). Furthermore, freedom from censorship is not equivalent to freedom from inspection or perusal. As to the Sixth Amendment, its reach is only to protect the attorney-client relationship from intrusion in the criminal setting, see *Black* v. *United States*, 385 U. S. 26 (1966); *O'Brien* v. *United States*, 386 U. S. 345 (1967); see also *Coplon* v. *United States*, 89 U. S. App. D. C. 103, 191 F. 2d 749 (1951), while the claim here would insulate all mail from inspection, whether related to civil or criminal matters. Finally, the Fourteenth Amendment due process claim based on access to the courts, *Ex parte Hull*, 312 U. S. 546 (1941); *Johnson* v. *Avery*, 393 U. S. 483 (1969); *Younger* v. *Gilmore*, 404 U. S. 15 (1971), has not been extended by this Court to apply further than protecting the ability of an inmate to prepare a petition or complaint. Moreover, even if one were to accept the argument that inspection of incoming mail from an attorney placed an obstacle to access to the court, it is far from clear that this burden is a substantial one. We need not decide, however, which, if any, of the asserted rights are operative here, for the question is whether, assuming some constitutional right is implicated, it is infringed by the procedure now found acceptable by the State.

In our view, the approach of the Court of Appeals is unworkable and none of the above rights is infringed by the procedures petitioners now accept. If prison officials had to check in each case whether a communication was from an attorney before opening it for inspection, a near-impossible task of administration would be imposed. We think it entirely appropriate that the State require any such communications to be specially marked as originating from an attorney, with his name and address being given, if they are to receive special treatment. It would also certainly be permissible that prison authorities require

that a lawyer desiring to correspond with a prisoner, *first* identify himself and his client to the prison officials, to assure that the letters marked privileged are actually from members of the bar. As to the ability to open the mail in the presence of inmates, this could in no way constitute censorship, since the mail would not be read. Neither could it chill such communications, since the inmate's presence insures that prison officials will not read the mail. The possibility that contraband will be enclosed in letters, even those from apparent attorneys, surely warrants prison officials' opening the letters. We disagree with the Court of Appeals that this should only be done in "appropriate circumstances." Since a flexible test, besides being unworkable, serves no arguable purpose in protecting any of the possible constitutional rights enumerated by respondent, we think that petitioners, by acceding to a rule whereby the inmate is present when mail from attorneys is inspected, have done all, and perhaps even more, than the Constitution requires.

VIII

The last issue presented is whether the Complex must make available, and if so has made available, adequate legal assistance, under *Johnson* v. *Avery, supra,* for the preparation of habeas corpus petitions and civil rights actions by inmates. The issue arises in the context of a challenge to a regulation providing, in pertinent part:

> "*Legal Work*
>
> "A legal advisor has been appointed by the Warden for the benefit of those offenders who are in need of legal assistance. This individual is an offender who has general knowledge of the law procedure. He is not an attorney and can not represent you as such.
>
> "No other offender than the legal advisor is permitted to assist you in the preparation of legal docu-

ments unless with the specific written permission of the Warden."

Respondent contended that this regulation was invalid because it failed to allow inmates to furnish assistance to one another. The District Court assumed that the Warden freely gave permission to inmates to give assistance to each other, and that *Johnson* v. *Avery, supra,* was thereby satisfied. The Court of Appeals found that the record did not support the assumption and that permission has been denied solely because of the existence of the inmate legal advisor, one of the inmates specially approved by the prison authorities. It decided, therefore, to remand the case to decide whether the one advisor satisfied the requirements of *Johnson* v. *Avery.* In so doing, the court stated that in determining the need for legal assistance, petitioners were to take into account the need for assistance in civil rights actions as well as habeas corpus suits.

In *Johnson* v. *Avery,* an inmate was disciplined for violating a prison regulation which prohibited inmates from assisting other prisoners in preparing habeas corpus petitions. The Court held that "unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief," inmates could not be barred from furnishing assistance to each other. 393 U. S., at 490. The court emphasized that the writ of habeas corpus was of fundamental importance in our constitutional scheme, and since the basic purpose of the writ "is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed." *Id.,* at 485. Following *Avery,* the Court, in *Younger* v. *Gilmore, supra,* affirmed a three-judge court judgment which required state officials to provide indi-

gent inmates with access to a reasonably adequate law library for preparation of legal actions.

Petitioners contend that *Avery* is limited to assistance in the preparation of habeas corpus petitions and disputes the direction of the Court of Appeals to the District Court that the capacity of the inmate adviser be assessed in light of the demand for assistance in civil rights actions as well as in the preparation of habeas petitions. Petitioners take too narrow a view of that decision.

First, the demarcation line between civil rights actions and habeas petitions is not always clear. The Court has already recognized instances where the same constitutional rights might be redressed under either form of relief. Cf. *Preiser* v. *Rodriguez,* 411 U. S. 475 (1973); *Haines* v. *Kerner,* 404 U. S. 519 (1972); *Wilwording* v. *Swenson,* 404 U. S. 249 (1971). Second, while it is true that only in habeas actions may relief be granted which will shorten the term of confinement, *Preiser, supra,* it is more pertinent that both actions serve to protect basic constitutional rights. The right of access to the courts, upon which *Avery* was premised, is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights. It is futile to contend that the Civil Rights Act of 1871 has less importance in our constitutional scheme than does the Great Writ. The recognition by this Court that prisoners have certain constitutional rights which can be protected by civil rights actions would be diluted if inmates, often "totally or functionally illiterate," were unable to articulate their complaints to the courts. Although there may be additional burdens on the Complex, if inmates may seek help from other inmates, or from the inmate adviser if he proves adequate, in both habeas and civil rights actions, this should not prove overwhelming. At

present only one inmate serves as legal adviser and it may be expected that other qualified inmates could be found for assistance if the Complex insists on naming the inmates from whom help may be sought.

Finding no reasonable distinction between the two forms of actions, we affirm the Court of Appeals on this point, and as the Court of Appeals suggested, the District Court will assess the adequacy of legal assistance under the reasonable-alternative standard of *Avery*.

Affirmed in part, reversed in part, and remanded.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, concurring in part and dissenting in part.

I join Part VIII of the Court's opinion, holding that the Complex may not prohibit inmates from assisting one another in the preparation of legal documents unless it provides adequate alternative legal assistance for the preparation of civil rights actions as well as petitions for habeas corpus relief. I also agree with the result reached in Part VII of the opinion of the Court, upholding the inspection of mail from attorneys for contraband by opening letters in the presence of the inmate. While I have previously expressed my view that the First Amendment rights of prisoners prohibit the reading of inmate mail, see *Procunier* v. *Martinez*, 416 U. S. 396, 422 (1973) (concurring opinion), and while I believe that inmates' rights to counsel and to access to the courts are also implicated here, I do not see how any of these constitutional rights are infringed to any significant extent by the mere inspection of mail in the presence of the inmate.

My disagreement with the majority is over its disposition of the primary issue presented by this case, the extent of the procedural protections required by the Due Process Clause of the Fourteenth Amendment in prison disciplinary proceedings. I have previously stated my

view that a prisoner does not shed his basic constitutional rights at the prison gate, and I fully support the Court's holding that the interest of inmates in freedom from imposition of serious discipline is a "liberty" entitled to due process protection.[1] But, in my view, the content which the Court gives to this due process protection leaves these noble holdings as little more than empty promises. To be sure, the Court holds that inmates are constitutionally entitled to advance written notice of the charges against them and a statement of the evidence relied on, the facts found, and the reasons supporting the disciplinary board's decision. Apparently, an inmate is also constitutionally entitled to a hearing and an opportunity to speak in his own defense. These are valuable procedural safeguards, and I do not mean for a moment to denigrate their importance.

But the purpose of notice is to give the accused the opportunity to prepare a defense, and the purpose of a hearing is to afford him the chance to present that defense. Today's decision deprives an accused inmate of any enforceable constitutional right to the procedural tools essential to the presentation of any meaningful defense, and makes the required notice and hearing formalities of little utility. Without the enforceable right

[1] The Court defines the liberty interest at stake here in terms of the forfeiture of good time as a disciplinary measure. Since it is only loss of good time that is at issue in this case, this definition is of course quite appropriate here. But lest anyone be deceived by the narrowness of this definition, I think it important to note that this is obviously not the only liberty interest involved in prison disciplinary proceedings which is protected by due process. Indeed, the Court later observes that due process requires the same procedural protection when solitary confinement is at issue. *Ante*, at 571–572, n. 19. The Court apparently holds that inmates' "liberty" is protected by due process whenever "a major change in the conditions of confinement" is imposed as punishment for misconduct. *Ibid.* I agree. See *Palmigiano* v. *Baxter*, 487 F. 2d 1280, 1284 (CA1 1973).

to call witnesses and present documentary evidence, an accused inmate is not guaranteed the right to present any defense beyond his own word. Without any right to confront and cross-examine adverse witnesses, the inmate is afforded no means to challenge the word of his accusers. Without these procedures, a disciplinary board cannot resolve disputed factual issues in any rational or accurate way. The hearing will thus amount to little more than a swearing contest, with each side telling its version of the facts—and, indeed, with only the prisoner's story subject to being tested by cross-examination. In such a contest, it seems obvious to me that even the wrongfully charged inmate will invariably be the loser. I see no justification for the Court's refusal to extend to prisoners these procedural safeguards which in every other context we have found to be among the "*minimum* requirements of due process." *Morrissey* v. *Brewer*, 408 U. S. 471, 489 (1972) (emphasis added).

The Court states that it is "of the opinion that the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." *Ante*, at 566. Since the Court is not ordinarily in the business of giving neighborly advice to state correctional authorities, I think it fair to assume that this statement represents the considered judgment of the Court that the Constitution requires that an accused inmate be permitted to call defense witnesses and present documentary evidence. Still, the Court hardly makes this clear, and ends up deferring to the discretion of prison officials to the extent that the right recognized is, as my Brother DOUGLAS demonstrates, *post*, at 597–598, practically unenforceable.

I would make clear that an accused inmate's right to present witnesses and submit other evidence in his

defense is constitutionally protected and, if unnecessarily abridged, judicially enforceable. As we said only last Term: "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers* v. *Mississippi,* 410 U. S. 284, 302 (1973).

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the [hearing body] so it may decide where the truth lies." *Washington* v. *Texas,* 388 U. S. 14, 19 (1967).

See also *Morrissey* v. *Brewer, supra,* at 489; *In re Oliver,* 333 U. S. 257, 273 (1948). The right to present the testimony of impartial witnesses and real evidence to corroborate his version of the facts is particularly crucial to an accused inmate, who obviously faces a severe credibility problem when trying to disprove the charges of a prison guard. See *Clutchette* v. *Procunier,* 497 F. 2d 809, 818 (CA9 1974); ABA Commission on Correctional Facilities and Services, Survey of Prison Disciplinary Practices and Procedures 19 (1974) (hereinafter ABA Survey).

I see no persuasive reason to justify the Court's refusal to afford this basic right to an accused inmate. The majority cites the possible interference with "swift punishment." But how often do we have to reiterate that the Due Process Clause "recognizes higher values than speed and efficiency"? *Fuentes* v. *Shevin,* 407 U. S. 67, 90–91, n. 22 (1972). Surely the brief prolongation of disciplinary hearings required to hear the testimony of a few witnesses before reaching what would otherwise seem to be a pre-ordained decision provides no support whatever for refusal to give accused inmates this right. Nor do I see the "obvious potential for disruption" that

the majority relies upon in the context of an inmate's right to call *defense* witnesses.

But even if the majority's fear in this regard is justified, the point that must be made clear is that the accused prisoner's right to present witnesses is the constitutional rule and that the needs of prison security must be accommodated within a narrowly limited exception to that rule. The inmate's right to call witnesses should, of course, be subject to reasonable limitation by the disciplinary board to prevent undue delay caused by an inmate's calling numerous cumulative witnesses or witnesses whose contributions would be of marginal relevance. The right to call a particular witness could also justifiably be limited if necessary to protect a confidential informant against a substantial risk of reprisal. I agree with the Court that there is this much flexibility in the due process requirement. But in my view the exceptions made to the constitutional rule must be kept to an absolute minimum, and each refusal to permit witnesses justified in writing in the disciplinary file, a rule the majority finds "useful" but inexplicably refuses to prescribe. *Ante,* at 566. And if prison authorities persist in a niggardly interpretation of the inmates' right to call witnesses, it must ultimately be up to the courts to exercise their great responsibility under our constitutional plan and enforce this fundamental constitutional right.

With respect to the rights of confrontation and cross-examination, the gulf between the majority opinion and my views is much wider. In part, this disagreement appears to stem from the majority's view that these rights are just not all that important. Thus, the Court states—not surprisingly, without citation of authority, other than MR. JUSTICE WHITE's separate opinion in *Arnett* v. *Kennedy,* 416 U. S. 134, 171 (1974)—that confrontation and cross-examination "are not rights universally

applicable to all hearings." *Ante,* at 567. And the Court suggests that while these procedures may be essential in situations where "serious deprivations" like loss of employment are at stake, they are not so essential here. I suppose the majority considers loss of a job to be a more serious penalty than the imposition of an additional prison sentence—on this record, ranging up to 18 months—which is the effective result of withdrawal of accumulated good time.

I could not disagree more, both with respect to the seriousness of the deprivation involved here and the importance of these rights. Our decisions flatly reject the Court's view of the dispensability of confrontation and cross-examination. We have held that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg* v. *Kelly,* 397 U. S. 254, 269 (1970). And in *Greene* v. *McElroy,* 360 U. S. 474, 496 (1959), we found that the view that cross-examination and confrontation must be permitted whenever "governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings" was one of the "immutable" principles of our jurisprudence—immutable, that is, until today. See also *Arnett* v. *Kennedy, supra,* at 215 (MARSHALL, J., dissenting); *Chambers* v. *Mississippi, supra,* at 294–295; *Morrissey* v. *Brewer,* 408 U. S., at 489; *In re Gault,* 387 U. S. 1, 56–57 (1967). Surely confrontation and cross-examination are as crucial in the prison disciplinary context as in any other, if not more so. Prison disciplinary proceedings will invariably turn on disputed questions of fact, see *Landman* v. *Royster,* 333 F. Supp. 621, 653 (ED Va. 1971), and, in addition to the usual need for cross-examination to reveal mistakes of identity, faulty perceptions, or cloudy memories, there is a significant potential

for abuse of the disciplinary process by "persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy," *Greene* v. *McElroy, supra,* at 496, whether these be other inmates seeking revenge or prison guards seeking to vindicate their otherwise absolute power over the men under their control. See also *Davis* v. *Alaska,* 415 U. S. 308. 317 (1974). I can see no rational means for resolving these disputed questions of fact without providing confrontation and cross-examination.

The majority, however, denies accused prisoners these basic constitutional rights. and leaves these matters for now to the "sound discretion" of prison officials. Since we already know how Nebraska authorities, at least, have chosen to exercise this discretion, the Court necessarily puts its stamp of approval on the State's failure to provide confrontation and cross-examination. I see no persuasive justification for this result. The Court again cites concern for administrative efficiency in support of its holding: "Proceedings would inevitably be longer and tend to unmanageability." *Ante,* at 567. I can only assume that these are makeweights, for I refuse to believe that the Court would deny fundamental rights in reliance on such trivial and easily handled concerns.

A more substantial problem with permitting the accused inmate to demand confrontation with adverse witnesses is the need to preserve the secrecy of the identity of inmate informers and protect them from the danger of reprisal. I am well aware of the seriousness of this problem, and I agree that in some circumstances this confidentiality must prevail over the accused's right of confrontation. "But this concern for the safety of inmates does not justify a wholesale denial of the right to confront and cross-examine adverse witnesses." *Clutchette* v. *Procunier,* 497 F. 2d, at 819. The need to keep the identity of informants confidential will exist in only

a small percentage of disciplinary cases. Whether because of the "inmates' code" or otherwise, the disciplinary process is rarely initiated by a fellow inmate and almost invariably by a correctional officer. I see no legitimate need to keep confidential the identity of a prison guard who files charges against an inmate; indeed, Nebraska, like most States, routinely informs accused prisoners of the identity of the correctional officer who is the charging party, if he does not already know. In the relatively few instances where inmates press disciplinary charges, the accused inmate often knows the identity of his accuser, as, for example, where the accuser was the victim of a physical assault.

Thus, the Court refuses to enforce prisoners' fundamental procedural rights because of a legitimate concern for secrecy which must affect only a tiny fraction of disciplinary cases. This is surely permitting the tail to wag the constitutional dog. When faced with a similar problem in *Morrissey* v. *Brewer, supra,* we nonetheless held that the parolee had the constitutional right to confront and cross-examine adverse witnesses, and permitted an exception to be made "if the hearing officer determines that an informant would be subjected to risk of harm if his identity were disclosed." 408 U. S., at 487. In my view, the same approach would be appropriate here.

Aside from the problem of preserving the confidentiality of inmate informers, the Court does not require confrontation and cross-examination of known accusers, whether inmates or guards, and indeed does not even require cross-examination of adverse witnesses who actually testify at the hearing. Yet, as THE CHIEF JUSTICE recently observed, "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested," *Davis* v. *Alaska, supra,* at 316, and " '[t]he main and essential purpose of con-

frontation is *to secure for the opponent the opportunity of cross-examination.*'" *Id.*, at 315–316. I see little basis for the Court's refusal to recognize the accused inmate's rights in these circumstances. The Court apparently accepts petitioners' arguments that there is a danger that such cross-examination will produce hostility between inmate and guard, or inmate and inmate, which will eventually lead to prison disruption; or that cross-examination of a guard by an inmate would threaten the guard's traditional role of absolute authority; or that cross-examination would somehow weaken the disciplinary process as a vehicle for rehabilitation.

I do not believe that these generalized, speculative, and unsupported theories provide anything close to an adequate basis for denying the accused inmate the right to cross-examine his accusers. The State's arguments immediately lose most of their potential force when it is observed that Nebraska already permits inmates to question the correctional officer who is the charging party with respect to the charges. See *ante*, at 567 n. 17. Moreover, by far the greater weight of correctional authority is that greater procedural fairness in disciplinary proceedings, including permitting confrontation and cross-examination, would enhance rather than impair the disciplinary process as a rehabilitative tool. President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Corrections 13, 82–83 (1967); ABA Survey 20–22; see *Landman* v. *Royster*, 333 F. Supp., at 653.

> "Time has proved . . . that blind deference to correctional officials does no real service to them. Judicial concern with procedural regularity has a direct bearing upon the maintenance of institutional order; the orderly care with which decisions are made by the prison authority is intimately related to the level of respect with which prisoners regard that author-

> ity. There is nothing more corrosive to the fabric of a public institution such as a prison than a feeling among those whom it contains that they are being treated unfairly." *Palmigiano* v. *Baxter*, 487 F. 2d 1280, 1283 (CA1 1973).

As THE CHIEF JUSTICE noted in *Morrissey* v. *Brewer*, 408 U. S., at 484, "fair treatment . . . will enhance the chance of rehabilitation by avoiding reactions to arbitrariness."

Significantly, a substantial majority of the States do permit confrontation and cross-examination in prison disciplinary proceedings, and their experience simply does not bear out the speculative fears of Nebraska authorities. See ABA Survey 21–22. The vast majority of these States have observed "no noticeable effect on prison security or safety. Furthermore, there was general agreement that the quality of the hearings had been 'upgraded' and that some of the inmate feelings of powerlessness and frustration had been relieved." *Id.*, at 21. The only reported complaints have been, not the theoretical problems suggested by petitioners, but that these procedures are time consuming and have slowed down the disciplinary process to some extent. These are small costs to bear to achieve significant gains in procedural fairness.

Thus, in my view, we should recognize that the accused prisoner has a constitutional right to confront and cross-examine adverse witnesses, subject to a limited exception when necessary to protect the identity of a confidential inmate informant. This does not mean that I would not permit the disciplinary board to rely on written reports concerning the charges against a prisoner. Rather, I would think this constitutional right sufficiently protected if the accused had the power to compel the attendance of an adverse witness so that his story can be tested by cross-examination. See *Clutchette* v. *Procunier*,

552-191 O - 76 - 40

497 F. 2d, at 819; *Palmigiano* v. *Baxter, supra,* at 1290. Again, whenever the right to confront an adverse witness is denied an accused, I would require that this denial and the reasons for it be noted in writing in the record of the proceeding. I would also hold that where it is found necessary to restrict the inmate's right of confrontation, the disciplinary board has the constitutional obligation to call the witness before it *in camera* and itself probe his credibility, rather than accepting the unchallenged and otherwise unchallengeable word of the informer. See *ibid.;* cf. *Birzon* v. *King,* 469 F. 2d 1241 (CA2 1972). And, again, I would make it clear that the unwarranted denial of the right to confront adverse witnesses, after giving due deference to the judgment of prison officials and their reasonable concerns with inmate safety and institutional order, would be cause for judicial intervention.

The Court next turns to the question of an accused inmate's right to counsel, and quotes a long passage from our decision last Term in *Gagnon* v. *Scarpelli,* 411 U. S. 778 (1973), in support of its conclusion that appointed counsel need not be provided and retained counsel need not be permitted in prison disciplinary proceedings at this time. The Court seemingly forgets that the holding of *Scarpelli* was that fundamental fairness requires the appointment of counsel in some probation revocation or parole revocation proceedings and overlooks its conclusion that

> "the effectiveness of the rights guaranteed by *Morrissey* may in some circumstances depend on the use of skills which the probationer or parolee is unlikely to possess. Despite the informal nature of the proceedings and the absence of technical rules of procedure or evidence, the unskilled or uneducated probationer or parolee may well have difficulty in

> presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex documentary evidence." *Id.*, at 786–787.

Plainly, these observations are at least as appropriate in the context of prison disciplinary proceedings. We noted in *Johnson* v. *Avery*, 393 U. S. 483, 487 (1969), that "penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited"; the same considerations provide the motivating force for the holding today in Part VIII of the Court's opinion.

In view of these considerations, I think it is clear that, at least in those serious disciplinary cases meeting the *Scarpelli* requirements, see 411 U. S., at 790, any inmate who seeks assistance in the preparation of his defense must be constitutionally entitled to have it. But, although for me the question is fraught with great difficulty, I agree with the Court that it would be inappropriate at this time to hold that this assistance must be provided by an appointed member of the bar.[2] There is considerable force to the argument that counsel on either side would be out of place in these disciplinary proceedings, and the practical problems of providing appointed counsel in these proceedings may well be insurmountable. But

[2] On the record in this case, no question is presented with respect to the presence of retained counsel at prison disciplinary proceedings, and I think it inappropriate for the Court to reach out and decide this important issue without the benefit of a concrete factual situation in which the issue arises. I would reserve for another day the questions whether the Constitution requires that an inmate able to afford counsel be permitted to bring counsel into the disciplinary hearing, or whether the Constitution allows a State to permit the presence of retained counsel when counsel is not appointed for indigents. Cf. *Gagnon* v. *Scarpelli*, 411 U. S. 778, 783 n. 6 (1973).

the controlling consideration for me is my belief that, in light of the types of questions likely to arise in prison discipline cases, counsel substitutes should be able to provide sufficiently effective assistance to satisfy due process. At least 41 States already provide such counsel substitutes, ABA Survey 22, reflecting the nearly universal recognition that for most inmates, this assistance with the preparation of a defense, particularly as disciplinary hearings become more complex, is absolutely essential. Thus, I would hold that any prisoner is constitutionally entitled to the assistance of a competent fellow inmate or correctional staff member—or, if the institution chooses, such other alternatives as the assistance of law students—to aid in the preparation of his defense.

Finally, the Court addresses the question of the need for an impartial tribunal to hear these prison disciplinary cases. We have recognized that an impartial decisionmaker is a fundamental requirement of due process in a variety of relevant situations, see, *e. g.*, *Morrissey* v. *Brewer*, 408 U. S., at 485–486; *Goldberg* v. *Kelly*, 397 U. S., at 271, and I would hold this requirement fully applicable here. But in my view there is no constitutional impediment to a disciplinary board composed of responsible prison officials like those on the Adjustment Committee here. While it might well be desirable to have persons from outside the prison system sitting on disciplinary panels, so as to eliminate any possibility that subtle institutional pressures may affect the outcome of disciplinary cases and to avoid any appearance of unfairness, in my view due process is satisfied as long as no member of the disciplinary board has been involved in the investigation or prosecution of the particular case, or has had any other form of personal involvement in the case. See *Clutchette* v. *Procunier*, 497 F. 2d, at 820; *United States ex rel. Miller* v. *Twomey*, 479 F. 2d

701, 716, 718 (CA7 1973); *Landman* v. *Royster*, 333 F. Supp., at 653. I find it impossible to determine on the present record whether this standard of impartiality has been met, and I would leave this question open for the District Court's consideration on remand.

Thus, it is my conclusion that the Court of Appeals was substantially correct in its holding that the minimum due process procedural requirements of *Morrissey* v. *Brewer* are applicable in the context of prison disciplinary proceedings. To the extent that the Court is willing to tolerate reduced procedural safeguards for accused inmates facing serious punishment which do not meet the standards set out in this opinion, I respectfully dissent.

MR. JUSTICE DOUGLAS, dissenting in part, concurring in the result in part.

The majority concedes that prisoners are persons within the meaning of the Fourteenth Amendment, requiring the application of certain due process safeguards to prison disciplinary proceedings, if those proceedings have the potential of resulting in the prisoner's loss of good time or placement in solitary confinement, *ante*, at 571–572, n. 19. But the majority finds that prisoners can be denied the right to cross-examine adverse witnesses against them, and sustains the disciplinary board's right to rely on secret evidence provided by secret accusers in reaching its decision, on the ground that only the prison administration can decide whether in a particular case the danger of retribution requires shielding a particular witness' identity. And in further deference to prison officials, the majority, while holding that the prisoner must usually be accorded the right to present witnesses on his own behalf, appears to leave the prisoner no remedy against a prison board which unduly restricts that right in the name of "institutional safety." Re-

spondent thus receives the benefit of some of the constitutional rights of due process that the Fourteenth Amendment extends to all "persons." In my view, however, the threat of any substantial deprivation of liberty within the prison confines, such as solitary confinement, is a loss which can be imposed upon respondent prisoner and his class only after a full hearing with all due process safeguards.

I

I agree that solitary confinement is a deprivation requiring a due process hearing for its imposition. Due process rights are required whenever an individual risks condemnation to a " 'grievous loss,' " *Morrissey* v. *Brewer*, 408 U. S. 471, 481; *Goldberg* v. *Kelly*, 397 U. S. 254, 263; *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 168 (Frankfurter, J., concurring). Thus due process is required before the termination of welfare benefits, *Goldberg, supra;* revocation of parole or probation, *Morrissey, supra,* and *Gagnon* v. *Scarpelli*, 411 U. S. 778; revocation of a driver's license, *Bell* v. *Burson*, 402 U. S. 535; and attachment of wages, *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337. Every prisoner's liberty is, of course, circumscribed by the very fact of his confinement, but his interest in the limited liberty left to him is then only the more substantial. Conviction of a crime does not render one a nonperson whose rights are subject to the whim of the prison administration, and therefore the imposition of any serious punishment within the prison system requires procedural safeguards. Of course, a hearing need not be held before a prisoner is subjected to some minor deprivation, such as an evening's loss of television privileges. Placement in solitary confinement, however, is not in that category. Prisoners are sometimes placed in solitary or punitive segregation for months or even years. *Bryant* v. *Harris*, 465 F. 2d 365; *Sostre* v. *McGinnis*, 442 F. 2d 178; *Adams*

v. *Carlson,* 368 F. Supp. 1050; *Landman* v. *Royster,* 333 F. Supp. 621, and such confinement inevitably results in depriving the prisoner of other privileges as well as those which are ordinarily available to the general prison population, *LaReau* v. *MacDougall,* 473 F. 2d 974; *Wright* v. *McMann,* 387 F. 2d 519. Moreover, the notation in a prisoner's file that he has been placed in such punitive confinement may have a seriously adverse effect on his eligibility for parole, a risk which emphasizes the need for prior due process safeguards, *Clutchette* v. *Procunier,* 497 F. 2d 809.

II

I would start with the presumption that cross-examination of adverse witnesses and confrontation of one's accusers are essential rights which ought always to be available absent any special overriding considerations. In *Morrissey* v. *Brewer, supra,* we held that the right to confront and cross-examine adverse witnesses is a minimum requirement of due process which must be accorded parolees facing revocation of their parole "unless the hearing officer specifically finds good cause for not allowing confrontation." 408 U. S., at 489. "Because most disciplinary cases will turn on issues of fact . . . the right to confront and cross-examine witnesses is essential." *Landman* v. *Royster, supra,* at 653.

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where

> the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases . . . but also in all types of cases where administrative and regulatory actions were under scrutiny." *Greene* v. *McElroy,* 360 U. S. 474, 496–497.

The decision as to whether an inmate should be allowed to confront his accusers should not be left to the unchecked and unreviewable discretion of the prison disciplinary board. The argument offered for that result is that the danger of violent response by the inmate against his accusers is great, and that only the prison administrators are in a position to weigh the necessity of secrecy in each case. But it is precisely this unchecked power of prison administrators which is the problem that due process safeguards are required to cure. "Not only the principle of judicial review, but the whole scheme of American government, reflects an institutionalized mistrust of any such unchecked and unbalanced power over essential liberties. That mistrust does not depend on an assumption of inveterate venality or incompetence on the part of men in power . . . ." *Covington* v. *Harris,* 136 U. S. App. D. C. 35, 39, 419 F. 2d 617, 621. Likewise the prisoner should have the right to cross-examine adverse witnesses who testify at the hearing. Opposed is the view that the right may somehow undermine the proper administration of the prison, especially if accused inmates are allowed to put questions to their guards. That, however, is a view of prison administra-

tion which is outmoded and indeed anti-rehabilitative, for it supports the prevailing pattern of hostility between inmate and personnel which generates an "inmates' code" of noncooperation, thereby preventing the rapport necessary for a successful rehabilitative program. The goal is to reintegrate inmates into a society where men are supposed to be treated fairly by the government, not arbitrarily. The opposed procedure will be counterproductive. A report prepared for the Joint Commission on Correctional Manpower and Training has pointed out that the "basic hurdle [to reintegration] is the concept of a prisoner as a nonperson and the jailer as an absolute monarch. The legal strategy to surmount this hurdle is to adopt rules . . . maximizing the prisoner's freedom, dignity, and responsibility. More particularly, the law must respond to the substantive and procedural claims that prisoners may have . . . ." F. Cohen, The Legal Challenge to Corrections 65 (1969). We recognized this truth in *Morrissey,* where we noted that society has an interest in treating the parolee fairly in part because "fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." 408 U. S., at 484. The same principle applies to inmates as well.

The majority also holds that "the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." *Ante,* at 566. Yet, while conceding that "the right to present evidence is basic to a fair hearing," *ibid.,* the Court again chooses to leave the matter to the discretion of prison officials, who are not even required to state their reasons for refusing a prisoner his right to call a witness, although the Court finds that such a statement of reasons would be

"useful." *Ibid.* Thus, although the Court acknowledges the prisoner's right, it appears to leave him with no means of enforcing it.

As the Court itself agrees in holding that the disciplinary board must provide a statement of reasons for its ultimate determination on the merits, *ante*, at 564–565, such a written statement is crucial not only to provide a basis for review, but to ensure that the board "will act fairly." *Ante*, at 565. Of course even in a criminal trial the right to present one's own witnesses may be limited by the trial judge's finding that the evidence offered is irrelevant, incompetent, or needlessly repetitious, and certainly the same restrictions may apply in the prison setting. But when the judge makes such a ruling it is a matter in the record which may be challenged on appeal. Nebraska may not provide any channel for administrative appeal of the board's ruling, but because " '[t]he fundamental requisite of due process of law is the opportunity to be heard,' " *Goldberg* v. *Kelly*, 397 U. S. 254, 267, some possibility must remain open for judicial oversight. Here as with the rights of confrontation and cross-examination, I must dissent from the Court's holding that the prisoner's exercise of a fundamental constitutional right should be left within the unreviewable discretion of prison authorities.

Our prisons are just now beginning to work their way out of their punitive heritage. The first American penitentiary was established in Philadelphia in 1790; it contained 24 individual cells for the solitary confinement of hardened offenders. P. Tappan, Crime, Justice and Correction 605–606 (1960). Under this "Pennsylvania System" the prisoner was continuously confined to solitary and all communication was forbidden, with the exception of religious advisors and official visitors. M. Wilson, The Crime of Punishment 219–220 (1931). New

York experimented with this approach but found it too severe, and adopted instead a compromise solution known as the "Auburn" or "silent" system, in which inmates were allowed to work in shops with others during the day, although under a strict rule of silence, and then returned to solitary confinement at night. Prisoners were marched around in military lock-step with their eyes cast on the ground, and the violations of any rules resulted in the immediate infliction of corporal punishment by the guards. Tappan, *supra*, at 609–610. Although the harsh treatment produced an orderly prison, it came under criticism because of its inhumanity, with particular emphasis on the unfettered discretion of the guards to impose punishment on the basis of vague charges that were never subjected to detached or impartial evaluation. Introductory Report to the Code of Reform and Prison Discipline 8, printed in E. Livingston, A System of Penal Law for the United States (1828).

We have made progress since then but the old tradition still lingers. Just recently an entire prison system of one State was held so inhumane as to be a violation of the Eighth Amendment bar on cruel and unusual punishment. *Holt* v. *Sarver*, 309 F. Supp. 362, aff'd, 442 F. 2d 304. The lesson to be learned is that courts cannot blithely defer to the supposed expertise of prison officials when it comes to the constitutional rights of inmates.

> "Prisoners often have their privileges revoked, are denied the right of access to counsel, sit in solitary or maximum security or lose accrued 'good time' on the basis of a single, unreviewed report of a guard. When the courts defer to administrative discretion, it is this guard to whom they delegate the final word on reasonable prison practices. This is the central evil in prison . . . the unreviewed adminis-

> trative discretion granted to the poorly trained personnel who deal directly with prisoners." Hirschkop & Millemann, The Unconstitutionality of Prison Life, 55 Va. L. Rev. 795, 811–812 (1969).

The prisoner's constitutional right of confrontation should not yield to the so-called expertise of prison officials more than is necessary. The concerns of prison officials in maintaining the security of the prison and of protecting the safety of those offering evidence in prison proceedings are real and important. But the solution cannot be a wholesale abrogation of the fundamental constitutional right to confront one's accusers. The danger of retribution against the informer is not peculiar to the prison system; it exists in every adversary proceeding, and the criminal defendant out on bail during his trial might present a greater threat to the witness hostile to his interests than the prison inmate who is subject to constant surveillance. See *Preiser* v. *Rodriguez,* 411 U. S. 475, 492. If there is an "inmates' code" of the prison, resulting from hostility to the authorities, which proscribes inmate cooperation with prison officials in disciplinary proceedings, it is probably based upon the perceived arbitrariness of those proceedings. That ethic, which is clearly anti-rehabilitative, must be ferreted out, but I do not see how the petitioners can rely on their current failure to correct this evil for the perpetration of an additional one—the denial of the right of confrontation. In some circumstances it may be that an informer's identity should be shielded. Yet in criminal trials the rule has been that if the informer's information is crucial to the defense, then the government must choose between revealing his identity and allowing confrontation, or dismissing the charges. *Roviaro* v. *United States,* 353 U. S. 53. And it is the court, not the prosecutor, who determines the defendant's need for the information. We

should no more place the inmate's constitutional rights in the hands of the prison administration's discretion than we should place the defendant's right in the hands of the prosecutor.

Insofar as the Court affirms the judgment of the Court of Appeals I concur in the result. But the command of the Due Process Clause of the Fourteenth Amendment compels me to dissent from that part of the judgment allowing prisoners to continue to be deprived of the right to confront and cross-examine their accusers, and leaving the right to present witnesses in their own behalf in the unreviewable discretion of prison officials.

III

Finally, the Court again, as earlier this term in *Procunier* v. *Martinez,* 416 U. S. 396, sidesteps the issue of the First Amendment rights of prisoners to send and receive mail. I adhere to the views expressed by my Brother MARSHALL and myself earlier this Term in our separate opinions in *Procunier.* I agree, however, with the Court that the prisoners' First Amendment rights are not violated by inspection of their mail for contraband, so long as the mail is not read and the inspection is done in the prisoner's presence so that he can be assured that the privacy of his communications is not breached. Such a procedure should adequately serve the prison administration's interest in ensuring that weapons, drugs, and other prohibited materials are not unlawfully introduced into the prison, while preserving the prisoner's First Amendment right to communicate with others through the mail.

UNITED STATES *v.* MARINE BANCORPORATION, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

No. 73-38. Argued April 23, 1974—Decided June 26, 1974

The United States brought this civil antitrust action under § 7 of the Clayton Act to challenge a proposed merger between two commercial banks, which would substitute the acquiring bank for the acquired bank in Spokane, Wash., and would permit the former for the first time to participate directly in the Spokane market. The acquiring bank, appellee National Bank of Commerce (NBC), is a large, nationally chartered bank based in Seattle, Wash., and a wholly owned subsidiary of appellee Marine Bancorporation, Inc., and in terms of assets, deposits, and loans is the second largest banking organization with headquarters in Washington, operating 107 branches in the State, including 59 in the Seattle metropolitan area and 31 in lesser developed eastern sections of the State, but none of which is in the Spokane metropolitan area. The acquired or target bank, appellee Washington Trust Bank (WTB), is a medium-size, state-chartered bank located in Spokane, with seven branches, six in the city and one in a suburb, and is the eighth largest bank with headquarters in Washington and the ninth largest in the State, controlling 17.4% of the 46 commercial banking offices and holding 18.6% or the third largest percentage of the total deposits in the Spokane metropolitan area. (The two banks with the largest percentages in the area hold 42.1% and 31.6% respectively of total deposits.) The Government bases its case exclusively on the potential-competition doctrine, seeking to establish that the merger "may . . . substantially . . . lessen competition" within the meaning of § 7: (i) by eliminating the prospect that NBC, absent acquisition of the market share represented by WTB, would enter Spokane *de novo* or through acquisition of a smaller bank and thus would assist in deconcentrating that market over the long run; (ii) by ending present procompetitive effects allegedly produced in Spokane by NBC's perceived presence on the fringe of the Spokane market; and (iii) by terminating the alleged prob-

ability that WTB as an independent entity would develop by internal expansion or mergers with other medium-size banks into a regional or ultimately statewide actual competitor of NBC and other large banks. The District Court held against the Government on all aspects and dismissed the complaint. *Held:*

1. As "a necessary predicate" to deciding whether the proposed merger contravenes the Clayton Act, the District Court properly found that the relevant product market was the "business of commercial banking" and that the relevant geographic market was the Spokane metropolitan area. The entire State is not, despite the Government's contrary contention, an appropriate "section of the country" within the meaning of § 7, since for the purpose of this case the appropriate "section of the country" and the "relevant geographic market" are the same, being the area in which the acquired firm is an actual, direct competitor, and since moreover the Government has not shown that the effect of the merger on a statewide basis "may be substantially to lessen competition" within the meaning of § 7. Pp. 618–623.

2. While geographic market extension mergers by commercial banks must pass muster under the potential-competition doctrine, the application of the doctrine to commercial banking must take into account the extensive and unique federal and state regulatory restraints on entry into that line of commerce, including controls over the number of bank charters to be granted, prior bank regulatory agency approval of the opening of branches, and state-law restrictions, such as those in Washington, on *de novo* geographic expansion through branching and multibank holding companies. Pp. 626–630.

3. The Government's evidence of concentration ratios in the Spokane commercial banking market established a prima facie case that that market was sufficiently concentrated to invoke the potential-competition doctrine, and appellees did not demonstrate that such ratios inaccurately depicted the economic characteristics of the Spokane market. Pp. 630–632.

4. In view of the legal barriers to entry, notably state-law prohibitions against *de novo* branching, branching from a branch office, and multibank holding companies, the Government failed to sustain its burden of proof that the challenged merger violates § 7 by eliminating the likelihood that, but for the merger, NBC would enter Spokane *de novo* by means of sponsorship-acquisition or through a foothold acquisition of a small state bank in the Spokane

area, since it was not shown that either of the proposed alternative methods of entry was feasible or offered a substantial likelihood of ultimately producing deconcentration of the Spokane market or other significant procompetitive effects. Pp. 632–639.

5. The Government's failure to establish that NBC has alternative methods of entry offering a reasonable likelihood of producing significant procompetitive effects is determinative of its contention that without regard to the possibility of future deconcentration of the Spokane market, the challenged merger is illegal because it eliminates NBC as a perceived potential entrant. Assuming that commercial bankers in Spokane are aware of the regulatory barriers that render NBC an unlikely or insignificant potential entrant except by merger with WTB, it is improbable, in light of such barriers, that NBC exerts any meaningful procompetitive influence over Spokane banks by "standing in the wings." Pp. 639–640.

6. The record amply supports the District Court's finding that the Government "failed to establish . . . that there is any reasonable probability that WTB will expand into other banking markets," since at no time in its 70-year history has WTB established branches outside the Spokane area, acquired another bank, or received a merger offer other than the one at issue here. Pp. 640–641.

Affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and REHNQUIST, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 642. DOUGLAS, J., took no part in the decision of this case.

Deputy Solicitor General Friedman argued the cause for the United States. With him on the brief were *Solicitor General Bork, Assistant Attorney General Kauper, Howard E. Shapiro,* and *George Edelstein.*

R. A. Moen argued the cause for appellees Marine Bancorporation, Inc., et al. With him on the brief was *James Wm. Johnston.* *Lee Loevinger* argued the cause for appellee Comptroller of the Currency. With him on the brief were *Robert Bloom* and *Jon D. Hartman.*

MR. JUSTICE POWELL delivered the opinion of the Court.

The United States brought this civil antitrust action under § 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 18, to challenge a proposed merger between two commercial banks. The acquiring bank is a large, nationally chartered bank based in Seattle, Washington, and the acquired bank is a medium-size, state-chartered bank located at the opposite end of the State in Spokane. The banks are not direct competitors to any significant degree in Spokane or any other part of the State. They have no banking offices in each other's home cities. The merger agreement would substitute the acquiring bank for the acquired bank in Spokane and would permit the former for the first time to operate as a direct participant in the Spokane market.

The proposed merger would have no effect on the number of banks in Spokane. The United States bases its case exclusively on the potential-competition doctrine under § 7 of the Clayton Act. It contends that if the merger is prohibited, the acquiring bank would find an alternative and more competitive means for entering the Spokane area and that the acquired bank would ultimately develop by internal expansion or mergers with smaller banks into an actual competitor of the acquiring bank and other large banks in sections of the State outside Spokane. The Government further submits that the merger would terminate the alleged procompetitive influence that the acquiring bank presently exerts over Spokane banks due to the potential for its entry into that market.

After a full trial, the District Court held against the Government on all aspects of the case. We affirm that court's judgment. We hold that in applying the poten-

552-191 O - 76 - 41

tial-competition doctrine to commercial banking, courts must take into account the extensive federal and state regulation of banks, particularly the legal restraints on entry unique to this line of commerce. The legal barriers to entry in the instant case, notably state-law prohibitions against *de novo* branching, against branching from a branch office, and against multibank holding companies, compel us to conclude that the challenged merger is not in violation of § 7.

I

BACKGROUND

A. Facts.

The acquiring bank, National Bank of Commerce (NBC), is a national banking association with its principal office in Seattle, Washington. Located in the northwest corner of the State, Seattle is the largest city in Washington. NBC is a wholly owned subsidiary of a registered bank holding company, Marine Bancorporation, Inc. (Marine), and in terms of assets, deposits, and loans is the second largest banking organization with headquarters in the State of Washington. At the end of 1971, NBC had total assets of $1.8 billion, total deposits of $1.6 billion, and total loans of $881.3 million.[1] It operates 107 branch banking offices within the State, 59 of which are located in the Seattle metropolitan area and 31 of which are in lesser developed sections of eastern Washington. In order of population, the four major

[1] By comparison, the largest banking organization with headquarters in Washington, Seattle-First National Bank, at the same time had assets of $2.8 billion, deposits of $2.5 billion, and loans of $1.4 billion. The figures shown here and in the text for NBC and Seattle-First National Bank take into account the operations of the two banks within and outside the State of Washington. Subsequent figures, see, *e. g.*, n. 3, *infra*, reflect operations solely within the State.

metropolitan areas in Washington are Seattle, Tacoma, Spokane, and Everett. NBC has no branch offices in the latter three areas.

The target bank, Washington Trust Bank (WTB), founded in 1902, is a state bank with headquarters in Spokane. Spokane is located in the extreme eastern part of the State, approximately 280 road miles from Seattle. It is the largest city in eastern Washington, with a population of 170,000 within the corporate limits and of approximately 200,000 in the overall metropolitan area. The city has a substantial commercial and industrial base. The surrounding region is sparsely populated and is devoted largely to agriculture, mining, and timber. Spokane serves as a trade center for this region. NBC, the acquiring bank, has had a longstanding interest in securing entry into Spokane.

WTB has seven branch offices, six in the city of Spokane and one in Opportunity, a Spokane suburb. WTB is the eighth largest banking organization with headquarters in Washington and the ninth largest banking organization in the State. At the end of 1971, it had assets of $112 million, total deposits of $95.6 million, and loans of $57.6 million. It controls 17.4% of the 46 commercial banking offices in the Spokane metropolitan area. It is one of 12 middle-size banks in Washington (*i. e.*, banks with assets in the $30 million to $250 million range).

WTB is well managed and profitable. From December 31, 1966, to June 30, 1972, it increased its percentage of total deposits held by banking organizations in the Spokane metropolitan area from 16.6% to 18.6%. The amount of its total deposits grew by approximately 50% during that period, a somewhat higher rate of increase than exhibited by all banking organizations operating in Spokane at the same time.[2] Although WTB has exhibited

[2] See App. 1220. The following table depicts the relative status

a pattern of moderate growth, at no time during its 70-year history has it expanded outside the Spokane metropolitan area.

As of June 30, 1972, there were 91 national and state banking organizations in Washington. The five largest in the State held 74.3% of the State's total commercial

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of the six banking organizations operating in the Spokane metropolitan area from 1966 to mid-1972.

DISTRIBUTION OF TOTAL DEPOSITS HELD BY BANKING ORGANIZATIONS IN THE SPOKANE METROPOLITAN AREA, 1966–1972

(dollars in thousands)

	12–31–66		6–30–72	
Banking Organization	$	% of Total	$	% of Total
Washington Bancshares, Inc.*	155,885	41.1	216,340	42.1
Seattle-First National Bank	145,251	38.3	162,220	31.6
Washington Trust Bank	63,102	16.6	95,464	18.6
Sub Total	364,238	96.1	474,024	92.3
American Commercial Bank	3,552	.9	15,739	3.1
Farmers and Merchants Bank	5,593	1.5	12,558	2.5
Pacific National Bank**	5,801	1.5	11,152	2.2
Total	379,184	100.0	513,473	100.0

Note: Due to rounding, figures may not add to totals.

*Washington Bancshares, Inc., a bank holding company, owns two subsidiaries operating in Spokane, Old National Bank of Washington and First National Bank of Spokane. The deposit totals of these two banks are consolidated under the Washington Bancshares, Inc., entry in the above table.

**The bank at the bottom of the table is a branch (with two banking offices) of Pacific National Bank of Washington, which has its principal office in Seattle. This Seattle bank is in turn a subsidiary of Western Bancorporation, a multistate bank holding company with assets of approximately $14 billion.

bank deposits and operated 61.3% of its banking offices. At that time, the two largest in the State, Seattle-First National Bank and NBC, held 51.3% of total deposits and operated 36.5% of the banking offices in Washington.[3] There are six banking organizations operating in the Spokane metropolitan area. One organization, Washington Bancshares, Inc., controls two separate banks and their respective branch offices. As of midyear 1972, this organization in the aggregate held 42.1% of total deposits in the area. Seattle-First National Bank, by comparison, held 31.6%. The target bank held 18.6% of total deposits at that time, placing it third in the Spokane area behind Washington Bancshares, Inc., and Seattle-First National Bank. Thus, taken together, Washington Bancshares, Seattle-First National Bank, and WTB hold approximately 92% of total deposits in the Spokane area. None of the remaining three commercial banks in Spokane holds a market share larger than 3.1%.[4] One of these banks, Farmers & Merchants Bank, has offices only in a Spokane suburb.

The degree of concentration of the commercial banking business in Spokane may well reflect the severity of Washington's statutory restraints on *de novo* geographic expansion by banks. Although Washington permits branching, the restrictions placed on that method of in-

[3] See App. 1165. The relative size of banking organizations in Washington is indicated by a table introduced by the Government and set forth in the Appendix to this opinion. See *infra*, p. 643.

The degree of concentration in commercial banking in Washington has not increased significantly in the last decade. For the 12-year period ending December 31, 1971, the 10 largest banking organizations increased their aggregate share of total deposits by a single percentage point. WTB's percentage of total deposits in the State was essentially stable for this period, decreasing from 1.5% to 1.4%. From 1960 to 1971 the number of commercial banks in Washington increased by five.

[4] See n. 2, *supra*.

ternal growth are stringent. Subject to the approval of the state supervisor of banking, Washington banks with sufficient paid-in capital may open branches in the city or town in which their headquarters are located, the unincorporated areas of the county in which their headquarters are located, and incorporated communities which have no banking office. Wash. Rev. Code Ann. § 30.40.020 (Supp. 1973). But under state law, no state-chartered bank "shall establish or operate any branch . . . in any city or town outside the city or town in which its principal place of business is located in which any bank, trust company or national banking association regularly transacts a banking or trust business, except by taking over or acquiring an existing bank, trust company or national banking association . . . ." *Ibid.* Since federal law subjects nationally chartered banks to the branching limitations imposed on their state counterparts,[5] national and state banks in Washington are restricted to mergers or acquisitions in order to expand into cities and towns with preexisting banking organizations.

The ability to acquire existing banks is also limited by a provision of state law requiring that banks incorporating in Washington include in their articles of incorporation a clause forbidding a new bank from merging with or permitting its assets to be acquired by another bank for a period of at least 10 years, without the consent of the state supervisor of banking. Wash. Rev. Code Ann. § 30.08.020 (7) (1961 and Supp. 1973).[6] In addition,

[5] 12 U. S. C. § 36 (c). See *First National Bank* v. *Dickinson*, 396 U. S. 122 (1969); *First National Bank* v. *Walker Bank*, 385 U. S. 252 (1966). Cf. *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 328 (1963).

[6] This statute provides, in relevant part, that the articles of incorporation of any bank to be initiated in Washington shall state:

"(7) That for a stated number of years, which shall be not less than ten nor more than twenty years from the date of approval of

once a bank acquires or takes over one of the banks operating in a city or town other than the acquiring bank's principal place of business, it cannot branch from the acquired bank. Wash. Rev. Code Ann. § 30.40.020 (Supp. 1973). Thus, an acquiring bank that enters a new city or town containing banks other than the acquired bank is restricted to the number of bank offices obtained at the time of the acquisition. Moreover, multibank holding companies are prohibited in Washington. Wash. Rev. Code Ann. § 30.04.230 (Supp. 1973).[7] Under state law, no

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the articles (a) no voting share of the corporation shall, without the prior written approval of the supervisor, be affirmatively voted for any proposal which would have the effect of sale, conversion, merger, or consolidation to or with, any other banking entity or affiliated financial interest, whether through transfer of stock ownership, sale of assets, or otherwise, (b) the corporation shall take no action to consummate any sale, conversion, merger, or consolidation in violation of this subdivision, (c) this provision of the articles shall not be revoked, altered, or amended by the shareholders without the prior written approval of the supervisor, and (d) all stock issued by the corporation shall be subject to this subdivision and a copy hereof shall be placed upon all certificates of stock issued by the corporation."

[7] This statute provides:

"A corporation or association organized under the laws of this state, or licensed to transact business in the state, shall not hereafter acquire any shares of stock of any bank, trust company, or national banking association which, in the aggregate, enable it to own, hold, or control more than twenty-five percent of the capital stock of more than one such bank, trust company, or national banking association: *Provided, However,* That the foregoing restriction shall not apply as to any legal commitments existing on February 27, 1933: *And Provided, Further,* That the foregoing restriction shall not apply to prevent any such corporation or association which has its principal place of business in this state from acquiring additional shares of stock in a bank, trust company, or national banking association in which such corporation or association owned twenty-five percent or more of the capital stock on January 1, 1961.

"A person who does, or conspires with another or others in doing,

corporation in Washington may own, hold, or control more than 25% of the capital stock of more than one bank. *Ibid.* Violations of the one-bank holding company statute are gross misdemeanors carrying a possible penalty of forfeiture of a corporate charter. *Ibid.* Accordingly, it is not possible in Washington to achieve the rough equivalent of free branching by aggregating a number of unit banks under a bank holding company.[8]

B. The Proceedings.

In February 1971, Marine, NBC, and WTB agreed to merge the latter into NBC. NBC, as the surviving bank, would operate all eight banking offices of WTB as branches of NBC. In March 1971, NBC and WTB applied to the Comptroller of the Currency pursuant to the

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an act in violation of this section shall be guilty of a gross misdemeanor. A corporation that violates this section, or a corporation whose stock is acquired in violation hereof, shall forfeit its charter if it be a domestic corporation, or its license to transact business if it be a foreign corporation; and the forfeiture shall be enforced in an action by the state brought by the attorney general."

[8] The wisdom of inflexible limitations on *de novo* bank expansion like those in force in Washington has been questioned. *E. g.*, Baker, State Branch Bank Barriers and Future Shock—Will the Walls Come Tumbling Down?, 91 Banking L. J. 119 (1974); Comment, Bank Branching in Washington: A Need for Reappraisal, 48 Wash. L. Rev. 611 (1973). They inhibit growth by internal expansion and compel banks to resort to mergers and acquisitions in order to enter many new markets. Although other reasons no doubt exist, these limitations ostensibly are designed to prevent banks from encountering financial difficulties through overextending themselves, and they often date from the period of bank failures in the 1930's. If bank safety is their purpose, such restrictions may deserve reconsideration today in light of the extensive range of regulatory controls that otherwise exist, including federal and state supervision of the issuance of new bank charters, controls on interest rates and investments, deposit insurance, and regular, intensive bank inspections. Whatever their efficacy, a question that is not ours to resolve, such barriers to new entry are a fact of banking life in Washington.

Bank Merger Act of 1966 for approval of the merger.[9] As required by that Act, see 12 U. S. C. § 1828 (c) (4), the Comptroller requested "reports on the competitive factors involved" from the Attorney General, the Federal Deposit Insurance Corporation, and the Board of Governors of the Federal Reserve System. Each of these agencies submitted a negative report on the competitive effects of the merger. The Attorney General relied on the reasons advanced in the instant case. The latter two agencies based their conclusions primarily on the degree of concentration in commercial banking in Washington as a whole.

The Comptroller approved the merger in a report issued September 24, 1971. He concluded that state law precluded NBC from branching in Spokane and "effectively prevented" NBC from causing a new Spokane bank to be formed which could later be treated as a merger partner. He noted that state law prevented the only independent small bank with offices located within the city boundaries of Spokane from merging with NBC, since that bank was state chartered, had been founded in 1965, and was subject to the minimum 10-year restriction against sale of a new bank set out in Wash. Rev. Code

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[9] See 80 Stat. 7, 12 U. S. C. §§ 1828 (c) (2) (A) and (c) (5). If in a bank merger the "acquiring, assuming, or resulting bank is to be a national bank . . . ," the merger must receive prior written approval from the Comptroller of the Currency. 12 U. S. C. § 1828 (c) (2) (A). The Comptroller shall not approve any proposed merger transaction

"whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." 12 U. S. C. § 1828 (c) (5) (B).

Ann. § 30.08.020 (7) (1961 and Supp. 1973). The Comptroller relied heavily on the view that the merger would contribute to the convenience and needs of bank customers in Spokane by bringing to them services not previously provided by WTB.

Acting within the 30-day limitation period set out in the Bank Merger Act of 1966, 12 U. S. C. § 1828 (c) (7), the United States then commenced this action in the United States District Court for the Western District of Washington, challenging the legality of the merger under § 7 of the Clayton Act.[10] As a result, the merger was automatically stayed. 12 U. S. C. § 1828 (c) (7) (A). Pursuant to 12 U. S. C. § 1828 (c) (7) (D), the Comptroller intervened in support of the merger as a party defendant.

Prior to trial the United States dropped all allegations concerning actual competition between the merger partners.[11] The remainder of the complaint addressed the subject of potential competition. The United States

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[10] Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U. S. C. § 18, provides in pertinent part:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

[11] In its complaint, the United States alleged that NBC and WTB were in direct competition due to the overlap of correspondent services and because NBC had two small branch offices located in Spokane County, although outside the Spokane metropolitan area. In a pretrial stipulation, however, the parties agreed that "there is no substantial existing competition between NBC and WTB in the Spokane metropolitan area or in any section of the country." App. 367.

sought to establish that the merger "may . . . substantially . . . lessen competition" within the meaning of § 7 in three ways: by eliminating the prospect that NBC, absent acquisition of the market share represented by WTB, would enter Spokane *de novo* or through acquisition of a smaller bank and thus would assist in deconcentrating that market over the long run; by ending present procompetitive effects allegedly produced in Spokane by NBC's perceived presence on the fringe of the Spokane market; and by terminating the alleged probability that WTB as an independent entity would develop through internal growth or through mergers with other medium-size banks into a regional or ultimately statewide counterweight to the market power of the State's largest banks. The Government's first theory—alleged likelihood of *de novo* or foothold entry by NBC if the challenged merger were blocked—was the primary basis upon which this case was presented to the District Court.[12]

At the close of final oral argument following a week-long trial, the District Judge ruled for the defendants from the bench. Two weeks later he adopted without change the defendants' proposed findings of facts and conclusions of law, the latter consisting of seven sentences. 1973–1 Trade Cas. ¶ 74,496, p. 94,244 (1973).[13]

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[12] Brief for United States 27–28.

[13] In adopting, verbatim, proposed findings of fact in a complicated § 7 antitrust action, the District Court failed to heed this Court's admonition voiced a decade ago. *United States* v. *El Paso Natural Gas Co.*, 376 U. S. 651, 656–657 (1964). This has added considerably to our burden of reviewing the extensive record developed in this case. We have also been hampered by the absence of transcript citations in support of the District Court's findings. It is to be remembered that in a direct-appeal case like this one, we must apply the "clearly erroneous" standard of Fed. Rule Civ. Proc. 52 (a), just as the courts of appeals must in cases governed exclusively by 28 U. S. C. §§ 1291 and 1292. See, *e. g.*, *United States* v. *General*

The court found that the merger would "substantially" increase competition in commercial banking in the Spokane metropolitan area and would have "no inherent anticompetitive effect . . . ." *Ibid.* In light of the legal and economic barriers to any other method of entry, the court further found "no reasonable probability" that, absent the challenged merger, NBC would enter the Spokane market in the "reasonably foreseeable future." *Id.*, at 94,245.

According to the District Court, Washington law forbade NBC from establishing *de novo* branches in Spokane, and the Government had failed to establish that there was any existing bank in Spokane other than WTB "available for acquisition by NBC on any reasonably acceptable basis at any time in the foreseeable future, or at all." *Ibid.* Moreover, any attempt by NBC to enter *de novo* by assisting in the formation of and then acquiring a newly chartered bank in Spokane "even if it could be legally accomplished," [14] or to undertake a foothold

Dynamics Corp., 415 U. S. 486 (1974). We welcome any assistance in performance of the role, as do, undoubtedly, the courts of appeals.

With regard to the skeletal conclusions of law entered by the District Court, we reiterate that direct appeals of such cases, "the trials of which usually result in long and complex factual records, come here without the benefit of any sifting by the Courts of Appeals." *El Paso Natural Gas Co., supra,* at 663 (separate opinion of Harlan, J.). Accordingly, if the District Court does not enter an opinion analyzing the relevant precedents in light of the record, we are deprived of this helpful guidance.

[14] The court's reservations about the legality of this alleged potential method of entry by NBC into Spokane reflect the fact that the procedure is analogous in substance to *de novo* branching, yet under state law NBC is prohibited from establishing new branches in Spokane. See Wash. Rev. Code Ann. § 30.40.020 (Supp. 1973). The parties are in sharp disagreement over whether the state branching statute proscribes the sponsorship and subsequent acquisition of a

acquisition, would not be economically feasible. *Ibid.* In addition to noting the past and projected slow growth of the Spokane area, the court found that the ability to branch in a metropolitan area was essential to effective competition in the banking business. *Ibid.* Under state law, NBC would be unable to open new branch offices in Spokane if it made a foothold acquisition or helped form and then acquired a new bank. These and other factors rendered "negative" the prospects for growth of a foothold acquisition or of a sponsored bank started from scratch. *Ibid.* This was confirmed by the experience of another large banking organization not based in Spokane that had entered the city through a foothold acquisition in 1964 and subsequently had been unable to expand the market share of the acquired bank. *Id.*, at 94,245–94,246.

The court found no perceptible procompetitive effect deriving from NBC's premerger presence on the fringe of the Spokane market. *Id.*, at 94,246. It also held that the Government had failed to carry its burden of proving a reasonable probability that WTB, absent the merger, would expand beyond the Spokane market by *de novo* growth or through combination with another medium-size bank. *Ibid.* It found no probability that NBC would be "entrenched as a dominant bank in the

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new bank. The Government contends that the formation of a new national bank is not governed by state-law restrictions on branching, citing 12 U. S. C. §§ 26, 27. Appellees respond in essence that this would still constitute *sub rosa* branching in violation of state law. The formation of a new national bank in Spokane would in any event require approval for a new charter from the Comptroller of the Currency. In this regard, the District Court gave "great weight" to the testimony of the Regional Administrator of National Banks that it was unlikely that a charter for a new national bank in Spokane would be granted within the foreseeable future. 1973–1 Trade Cas. ¶ 74,496, p. 94,245.

Spokane metropolitan area" as a result of the merger, and it could find no likelihood that the merger would trigger a series of defensive mergers by other banks in the State. *Id.*, at 94,246–94,247.[15]

On the basis of its findings, the District Court dismissed the Government's complaint. The Government thereupon brought this direct appeal under the Expediting Act, 32 Stat. 823, as amended, 15 U. S. C. § 29. We noted probable jurisdiction. 414 U. S. 907 (1973).

II

THE RELEVANT MARKETS

Determination of the relevant product and geographic markets is "a necessary predicate" to deciding whether a merger contravenes the Clayton Act. *United States* v. *Du Pont & Co.*, 353 U. S. 586, 593 (1957); *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 324 (1962). The District Court found that the relevant product market "within which the competitive effect of the merger is to be judged" is the "business of commercial banking (and the cluster of products and services denoted thereby)...." 1973–1 Trade Cas. ¶ 74,496, p. 94,243. The parties do

[15] The District Court also issued extensive findings of fact concerning the "convenience and needs" defense set out in the Bank Merger Act of 1966, 12 U. S. C. § 1828 (c) (5) (B). The court found in essence that NBC, as a full-service bank, would bring to the Spokane area a broad range of banking services that WTB, due to its limited size, is unable to provide. These included increased loan limits, different types of loans, international banking services, computer services, enhanced trust services, and other benefits. The court's findings on this subject led it to the conclusion that even if the merger violated the standards of the Clayton Act, it was nevertheless lawful under the Bank Merger Act of 1966. 1973–1 Trade Cas. ¶ 74,496, pp. 94,247–94,251. In light of our conclusion with regard to § 7 of the Clayton Act, we do not address the District Court's findings under the "convenience and needs" defense.

not dispute this finding, and in any event it is in full accord with our precedents.[16]

The District Court found that the relevant geographic market is the Spokane metropolitan area, "consisting of the City of Spokane and the populated areas immediately adjacent thereto, including the area extending easterly through the suburb of Opportunity toward the Idaho border . . . ." *Id.*, at 94,244. This area extends approximately five miles to the west and south and 10 miles to the north and east of the center of the city. It is wholly within and considerably smaller than Spokane County and is surrounded by a sparsely populated region, with no nearby major metropolitan centers. It contains all eight of the target bank's offices. On the basis of the record, we have no reason to doubt that it constitutes a reasonable approximation of the "localized" banking market in which Spokane banks offer the major part of their services and to which local consumers can practicably turn for alternatives. *E. g., United States* v. *Phillipsburg National Bank*, 399 U. S. 350, 362–365 (1970). It is also the area where "the effect of the merger on competition will be direct and immediate . . . ," which as this Court has held is the appropriate "section of the country" for purposes of § 7. *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 357 (1963). Accordingly, we affirm the District Court's holding that the Spokane metropolitan area is the appropriate geographic market for determining the legality of the merger.

Prior to trial the Government stipulated that the Spokane area is a relevant geographic market in the instant

[16] See *United States* v. *Phillipsburg National Bank*, 399 U. S. 350, 359–362 (1970); *United States* v. *Third National Bank*, 390 U. S. 171, 182 n. 15 (1968); *United States* v. *Philadelphia National Bank*, 374 U. S., at 356–357. See also *United States* v. *Alcoa*, 377 U. S. 271, 275 n. 3 (1964); *United States* v. *First National Bank*, 376 U. S. 665, 667 (1964).

case, and there is no dispute that it is the only banking market in which WTB is a significant participant. Nevertheless, the Government contends that the entire State is also an appropriate "section of the country" in this case. It is conceded that the State is not a banking market. But the Government asserts that the State is an economically differentiated region, because its boundaries delineate an area within which Washington banks are insulated from most forms of competition by out-of-state banking organizations. The Government further argues that this merger, and others it allegedly will trigger, may lead eventually to the domination of all banking in the State by a few large banks, facing each other in a network of local, oligopolistic banking markets. This assumed eventual statewide linkage of local markets, it is argued, will enhance statewide the possibility of parallel, standardized, anticompetitive behavior. This concern for the possible statewide consequences of geographic market extension mergers by commercial banks appears to be an important reason for the Government's recent efforts to block such mergers through an application of the potential-competition doctrine under § 7.[17]

The Government's proposed reading of the "any section of the country" phrase of § 7 is at variance with this Court's § 7 cases, and we reject it. Without exception the Court has treated "section of the country" and "relevant geographic market" as identical,[18] and it has defined

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[17] See, *e. g.*, Baker, Potential Competition in Banking: After Greeley, What?, 90 Banking L. J. 362 (1973); Solomon, Bank Merger Policy and Problems: A Linkage Theory of Oligopoly, 89 Banking L. J. 116 (1972).

[18] The Court's first case under amended § 7 referred to "section of the country" and "geographic market" in the same breath, see *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 324 (1962) ("a geographic market (the 'section of the country')"), as did the Court's first § 7 bank merger case. See *Philadelphia National Bank, supra,*

the latter concept as the area in which the goods or services at issue are marketed to a significant degree by the acquired firm. *E. g., Philadelphia National Bank, supra,* at 357–362.[19] In cases in which the acquired firm markets its products or services on a local, regional, and national basis, the Court has acknowledged the existence of more than one relevant geographic market.[20] But in no previous § 7 case has the Court determined the legality of a merger by measuring its effects on areas where the acquired firm is not a direct competitor. In

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at 356 ("'section of the country' (relevant geographical market)"). See also *Phillipsburg National Bank, supra,* at 362–365. Identity between "section of the country" and relevant geographic market has been assumed in the § 7 potential-competition cases. *E. g., United States* v. *Falstaff Brewing Corp.,* 410 U. S. 526, 527 (1973); *United States* v. *Continental Can Co.,* 378 U. S. 441, 447 (1964).

[19] If a challenged combination takes the form of a joint venture by which two firms plan to enter a new area simultaneously, the relevant geographic market is the section of the country in which the newly formed enterprise will market its goods. See *United States* v. *Penn-Olin Chemical Co.,* 378 U. S. 158 (1964).

[20] See, *e. g., United States* v. *Pabst Brewing Co.,* 384 U. S. 546 (1966). Some of the Court's language in *Pabst* suggests that the Government may challenge a merger under § 7 without establishing any relevant geographic market, see *id.,* at 549–550, a suggestion that prompted separate opinions by MR. JUSTICE WHITE, *id.,* at 555, by Mr. Justice Harlan, joined by MR. JUSTICE STEWART, *ibid.,* and by Mr. Justice Fortas. *Id.,* at 561. But *Pabst* in reality held that the Government had established three relevant markets in which the acquired firm actually marketed its products—a single State, a multistate area, and the Nation as a whole. See *id.,* at 550–551. And in that case the acquiring firm was an actual competitor of the acquired firm in all three relevant geographic markets. *Ibid.* Thus while *Pabst* stands for the proposition that there may be more than one relevant geographic market, it did not abandon the traditional view that for purposes of § 7 "section of the country" means "relevant geographic market" and the latter concept means the area in which the relevant product is in fact marketed by the acquired firm.

552-191 O - 76 - 42

urging that the legality of this merger be gauged on a statewide basis, the Government is suggesting that we take precisely that step, because, as it concedes, the section of the country in which WTB markets by far the greatest portion of its services, due to the predominantly localized character of commercial banking, is the Spokane metropolitan area.[21] Under the precedents, we decline the Government's invitation. We hold that in a potential-competition case like this one, the relevant geographic market or appropriate section of the country is the area in which the acquired firm is an actual, direct competitor.

Apart from the fact that the Government's statewide approach is not supported by the precedents, it is simply too speculative on this record. There has been no persuasive showing that the effect of the merger on a statewide basis "may be substantially to lessen competition" within the meaning of § 7. To be sure, § 7 was designed to arrest mergers "at a time when the trend to a lessening of competition in a line of commerce [is] still in its incipiency." *Brown Shoe Co.*, 370 U. S., at 317. See, *e. g.*, *United States* v. *Von's Grocery Co.*, 384 U. S. 270, 277 (1966). Moreover, the proscription expressed in § 7 against mergers "when a 'tendency' toward monopoly or [a] 'reasonable likelihood' of a substantial lessening of competition in the relevant market is shown," *United States* v. *Penn-Olin Chemical Co.*, 378 U. S. 158, 171 (1964), applies alike to actual- and potential-competition cases. *Ibid.* But it is to be remembered that § 7 deals

[21] The record demonstrates in several ways the local character of the area over which WTB exerts a competitive influence. For example, as of January 31, 1972, 90.1% of WTB's deposit accounts originated within the Spokane metropolitan area; 4.1% originated elsewhere in Spokane County; and the remainder came from eastern Washington, western Washington, and other States. App. 1861.

in "probabilities," not "ephemeral possibilities." *Brown Shoe Co., supra,* at 323.[22] The Government's underlying concern for a linkage or network of statewide oligopolistic banking markets is, on this record at least, considerably closer to "ephemeral possibilities" than to "probabilities." To assume, on the basis of essentially no evidence, that the challenged merger will tend to produce a statewide linkage of oligopolies is to espouse a *per se* rule against geographic market extension mergers like the one at issue here. No § 7 case from this Court has gone that far,[23] and we do not do so today. For the purpose of this case, the appropriate "section of the country" and the "relevant geographic market" are the same—the Spokane metropolitan area.

III

POTENTIAL-COMPETITION DOCTRINE

The term "potential competitor" appeared for the first time in a § 7 opinion of this Court in *United States* v. *El Paso Natural Gas Co.,* 376 U. S. 651, 659 (1964). *El Paso* was in reality, however, an actual-competition rather than a potential-competition case.[24] The potential-

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[22] As Mr. Justice Marshall noted in *Falstaff Brewing Corp., supra,* at 555 (separate opinion), "remote possibilities are not sufficient to satisfy the test set forth in § 7." Rather, the loss of competition "which is sufficiently probable and imminent" is the concern of § 7. *United States* v. *Continental Can Co., supra,* at 458.

[23] We put aside cases where an acquiring firm's market power, existing capabilities, and proposed merger partner are such that the merger would produce an enterprise likely to dominate the target market (a concept known as entrenchment). See *FTC* v. *Procter & Gamble Co.,* 386 U. S. 568 (1967). Cf. *Falstaff Brewing Corp., supra,* at 531. There is no allegation that the instant merger would produce entrenchment in the Spokane market.

[24] The merger declared unlawful in *El Paso* "removed not merely a potential, but rather an actual, competitor." Turner, Conglomerate

competition doctrine has been defined in major part by subsequent cases, particularly *United States* v. *Falstaff Brewing Corp.*, 410 U. S. 526 (1973).[25] Unequivocal proof that an acquiring firm actually would have entered *de novo* but for a merger is rarely available.[26] Thus, as *Falstaff* indicates, the principal focus of the doctrine is on the likely effects of the premerger position of the acquiring firm on the fringe of the target market. In developing and applying the doctrine, the Court has recognized that a market extension merger may be unlawful if the target market is substantially concentrated, if the acquiring firm has the characteristics, capabilities, and economic incentive to render it a perceived potential

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Mergers and Section 7 of the Clayton Act, 78 Harv. L. Rev. 1313, 1371 (1965). Accord, Berger & Peterson, Conglomerate Mergers and Criteria for Defining Potential Entrants, 15 Antitrust Bulletin 489, 498 (1970); Davidow, Conglomerate Concentration and Section Seven: The Limitations of the Anti-Merger Act, 68 Col. L. Rev. 1231, 1242 n. 36 (1968). Prior to the acquisition at issue in *El Paso*, the acquired firm had entered a tentative supply contract with one of the acquiring firm's substantial customers in the relevant market, compelling the acquiring firm to make significant price and delivery concessions in order to retain that customer. 376 U. S., at 654–655, 659. The acquired firm was thus "shown by [the] record to have been a substantial factor in the [relevant] market at the time it was acquired . . . ." *Id.*, at 658. The degree of entry that the acquired firm had achieved into the market of the acquiring firm distinguishes *El Paso* from subsequent cases truly presenting a potential-competition situation. It also distinguishes *El Paso* from the instant case, where the record demonstrates no analogous penetration of WTB's market by NBC or of NBC's market by WTB.

[25] See also *Ford Motor Co.* v. *United States*, 405 U. S. 562, 567–568 (1972); *id.*, at 591–592 (separate opinion of BURGER, C. J.); *FTC* v. *Procter & Gamble Co.*, *supra*; *United States* v. *Continental Can Co.*, *supra*; *United States* v. *Penn-Olin Chemical Co.*, *supra*.

[26] See Brodley, Oligopoly Power Under the Sherman and Clayton Acts—From Economic Theory to Legal Policy, 19 Stan. L. Rev. 285, 357–358 (1967).

de novo entrant, and if the acquiring firm's premerger presence on the fringe of the target market in fact tempered oligopolistic behavior on the part of existing participants in that market. In other words, the Court has interpreted § 7 as encompassing what is commonly known as the "wings effect"—the probability that the acquiring firm prompted premerger procompetitive effects within the target market by being perceived by the existing firms in that market as likely to enter *de novo*. *Falstaff, supra,* at 531–537.[27] The elimination of such present procompetitive effects may render a merger unlawful under § 7.

Although the concept of perceived potential entry has been accepted in the Court's prior § 7 cases, the potential-competition theory upon which the Government places principal reliance in the instant case has not. The Court has not previously resolved whether the potential-competition doctrine proscribes a market extension merger solely on the ground that such a merger eliminates the prospect for long-term deconcentration of an oligopolistic market that in theory might result if the acquiring firm were forbidden to enter except through a *de novo* undertaking or through the acquisition of a small existing entrant (a so-called foothold or toehold acquisition). *Falstaff* expressly reserved this issue.[28]

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[27] See also, Robinson, Antitrust Developments: 1973, 74 Col. L. Rev. 163, 180–190 (1974); Berger & Peterson, *supra;* Davidow, *supra;* Turner, *supra,* at 1362–1386; Hale & Hale, Potential Competition Under Section 7: The Supreme Court's Crystal Ball, 1964 Sup. Ct. Rev. 171; Note, United States v. Falstaff Brewing Corporation: Potential Competition Re-examined, 72 Mich. L. Rev. 837 (1974).

[28] See 410 U. S., at 537:

"We leave for another day the question of the applicability of § 7 to a merger that will leave competition in the marketplace exactly as it was, neither hurt nor helped, and that is challengeable under § 7 only on grounds that the company could, but did not, enter *de novo*

The Government's potential-competition argument in the instant case proceeds in five steps. First, it argues that the potential-competition doctrine applies with full force to commercial banks. Second, it submits that the Spokane commercial banking market is sufficiently concentrated to invoke that doctrine. Third, it urges us to resolve in its favor the question left open in *Falstaff*. Fourth, it contends that, without regard to the possibility of future deconcentration of the Spokane market, the challenged merger is illegal under established doctrine because it eliminates NBC as a perceived potential entrant. Finally, it asserts that the merger will eliminate WTB's potential for growth outside Spokane. We shall address those points in the order presented.

A. Application of the Doctrine to Commercial Banks.

Since *United States* v. *Philadelphia National Bank*, 374 U. S. 321 (1963), the Court has taken the view that, as a general rule, standard § 7 principles applicable to unregulated industries apply as well to mergers between commercial banks. See also *United States* v. *First National Bank*, 376 U. S. 665 (1964). Congress reacted to *Philadelphia National Bank* by including in the Bank Merger Act of 1966 a "convenience and needs" defense uniquely applicable to commercial banks. 12 U. S. C. §§ 1828 (c)(5)(B) and (c)(7)(B). Subsequent cases have revealed, however, that that defense comes into play only after a district court has made a *de novo* determination of the status of a bank merger under the Clayton Act. See *United States* v. *Third National Bank*, 390 U. S. 171 (1968); *United States* v. *First City National Bank*, 386 U. S. 361 (1967). As the Court noted in *Phillipsburg National Bank, supra*, "the antitrust standards of . . .

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or through 'toe-hold' acquisition and that there is less competition than there would have been had entry been in such a manner."

Philadelphia National Bank . . . were preserved in the Bank Merger Act of 1966." 399 U. S., at 358.[29]

Although the Court's prior bank merger cases have involved combinations between actual competitors operating in the same geographic markets, an element that distinguishes them factually from this case, they nevertheless are strong precedents for the view that § 7 doctrines are applicable to commercial banking. In accord with the general principles of those cases, we hold that geographic market extension mergers by commercial banks must pass muster under the potential-competition doctrine. We further hold, however, that the application of the doctrine to commercial banking must take into account the unique federal and state regulatory restraints on entry into that line of commerce. Failure to do so would produce misconceptions that go to the heart of the doctrine itself.

The Government's present position has evolved over a series of eight District Court cases, all of them decided unfavorably to its views.[30] The conceptual difficulty

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[29] See, *e. g.*, Kintner & Hansen, A Review of the Law of Bank Mergers, 14 B. C. Ind. & Com. L. Rev. 213 (1972); Alcorn, Phillipsburg and Beyond—Developing Trends in Substantive Standards for Bank Mergers, 9 Houston L. Rev. 417 (1972); Shull & Horvitz, The Bank Merger Act of 1960: A Decade After, 16 Antitrust Bulletin 859 (1971); Lifland, The Supreme Court, Congress, and Bank Mergers, 32 Law & Contemp. Prob. 15 (1967); Via, Antitrust and the Amended Bank Merger and Holding Company Acts: The Search for Standards, 53 Va. L. Rev. 1115 (1967). Cf. Wu & Connell, Merger Myopia: An Economic View of Supreme Court Decisions on Bank Mergers, 59 Va. L. Rev. 860 (1973).

[30] In addition to the District Court decision in this case, see *United States* v. *Connecticut National Bank*, 362 F. Supp. 240 (Conn. 1973), vacated and remanded, *post*, p. 656; *United States* v. *United Virginia Bankshares, Inc.*, 347 F. Supp. 891 (ED Va. 1972); *United States* v. *First National Bancorporation, Inc.*, 329 F. Supp. 1003 (Colo. 1971), aff'd *per curiam*, 410 U. S. 577 (1973); *United*

with the Government's approach, and an important reason why it has been uniformly unsuccessful in the district courts, is that it fails to accord full weight to the extensive federal and state regulatory barriers to entry into commercial banking.[31] This omission is of great importance, because ease of entry on the part of the acquiring firm is a central premise of the potential-competition doctrine.[32]

Unlike, for example, the beer industry, see *Falstaff Brewing Corp., supra,* entry of new competitors into the commercial banking field is "wholly a matter of governmental grace . . ." and "far from easy." *Philadelphia National Bank, supra,* at 367, and n. 44. Beer manufacturers are free to base their decisions regarding entry and the scale of entry into a new geographic market on nonregulatory considerations, including their own financial capabilities, their long-range goals as to mar-

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States v. *Idaho First National Bank,* 315 F. Supp. 261 (Idaho 1970); *United States* v. *First National Bank of Maryland,* 310 F. Supp. 157 (Md. 1970); *United States* v. *First National Bank of Jackson,* 301 F. Supp. 1161 (SD Miss. 1969); *United States* v. *Crocker-Anglo National Bank,* 277 F. Supp. 133 (ND Cal. 1967) (three-judge court).

[31] See Robinson, *supra,* at 189 n. 162; Shenefield, Annual Survey of Antitrust Developments—The Year of the Regulated Industry, 31 Wash. & Lee L. Rev. 1, 37–39 (1974); Hale & Hale, *supra,* at 179.

[32] This Court's potential-competition cases have repeatedly noted this factor. *E. g., FTC* v. *Procter & Gamble Co.,* 386 U. S., at 580; *United States* v. *Continental Can Co.,* 378 U. S., at 464–465. See J. Bain, Industrial Organization 8 (2d ed. 1968): "The condition of entry . . . determines the relative force of potential competition as an influence or regulator on the conduct and performance of sellers already established in a market." See also P. Areeda, Antitrust Analysis 517 (1967): "The sight of a particular firm 'waiting at the market's edge' may emphasize the entry threat, but it is ease of entry, not necessarily an identifiable potential entrant, that limits present market power by reminding existing firms that high profits will attract outsiders."

kets, the cost of creating new production and distribution facilities, and above all the profit prospects in the target market. They need give no thought to public needs and convenience. No comparable freedom exists for commercial banks. Ease of entry into a market presumes ease of exit—*i. e.*, the withdrawal or financial collapse of a certain number of participants in that market. Reflecting this country's bitter experience of four decades ago that "[a] bank failure is a community disaster . . . ," [33] entry into and exit from the commercial banking business have been extensively regulated by the Federal and State Governments. The regulatory barriers to entry include federal and state supervisory controls over the number of bank charters to be granted, designed to limit the number of banks operating in any particular market and thus to prevent bank failures. See *id.*, at 328. In addition, no branch, no matter how small, may be opened without prior approval of the appropriate bank regulatory agency. Moreover, there are state-law restrictions, such as those in force in Washington, on *de novo* geographic expansion through branching and multibank holding companies. As noted earlier, Washington statutes forbid branching into cities and towns where the expanding bank does not maintain its headquarters and other banks operate, and they forbid branching from a branch in such areas. See *supra*, at 609–611. Similarly, Washington permits only one-bank holding companies. *Supra*, at 611–612.

In *Philadelphia National Bank, supra*, the Court relied on regulatory barriers to entry to support its conclusion that mergers between banks in direct competition in the same market must be scrutinized with particular care under § 7. 374 U. S., at 352, 367–370, 372. But the same

[33] *Philadelphia National Bank*, 374 U. S., at 375 (Harlan, J., dissenting).

restrictions on new entry render it difficult to hold that a geographic market extension merger by a commercial bank is unlawful under the potential-competition doctrine. Such limitations often significantly reduce, if they do not eliminate, the likelihood that the acquiring bank is either a perceived potential *de novo* entrant or a source of future competitive benefits through *de novo* or foothold entry. Similarly, the Court noted in *Philadelphia National Bank* that under applicable state law *de novo* branching in the relevant market was permissible and presented an "alternative to the merger route . . . ." *Id.*, at 370. In this case, by contrast, there are serious questions whether an "alternative to the merger route" through branching or a functional equivalent is a legal or feasible method of entry by NBC into the Spokane market.

B. Structure of the Spokane Market.

Since the legality of the challenged merger must be judged by its effects on the relevant product and geographic markets, commercial banking in the Spokane metropolitan area, it is imperative to determine the competitive characteristics of commercial banking in that section of the country. The potential-competition doctrine has meaning only as applied to concentrated markets. That is, the doctrine comes into play only where there are dominant participants in the target market engaging in interdependent or parallel behavior and with the capacity effectively to determine price and total output of goods or services. If the target market performs as a competitive market in traditional antitrust terms, the participants in the market will have no occasion to fashion their behavior to take into account the presence of a potential entrant. The present procompetitive effects that a perceived potential entrant may produce in an

oligopolistic market will already have been accomplished if the target market is performing competitively. Likewise, there would be no need for concern about the prospects of long-term deconcentration of a market which is in fact genuinely competitive.

In an effort to establish that the Spokane commercial banking market is oligopolistic, the Government relied primarily on concentration ratios indicating that three banking organizations (including WTB) control approximately 92% of total deposits in Spokane. The District Court held against the Government on this point, finding that "a highly competitive market" existed which "does not suffer from parallel or other anticompetitive practices attributable to undue market power." 1973–1 Trade Cas. ¶ 74,496, p. 94,246. The court apparently gave great weight to the testimony of the banks' expert witnesses concerning the number of bank organizations and banking offices operating in the Spokane metropolitan area. The record indicates that neither the Government nor the appellees undertook any significant study of the performance, as compared to the structure, of the commercial banking market in Spokane.

We conclude that by introducing evidence of concentration ratios of the magnitude of those present here the Government established a prima facie case that the Spokane market was a candidate for the potential-competition doctrine. On this aspect of the case, the burden was then upon appellees to show that the concentration ratios, which can be unreliable indicators of actual market behavior, see *United States* v. *General Dynamics Corp.*, 415 U. S. 486 (1974), did not accurately depict the economic characteristics of the Spokane market. In our view, appellees did not carry this burden, and the District Court erred in holding to the contrary. Appellees introduced no significant evidence of the absence of paral-

lel behavior in the pricing or providing of commercial bank services in Spokane.[34]

We note that it is hardly surprising that the Spokane commercial banking market is structurally concentrated. As the Government's expert witness conceded, *all* banking markets in the country are likely to be concentrated.[35] This is so because as a country we have made the policy judgment to restrict entry into commercial banking in order to promote bank safety. Thus, most banking markets in theory will be subject to the potential-competition doctrine. But the same factor that usually renders such markets concentrated and theoretical prospects for potential-competition § 7 cases—regulatory barriers to new entry—will also make it difficult to establish that the doctrine invalidates a particular geographic market extension merger.

C. Potential De Novo or Foothold Entry.

The third step in the Government's argument, resolution of the question reserved in *Falstaff*, was the primary basis on which the case was presented to the District

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[34] The marketing of many forms of commercial bank services is controlled by government regulation. For example, regulation, not concentration in a banking market, produces parallelism with respect to such important elements of the banking business as interest allowed on savings accounts and interest charged on home mortgage loans. There are also many individualized judgments in the banking business, such as the decision whether to extend credit in various cases, that are not prone to parallel behavior regardless of the concentration of a market. Nevertheless, unfettered competition among banks does exist in a number of areas important to the public, as evidenced by the much-advertised differences in various forms of services offered by banks within the same geographic market. It is with regard to the latter economic activity that actual market behavior, and especially the presence or absence of significant parallel conduct, becomes relevant in this type of case.

[35] App. 534.

Court [36] and to us. The Government contends that the challenged merger violates § 7 because it eliminates the alleged likelihood that, but for the merger, NBC would enter Spokane *de novo* or through a foothold acquisition. Utilization of one of these methods of entry, it is argued, would be likely to produce deconcentration of the Spokane market over the long run or other procompetitive effects, because NBC would be required to compete vigorously to expand its initially insignificant market share.

Two essential preconditions must exist before it is possible to resolve whether the Government's theory, if proved, establishes a violation of § 7. It must be determined: (i) that in fact NBC has available feasible means for entering the Spokane market other than by acquiring WTB; and (ii) that those means offer a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects. The parties are in sharp disagreement over the existence of each of these preconditions in this case. There is no dispute that NBC possesses the financial capability and incentive to enter. The controversy turns on what methods of entry are realistically possible and on the likely effect of various methods on the characteristics of the Spokane commercial banking market.

It is undisputed that under state law NBC cannot establish *de novo* branches in Spokane and that its parent holding company cannot hold more than 25% of the stock of any other bank. Entry for NBC into Spokane therefore must be by acquisition of an existing bank. The Government contends that NBC has two distinct alternatives for acquisition of banks smaller than WTB and that either alternative would be likely to benefit the Spokane commercial banking market.

First, the Government contends that NBC could ar-

[36] Brief for United States 27–28.

range for the formation of a new bank (a concept known as "sponsorship"), insure that the stock for such a new bank is placed in friendly hands, and then ultimately acquire that bank. Appellees respond that this approach would violate the spirit if not the letter of state-law restrictions on bank branching. They note that this method would require the issuance of either a state or a national charter, and they assert that neither state nor federal banking authorities would be likely to grant a charter for a new bank in a static, "well-banked" market like Spokane. Moreover, it is argued that such officials would be certain to refuse to do so where the purpose of the scheme was to avoid the requirements of the state branching law.[37] Appellees further note that the stock and assets of any new state bank in Washington are inalienable for at least 10 years without approval of state banking officials, see Wash. Rev. Code Ann. § 30.08.020 (7), and they argue that such officials would refuse to grant approval for sale as part of a sponsorship plan.

The Government counters by pointing to instances in which sponsorship-acquisition of small banks by large banks has occurred in Washington, on occasion with the apparent knowledge and asserted approval of bank regulatory officials and within less than 10 years of the formation of the new bank.[38] Indeed, the Government contends that NBC is presently sponsoring a small bank in an unrelated area of Washington with the purpose of ultimate acquisition and conversion of the bank into a branch of NBC. Appellees reply that if sponsorship by other banks has occasionally occurred, it is nonetheless

[37] The Government called as a witness a former state supervisor of banking. On cross-examination, this witness testified that if the purpose of the organization of a new bank were to establish a potential branch for another bank, he would not regard that as a proper objective under state chartering statutes. App. 768–770.

[38] Cf. Comment, 48 Wash. L. Rev. 611, 626–628 (1973).

illegal under state law and that prior instances of tolerated illegality do not convert an illegal process into a legal one. NBC also denies that it has ever engaged in sponsorship solely for the purpose of acquisition, and it insists that even if a new bank is sponsored there is no guarantee that the sponsor, rather than some other bank willing to outbid it, will acquire the sponsored bank.[39] Appellees further point out, as is confirmed by the record, that the United States has not shown that any bank in Washington has ever used sponsorship-acquisition as a means of entering a major metropolitan area. In fact, the Government's principal witness in support of its sponsorship theory conceded on cross-examination that his bank "wouldn't consider trying to use that method in getting into" a major city.[40]

In its findings and conclusions, the District Court did not resolve the question of the status of the Government's proposed sponsorship-acquisition approach under Washington's banking statutes.[41] We similarly decline to decide this issue. Although we note that the intricate

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[39] The Government did not establish that NBC has ever acquired a bank that it had assisted in starting. It did offer substantial evidence that NBC has assisted in the formation of a new bank in south-central Washington, outside any major metropolitan area. NBC undertook this effort in response to the desire of one of its major clients to have a bank in that area. But NBC has no contractual right to acquire that bank, and indeed there is no guarantee that it will ultimately be successful in acquiring it.

[40] App. 614.

[41] During the trial, the District Judge commented from the bench that he could not see "anything civilly wrong" with the Government's proposed sponsorship-acquisition approach. He apparently assumed that it was possible. App. 870. In its findings, the court took the view that such a method of entry was not economically feasible, in light of state-law restrictions on branching from a branch and the characteristics of the banking business. 1973–1 Trade Cas. ¶ 74,496, p. 94,245.

procedure for entry by sponsorship espoused by the Government can scarcely be compared to the *de novo* entry opportunities available to unregulated enterprises such as beer producers, see *Falstaff, supra,* we will assume, *arguendo,* that NBC conceivably could succeed in sponsoring and then acquiring a new bank in Spokane at some indefinite time in the future. It does not follow from this assumption, however, that this method of entry would be reasonably likely to produce any significant procompetitive benefits in the Spokane commercial banking market. To the contrary, it appears likely that such a method of entry would not significantly affect that market.

State law would not allow NBC to branch from a sponsored bank after it was acquired. NBC's entry into Spokane therefore would be frozen at the level of its initial acquisition. Thus, if NBC were to enter Spokane by sponsoring and acquiring a small bank, it would be trapped into a position of operating a single branch office in a large metropolitan area with no reasonable likelihood of developing a significant share of that market.[42] This assumed method of entry therefore would offer little realistic hope of ultimately producing deconcentration of the Spokane market. Moreover, it is unlikely that a

[42] NBC's acquisition of WTB, by comparison, will give it eight banking offices in Spokane and a significant market share. From this position, NBC will be able to have a substantial impact on the Spokane market.

The Government suggests that a sponsored bank could create a number of branches before being acquired. Brief for United States 50 n. 47. The Government offered no proof that this has ever occurred in Washington. Undertaking sponsorship on such a scale is probably unrealistic, and it would multiply the problems of obtaining approval of a sponsorship plan from bank regulatory agencies. In any event, nothing in § 7 of the Clayton Act requires a firm to go to such lengths in order to avoid a merger that has no effect on concentration in the relevant market in the first place.

single new bank in Spokane with a small market share, and forbidden to branch, would have any other significant procompetitive effect on that market. The Government introduced no evidence, for example, establishing that the three small banks presently in Spokane have had any meaningful effect on the economic behavior of the large Spokane banks. In sum, it blinks reality to conclude that the opportunity for entry through sponsorship, assuming its availability, is comparable to the entry alternatives open to unregulated industries such as those involved in this Court's prior potential-competition cases [43] or would be likely to produce the competitive effects of a truly unfettered method of entry. Since there is no substantial likelihood of procompetitive loss if the challenged merger is undertaken in place of the Government's sponsorship theory, we are unable to conclude that the effect of the former "may be substantially to lessen competition" within the meaning of the Clayton Act.

As a second alternative method of entry, the Government proposed that NBC could enter by a foothold acquisition of one of two small, state-chartered commercial banks that operate in the Spokane metropolitan area.[44] Appellees reply that one of those banks is located in a suburb and has no offices in the city of Spokane, that after an acquisition NBC under state law could not branch from the suburb into the city, and that such a

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[43] *E. g., United States* v. *Falstaff Brewing Corp.*, 410 U. S. 526 (1973); *FTC* v. *Procter & Gamble Co.*, 386 U. S., at 580.

[44] The third small bank in Spokane is a branch of a large nationally chartered bank in Seattle, which in turn is owned by a large holding company. There is no allegation that this small bank is a potential foothold acquisition. The Government presses its foothold-acquisition approach with considerably less vigor than its sponsorship theory, which may reflect the fact that under the former approach the total number of banking organizations in Spokane would remain the same.

552-191 O - 76 - 43

peripheral foothold cannot be viewed as an economically feasible method of entry into the relevant market. Appellees also point out that the second small bank was chartered in 1965 and thus under state law would not have been available for acquisition until at least four years after the 1971 NBC–WTB merger agreement.

Granting the Government the benefit of the doubt that these two small banks were available merger partners for NBC, or were available at some not too distant time, it again does not follow that an acquisition of either would produce the long-term market-structure benefits predicted by the Government. Once NBC acquired either of these banks, it could not branch from the acquired bank. This limitation strongly suggests that NBC would not develop into a significant participant in the Spokane market, a prospect that finds support in the record. In 1964, one of the largest bank holding companies in the country, through its Seattle-based subsidiary, acquired a foothold bank with two offices in Spokane. Eight years later this bank, Pacific National Bank, held a mere 2.2% of total bank deposits in the Spokane metropolitan area, an insignificant increase over its share of the market at the date of the acquisition. See n. 2, *supra*. An officer of this bank, called as a witness by the Government, attributed the poor showing to an inability under state law to establish further branches in Spokane.[45]

In sum, with regard to either of its proposed alternative methods of entry, the Government has offered an unpersuasive case on the first precondition of the question reserved in *Falstaff*—that feasible alternative methods of entry in fact existed. Putting these difficulties aside, the Government simply did not establish the second precondition. It failed to demonstrate that the alternative means

[45] App. 1103.

offer a reasonable prospect of long-term structural improvement or other benefits in the target market. In fact, insofar as competitive benefits are concerned, the Government is in the anomalous position of opposing a geographic market extension merger that will introduce a third full-service banking organization to the Spokane market, where only two are now operating, in reliance on alternative means of entry that appear unlikely to have any significant procompetitive effect.[46] Accordingly, we cannot hold for the Government on its principal potential-competition theory. Indeed, since the preconditions for that theory are not present, we do not reach it, and therefore we express no view on the appropriate resolution of the question reserved in *Falstaff*. We reiterate that this case concerns an industry in which new entry is extensively regulated by the State and Federal Governments.

D. Perceived Potential Entry.

The Government's failure to establish that NBC has alternative methods of entry that offer a reasonable likelihood of producing procompetitive effects is determinative of the fourth step of its argument. Rational commercial bankers in Spokane, it must be assumed, are aware of the regulatory barriers that render NBC an unlikely or an insignificant potential entrant except by merger with WTB. In light of those barriers, it is improbable that

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[46] Cf. *Falstaff Brewing Corp., supra*, at 561 (separate opinion of MARSHALL, J.):

"If the company would have remained outside the market but for the possibility of entry by acquisition, and if it is exerting no influence as a perceived potential entrant, then there will normally be no competitive loss when it enters by acquisition. Indeed, there may even be a competitive gain to the extent that it strengthens the market position of the acquired firm." (Footnote omitted.)

NBC exerts any meaningful procompetitive influence over Spokane banks by "standing in the wings."

Moreover, the District Court found as a fact that "the threat of entry by NBC into the Spokane market by any means other than the consummation of the merger, to the extent any such threat exists, does not have any significant effect on the competitive practices of commercial banks in that market nor any significant effect on the level of competition therein." 1973–1 Trade Cas. ¶ 74,496, p. 94,246. In making this finding, it appears that the District Court "appraised the economic facts" about NBC and the Spokane market "in order to determine whether in any realistic sense [NBC] could be said to be a potential competitor on the fringe of the market with likely influence on existing competition." *Falstaff*, 410 U. S., at 533–534 (footnote omitted). Our review of the record indicates that the court's finding was not in error. The Government's only hard evidence of any "wings effect" was a memorandum written in 1962 by an officer of NBC expressing the view that Spokane banks were likely to engage in price competition as NBC approached their market. Evidence of an expression of opinion by an officer of the acquiring bank, not an official of a bank operating in the target market, in a memorandum written a decade prior to the challenged merger does not establish a violation of § 7.

E. Elimination of WTB's Potential for Growth.

In the final step of its argument, the Government challenges the merger on the ground that it will eliminate the prospect that WTB may expand outside its base in Spokane and eventually develop into a direct competitor with large Washington banks in other areas of the State. The District Court found, however, that the Government had "failed to establish . . . that there is any reasonable probability that WTB will expand into

other banking markets . . . ." 1973–1 Trade Cas. ¶ 74,496, p. 94,246. The record amply supports this finding. At no time in its 70-year history has WTB established branches outside the Spokane metropolitan area. Nor has it ever acquired another bank [47] or received a merger offer other than the one at issue here.[48] In sum, the Government's argument about the elimination of WTB's potential for expansion outside Spokane is little more than speculation. It provides no sound basis for overturning the District Court's holding.

IV

CONCLUSION

In applying the doctrine of potential competition to commercial banking, courts must, as we have noted, take into account the extensive federal and state regulation of banks. Our affirmance of the District Court's judgment in this case rests primarily on state statutory barriers to *de novo* entry and to expansion following entry into a new geographic market. In States where such stringent barriers exist and in the absence of a likelihood of entrenchment, the potential-competition doctrine—grounded as it is on relative freedom of entry on the part of the acquiring firm—will seldom bar a geographic market extension merger by a commercial bank. In States that permit free branching or multibank holding companies, courts hearing cases involving such mergers should take into account all relevant factors, including the barriers to entry created by state and federal control over the issuance of new bank charters. Testimony by responsible regulatory officials that they will not grant new charters in the target market is entitled to great weight, although it is not determinative. To avoid the

[47] App. 931.

[48] *Id.*, at 933.

danger of subjecting the enforcement of the antitrust laws to the policies of a particular bank regulatory official or agency, courts should look also to the size and growth prospects of the target market, the size and number of banking organizations participating in it, and past practices of regulatory agencies in granting charters. If regulatory restraints are not determinative, courts should consider the factors that are pertinent to any potential-competition case, including the economic feasibility and likelihood of *de novo* entry, the capabilities and expansion history of the acquiring firm, and the performance as well as the structural characteristics of the target market.

The judgment is

Affirmed.

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

[For appendix to opinion of the Court, see *post*, p. 643.]

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

For the second time this Term, the Court's new antitrust majority has chipped away at the policies of § 7 of the Clayton Act. In *United States* v. *General Dynamics Corp.*, 415 U. S. 486 (1974), the majority sustained the failing-company defense in a new guise. Here, it redefines the elements of potential competition and dramatically escalates the burden of proving that a merger "may be substantially to lessen competition" within the meaning of § 7.

That we are dealing with a severely concentrated commercial banking market in the Spokane metropolitan area is conceded. The Court also proceeds on the basis that it was open to the Government to make its case by

[Dissenting opinion of MR. JUSTICE WHITE continued on p. 644.]

APPENDIX TO THE OPINION OF THE COURT

TOTAL DEPOSITS HELD BY THE 2 LARGEST, 5 LARGEST, 10 LARGEST, AND REMAINING COMMERCIAL BANKING ORGANIZATIONS OF THE STATE OF WASHINGTON IN THE STATE OF WASHINGTON—June 30, 1972

Bank Organizations	No. of Offices	Percent of Total	Deposits 000's	Percent of Total	Rank in State
Seattle-First National Bank—Seattle	144	20.96	$2,054,951	31.71	1
National Bank of Commerce—Seattle	107	15.57	1,268,132	19.57	2
TOTAL 2 LARGEST BANKING ORGANIZATIONS	251	36.54	$3,323,083	51.27	
Pacific National Bank of Washington—Seattle	64	9.32	650,342	10.03	3
Peoples National Bank of Washington—Seattle	55	8.01	468,063	7.22	4
Washington Bancshares, Inc.—Spokane	51	7.42	372,739	5.75	5
TOTAL 5 LARGEST BANKING ORGANIZATIONS	421	61.28	$4,814,227	74.28	
Puget Sound National Bank—Tacoma	29	4.22	227,429	3.51	6
Bank of California—Seattle and Tacoma	2	.29	199,878	3.08	7
Seattle Trust & Savings Bank—Seattle	26	3.78	172,801	2.67	8
Washington Trust Bank—Spokane	8	1.16	96,518	1.49	9
Everett Trust & Savings Bank	13	1.89	91,034	1.40	10
TOTAL 10 LARGEST BANKING ORGANIZATIONS	499	72.63	$5,601,887	86.43	
81 REMAINING BANKING ORGANIZATIONS	188	27.37	$879,183	13.57	
91 BANKING ORGANIZATIONS	687	100.00	$6,481,070	100.00	

Note: Due to rounding, figures may not add to totals.

proving that the NBC–WTB merger would probably cause a substantial lessening of competition in either one of two ways. First, it could be proved that NBC, with the resources and desire to enter the Spokane market, would probably have entered the market either by acquiring one of the small Spokane banks or by sponsoring a new bank and ultimately acquiring it. The merger thus deprived the Spokane market of a new competitor, and produced the requisite anticompetitive effect. Second, it could be shown that NBC's resources and interest in entering the Spokane market were so obvious to or recognized by those already in the market that, as a potential competitor waiting in the wings, NBC very probably exercised a restraining influence on anticompetitive practices in the concentrated Spokane banking market.

The majority does not quibble about the fact of NBC's resources and its incentive to extend its banking activities into Spokane. NBC is the State's second largest banking organization with total assets of $1.8 billion as of 1971. It has branched widely in the State of Washington, having a total of 107 branches, 15 of them within 100 miles of Spokane. Two other Seattle banking organizations were already operating in Spokane; and NBC itself had seriously negotiated for an acquisition in that market. Given the opportunity, NBC would obviously enter Spokane. Under Washington law, it could not branch there; but it was free to acquire another bank, given consent of banking authorities. That consent was obtained for the acquisition involved in this case, and it may fairly be assumed that it could have been obtained for the acquisition, not of a major competitor contributing to the concentration in the Spokane market, but of one of the smaller banks—a so-called "toehold" position in the market.

Another mode of entry into Spokane was also available to NBC. It could have been instrumental in form-

ing a new bank in that market and in due course could have merged with the "sponsored" institution. It is argued that this route was all but legally unavailable to NBC,[1] but the sponsored-bank method of expansion has occurred frequently in the State of Washington. The District Court did not hold sponsorship barred by state law. This Court also refrains from so holding and proceeds on the assumption that the sponsored-bank route was available to NBC. Under state law, a merger with the new bank could not take place, without the consent of banking authorities, prior to 10 years from the date the new bank began operations; but consent to merge prior to that time has been obtained in the past.

Thus, although branching into Spokane was not legally feasible, there were other modes of entry no less

[1] The evidence, based upon past practices, is entirely to the contrary. NBC has itself employed the procedure with regard to the Columbia Center National Bank located in a shopping center in south central Washington. The techniques it employed included finding an organizer for the bank, controlling the sublease of the land on which the new bank was to be located, through Marine Bancorporation, so as to prevent acquisition by others without its approval, and making sure the majority stock of the bank was in friendly hands. App. 246–280. The record abounds with various examples of the technique by other Washington banks; and federal authorities were aware of many of the methods, as disclosed in the applications for approval of acquisition by the sponsors. The statute also forbids a new bank from merging with or permitting its assets to be acquired by another bank for a period of 10 years but only *without* the consent of the state supervisor. Suffice it to state that earlier acquisitions have, as the majority recognizes, been made in the past. Surely the fragmentary fears of illegality are not enough to overturn what seems a perfectly well-established technique of market entry not at odds with the language of the state statute. It should be noted that the District Court, although not formally ruling on the state law matter in its findings of fact and conclusions of law, did state during trial that this was, in its view, a feasible means of entry. App. 870.

attractive or less feasible than entering by establishing a new branch. It is incredible that if branching into Spokane had been allowable NBC would not have entered in this way. It is equally unlikely that absent the understandably attractive merger with WTB, NBC would not have proceeded to acquire a smaller bank or to be instrumental in forming a new sponsored bank.

The Court apparently assumes this to be the case, but goes on to hold that the Government's proof failed because neither a small new bank nor one of the existing small banks, if acquired, had a realistic chance of deconcentrating the Spokane market to any substantial extent. Also, absent the capability of making substantial inroads on the market shares of the principal banks, it is said that those banks had nothing to fear from NBC as a potential competitor and that NBC therefore had no current influence on competitive practices in the Spokane market.

I part company with the majority at this point. The Spokane market was highly concentrated. NBC had the resources and the desire to enter the market. There were no impenetrable legal or economic barriers to its doing so; and it is sufficiently plain from the record that absent merger with WTB, NBC could and would either have made a toehold entry or been instrumental in establishing a sponsored bank in Spokane. But NBC chose to merge with a larger bank and to deprive the market of the competition it would have offered had it entered in either of two other ways. In my opinion, this made out a sufficient prima facie case under § 7, which, absent effective rebuttal, entitled the United States to judgment.

The Court's sole answer to the Government's proof is that even if NBC would have entered by acquisition or *de novo* through a sponsored bank, it would have "little realistic hope of ultimately producing deconcen-

tration of the Spokane market." This was because under Washington law after acquiring an existing or newly formed bank, NBC could not branch from that institution but would be confined to the banking offices which it acquired at the time of the merger. In the Court's opinion, NBC, without branching, would have "no reasonable likelihood of developing a significant share of that market," and the Government's case therefore failed.

I cannot accept the *per se* view that, without branching, an able and willing newcomer to the banking market cannot be considered a sufficiently substantial competitive influence, immediately or in the foreseeable future, so that its loss to the market would warrant application of § 7. This is particularly true if the putative entrant is a large and successful banking organization with wide experience in developing new markets.

Small banks can be profitable, and they can grow rapidly. The experience of the three small banks in Spokane proves this. Each of them is a profitable bank. The profits of American Commercial Bank, for example, with headquarters in downtown Spokane, rose from $27,740 in 1966 to $132,527 in 1971. The deposits of each of the three small banks have grown. From 1966 to 1972, total bank deposits in the Spokane metropolitan area rose from $379.2 million to $513.5 million, a growth of 35% in six years. Spokane would not appear to be a stagnant banking market, and it provides opportunities for smaller banking concerns. The deposits in the three small banks during the same six years grew from $14.9 million to $39.4 million, an increase of approximately 160%. Their market share, although remaining relatively small, increased from 3.9% to 7.8%. Of course, deposits in the three large banking organizations also grew. Two of them increased their market shares very

slightly, but the third lost ground from 38.3% to 31.6%, for a combined decline of the three from 96% to 92.3%. The small banks thus more than held their own in the Spokane market. This showing of the smaller banks hardly indicates such impotence on the part of small competitors that a new entrant in the market should necessarily be deemed to be without influence in the market and to be beyond recognition under § 7.[2]

If Seattle-First National Bank, with 31.6% of the deposits in 1972, or Washington Bancshares, Inc., with 42.1%, had acquired either American Commercial Bank or Farmers & Merchants Bank, with 3.1% and 2.5% respectively of Spokane bank deposits, the merger would have been anticompetitive and forbidden by § 7, unless saved by the convenience-and-needs proviso of the Bank Merger Act. *United States* v. *Philadelphia National Bank*, 374 U. S. 321 (1963). Depriving the market of a *new* competitor that could achieve similar status in a rela-

[2] The banks rely on the experience of Pacific National Bank of Washington. In 1964, a large bank holding company acquired a toehold in Spokane by acquiring an existing small bank, but by 1972 had only garnered 2.2% of the total bank deposits in Spokane. A vice president of the bank testified at trial that its disappointing share of the market—its 1972 share of industrial and commercial loans was 4.6%—was probably due to its inability to branch. Although this officer also testified that his bank was not opposing the merger of NBC and WTB, he certainly was an interested party. Upon this witness' opinion, the outcome of this case cannot hinge. In light of the objective evidence, which strongly suggests that competition can exist without equality in branch capability, the testimony of this vice president should not be given great weight. It is not only a speculative statement as to the failure of the Pacific National; it is also self-serving to the extent it keeps additional competitors out of the market. As with the testimony of bank officials who profess no interest in entering a market, see *United States* v. *Falstaff Brewing Corp.*, 410 U. S. 526, 534–535 (1973), it should only be considered along with the rest of the objective economic evidence.

tively short period of time should not be so readily placed beyond the reach of § 7 when considering the application of the doctrine of potential competition to market extension mergers.

The details on the relative size of individual bank branches in Spokane or elsewhere in metropolitan areas of the State are not in the record; but it is unbelievable that there are no branches that have started very small and grown very large. New branches must make their way, often in head-to-head competition with other banks. Some are more successful than others, and I cannot accept, as a *per se* legal rule, the notion that a new bank sponsored by NBC in downtown Spokane or elsewhere in the city must be forever deemed to be without substantial competitive impact on the banking community.[3] It is incredible to me that the presence of a major Seattle bank like NBC in downtown Spokane could or would be ignored by the entrenched banking powers or should be ignored for the purposes of applying § 7 of the Clayton Act.

NBC has 15 branches within a 100-mile radius of Spokane. Those branches have $103 million in total

[3] Evidence introduced by the Government as to the ability of banks in the other major metropolitan banking markets of Washington—Seattle, Tacoma, and Everett—totally undercuts the Court's assumption that a bank with only one office cannot acquire a substantial enough market share to effect deconcentration. In Seattle, the Bank of California, with only one office, had $112 million in total deposits in 1970, representing 6.27% of the total deposit market. This share can be compared with that of Pacific National Bank of Washington which, with 13 offices, had a 9.38% market share. In Tacoma, the Bank of California-Tacoma had $65.4 million in total deposits which represented a 15.55% market share. Compare this with the 3.17% share of Seattle-First National Bank-Tacoma, with four offices. In Everett, Peoples National Bank of Washington-Everett, with one office, had $17.2 million in total deposits, a 10.83% market share.

deposits, including $4.4 million from Spokane customers. Two of these branches are in Spokane County and between them have $11 million in deposits. They also have loans totaling $10.2 million to Spokane interests. NBC is a major financial institution with large lending limits and offering a full line of commercial banking services. It is obviously equipped to penetrate and compete vigorously in the Spokane lending market wholly aside from how fast deposits might grow in a newly established or acquired Spokane bank. It is quite untenable to assert that the competition that might be offered in the Spokane lending market by a new bank formed by this obviously vigorous competitor is too insignificant to warrant the protections of § 7.[4]

The availability of branching is, of course, an important competitive consideration, but it should not be forgotten that American Commercial Bank, headquartered in downtown Spokane, has four branches and if acquired by NBC would give that bank a substantial operating capacity in Spokane. The majority, nevertheless, even assuming the acquisition of this bank by NBC, insists on its own view of competitive reality and holds

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[4] As the majority recognizes, the relevant product market in this case is the cluster of services offered by commercial banks. A main component of that cluster, and one which determines profits, is the ability to provide loans, and it seems to me that a prospect of competition for loans, whether based on deposits garnered in Spokane or elsewhere, has a substantial possibility of effecting deconcentration in at least one segment of the banking business. The fact that profitability and number of offices are not highly correlated is supported by comparing the experience of Washington Bancshares and Seattle-First National Bank. In 1971, the former had 23 offices and a net income of $2.2 million. The latter, with only seven offices, had a net income of $3.5 million. In that same year, although Washington Bancshares had $45.6 million more in deposits than did Seattle-First National, the latter had an edge of $7.2 million in commercial and industrial loans.

that the loss of NBC as a competitor in place of American must be deemed an insignificant loss to competition. This is true even though one of the major competitors, Seattle-First National Bank, has only seven branches and under the state law already referred to, it is confined to its existing branches.

It is also true that if NBC entered Spokane by sponsoring a new bank, the new bank itself could legally branch and create the necessary branch infrastructure for as long as it was not acquired by NBC or another outsider. The majority states that this is "probably unrealistic" and that it would "multiply the problems" of obtaining approval of sponsorship from bank regulatory agencies. But this is sheer speculation; the Court simply has no idea what the attitude of regulatory officials would be in this regard. Furthermore, NBC itself has had experience with sponsored-bank situations, and, as the majority recognizes, it asserts that it has not sponsored banks solely for the purpose of acquisition. Apparently, relationships with a sponsored institution are themselves of inherent value, and the benefits would only increase if the sponsored bank itself branched as it grew.

Viewed in this light, the Court's *per se* rule becomes threadbare indeed when applied to NBC entering by acquisition into the Spokane market. The three existing smaller banks in Spokane have been successful and profitable and have even increased their share of the market in six years. Furthermore, Seattle-First National cannot legally go beyond its present seven branches in the Spokane market, and its share of the market has declined. It is quite unreasonable to think that NBC, if it acquired American Commercial, with its four branches could not be an effective competitor at least against Seattle-First National in Spokane, with its seven branches, or against WTB with its eight.

The Court also errs in holding that NBC, an obvious potential competitor, cannot be deemed to have exercised substantial influence on the Spokane market and that its entry by merger with a major Spokane bank therefore represents no probable injury to competition in that market. To the extent that the Court's holding on this branch of the case rests on its notion that no bank, without branching, can make substantial inroads on the Spokane market, I disagree for reasons already stated. Beyond that, however, the waiting-in-the-wings approach to potential competition rests on what objective factors indicate the perception of the reasonably minded competitor in the Spokane market might be of the likelihood and impact of an entry by NBC, either *de novo* or by acquisition of a small bank. Predictions of market behavior and competitive success are just not as certain or uniformly held as the Court makes them out to be. Here, before NBC acquired WTB, NBC negotiated to acquire the much smaller Farmers & Merchants Bank—a three-office suburban bank with about $13 million in deposits and 2.5% of the market. The target bank was in the relevant geographic market accepted by the parties and Court. The President of Marine Bancorporation, Maxwell Carlson, had at various times noted that the President and Director of WTB, Philip Stanton, expected NBC to be in Spokane some day. One wonders, if the majority's branch-disability theory is correct, why these bankers even discussed potential entry into the market. The fact is that they did, and it is fair to assume that through informal contacts, and by reason of the prior acquisition discussions, bankers in the market were aware of NBC's interest. The majority would have one believe that even if NBC was interested, no one in the market would take it seriously enough to restrain anticompetitive practices. It is certainly possible, however, that even if bankers in the market doubted that NBC would actually

be successful in acquiring a significant market share, if they entered the market, the *possibility* of entry and the *possibility* of competition following entry were sufficiently strong to restrain anticompetitive practices. If bankers thought that there was a probability of entry, which there surely was, but that their losses from such entry could be substantial, if NBC, once in the market, competed more effectively than anticipated, they would take countermeasures and make entry less attractive by refraining from engaging in anticompetitive practices.

In the last analysis, one's view of this case, and the rules one devises for assessing whether this merger should be barred, turns on the policy of § 7 of the Clayton Act to bar mergers which may contribute to further concentration in the structure of American business. *United States* v. *Philadelphia National Bank,* 374 U. S., at 362–363; *United States* v. *Penn-Olin Chemical Co.,* 378 U. S. 158, 170–171 (1964); *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 331–332 (1962). The dangers of concentration are particularly acute in the banking business, since "if the costs of banking services and credit are allowed to become excessive by the absence of competitive pressures, virtually all costs, in our credit economy, will be affected . . . ." *Philadelphia Bank, supra,* at 372; *United States* v. *Phillipsburg National Bank,* 399 U. S. 350, 358 (1970).

Unless an otherwise illegal merger is saved by a finding under the Bank Merger Act that it is necessary to serve the convenience and needs of the community, the law requires us in the first instance to judge bank mergers by normal § 7 standards. I simply cannot agree with the Court's narrow view of what bank mergers "may . . . substantially . . . lessen competition."

With respect to whether depriving the market of the competition offered by a new entrant violates § 7, it is not enough under the Court's view that the newcomer

552-191 O - 76 - 44

has itself found the market sufficiently attractive to enter and to assume all the start-up costs and risks attendant to a new business undertaking. The Court is willing also to assume that the new business will be profitable and long-lived, for under the approach taken today, it is not enough to show the loss of one or more profitable but small businesses. Apparently, it cannot be assumed that a small business, even when backed by a major enterprise, can or will be successful in competing against the entrenched powers in the market.

This thesis erects formidable barriers to the application of the potential-competition doctrine not only in the banking business but in other lines of commerce.[5] To show that the potential entrant, waiting in the wings, is exercising a present influence on the market, or that its loss as a *de novo* or toehold entrant may be a substantial injury to competition, it will not be enough to prove ability and willingness to enter, along with the probability, or even certainty, of entry. Nor will it suffice to prove that the potential or actual entrant would be a profitable concern and successfully prevent the major figures in the market from increasing their market shares. The courts must also examine conditions in the market and conclude for themselves that there is a realistic expectation that the new entrant will appropriate for itself a substantial part of the business of the major competitors in the market.

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[5] The Court professes to limit its *per se* rule to "an industry in which new entry is extensively regulated by the State and Federal Governments." The case, as decided, however, does not turn on barriers to entry, but "barriers" to effective competition, once entry is effected, and "barriers" to effective competition are not easily limited to regulated industries. The Court lays itself open for arguments that economic, as well as legal, barriers exist for new competitors. At least it is difficult to see why one should be more controlling than another; in fact, the Court itself blurs the two.

The Court then delivers the *coup de grace* by imposing its own visions of reality in commercial banking markets: without unlimited branching authority in the market involved, no newcomer to the market can be sufficiently successful against others, who have the authority, to be a substantial competitor and to merit recognition under doctrines of potential competition. No new entrant can attain, let us say, 15 or 20 percent of the banking business in the Spokane area unless it has branching authority. The Court apparently insists this will be true no matter where the new banking office is located and no matter who and how well equipped and financed the new entrant may be. This is claiming a prescience that I doubt the Court has and is a view of the effectiveness and worth of competition, though having modest beginnings, that I do not share. Furthermore, the conclusion the Court reaches passes beyond my comprehension when it refuses to concede that NBC, if it acquired American Commercial Bank, with its four branches, could not make substantial inroads on the market shares of any of the major banks in the market, even though one of them is forever limited to seven offices under the present law.

UNITED STATES *v.* CONNECTICUT NATIONAL BANK ET AL.

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

No. 73–767. Argued April 23, 1974—Decided June 26, 1974

The United States brought this civil antitrust action under § 7 of the Clayton Act challenging a proposed consolidation between the Connecticut National Bank (CNB) and the First New Haven National Bank (FNH), which are, respectively, the fourth and eighth largest commercial banks in Connecticut. The banks operate in contiguous areas of the State, CNB having headquarters in Bridgeport, with 51 offices there and in nearby towns; FNH having headquarters in New Haven, with 22 offices there and in nearby towns. The Government contended that the merger would eliminate significant potential competition in commercial banking in the New Haven and Bridgeport metropolitan areas and in other areas in Connecticut. The District Court rejected the Government's arguments in support of that position, relying on state law restraints on *de novo* branching, the two banks' expansion plans and capabilities, the posture of national and state regulatory officials regarding the issuance of new bank charters, and the existence and economic feasibility of possible foothold acquisitions. The court concluded that under § 7 commercial banking is not a distinct line of commerce in Connecticut and that the relevant geographic market, or "section of the country" under that provision, is the State as a whole. *Held:*

1. The District Court erred in holding that the appropriate "line of commerce" within the meaning of § 7 included both commercial banks and savings banks. Pp. 660–666.

2. The District Court further erred in ruling that the relevant geographic market is the State of Connecticut as a whole. In a potential-competition case like this, the relevant geographic market must be defined as the localized area in which the acquired bank is in significant, direct competition with other banks, albeit not the acquiring bank. *United States* v. *Marine Bancorporation, ante,* p. 602. Pp. 666–668.

3. On remand, the District Court must make a determination as to the geographic market in which each of the banks operates

and to which the bulk of its customers may turn for alternative commercial bank services, and in making that determination it will be aided by the following considerations: (i) the Government has the burden of producing evidence to define localized banking markets; (ii) in satisfying that burden (as the District Court correctly held) the Government cannot rely only on Standard Metropolitan Statistical Areas; and (iii) town boundaries, although significant, are not controlling. Pp. 668–671.

4. The Government's contention that the State as a whole, though not a banking market, is a "section of the country" within the meaning of § 7 is without merit, *Marine Bancorporation, supra.* Pp. 672–673.

362 F. Supp. 240, vacated and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and REHNQUIST, JJ., joined, and in Part I of which DOUGLAS, BRENNAN, WHITE, and MARSHALL, JJ., joined. WHITE, J., filed an opinion concurring in part and dissenting in part, in which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined, *post,* p. 673.

Howard E. Shapiro argued the cause for the United States. With him on the brief were *Solicitor General Bork, Assistant Attorney General Kauper, Robert B. Nicholson,* and *John W. Clark.*

George D. Reycraft argued the cause for appellees Connecticut National Bank et al. With him on the brief were *John Boyer, Haven C. Roosevelt,* and *Richard G. Bell. Lee Loevinger* argued the cause for appellee Comptroller of the Currency. With him on the brief were *Robert Bloom* and *Charles H. McEnerney, Jr.*

MR. JUSTICE POWELL delivered the opinion of the Court.

This case concerns the legality of a proposed consolidation of two nationally chartered commercial banks operating in adjoining regions of Connecticut. The United States brought a civil antitrust action challenging the

consolidation under § 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 18. Following a lengthy trial and on the basis of extensive findings and conclusions, the United States District Court for the District of Connecticut dismissed the Government's complaint. 362 F. Supp. 240 (1973). The Government brought a direct appeal pursuant to the Expediting Act, 32 Stat. 823, as amended, 15 U. S. C. § 29, and the Court noted probable jurisdiction, 414 U. S. 1127 (1974).

The banks desiring to consolidate, Connecticut National Bank (CNB) and First New Haven National Bank (FNH), have offices in contiguous areas in the southwestern portion of Connecticut. CNB maintains its headquarters in the town of Bridgeport, which is situated on the Long Island Sound approximately 60 miles from New York City. CNB is the fourth largest commercial bank in the State. At year-end 1972, it held 6.2% of the deposits in commercial banks in Connecticut. CNB operates 51 offices located in Bridgeport and nearby towns in the extreme southwest section of Connecticut.

FNH has its headquarters in the town of New Haven, approximately 19 miles to the northeast of Bridgeport along the Long Island Sound. FNH is the eighth largest commercial bank in Connecticut. At the end of 1972, it held 4.1% of commercial bank deposits in the State. FNH operates 22 bank offices in New Haven and surrounding towns.

In Connecticut as a whole at the end of 1971, the five largest commercial banks held 61% and the 10 largest commercial banks held 83% of the deposits in such banks in the State. Two large commercial banks based in Hartford, Connecticut Bank & Trust Co. of Hartford and Hartford National Bank, operate essentially statewide. At year-end 1972, they had 41% of the total commercial bank deposits held by Connecticut banks.

CNB and FNH both have offices and are in direct competition in a so-called "four-town area" located between Bridgeport and New Haven. The banks assured the District Court, however, that in implementing the consolidation they would divest themselves of a sufficient number of offices in the four-town area to render insignificant the degree of overlap of their areas of actual operation. The District Court held that this divestiture plan eliminated any antitrust difficulties presented by the merger of direct competitors. 362 F. Supp., at 268–270, 286. The United States has not pursued the point on appeal. Accordingly, the case has been presented to us strictly as a geographic market extension merger on the part of both banks. The proposed consolidation would join the banks under FNH's national charter (with headquarters in Bridgeport). It would have no effect on the number of banks operating in either the Bridgeport or New Haven area. In that posture, the case presents potential-competition issues similar to those raised in *United States* v. *Marine Bancorporation, Inc., ante,* p. 602.

The District Court rejected the Government's potential-competition arguments, relying on such factors as state-law restraints on *de novo* branching,[1] the expan-

[1] Under state law in Connecticut, commercial banks may not branch into a town containing the main office of another bank (the so-called "home office protection" provision). Conn. Gen. Stat. Rev. § 36–59 (1972). Towns that contain the main office of a bank are referred to as "closed" towns. The remaining towns are "open towns." The term "town" in Connecticut refers to a political subdivision of the State, somewhat analogous to counties in other States. It does not denote a metropolitan area, although some cities are more or less congruent with the towns in which they are located.

There are 169 towns in Connecticut. The effect of the "home office protection" provision is to create a checkerboard of "open" and "closed" towns reflecting the location of the main offices of the

sion plans and capabilities of the two banks, the posture of national and state regulatory officials regarding the issuance of new bank charters, and the existence and economic feasibility of possible foothold acquisitions. 362 F. Supp., at 286–288. As we have held today in the *Marine Bancorporation* case, these and analogous factors are the appropriate considerations to take into account in determining the legality under § 7 of the Clayton Act of geographic market extension mergers by commercial banks. We are unable, however, to reach the question of whether the District Court correctly assessed the import of those factors in the instant case. We have also held in *Marine Bancorporation* that the legality of a market extension merger must be determined against the backdrop of properly defined product and geographic markets. See *ante,* at 618. In our view, the District Court erred in its definition of both concepts, and it is not possible to ascertain the degree, if any, to which those errors may have influenced its conclusions with regard to the Government's potential-competition arguments. Accordingly, the District Court's judgment must be vacated and the case remanded for reconsideration.

I

The District Court concluded that the appropriate "line of commerce" within the meaning of § 7 included both commercial banks and savings banks. 362 F. Supp., at 281. The court recognized that its conclusion departed from this Court's holdings in, *e. g., United States* v. *Phillipsburg National Bank,* 399 U. S. 350, 359–362 (1970), and *United States* v. *Philadelphia National Bank,* 374 U. S. 321, 356–357 (1963). But in the District Court's

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banks operating in the State. State law forbids any bank that does not have its headquarters in Connecticut from operating banking offices within the State. Conn. Gen. Stat. Rev. § 36–59 (4).

view the pronouncements in *Phillipsburg National Bank* and *Philadelphia National Bank* "were not intended to be ironclad, hard and fast rules which require a court to don blinders to block out the true competitive situation existing in every set of circumstances." 362 F. Supp., at 280.

Several factors led the District Court to the conclusions that "savings banks are in direct and substantial competition with commercial banks in providing product-services to the banking consumers in Connecticut . . . ," and that "[t]he cold, hard realities of the situation are that savings and commercial banks are fierce competitors in this state." *Ibid.* The court noted that under state law savings banks in the near future will be permitted to offer one of the traditional indicia of commercial banks, personal checking accounts. See Conn. Pub. Act No. 73–195 (May 14, 1973). It pointed out that savings banks in Connecticut compete with commercial banks for real estate mortgages, personal loans, IPC (individual, partnership, and corporate) deposits, and, the court found, commercial loans. 362 F. Supp., at 280. It cited *United States* v. *Continental Can Co.*, 378 U. S. 441 (1964), for the proposition that "complete industry overlap" is not required to establish a relevant line of commerce under § 7. 362 F. Supp., at 281. It also relied on the omission of the "in any line of commerce" phrase from the Bank Merger Act of 1966, 12 U. S. C. § 1828 (c)(5)(B), an Act which in other essential respects tracks the language of § 7 of the Clayton Act.[2] Finally, it distinguished

[2] See 362 F. Supp., at 281. The relevant provision of the Bank Merger Act of 1966, 80 Stat. 8, 12 U. S. C. § 1828 (c)(5)(B), proscribes any bank consolidation:

"Whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless . . . the anticompetitive effects of the proposed transaction are clearly out-

Philadelphia National Bank, supra, and *Phillipsburg National Bank, supra,* by pointing to the absence of significant competition by savings banks in the relevant geographic markets in those cases. 362 F. Supp., at 281. The District Court's conclusion on the appropriate line of commerce caused it to "shade" (*i. e.,* to reduce) the Government's concentration ratios to take into account the presence of savings banks. *Id.,* at 285.

We are in complete agreement with the District Court that *Phillipsburg National Bank* and *Philadelphia National Bank* do not require a court to blind itself to economic realities. Similarly, we have no doubt on this record that savings banks and commercial banks in Connecticut are "fierce competitors," see 362 F. Supp., at 280, to the degree that they offer identical or essentially fungible services. The District Court was also correct that "complete inter-industry competitive overlap need not be shown." *Continental Can Co., supra,* at 457. As the Court declared in *Continental Can,* "we must recognize meaningful competition where it is found to exist." 378 U. S., at 449. Nonetheless, we hold for several reasons that the District Court was mistaken in including both savings and commercial banks in the same product market for purposes of this case.

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weighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U. S. C. § 18, by comparison provides in pertinent part:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

Two of the District Court's reasons may be dealt with briefly. The court erred as a matter of law in concluding that the absence of a "line of commerce" phrase in the Bank Merger Act of 1966 alters traditional standards under § 7 of the Clayton Act for defining the relevant product market in a bank merger case. *United States* v. *Third National Bank*, 390 U. S. 171, 182 n. 15 (1968). See *Phillipsburg National Bank*, 399 U. S., at 359–362. Moreover, the absence of significant competition from savings banks in *Philadelphia National Bank, supra,* and *Phillipsburg National Bank, supra,* is not determinative. The commercial banks in both of those cases faced significant competition from savings and loan associations and other credit institutions. See, *e. g.*, 374 U. S., at 357 n. 34; *United States* v. *Phillipsburg National Bank*, 306 F. Supp. 645, 649 (NJ 1969). The Court in both instances nevertheless viewed the business of commercial banking as sufficiently distinct from other credit institutions to merit treatment as a separate "line of commerce" under § 7. Analogous distinctions, although perhaps not as sharply defined, are controlling here.

We believe that the District Court overestimated the degree of competitive overlap that in fact exists between savings banks and commercial banks in Connecticut. To be sure, there is a large measure of similarity between the services marketed by the two categories of banks.[3] In

[3] As we have noted, the District Court identified some of the services offered by both savings and commercial banks, including real estate mortgages, personal loans, and time deposits. As the District Court put it in another context, it would be "ostrich-like," 362 F. Supp., at 254, to assume that the two types of banks are not in direct and vigorous competition with regard to the services they share or are not viewed by many bank customers as more or less fungible for purposes of those services. Cf. *United States* v. *Phillipsburg National Bank*, 399 U. S. 350, 360 (1970). That savings and commercial banks are direct competitors in some submarkets, how-

our view, however, the overlap is not sufficient at this stage in the development of savings banks in Connecticut to treat them together with commercial banks in the instant case. Despite the strides that savings banks in that State have made toward parity with commercial banks, the latter continue to be able to provide a cluster of services that the former cannot, particularly with regard to commercial customers, and this Court has repeatedly held that it is the unique cluster of services provided by commercial banks that sets them apart for purposes of § 7.

The Court declared in *Phillipsburg National Bank, supra,* at 360:

> "*Philadelphia Bank* emphasized that it is the *cluster* of products and services that full-service banks offer that as a matter of trade reality makes commercial banking a distinct line of commerce. Commercial banks are the only financial institutions in which a wide variety of financial products and services—some unique to commercial banking and others not—are gathered together in one place. The clustering of financial products and services in banks facilitates convenient access to them for all banking customers. . . ." (Emphasis in original.)

From the vantage point of at least one significant consumer of bank services—the commercial enterprise—commercial banks in Connecticut offer a "cluster of products and services" that their savings bank counterparts do not. The facts of this case indicate that the differences in what commercial banks in the State can offer to that important category of bank customers are sufficient to establish commercial banking as a distinct line of commerce.

The District Court concluded that "meaningful competition" existed between commercial and savings banks

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ever, is not the end of the inquiry, as *Phillipsburg* makes clear. *Ibid.*

for commercial loans. 362 F. Supp., at 280. This conclusion is not supported by the record. Commercial loans, generally speaking, are relatively short-term loans to business enterprises of all sizes, usually for purposes of inventory or working capital. At the end of 1971 commercial banks in Connecticut had outstanding $1.03 billion in commercial loans.[4] Savings banks, by comparison, had $26 million in such loans at that time.[5] The disparity in these figures demonstrates that the commercial bank-loan business in Connecticut is controlled almost exclusively by commercial banks. Moreover, commercial banks in the State offer credit-card plans, loans for securities purchases, trust services, investment services, computer and account services, and letters of credit. Savings banks do not.

It is true that under state law savings banks soon will be able to provide some checking account services. Conn. Pub. Act No. 73–195 (May 14, 1973).[6] This will increase the degree of direct competition between savings banks and commercial banks, because demand deposits have traditionally been a unique attribute of the latter institutions. But even this new authority for savings banks will not allow them to serve commercial customers, who constitute a significant percentage of the clientele of commercial banks. The state statute empowering savings banks to offer demand deposits forbids those banks from marketing the service to anyone "for the purpose of, or in connection with, the carrying on of any business, trade, occupation or profession." *Id.*, §§ 1 (a), 5. Thus,

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[4] App. 1793.

[5] *Id.*, at 1795.

[6] The pertinent provisions of Conn. Pub. Act No. 73–195 will take effect no later than December 31, 1975, although the enactment of certain federal legislation or other specified events not relevant here may trigger those provisions at an earlier date. See *id.*, § 7.

under the new Act, savings banks will be restricted to offering personal checking accounts. *Id.*, § 2.

We do not say, and *Phillipsburg National Bank, supra,* and *Philadelphia National Bank, supra,* do not say, that in a case involving a merger of commercial banks a court may never consider savings banks and commercial banks as operating in the same line of commerce, no matter how similar their services and economic behavior. At some stage in the development of savings banks it will be unrealistic to distinguish them from commercial banks for purposes of the Clayton Act. In Connecticut, that point may well be reached when and if savings banks become significant participants in the marketing of bank services to commercial enterprises. But, in adherence to the tests set forth in our earlier bank merger cases, which we are constrained to follow, we hold that such a point has not yet been reached. Accordingly, on remand the District Court should treat commercial banking as the relevant product market.

II

The District Court ruled that the relevant geographic market, or "section of the country," under § 7, is the State as a whole. 362 F. Supp., at 283. We think the District Court erred on this point for several reasons. If the State were the relevant geographic market, it would then be appropriate to analyze this not as a potential-competition case but as a direct-competition case involving the consolidation of two firms holding an aggregate market share of approximately 10%. Even if this figure is "shaded" by a factor of 10% to account for the influence of banks in New York, see *id.*, at 260; *Philadelphia National Bank,* 374 U. S., at 364 n. 40, the consolidation of CNB and FNH would create a firm holding a 9% share of statewide commercial-bank deposits. Mergers between direct competitors producing smaller shares

of less concentrated markets have been held illegal under § 7. *E. g., United States* v. *Von's Grocery Co.*, 384 U. S. 270 (1966).

The State cannot be the relevant geographic market, however, because CNB and FNH are not direct competitors on that basis (or for that matter on any other basis pertinent to this appeal). The two banks do not operate statewide, nor do their customers as a general rule utilize commercial banks on that basis. The offices of the two banks are restricted to adjoining sections of the southwest segment of Connecticut. Although the two banks presumably market a small percentage of their loans to large customers on a statewide or broader basis, it is undoubtedly true that almost all of their business originates locally. For example, "about 88% of CNB's total deposit business derive[s] from the towns in which CNB has offices." 362 F. Supp., at 250. As the District Court noted in a finding that is inconsistent with its conclusion on the appropriate section of the country, "[c]ommon sense . . . would indicate that the relevant market areas of CNB and FNH generally coincide with where each has established branch offices." *Ibid.*

As indicated by our opinion today in *Marine Bancorporation, ante*, p. 602, the relevant geographic market of the acquired bank is the localized area in which that bank is in significant, direct competition with other banks, albeit not the acquiring bank. This area must be defined in accordance with this Court's precedents in prior bank-merger cases. Yet the District Court's conclusion on this issue conflicts with *Philadelphia National Bank, supra.* The Court emphasized in that case:

> "In banking, as in most service industries, convenience of location is essential to effective competition. Individuals and corporations typically confer the bulk of their patronage on banks in their

> local community; they find it impractical to conduct their banking business at a distance. . . . The factor of inconvenience localizes banking competition as effectively as high transportation costs in other industries." 374 U. S., at 358 (footnote and citations omitted).

In recognition of the local character of the great majority of commercial bank activities, *Philadelphia National Bank* indicated that the relevant geographic market in bank-merger cases must be drawn narrowly to encompass the area where "the effect of the merger on competition will be direct and immediate." *Id.*, at 357. Moreover, the geographic market must be delineated in a way that takes into account the local nature of the demand for most bank services. It "must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for [alternatives] . . . ." *Id.*, at 359 (citations, internal quotations, and italics omitted). Because the economic scale of separate categories of consumers of bank services will vary, a workable compromise must be struck "to delineate the area in which bank customers that are neither very large nor very small find it practical to do their banking business . . . ." *Id.*, at 361.[7]

On remand the District Court must determine pursuant to the localized approach denoted above the geographic market in which CNB operates and to which the bulk of its customers may turn for alternative commercial bank services. It must do the same with regard to FNH, for this case presents the unusual fact situation of a consolidation of two banks, each with a history of *de novo* geographic expansion, rather than the acquisition of

[7] The Court's approach in *Philadelphia National Bank* to defining geographic markets for commercial banks was reaffirmed in *Phillipsburg National Bank*, 399 U. S., at 362–365.

a geographically stable bank as in *Marine Bancorporation, ante,* p. 602. The task is important, because the definition of the respective geographic markets determines the number of alternative avenues of entry theoretically open to CNB in piercing FNH's area of significant competitive influence and vice versa.

We are not unaware of the difficulty of the assignment confronting the District Court. An element of "fuzziness would seem inherent in any attempt to delineate the relevant geographical market." *Philadelphia National Bank, supra,* at 360 n. 37. The task is made especially taxing here by the fragmented character of the distribution of the banking offices of the two banks, especially CNB. Apparently because the Connecticut branching statute has created a checkerboard of "open" and "closed" towns, see n. 1, *supra,* CNB and FNH have not expanded in the past in a manner that produced readily definable, completely covered areas around the towns where they have their home offices. There is, for example, a gap consisting of four towns in the extreme southwest section of Connecticut in which CNB has no offices, although it has established offices in almost all of the surrounding towns in that part of the State. That gap presumably will have to be excluded from consideration on remand.

The difficulty of the responsibility imposed on the District Court with regard to defining the geographic markets of the two banks is ameliorated by several considerations. First, the burden of producing evidence on this subject is on the Government. The Government repeatedly notes that it is not required to define geographic markets by "metes and bounds," citing *United States* v. *Pabst Brewing Co.*, 384 U. S. 546, 549 (1966). To the extent that this means that such markets need not—indeed cannot—be defined with scientific precision, it is accurate. But it is nevertheless the Government's role to come forward with evidence delineating the rough approximation

of localized banking markets mandated by *Philadelphia National Bank, supra,* and *Phillipsburg National Bank, supra.*

Second, we affirm that portion of the District Court's judgment holding that the Government cannot rely, without more, on Standard Metropolitan Statistical Areas (SMSA's) as defining the geographic markets of the two banks. See 362 F. Supp., at 249–250, 281–282. SMSA's are prepared by the Office of Management and Budget to determine areas of economic and social integration, principally on the basis of the commuting patterns of residents.[8] They are not defined in terms of banking criteria, and they were not developed as a tool for analyzing banking markets. *Id.,* at 249. Exclusive reliance on SMSA's here may lead to inaccuracies. For example, as the District Court noted, only 57% of CNB's deposits originate from the Bridgeport SMSA. *Id.,* at 250, 282. This is because CNB's offices extend to several areas outside the Bridgeport SMSA. The Bridgeport SMSA is relevant, if at all, only to the CNB offices located in Bridgeport, and even then it is at best a crude indicator. The same is true of the New Haven SMSA and the FNH offices located in the town of New Haven. In sum, although the Bridgeport and New Haven SMSA's may be helpful in defining the general metropolitan characteristics of southwest Connecticut, they are not sufficiently refined in terms of realistic commercial banking markets to satisfy the Government's burden. The Government must demonstrate more accurately than is possible solely with SMSA's the localized banking markets, or areas of significant competitive influence, surrounding the sites where CNB and FNH maintain their banking offices.[9]

[8] App. 1435–1437.

[9] The federal bank regulatory agencies define a bank's service area as the geographic area from which the bank derives 75% of

Third, the District Court may not, as the banks would have it, rely solely on towns as the relevant geographic markets. The towns served by the two banks are highly significant geographic units, because state law restraints on *de novo* branching are defined in terms of towns. See n. 1, *supra*. But not all towns are closed to *de novo* branching by one or the other bank, and it seems fair to assume that the area of significant competitive influence of some bank offices may extend beyond town boundaries.

On remand, the District Court must delineate the localized banking markets surrounding the sites where CNB and FNH maintain their bank offices. It must then evaluate the economically and legally feasible alternative methods of entry, if any, into those areas available to one bank or the other. In so doing, it should keep in mind the considerations outlined today in *Marine Bancorporation, ante,* p. 602.[10]

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its deposits. See 362 F. Supp., at 250. The service-area concept may be considerably more useful in this case than SMSA's, although this is a matter we leave to the District Court on remand.

In *Marine Bancorporation, ante,* at 619, we affirmed the District Court's determination of the Spokane metropolitan area as the relevant geographic market. That holding was not an affirmation of SMSA's as banking markets; SMSA's were not at issue in that case. The Spokane metropolitan area was defined as the relevant geographic market in *Marine Bancorporation* because it is an insulated banking market, is comparatively small by geographic standards in the Western States, contains all the banking offices of the target bank, and is the area from which that bank draws some 90% of its deposit accounts.

[10] We note that it is not at all clear that the District Court's holdings as to potential competition were based on a statewide appraisal of the consolidation at issue, despite its conclusion that the State was the relevant section of the country. For example, the court's findings with regard to "toehold" acquisitions refer to SMSA's, towns, and service areas, 362 F. Supp., at 265, and its conclusions under the heading of "potential competition" speak of service area, service

III

In conformity with its approach in *Marine Bancorporation,* the Government argues that the State as a whole, although not a banking market, is nonetheless a "section of the country" within the meaning of § 7 of the Clayton Act. The Government repeats the concern expressed in *Marine Bancorporation,* see *ante,* at 620, that a statewide linkage of oligopolies "may" arise and that large banks across the state "may engage" in more standardized behavior as a result.[11] Moreover, the Government contends that a statewide approach is appropriate because the challenged consolidation would eliminate one of eight banks in Connecticut with the potential for statewide operation. "Thus the effect of a merger which eliminates even one of these banks will be felt statewide, for it will have an impact in every local market in the state where that bank does not currently operate but which it *might* otherwise enter." [12]

We reject the Government's statewide approach here, as we did in *Marine Bancorporation, ante,* at 620. The Government's argument that "a geographic area need not be a banking market to be a section of the country . . ." [13] is foreclosed by the precedents. *Ante,* at 620–622. Its theory of linked oligopolies appears to be as devoid of evidentiary support here as it was in *Marine Bancorporation.* Finally, its concern for any area of the State in which CNB or FNH "might" enter independently of the con-

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market, and towns. *Id.,* at 286–287. Because the District Court did not clarify what local area, if any, it considered controlling for purposes of the potential-competition doctrine, we are unable to hold that its error in denoting the State as the relevant section of the country, see *id.,* at 283, may be ignored.

[11] Brief for United States 34.

[12] *Id.,* at 33 (emphasis added).

[13] *Id.,* at 31.

solidation is too speculative to establish a case under the Clayton Act. In advancing the latter argument, the Government borders on espousing a *per se* rule against geographic market extension mergers by Connecticut commercial banks so long as any town in the State remains open to *de novo* branching. On remand the District Court will address itself to the geographic markets in which CNB and FNH presently operate.[14]

The judgment is vacated and the case is remanded for further consideration consistent with this opinion.

It is so ordered.

MR. JUSTICE WHITE, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join, concurring in part and dissenting in part.

Although I agree with Part I of the majority opinion, as to the relevant line of commerce, I dissent from that part of the opinion dealing with the determination of a relevant geographic market.

The Court holds that "the relevant geographic market of the acquired bank is the localized area in which that bank is in significant, direct competition with other banks, albeit not the acquiring bank," relying on a statement to similar effect in *United States* v. *Marine Bancorporation, Inc., ante,* p. 602. Accordingly, the Court rejects the proposition, which the appellee banks accepted

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[14] The District Court also concluded that assuming, *arguendo,* that the consolidation violated the Clayton Act, it nonetheless met the standards of the "convenience and needs" test of the Bank Merger Act of 1966, 12 U. S. C. § 1828 (c)(5)(B). 362 F. Supp., at 288. Its findings on the "convenience and needs" defense are not controlling, however, if it erred in the standards applied in judging the status of the consolidation under the Clayton Act. *United States* v. *Third National Bank,* 390 U. S. 171, 183–184 (1968). See also *Phillipsburg National Bank,* 399 U. S., at 369–370.

below,* that the merger of FNH and CNB should be analyzed in terms of its effect on possible potential competition in areas not in or adjacent to the New Haven and Bridgeport markets, however those markets are to be defined.

There is certainly nothing in this Court's past cases on mergers under Clayton § 7 which requires this result. Even if Bridgeport and New Haven are relevant geographic markets, there can be more than one relevant geographic market in which to test the possible effects of a merger. Section 7 of the Clayton Act speaks to lessening competition "in *any* section of the country" (emphasis added), and as the majority acknowledges in *Marine Bancorporation, ante,* at 621 n. 20, in *United States* v. *Pabst Brewing Co.,* 384 U. S. 546 (1966), the Court "held that the Government had established three relevant markets in which the acquired firm actually marketed its products—a single State, a multi-state area, and the Nation as a whole." To be sure, the selection of any relevant geographic market in a banking case must be chosen in terms of the needs of the customers and the area in which sellers operate, *United States* v. *Philadelphia National Bank,* 374 U. S. 321, 357–359 (1963), but this may result in several possible markets, especially in a potential-competition case where a merger might affect the economic behavior of existing firms in various markets.

As I read the majority opinion, if one assumed that FNH and CNB were the two largest banks in Connecticut, and, although located in southwest Connecticut, both had the capability and interest to enter a concentrated banking market in northeast Connecticut, it would be improper for the Government to oppose their merger, since

*One of the principal witnesses presented by the appellee banks, Dr. Peck, analyzed the effect of this merger, and the removal of FNH as a potential competitor, along with CNB, on the various banking markets in the State.

neither bank had as yet entered the northeast Connecticut banking market. The majority describes the possibility of such dual entry as "too speculative." *Ante,* at 673. What is a relevant geographic market is an issue entirely distinct from who is a potential competitor. It is obvious, for example, that while New Haven and/or its environs is a relevant market of banking competition, it may nonetheless be true that CNB may not prove to be a potential competitor with respect to that market. It, therefore, follows that whether the banking market in northeast Connecticut is a relevant banking market, is a question entirely separate from whether FNH and/or CNB should be considered potential competitors in that market, and whether the elimination of one of those competitors lessens either the possibility of deconcentration in that market or, under the "wings theory," affects present competition in that market. Since the majority professes to leave issues of potential competition to the District Court on remand, it should not preclude a finding that this merger will affect banking competition in areas of the State other than Bridgeport or New Haven. The possibility of finding many banking markets in Connecticut is an entirely separate matter from finding one banking market in the State under a theory of statewide linkage of oligopolies. The latter assumes that a section of the country need not be a banking market; the former does not.

I agree that the case should be remanded. As I understand the task of the District Court, once it has decided what the relevant geographic markets are, the case is to be analyzed in terms of the "wings theory" of potential competition enunciated in *United States* v. *Falstaff Brewing Corp.,* 410 U. S. 526 (1973), and the deconcentration theory now accepted by this Court in *Marine Bancorporation.* As to these matters, I adhere to my views as stated in *Marine Bancorporation.*

SECRETARY OF THE NAVY *v.* AVRECH

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72–1713. Argued February 20, 1974—Decided July 8, 1974

This Court will not decide whether the District Court had jurisdiction of an action challenging a court-martial conviction under Art. 80 of the Uniform Code of Military Justice of an attempt to commit an offense under Art. 134, on the ground, *inter alia*, that Art. 134 is unconstitutionally vague, since assuming, *arguendo*, that the District Court did have jurisdiction, the decision in *Parker* v. *Levy*, 417 U. S. 733, requires reversal of the Court of Appeals' decision on the merits reversing the District Court's denial of relief and holding that Art. 134 is unconstitutionally vague.

155 U. S. App. D. C. 352, 477 F. 2d 1237, reversed.

Solicitor General Bork argued the cause for appellant. With him on the brief were *Assistant Attorney General Petersen, Deputy Solicitor General Friedman, Allan A. Tuttle,* and *Jerome M. Feit.*

Dorian Bowman argued the cause for appellee. With him on the brief was *David Rein.**

PER CURIAM.

Appellee Mark Avrech was convicted by a special court-martial on charges of having violated Art. 80 of the Uniform Code of Military Justice, 10 U. S. C. § 880. The specification under Art. 80, which punishes attempts to commit offenses otherwise punishable under the UCMJ, charged an attempt to commit an offense under the first and second clauses of Art. 134, 10 U. S. C. § 934, namely, an attempt to publish a statement dis-

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**Marvin M. Karpatkin* and *Thomas M. Comerford* filed a brief for the Association of the Bar of the City of New York as *amicus curiae* urging affirmance.

loyal to the United States to members of the Armed Forces "with design to promote disloyalty and disaffection among the troops."

Upon conviction, appellee was sentenced to reduction in rank to the lowest enlisted grade, forfeiture of three months' pay, and confinement at hard labor for one month. The commanding officer suspended the confinement, but the remainder of the sentence was sustained by the Staff Judge Advocate and the Judge Advocate General of the Navy. Appellee was subsequently given a bad-conduct discharge after an unrelated second court-martial conviction.

In December 1970, appellee brought this action in the United States District Court for the District of Columbia, asserting jurisdiction under 5 U. S. C. §§ 701–706, 28 U. S. C. § 1331, and 28 U. S. C. § 1361. He claimed that Art. 134 was unconstitutionally vague and overbroad on its face and as applied, that his statement was protected speech, and that he was convicted without sufficient evidence of criminal intent. He sought an order declaring his Art. 80 conviction invalid and requiring the Secretary of the Navy to expunge any record of his conviction and to restore all pay and benefits lost because of the conviction. After the District Court denied relief, the Court of Appeals reversed, holding that Art. 134 is unconstitutionally vague. 155 U. S. App. D. C. 352, 477 F. 2d 1237 (1973). We noted probable jurisdiction. 414 U. S. 816 (1973). Following oral argument on the merits, we directed counsel to file supplemental briefs on the issues of the jurisdiction of the District Court and the exhaustion of remedies.

Without the benefit of further oral argument, we are unwilling to decide the difficult jurisdictional issue which the parties have briefed. Assuming, *arguendo,* that the District Court had jurisdiction under the circumstances of this case to review the decision of the court-martial, our

decision in *Parker* v. *Levy,* 417 U. S. 733 (1974), would require reversal of the Court of Appeals' decision on the merits of appellee's constitutional challenge to Art. 134. We believe that even the most diligent and zealous advocate could find his ardor somewhat dampened in arguing a jurisdictional issue where the decision on the merits is thus foreordained. We accordingly leave to a future case the resolution of the jurisdictional issue, and reverse the judgment of the Court of Appeals on the authority of *Parker* v. *Levy, supra.* See *United States* v. *Augenblick,* 393 U. S. 348 (1969); *Schneckloth* v. *Bustamonte,* 412 U. S. 218, 249 (1973).

MR. JUSTICE STEWART, concurring in the judgment.

I indicated my view in *Parker* v. *Levy,* 417 U. S. 733, 773, that Art. 134 of the Uniform Code of Military Justice, 10 U. S. C. § 934, is unconstitutionally vague. However, my view did not prevail in *Parker,* where the Court upheld the general articles against constitutional attack. Given that result, which controls the merits of the appellee's substantive claims here, I agree that it would be inappropriate to require further argument of the jurisdictional issues in this case. Consequently, I am content to leave those issues for another day, and concur in the judgment of the Court.

MR. JUSTICE DOUGLAS, dissenting.

Appellee was convicted of an attempt to publish a statement disloyal to the United States to members of the Armed Forces "with design to promote disloyalty and disaffection among the troops." Article 80 of the Uniform Code of Military Justice, 10 U. S. C. § 880, covers the attempt; and Art. 134, 10 U. S. C. § 934, covers the substantive offense.

Appellee was on active duty in Vietnam in a combat zone and like most soldiers on night duty had a lot of time on his hands. He typed the following statement:

> "It seems to me that the South Vietnamese people could do a little for the defense of their country. Why should we go out and fight their battles while they sit home and complain about communist aggression. What are we, cannon fodder or human beings? . . . The United States has no business over here. This is a conflict between two different politically minded groups. Not a direct attack on the United States. . . . We have peace talks with North Vietnam and the V. C. That's just fine and dandy except how many men died in Vietnam the week they argued over the shape of the table? . . . Do we dare express our feelings and opinions with the threat of court-martial perpetually hanging over our heads? Are your opinions worth risking a court-martial? We must strive for peace and if not peace then a complete U. S. withdrawal. We've been sitting ducks for too long. . . ."

His plan was to have the mimeograph operator make copies which he could distribute. But the operator instead turned it over to a superior officer and a court-martial followed. Appellee, a private first class, was reduced to the lowest enlisted grade, deprived of three months' pay, and confined for one month to hard labor. The commanding officer suspended the confinement, and the remainder of the sentence was sustained on review. This suit, asserting federal rights, was brought on the ground, among other things, that he was punished for protected speech. I think that claim has merit; and I would affirm the Court of Appeals.

Soldiers, lounging around, speak carefully of officers who are within earshot. But in World War I we were free to lambast General "Black Jack" Pershing who was distant, remote, and mythical. We also groused about the bankers' war, the munitions makers' war in which we had volunteered. What we said would have offended our military superiors. But since we could write our Congressmen or Senators about it, we saw no reason why we could not talk it out among ourselves.

Talk is, of course, incitement; but not all incitement leads to action. What appellee in this case wrote out with the purpose of showing to the marines in his unit, might, if released, have created only revulsion. Or it might have produced a strong reaction. Conceivably more might have shared his views. But he was not setting up a rendezvous for all who wanted to go AWOL or laying a dark plot against his superior officers. He was attempting to speak with his comrades in arms about the oppressive nature of the war they were fighting. His attempt, if successful, might at best have resulted in letters to his family or Congressman or Senators who might have read what he said to local people or have published the letters in newspapers or made them the subject of debate in legislative halls.

Secrecy and suppression of views which the Court today sanctions increases rather than repels the dangers of the world in which we live. I think full dedication to the spirit of the First Amendment is the real solvent of the dangers and tensions of the day. That philosophy may be hostile to many military minds. But it is time the Nation made clear that the military is not a system apart but lives under a Constitution that allows discussion of the great issues of the day, not merely the trivial ones—subject to limitations as to time, place, or occasion but never as to control.

The steps we take in *Parker* v. *Levy*, 417 U. S. 733, and in this case are backward steps measured by the standards of an open society.*

I dissent from a reversal of this judgment.

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

The Court's decision in *Parker* v. *Levy*, 417 U. S. 733 (1974), establishes that the Court of Appeals erred in overturning appellee's court-martial conviction on the basis of the unconstitutional vagueness of Art. 134. In these circumstances, I agree that this case does not present an appropriate vehicle for this Court's consideration of the substantial jurisdictional issues presented. Appellee also claimed, however, that Arts. 80 and 134, as applied to his case, infringed his First Amendment rights, claims rejected by the District Court but never

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*J. Robert Oppenheimer, cruelly cast into the outer darkness by the Atomic Energy Commission in its notorious "witch hunt," said on Edward R. Murrow's TV show "See It Now" in January 1955:

"The trouble with secrecy is that it denies to the government itself the wisdom and the resources of the whole community, of the whole country, and the only way you can do this is to let almost anyone say what he thinks—to try to give the best synopses, the best popularizations, the best mediations of technical things that you can, and to let men deny what they think is false—argue what they think is false, you have to have a free and uncorrupted communication.

"And this is—this is so the heart of living in a complicated technological world—it is so the heart of freedom that that is why we are all the time saying, 'Does this really have to be secret?' 'Couldn't you say more about that?' 'Are we really acting in a wise way?' Not because we enjoy chattering—not because we are not aware of the dangers of the world we live in, but because these dangers cannot be met in any other way.

"The fact is, our government cannot do without us—all of us." C. Curtis, The Oppenheimer Case, The Trial of a Security System 181 (1955).

passed upon by the Court of Appeals because of that court's holding as to the vagueness of Art. 134. See 155 U. S. App. D. C. 352, 354, 477 F. 2d 1237, 1239 (1973). I think it inappropriate for this Court to pass on these claims without the benefit of the Court of Appeals' consideration in the first instance. I would therefore vacate the judgment of the Court of Appeals and remand for reconsideration of the jurisdictional questions and the merits in light of *Parker* v. *Levy*.

Syllabus

UNITED STATES *v.* NIXON, PRESIDENT OF THE UNITED STATES, ET AL.

CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73–1766. Argued July 8, 1974—Decided July 24, 1974*

Following indictment alleging violation of federal statutes by certain staff members of the White House and political supporters of the President, the Special Prosecutor filed a motion under Fed. Rule Crim. Proc. 17 (c) for a subpoena *duces tecum* for the production before trial of certain tapes and documents relating to precisely identified conversations and meetings between the President and others. The President, claiming executive privilege, filed a motion to quash the subpoena. The District Court, after treating the subpoenaed material as presumptively privileged, concluded that the Special Prosecutor had made a sufficient showing to rebut the presumption and that the requirements of Rule 17 (c) had been satisfied. The court thereafter issued an order for an *in camera* examination of the subpoenaed material, having rejected the President's contentions (a) that the dispute between him and the Special Prosecutor was nonjusticiable as an "intra-executive" conflict and (b) that the judiciary lacked authority to review the President's assertion of executive privilege. The court stayed its order pending appellate review, which the President then sought in the Court of Appeals. The Special Prosecutor then filed in this Court a petition for a writ of certiorari before judgment (No. 73–1766) and the President filed a cross-petition for such a writ challenging the grand-jury action (No. 73–1834). The Court granted both petitions. *Held:*

1. The District Court's order was appealable as a "final" order under 28 U. S. C. § 1291, was therefore properly "in" the Court of Appeals, 28 U. S. C. § 1254, when the petition for certiorari before judgment was filed in this Court, and is now properly before this Court for review. Although such an order is normally not final and subject to appeal, an exception is made in a "limited class of

*Together with No. 73–1834, *Nixon, President of the United States* v. *United States*, also on certiorari before judgment to the same court.

cases where denial of immediate review would render impossible any review whatsoever of an individual's claims," *United States* v. *Ryan*, 402 U. S. 530, 533. Such an exception is proper in the unique circumstances of this case where it would be inappropriate to subject the President to the procedure of securing review by resisting the order and inappropriate to require that the District Court proceed by a traditional contempt citation in order to provide appellate review. Pp. 690–692.

2. The dispute between the Special Prosecutor and the President presents a justiciable controversy. Pp. 692–697.

(a) The mere assertion of an "intra-branch dispute," without more, does not defeat federal jurisdiction. *United States* v. *ICC*, 337 U. S. 426. P. 693.

(b) The Attorney General by regulation has conferred upon the Special Prosecutor unique tenure and authority to represent the United States and has given the Special Prosecutor explicit power to contest the invocation of executive privilege in seeking evidence deemed relevant to the performance of his specially delegated duties. While the regulation remains in effect, the Executive Branch is bound by it. *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260. Pp. 694–696.

(c) The action of the Special Prosecutor within the scope of his express authority seeking specified evidence preliminarily determined to be relevant and admissible in the pending criminal case, and the President's assertion of privilege in opposition thereto, present issues "of a type which are traditionally justiciable," *United States* v. *ICC*, *supra*, at 430, and the fact that both litigants are officers of the Executive Branch is not a bar to justiciability. Pp. 696–697.

3. From this Court's examination of the material submitted by the Special Prosecutor in support of his motion for the subpoena, much of which is under seal, it is clear that the District Court's denial of the motion to quash comported with Rule 17 (c) and that the Special Prosecutor has made a sufficient showing to justify a subpoena for production *before* trial. Pp. 697–702.

4. Neither the doctrine of separation of powers nor the generalized need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. See, *e. g.*, *Marbury* v. *Madison*, 1 Cranch 137, 177; *Baker* v. *Carr*, 369 U. S. 186, 211. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, the confidentiality of

Presidential communications is not significantly diminished by producing material for a criminal trial under the protected conditions of *in camera* inspection, and any absolute executive privilege under Art. II of the Constitution would plainly conflict with the function of the courts under the Constitution. Pp. 703–707.

5. Although the courts will afford the utmost deference to Presidential acts in the performance of an Art. II function, *United States* v. *Burr*, 25 F. Cas. 187, 190, 191–192 (No. 14,694), when a claim of Presidential privilege as to materials subpoenaed for use in a criminal trial is based, as it is here, not on the ground that military or diplomatic secrets are implicated, but merely on the ground of a generalized interest in confidentiality, the President's generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial and the fundamental demands of due process of law in the fair administration of criminal justice. Pp. 707–713.

6. On the basis of this Court's examination of the record, it cannot be concluded that the District Court erred in ordering *in camera* examination of the subpoenaed material, which shall now forthwith be transmitted to the District Court. Pp. 713–714.

7. Since a President's communications encompass a vastly wider range of sensitive material than would be true of an ordinary individual, the public interest requires that Presidential confidentiality be afforded the greatest protection consistent with the fair administration of justice, and the District Court has a heavy responsibility to ensure that material involving Presidential conversations irrelevant to or inadmissible in the criminal prosecution be accorded the high degree of respect due a President and that such material be returned under seal to its lawful custodian. Until released to the Special Prosecutor no *in camera* material is to be released to anyone. Pp. 714–716.

No. 73–1766, 377 F. Supp. 1326, affirmed; No. 73–1834, certiorari dismissed as improvidently granted.

BURGER, C. J., delivered the opinion of the Court, in which all Members joined except REHNQUIST, J., who took no part in the consideration or decision of the cases.

Leon Jaworski and *Philip A. Lacovara* argued the cause and filed briefs for the United States in both cases.

James D. St. Clair argued the cause for the President

in both cases. With him on the briefs were *Charles Alan Wright, Leonard Garment, Michael A. Sterlacci, Jerome J. Murphy, Loren A. Smith, James R. Prochnow, Theodore J. Garrish, James J. Tansey,* and *Larry G. Gutterridge. William Snow Frates, Andrew C. Hall, Spencer H. Boyer,* and *Henry H. Jones* filed a brief for respondent Ehrlichman in No. 73–1766. *John M. Bray* filed a brief for respondent Strachan in No. 73–1766.†

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

This litigation presents for review the denial of a motion, filed in the District Court on behalf of the President of the United States, in the case of *United States* v. *Mitchell* (D. C. Crim. No. 74–110), to quash a third-party subpoena *duces tecum* issued by the United States District Court for the District of Columbia, pursuant to Fed. Rule Crim. Proc. 17 (c). The subpoena directed the President to produce certain tape recordings and documents relating to his conversations with aides and advisers. The court rejected the President's claims of absolute executive privilege, of lack of jurisdiction, and of failure to satisfy the requirements of Rule 17 (c). The President appealed to the Court of Appeals. We granted both the United States' petition for certiorari before judgment (No. 73–1766),[1] and also the President's cross-petition for certio-

†*Norman Dorsen* and *Melvin L. Wulf* filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance of the District Court judgment.

[1] See 28 U. S. C. §§ 1254 (1) and 2101 (e) and our Rule 20. See, *e. g., Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579 (1952); *United States* v. *United Mine Workers,* 330 U. S. 258 (1947); *Carter* v. *Carter Coal Co.,* 298 U. S. 238 (1936); *Rickert Rice Mills* v. *Fontenot,* 297 U. S. 110 (1936); *Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330 (1935); *Norman* v. *Baltimore & Ohio R. Co.,* 294 U. S. 240 (1935).

rari before judgment (No. 73–1834),[2] because of the public importance of the issues presented and the need for their prompt resolution. 417 U. S. 927 and 960 (1974).

On March 1, 1974, a grand jury of the United States District Court for the District of Columbia returned an indictment charging seven named individuals[3] with various offenses, including conspiracy to defraud the United States and to obstruct justice. Although he was not designated as such in the indictment, the grand jury named the President, among others, as an unindicted coconspirator.[4] On April 18, 1974, upon motion of the Spe-

[2] The cross-petition in No. 73–1834 raised the issue whether the grand jury acted within its authority in naming the President as an unindicted coconspirator. Since we find resolution of this issue unnecessary to resolution of the question whether the claim of privilege is to prevail, the cross-petition for certiorari is dismissed as improvidently granted and the remainder of this opinion is concerned with the issues raised in No. 73–1766. On June 19, 1974, the President's counsel moved for disclosure and transmittal to this Court of all evidence presented to the grand jury relating to its action in naming the President as an unindicted coconspirator. Action on this motion was deferred pending oral argument of the case and is now denied.

[3] The seven defendants were John N. Mitchell, H. R. Haldeman, John D. Ehrlichman, Charles W. Colson, Robert C. Mardian, Kenneth W. Parkinson, and Gordon Strachan. Each had occupied either a position of responsibility on the White House staff or a position with the Committee for the Re-election of the President. Colson entered a guilty plea on another charge and is no longer a defendant.

[4] The President entered a special appearance in the District Court on June 6 and requested that court to lift its protective order regarding the naming of certain individuals as coconspirators and to any additional extent deemed appropriate by the Court. This motion of the President was based on the ground that the disclosures to the news media made the reasons for continuance of the protective order no longer meaningful. On June 7, the District Court removed its protective order and, on June 10, counsel for both parties jointly moved this Court to unseal those parts of the record which related to the action of the grand jury regarding the President. After receiv-

cial Prosecutor, see n. 8, *infra*, a subpoena *duces tecum* was issued pursuant to Rule 17 (c) to the President by the United States District Court and made returnable on May 2, 1974. This subpoena required the production, in advance of the September 9 trial date, of certain tapes, memoranda, papers, transcripts, or other writings relating to certain precisely identified meetings between the President and others.[5] The Special Prosecutor was able to fix the time, place, and persons present at these discussions because the White House daily logs and appointment records had been delivered to him. On April 30, the President publicly released edited transcripts of 43 conversations; portions of 20 conversations subject to subpoena in the present case were included. On May 1, 1974, the President's counsel filed a "special appearance" and a motion to quash the subpoena under Rule 17 (c). This motion was accompanied by a formal claim of privilege. At a subsequent hearing,[6] further motions to expunge the grand jury's action naming the President as an unindicted coconspirator and for protective orders against the disclosure of that information were filed or raised orally by counsel for the President.

On May 20, 1974, the District Court denied the motion to quash and the motions to expunge and for protective orders. 377 F. Supp. 1326. It further ordered "the President or any subordinate officer, official, or employee with custody or control of the documents or

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ing a statement in opposition from the defendants, this Court denied that motion on June 15, 1974, except for the grand jury's immediate finding relating to the status of the President as an unindicted coconspirator. 417 U. S. 960.

[5] The specific meetings and conversations are enumerated in a schedule attached to the subpoena. App. 42a–46a.

[6] At the joint suggestion of the Special Prosecutor and counsel for the President, and with the approval of counsel for the defendants, further proceedings in the District Court were held *in camera*.

objects subpoenaed," *id.*, at 1331, to deliver to the District Court, on or before May 31, 1974, the originals of all subpoenaed items, as well as an index and analysis of those items, together with tape copies of those portions of the subpoenaed recordings for which transcripts had been released to the public by the President on April 30. The District Court rejected jurisdictional challenges based on a contention that the dispute was nonjusticiable because it was between the Special Prosecutor and the Chief Executive and hence "intra-executive" in character; it also rejected the contention that the Judiciary was without authority to review an assertion of executive privilege by the President. The court's rejection of the first challenge was based on the authority and powers vested in the Special Prosecutor by the regulation promulgated by the Attorney General; the court concluded that a justiciable controversy was presented. The second challenge was held to be foreclosed by the decision in *Nixon* v. *Sirica,* 159 U. S. App. D. C. 58, 487 F. 2d 700 (1973).

The District Court held that the judiciary, not the President, was the final arbiter of a claim of executive privilege. The court concluded that, under the circumstances of this case, the presumptive privilege was overcome by the Special Prosecutor's prima facie "demonstration of need sufficiently compelling to warrant judicial examination in chambers . . . ." 377 F. Supp., at 1330. The court held, finally, that the Special Prosecutor had satisfied the requirements of Rule 17 (c). The District Court stayed its order pending appellate review on condition that review was sought before 4 p. m., May 24. The court further provided that matters filed under seal remain under seal when transmitted as part of the record.

On May 24, 1974, the President filed a timely notice of appeal from the District Court order, and the certified record from the District Court was docketed in the United

States Court of Appeals for the District of Columbia Circuit. On the same day, the President also filed a petition for writ of mandamus in the Court of Appeals seeking review of the District Court order.

Later on May 24, the Special Prosecutor also filed, in this Court, a petition for a writ of certiorari before judgment. On May 31, the petition was granted with an expedited briefing schedule. 417 U. S. 927. On June 6, the President filed, under seal, a cross-petition for writ of certiorari before judgment. This cross-petition was granted June 15, 1974, 417 U. S. 960, and the case was set for argument on July 8, 1974.

I

JURISDICTION

The threshold question presented is whether the May 20, 1974, order of the District Court was an appealable order and whether this case was properly "in" the Court of Appeals when the petition for certiorari was filed in this Court. 28 U. S. C. § 1254. The Court of Appeals' jurisdiction under 28 U. S. C. § 1291 encompasses only "final decisions of the district courts." Since the appeal was timely filed and all other procedural requirements were met, the petition is properly before this Court for consideration if the District Court order was final. 28 U. S. C. §§ 1254 (1), 2101 (e).

The finality requirement of 28 U. S. C. § 1291 embodies a strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals. See, *e. g., Cobbledick* v. *United States,* 309 U. S. 323, 324–326 (1940). This requirement ordinarily promotes judicial efficiency and hastens the ultimate termination of litigation. In applying this principle to an order denying a motion to quash and requiring the production of evidence pursuant

to a subpoena *duces tecum,* it has been repeatedly held that the order is not final and hence not appealable. *United States* v. *Ryan,* 402 U. S. 530, 532 (1971); *Cobbledick* v. *United States, supra; Alexander* v. *United States,* 201 U. S. 117 (1906). This Court has

> "consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal." *United States* v. *Ryan, supra,* at 533.

The requirement of submitting to contempt, however, is not without exception and in some instances the purposes underlying the finality rule require a different result. For example, in *Perlman* v. *United States,* 247 U. S. 7 (1918), a subpoena had been directed to a third party requesting certain exhibits; the appellant, who owned the exhibits, sought to raise a claim of privilege. The Court held an order compelling production was appealable because it was unlikely that the third party would risk a contempt citation in order to allow immediate review of the appellant's claim of privilege. *Id.,* at 12–13. That case fell within the "limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims." *United States* v. *Ryan, supra,* at 533.

Here too, the traditional contempt avenue to immediate appeal is peculiarly inappropriate due to the unique setting in which the question arises. To require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be

unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the Government. Similarly, a federal judge should not be placed in the posture of issuing a citation to a President simply in order to invoke review. The issue whether a President can be cited for contempt could itself engender protracted litigation, and would further delay both review on the merits of his claim of privilege and the ultimate termination of the underlying criminal action for which his evidence is sought. These considerations lead us to conclude that the order of the District Court was an appealable order. The appeal from that order was therefore properly "in" the Court of Appeals, and the case is now properly before this Court on the writ of certiorari before judgment. 28 U. S. C. § 1254; 28 U. S. C. § 2101 (e). *Gay* v. *Ruff*, 292 U. S. 25, 30 (1934).[7]

II

JUSTICIABILITY

In the District Court, the President's counsel argued that the court lacked jurisdiction to issue the subpoena because the matter was an intra-branch dispute between a subordinate and superior officer of the Executive Branch and hence not subject to judicial resolution. That argument has been renewed in this Court with emphasis on the contention that the dispute does not present a "case" or "controversy" which can be adjudicated in the federal courts. The President's counsel argues that the federal courts should not intrude into areas committed to the other branches of Government.

[7] The parties have suggested that this Court has jurisdiction on other grounds. In view of our conclusion that there is jurisdiction under 28 U. S. C. § 1254 (1) because the District Court's order was appealable, we need not decide whether other jurisdictional vehicles are available.

He views the present dispute as essentially a "jurisdictional" dispute within the Executive Branch which he analogizes to a dispute between two congressional committees. Since the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case, *Confiscation Cases,* 7 Wall. 454 (1869); *United States* v. *Cox,* 342 F. 2d 167, 171 (CA5), cert. denied *sub nom. Cox* v. *Hauberg,* 381 U. S. 935 (1965), it is contended that a President's decision is final in determining what evidence is to be used in a given criminal case. Although his counsel concedes that the President has delegated certain specific powers to the Special Prosecutor, he has not "waived nor delegated to the Special Prosecutor the President's duty to claim privilege as to all materials . . . which fall within the President's inherent authority to refuse to disclose to any executive officer." Brief for the President 42. The Special Prosecutor's demand for the items therefore presents, in the view of the President's counsel, a political question under *Baker* v. *Carr,* 369 U. S. 186 (1962), since it involves a "textually demonstrable" grant of power under Art. II.

The mere assertion of a claim of an "intra-branch dispute," without more, has never operated to defeat federal jurisdiction; justiciability does not depend on such a surface inquiry. In *United States* v. *ICC,* 337 U. S. 426 (1949), the Court observed, "courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented." *Id.,* at 430. See also *Powell* v. *McCormack,* 395 U. S. 486 (1969); *ICC* v. *Jersey City,* 322 U. S. 503 (1944); *United States ex rel. Chapman* v. *FPC,* 345 U. S. 153 (1953); *Secretary of Agriculture* v. *United States,* 347 U. S. 645 (1954); *FMB* v. *Isbrandtsen Co.,* 356 U. S. 481, 483 n. 2 (1958); *United States* v. *Marine Bancorporation, ante,* p. 602; and *United States* v. *Connecticut National Bank, ante,* p. 656.

Our starting point is the nature of the proceeding for which the evidence is sought—here a pending criminal prosecution. It is a judicial proceeding in a federal court alleging violation of federal laws and is brought in the name of the United States as sovereign. *Berger* v. *United States*, 295 U. S. 78, 88 (1935). Under the authority of Art. II, § 2, Congress has vested in the Attorney General the power to conduct the criminal litigation of the United States Government. 28 U. S. C. § 516. It has also vested in him the power to appoint subordinate officers to assist him in the discharge of his duties. 28 U. S. C. §§ 509, 510, 515, 533. Acting pursuant to those statutes, the Attorney General has delegated the authority to represent the United States in these particular matters to a Special Prosecutor with unique authority and tenure.[8] The regulation gives the

[8] The regulation issued by the Attorney General pursuant to his statutory authority, vests in the Special Prosecutor plenary authority to control the course of investigations and litigation related to "all offenses arising out of the 1972 Presidential Election for which the Special Prosecutor deems it necessary and appropriate to assume responsibility, allegations involving the President, members of the White House staff, or Presidential appointees, and any other matters which he consents to have assigned to him by the Attorney General." 38 Fed. Reg. 30739, as amended by 38 Fed. Reg. 32805. In particular, the Special Prosecutor was given full authority, *inter alia*, "to contest the assertion of 'Executive Privilege' . . . and handl[e] all aspects of any cases within his jurisdiction." *Id.*, at 30739. The regulation then goes on to provide:

"In exercising this authority, the Special Prosecutor will have the greatest degree of independence that is consistent with the Attorney General's statutory accountability for all matters falling within the jurisdiction of the Department of Justice. The Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions. The Special Prosecutor will determine whether and to what extent he will inform or consult with the Attorney General about the conduct of his duties and responsibilities. In accordance with assurances given by the President to the Attorney

Special Prosecutor explicit power to contest the invocation of executive privilege in the process of seeking evidence deemed relevant to the performance of these specially delegated duties.[9] 38 Fed. Reg. 30739, as amended by 38 Fed. Reg. 32805.

So long as this regulation is extant it has the force of law. In *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260 (1954), regulations of the Attorney General delegated certain of his discretionary powers to the Board

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General that the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given, the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part and without the President's first consulting the Majority and the Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action."

[9] That this was the understanding of Acting Attorney General Robert Bork, the author of the regulation establishing the independence of the Special Prosecutor, is shown by his testimony before the Senate Judiciary Committee:

"Although it is anticipated that Mr. Jaworski will receive cooperation from the White House in getting any evidence he feels he needs to conduct investigations and prosecutions, it is clear and understood on all sides that he has the power to use judicial processes to pursue evidence if disagreement should develop."

Hearings on the Special Prosecutor before the Senate Committee on the Judiciary, 93d Cong., 1st Sess., pt. 2, p. 450 (1973). Acting Attorney General Bork gave similar assurances to the House Subcommittee on Criminal Justice. Hearings on H. J. Res. 784 and H. R. 10937 before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 93d Cong., 1st Sess., 266 (1973). At his confirmation hearings, Attorney General William Saxbe testified that he shared Acting Attorney General Bork's views concerning the Special Prosecutor's authority to test any claim of executive privilege in the courts. Hearings on the Nomination of William B. Saxbe to be Attorney General before the Senate Committee on the Judiciary, 93d Cong., 1st Sess., 9 (1973).

of Immigration Appeals and required that Board to exercise its own discretion on appeals in deportation cases. The Court held that so long as the Attorney General's regulations remained operative, he denied himself the authority to exercise the discretion delegated to the Board even though the original authority was his and he could reassert it by amending the regulations. *Service* v. *Dulles,* 354 U. S. 363, 388 (1957), and *Vitarelli* v. *Seaton,* 359 U. S. 535 (1959), reaffirmed the basic holding of *Accardi.*

Here, as in *Accardi,* it is theoretically possible for the Attorney General to amend or revoke the regulation defining the Special Prosecutor's authority. But he has not done so.[10] So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it. Moreover, the delegation of authority to the Special Prosecutor in this case is not an ordinary delegation by the Attorney General to a subordinate officer: with the authorization of the President, the Acting Attorney General provided in the regulation that the Special Prosecutor was not to be removed without the "consensus" of eight designated leaders of Congress. N. 8, *supra.*

The demands of and the resistance to the subpoena present an obvious controversy in the ordinary sense, but that alone is not sufficient to meet constitutional standards. In the constitutional sense, controversy means more than disagreement and conflict; rather it means the kind of controversy courts traditionally resolve. Here

[10] At his confirmation hearings, Attorney General William Saxbe testified that he agreed with the regulation adopted by Acting Attorney General Bork and would not remove the Special Prosecutor except for "gross impropriety." *Id.,* at 5–6, 8–10. There is no contention here that the Special Prosecutor is guilty of any such impropriety.

at issue is the production or nonproduction of specified evidence deemed by the Special Prosecutor to be relevant and admissible in a pending criminal case. It is sought by one official of the Executive Branch within the scope of his express authority; it is resisted by the Chief Executive on the ground of his duty to preserve the confidentiality of the communications of the President. Whatever the correct answer on the merits, these issues are "of a type which are traditionally justiciable." *United States* v. *ICC*, 337 U. S., at 430. The independent Special Prosecutor with his asserted need for the subpoenaed material in the underlying criminal prosecution is opposed by the President with his steadfast assertion of privilege against disclosure of the material. This setting assures there is "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U. S., at 204. Moreover, since the matter is one arising in the regular course of a federal criminal prosecution, it is within the traditional scope of Art. III power. *Id.*, at 198.

In light of the uniqueness of the setting in which the conflict arises, the fact that both parties are officers of the Executive Branch cannot be viewed as a barrier to justiciability. It would be inconsistent with the applicable law and regulation, and the unique facts of this case to conclude other than that the Special Prosecutor has standing to bring this action and that a justiciable controversy is presented for decision.

III

RULE 17 (c)

The subpoena *duces tecum* is challenged on the ground that the Special Prosecutor failed to satisfy the requirements of Fed. Rule Crim. Proc. 17 (c), which governs

the issuance of subpoenas *duces tecum* in federal criminal proceedings. If we sustained this challenge, there would be no occasion to reach the claim of privilege asserted with respect to the subpoenaed material. Thus we turn to the question whether the requirements of Rule 17 (c) have been satisfied. See *Arkansas Louisiana Gas Co.* v. *Dept. of Public Utilities*, 304 U. S. 61, 64 (1938); *Ashwander* v. *TVA*, 297 U. S. 288, 346–347 (1936) (Brandeis, J., concurring).

Rule 17 (c) provides:

> "A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

A subpoena for documents may be quashed if their production would be "unreasonable or oppressive," but not otherwise. The leading case in this Court interpreting this standard is *Bowman Dairy Co.* v. *United States*, 341 U. S. 214 (1951). This case recognized certain fundamental characteristics of the subpoena *duces tecum* in criminal cases: (1) it was not intended to provide a means of discovery for criminal cases, *id.*, at 220; (2) its chief innovation was to expedite the trial by providing a time and place *before* trial for the inspection of

subpoenaed materials,[11] *ibid.* As both parties agree, cases decided in the wake of *Bowman* have generally followed Judge Weinfeld's formulation in *United States* v. *Iozia,* 13 F. R. D. 335, 338 (SDNY 1952), as to the required showing. Under this test, in order to require production prior to trial, the moving party must show: (1) that the documents are evidentiary[12] and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that

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[11] The Court quoted a statement of a member of the advisory committee that the purpose of the Rule was to bring documents into court "in advance of the time that they are offered in evidence, so that they may then be inspected in advance, for the purpose . . . of enabling the party to see whether he can use [them] or whether he wants to use [them]." 341 U. S., at 220 n. 5. The Manual for Complex and Multidistrict Litigation published by the Federal Judicial Center recommends that use of Rule 17 (c) be encouraged in complex criminal cases in order that each party may be compelled to produce its documentary evidence well in advance of trial and in advance of the time it is to be offered. P. 150.

[12] The District Court found here that it was faced with "the more unusual situation . . . where the subpoena, rather than being directed to the government by defendants, issues to what, as a practical matter, is a third party." *United States* v. *Mitchell,* 377 F. Supp. 1326, 1330 (DC 1974). The Special Prosecutor suggests that the evidentiary requirement of *Bowman Dairy Co.* and *Iozia* does not apply in its full vigor when the subpoena *duces tecum* is issued to third parties rather than to government prosecutors. Brief for United States 128–129. We need not decide whether a lower standard exists because we are satisfied that the relevance and evidentiary nature of the subpoenaed tapes were sufficiently shown as a preliminary matter to warrant the District Court's refusal to quash the subpoena.

the application is made in good faith and is not intended as a general "fishing expedition."

Against this background, the Special Prosecutor, in order to carry his burden, must clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity. Our own review of the record necessarily affords a less comprehensive view of the total situation than was available to the trial judge and we are unwilling to conclude that the District Court erred in the evaluation of the Special Prosecutor's showing under Rule 17 (c). Our conclusion is based on the record before us, much of which is under seal. Of course, the contents of the subpoenaed tapes could not at that stage be described fully by the Special Prosecutor, but there was a sufficient likelihood that each of the tapes contains conversations relevant to the offenses charged in the indictment. *United States* v. *Gross*, 24 F. R. D. 138 (SDNY 1959). With respect to many of the tapes, the Special Prosecutor offered the sworn testimony or statements of one or more of the participants in the conversations as to what was said at the time. As for the remainder of the tapes, the identity of the participants and the time and place of the conversations, taken in their total context, permit a rational inference that at least part of the conversations relate to the offenses charged in the indictment.

We also conclude there was a sufficient preliminary showing that each of the subpoenaed tapes contains evidence admissible with respect to the offenses charged in the indictment. The most cogent objection to the admissibility of the taped conversations here at issue is that they are a collection of out-of-court statements by declarants who will not be subject to cross-examination and that the statements are therefore inadmissible hearsay. Here, however, most of the tapes apparently contain con-

versations to which one or more of the defendants named in the indictment were party. The hearsay rule does not automatically bar all out-of-court statements by a defendant in a criminal case.[13] Declarations by one defendant may also be admissible against other defendants upon a sufficient showing, by independent evidence,[14] of a conspiracy among one or more other defendants and the declarant and if the declarations at issue were in furtherance of that conspiracy. The same is true of declarations of coconspirators who are not defendants in the case on trial. *Dutton* v. *Evans*, 400 U. S. 74, 81 (1970). Recorded conversations may also be admissible for the limited purpose of impeaching the credibility of any defendant who testifies or any other coconspirator who testifies. Generally, the need for evidence to impeach witnesses is insufficient to require its production in advance of trial. See, *e. g.*, *United States* v. *Carter*, 15 F. R. D. 367,

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[13] Such statements are declarations by a party defendant that "would surmount all objections based on the hearsay rule . . ." and, at least as to the declarant himself, "would be admissible for whatever inferences" might be reasonably drawn. *United States* v. *Matlock*, 415 U. S. 164, 172 (1974). *On Lee* v. *United States*, 343 U. S. 747, 757 (1952). See also C. McCormick, Evidence § 270, pp. 651–652 (2d ed. 1972).

[14] As a preliminary matter, there must be substantial, independent evidence of the conspiracy, at least enough to take the question to the jury. *United States* v. *Vaught*, 485 F. 2d 320, 323 (CA4 1973); *United States* v. *Hoffa*, 349 F. 2d 20, 41–42 (CA6 1965), aff'd on other grounds, 385 U. S. 293 (1966); *United States* v. *Santos*, 385 F. 2d 43, 45 (CA7 1967), cert. denied, 390 U. S. 954 (1968); *United States* v. *Morton*, 483 F. 2d 573, 576 (CA8 1973); *United States* v. *Spanos*, 462 F. 2d 1012, 1014 (CA9 1972); *Carbo* v. *United States*, 314 F. 2d 718, 737 (CA9 1963), cert. denied, 377 U. S. 953 (1964). Whether the standard has been satisfied is a question of admissibility of evidence to be decided by the trial judge.

371 (DC 1954). Here, however, there are other valid potential evidentiary uses for the same material, and the analysis and possible transcription of the tapes may take a significant period of time. Accordingly, we cannot conclude that the District Court erred in authorizing the issuance of the subpoena *duces tecum*.

Enforcement of a pretrial subpoena *duces tecum* must necessarily be committed to the sound discretion of the trial court since the necessity for the subpoena most often turns upon a determination of factual issues. Without a determination of arbitrariness or that the trial court finding was without record support, an appellate court will not ordinarily disturb a finding that the applicant for a subpoena complied with Rule 17 (c). See, *e. g.*, *Sue* v. *Chicago Transit Authority*, 279 F. 2d 416, 419 (CA7 1960); *Shotkin* v. *Nelson*, 146 F. 2d 402 (CA10 1944).

In a case such as this, however, where a subpoena is directed to a President of the United States, appellate review, in deference to a coordinate branch of Government, should be particularly meticulous to ensure that the standards of Rule 17 (c) have been correctly applied. *United States* v. *Burr*, 25 F. Cas. 30, 34 (No. 14,692d) (CC Va. 1807). From our examination of the materials submitted by the Special Prosecutor to the District Court in support of his motion for the subpoena, we are persuaded that the District Court's denial of the President's motion to quash the subpoena was consistent with Rule 17 (c). We also conclude that the Special Prosecutor has made a sufficient showing to justify a subpoena for production *before* trial. The subpoenaed materials are not available from any other source, and their examination and processing should not await trial in the circumstances shown. *Bowman Dairy Co.* v. *United States*, 341 U. S. 214 (1951); *United States* v. *Iozia*, 13 F. R. D. 335 (SDNY 1952).

IV

THE CLAIM OF PRIVILEGE

A

Having determined that the requirements of Rule 17 (c) were satisfied, we turn to the claim that the subpoena should be quashed because it demands "confidential conversations between a President and his close advisors that it would be inconsistent with the public interest to produce." App. 48a. The first contention is a broad claim that the separation of powers doctrine precludes judicial review of a President's claim of privilege. The second contention is that if he does not prevail on the claim of absolute privilege, the court should hold as a matter of constitutional law that the privilege prevails over the subpoena *duces tecum*.

In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. The President's counsel, as we have noted, reads the Constitution as providing an absolute privilege of confidentiality for all Presidential communications. Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury* v. *Madison*, 1 Cranch 137 (1803), that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Id.*, at 177.

No holding of the Court has defined the scope of judicial power specifically relating to the enforcement of a subpoena for confidential Presidential communications for use in a criminal prosecution, but other exercises of power by the Executive Branch and the Legislative Branch have been found invalid as in conflict with the Constitution. *Powell* v. *McCormack*, 395 U. S. 486 (1969); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952). In a

series of cases, the Court interpreted the explicit immunity conferred by express provisions of the Constitution on Members of the House and Senate by the Speech or Debate Clause, U. S. Const. Art. I, § 6. *Doe* v. *McMillan,* 412 U. S. 306 (1973); *Gravel* v. *United States,* 408 U. S. 606 (1972); *United States* v. *Brewster,* 408 U. S. 501 (1972); *United States* v. *Johnson,* 383 U. S. 169 (1966). Since this Court has consistently exercised the power to construe and delineate claims arising under express powers, it must follow that the Court has authority to interpret claims with respect to powers alleged to derive from enumerated powers.

Our system of government "requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch." *Powell* v. *McCormack, supra,* at 549. And in *Baker* v. *Carr,* 369 U. S., at 211, the Court stated:

> "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."

Notwithstanding the deference each branch must accord the others, the "judicial Power of the United States" vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. The Federalist, No. 47, p. 313 (S. Mittell ed.

1938). We therefore reaffirm that it is the province and duty of this Court "to say what the law is" with respect to the claim of privilege presented in this case. *Marbury* v. *Madison, supra,* at 177.

B

In support of his claim of absolute privilege, the President's counsel urges two grounds, one of which is common to all governments and one of which is peculiar to our system of separation of powers. The first ground is the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.[15] Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers;[16] the protection of the confidentiality of

[15] There is nothing novel about governmental confidentiality. The meetings of the Constitutional Convention in 1787 were conducted in complete privacy. 1 M. Farrand, The Records of the Federal Convention of 1787, pp. xi-xxv (1911). Moreover, all records of those meetings were sealed for more than 30 years after the Convention. See 3 Stat. 475, 15th Cong., 1st Sess., Res. 8 (1818). Most of the Framers acknowledged that without secrecy no constitution of the kind that was developed could have been written. C. Warren, The Making of the Constitution 134–139 (1937).

[16] The Special Prosecutor argues that there is no provision in the Constitution for a Presidential privilege as to the President's com-

Presidential communications has similar constitutional underpinnings.

The second ground asserted by the President's counsel in support of the claim of absolute privilege rests on the doctrine of separation of powers. Here it is argued that the independence of the Executive Branch within its own sphere, *Humphrey's Executor* v. *United States*, 295 U. S. 602, 629–630 (1935); *Kilbourn* v. *Thompson*, 103 U. S. 168, 190–191 (1881), insulates a President from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential Presidential communications.

However, neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for *in camera* inspection with all the protection that a district court will be obliged to provide.

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munications corresponding to the privilege of Members of Congress under the Speech or Debate Clause. But the silence of the Constitution on this score is not dispositive. "The rule of constitutional interpretation announced in *McCulloch* v. *Maryland*, 4 Wheat. 316, that that which was reasonably appropriate and relevant to the exercise of a granted power was to be considered as accompanying the grant, has been so universally applied that it suffices merely to state it." *Marshall* v. *Gordon*, 243 U. S. 521, 537 (1917).

The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III. In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.

> "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S., at 635 (Jackson, J., concurring).

To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of "a workable government" and gravely impair the role of the courts under Art. III.

C

Since we conclude that the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch. The right and indeed the duty to resolve that question does not free the Judiciary from according high respect to the representations made on behalf of the President. *United States* v. *Burr,* 25 F. Cas. 187, 190, 191–192 (No. 14,694) (CC Va. 1807).

The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.[17] In *Nixon* v. *Sirica*, 159 U. S. App. D. C. 58, 487 F. 2d 700 (1973), the Court of Appeals held that such Presidential communications are "presumptively privileged," *id.*, at 75, 487 F. 2d, at 717, and this position is accepted by both parties in the present litigation. We agree with Mr. Chief Justice Marshall's observation, therefore, that "[i]n no case of this kind would a court be required to proceed against the president as against an ordinary individual." *United States* v. *Burr*, 25 F. Cas., at 192.

But this presumptive privilege must be considered in light of our historic commitment to the rule of law. This

[17] "Freedom of communication vital to fulfillment of the aims of wholesome relationships is obtained only by removing the specter of compelled disclosure. . . . [G]overnment . . . needs open but protected channels for the kind of plain talk that is essential to the quality of its functioning." *Carl Zeiss Stiftung* v. *V. E. B. Carl Zeiss, Jena*, 40 F. R. D. 318, 325 (DC 1966). See *Nixon* v. *Sirica*, 159 U. S. App. D. C. 58, 71, 487 F. 2d 700, 713 (1973); *Kaiser Aluminum & Chem. Corp.* v. *United States*, 141 Ct. Cl. 38, 157 F. Supp. 939 (1958) (Reed, J.); The Federalist, No. 64 (S. Mittell ed. 1938).

is nowhere more profoundly manifest than in our view that "the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer." *Berger* v. *United States,* 295 U. S., at 88. We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

Only recently the Court restated the ancient proposition of law, albeit in the context of a grand jury inquiry rather than a trial,

> "that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege, *United States* v. *Bryan,* 339 U. S. [323, 331 (1950)]; *Blackmer* v. *United States,* 284 U. S. 421, 438 (1932) . . . ." *Branzburg* v. *Hayes,* 408 U. S. 665, 688 (1972).

The privileges referred to by the Court are designed to protect weighty and legitimate competing interests. Thus, the Fifth Amendment to the Constitution provides that no man "shall be compelled in any criminal case to be a witness against himself." And, generally, an attorney or a priest may not be required to disclose what has been revealed in professional confidence. These and other interests are recognized in law by privi-

leges against forced disclosure, established in the Constitution, by statute, or at common law. Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.[18]

In this case the President challenges a subpoena served on him as a third party requiring the production of materials for use in a criminal prosecution; he does so on the claim that he has a privilege against disclosure of confidential communications. He does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities. In *C. & S. Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103, 111 (1948), dealing with Presidential authority involving foreign policy considerations, the Court said:

> "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."

In *United States* v. *Reynolds*, 345 U. S. 1 (1953), deal-

[18] Because of the key role of the testimony of witnesses in the judicial process, courts have historically been cautious about privileges. Mr. Justice Frankfurter, dissenting in *Elkins* v. *United States*, 364 U. S. 206, 234 (1960), said of this: "Limitations are properly placed upon the operation of this general principle only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."

ing with a claimant's demand for evidence in a Tort Claims Act case against the Government, the Court said:

> "It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." *Id.*, at 10.

No case of the Court, however, has extended this high degree of deference to a President's generalized interest in confidentiality. Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.

The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced.

In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair

administration of criminal justice.[19] The interest in preserving confidentiality is weighty indeed and entitled to great respect. However, we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.[20]

On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for con-

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[19] We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for information, nor with the President's interest in preserving state secrets. We address only the conflict between the President's assertion of a generalized privilege of confidentiality and the constitutional need for relevant evidence in criminal trials.

[20] Mr. Justice Cardozo made this point in an analogous context. Speaking for a unanimous Court in *Clark* v. *United States*, 289 U. S. 1 (1933), he emphasized the importance of maintaining the secrecy of the deliberations of a petit jury in a criminal case. "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." *Id.*, at 13. Nonetheless, the Court also recognized that isolated inroads on confidentiality designed to serve the paramount need of the criminal law would not vitiate the interests served by secrecy:

"A juror of integrity and reasonable firmness will not fear to speak his mind if the confidences of debate are barred to the ears of mere impertinence or malice. He will not expect to be shielded against the disclosure of his conduct in the event that there is evidence reflecting upon his honor. The chance that now and then there may be found some timid soul who will take counsel of his fears and give way to their repressive power is too remote and shadowy to shape the course of justice." *Id.*, at 16.

fidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

D

We have earlier determined that the District Court did not err in authorizing the issuance of the subpoena. If a President concludes that compliance with a subpoena would be injurious to the public interest he may properly, as was done here, invoke a claim of privilege on the return of the subpoena. Upon receiving a claim of privilege from the Chief Executive, it became the further duty of the District Court to treat the subpoenaed material as presumptively privileged and to require the Special Prosecutor to demonstrate that the Presidential material was "essential to the justice of the [pending criminal] case." *United States* v. *Burr*, 25 F. Cas., at 192. Here the District Court treated the material as presumptively privileged, proceeded to find that the Special

Prosecutor had made a sufficient showing to rebut the presumption, and ordered an *in camera* examination of the subpoenaed material. On the basis of our examination of the record we are unable to conclude that the District Court erred in ordering the inspection. Accordingly we affirm the order of the District Court that subpoenaed materials be transmitted to that court. We now turn to the important question of the District Court's responsibilities in conducting the *in camera* examination of Presidential materials or communications delivered under the compulsion of the subpoena *duces tecum*.

E

Enforcement of the subpoena *duces tecum* was stayed pending this Court's resolution of the issues raised by the petitions for certiorari. Those issues now having been disposed of, the matter of implementation will rest with the District Court. "[T]he guard, furnished to [the President] to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a [district] court after those subpoenas have issued; not in any circumstance which is to precede their being issued." *United States* v. *Burr*, 25 F. Cas., at 34. Statements that meet the test of admissibility and relevance must be isolated; all other material must be excised. At this stage the District Court is not limited to representations of the Special Prosecutor as to the evidence sought by the subpoena; the material will be available to the District Court. It is elementary that *in camera* inspection of evidence is always a procedure calling for scrupulous protection against any release or publication of material not found by the court, at that stage, probably admissible in evidence and relevant to the issues of the trial for which it is sought. That being true of an ordinary situation, it is obvious that the District Court has

a very heavy responsibility to see to it that Presidential conversations, which are either not relevant or not admissible, are accorded that high degree of respect due the President of the United States. Mr. Chief Justice Marshall, sitting as a trial judge in the *Burr* case, *supra,* was extraordinarily careful to point out that

> "[i]n no case of this kind would a court be required to proceed against the president as against an ordinary individual." 25 F. Cas., at 192.

Marshall's statement cannot be read to mean in any sense that a President is above the law, but relates to the singularly unique role under Art. II of a President's communications and activities, related to the performance of duties under that Article. Moreover, a President's communications and activities encompass a vastly wider range of sensitive material than would be true of any "ordinary individual." It is therefore necessary [21] in the public interest to afford Presidential confidentiality the greatest protection consistent with the fair administration of justice. The need for confidentiality even as to idle conversations with associates in which casual reference might be made concerning political leaders within the country or foreign statesmen is too obvious to call for further treatment. We have no doubt that the District Judge will at all times accord to Presidential records that high degree of deference suggested in *United States* v. *Burr, supra,* and will discharge his responsibility to see to

[21] When the subpoenaed material is delivered to the District Judge *in camera,* questions may arise as to the excising of parts, and it lies within the discretion of that court to seek the aid of the Special Prosecutor and the President's counsel for *in camera* consideration of the validity of particular excisions, whether the basis of excision is relevancy or admissibility or under such cases as *United States* v. *Reynolds,* 345 U. S. 1 (1953), or *C. & S. Air Lines* v. *Waterman S. S. Corp.,* 333 U. S. 103 (1948).

it that until released to the Special Prosecutor no *in camera* material is revealed to anyone. This burden applies with even greater force to excised material; once the decision is made to excise, the material is restored to its privileged status and should be returned under seal to its lawful custodian.

Since this matter came before the Court during the pendency of a criminal prosecution, and on representations that time is of the essence, the mandate shall issue forthwith.

Affirmed.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of these cases.

Syllabus

MILLIKEN, GOVERNOR OF MICHIGAN, ET AL. *v.* BRADLEY ET AL.

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

No. 73–434. Argued February 27, 1974—Decided July 25, 1974*

Respondents brought this class action, alleging that the Detroit public school system is racially segregated as a result of the official policies and actions of petitioner state and city officials, and seeking implementation of a plan to eliminate the segregation and establish a unitary nonracial school system. The District Court, after concluding that various acts by the petitioner Detroit Board of Education had created and perpetuated school segregation in Detroit, and that the acts of the Board, as a subordinate entity of the State, were attributable to the State, ordered the Board to submit Detroit-only desegregation plans. The court also ordered the state officials to submit desegregation plans encompassing the three-county metropolitan area, despite the fact that the 85 outlying school districts in these three counties were not parties to the action and there was no claim that they had committed constitutional violations. Subsequently, outlying school districts were allowed to intervene, but were not permitted to assert any claim or defense on issues previously adjudicated or to reopen any issue previously decided, but were allowed merely to advise the court as to the propriety of a metropolitan plan and to submit any objections, modifications, or alternatives to any such plan. Thereafter, the District Court ruled that it was proper to consider metropolitan plans, that Detroit-only plans submitted by the Board and respondents were inadequate to accomplish desegregation, and that therefore it would seek a solution beyond the limits of the Detroit School District, and concluded that "[s]chool district lines are simply matters of political convenience and may not be used to deny constitutional rights." Without having evidence that the suburban school districts had committed acts of *de jure* segregation, the court appointed a panel to submit a plan for the

*Together with No. 73–435, *Allen Park Public Schools et al.* v. *Bradley et al.*, and No. 73–436, *Grosse Pointe Public School System* v. *Bradley et al.*, also on certiorari to the same court.

Detroit schools that would encompass an entire designated desegregation area consisting of 53 of the 85 suburban school districts plus Detroit, and ordered the Detroit Board to acquire at least 295 school buses to provide transportation under an interim plan to be developed for the 1972–1973 school year. The Court of Appeals, affirming in part, held that the record supported the District Court's finding as to the constitutional violations committed by the Detroit Board and the state officials; that therefore the District Court was authorized and required to take effective measures to desegregate the Detroit school system; and that a metropolitan area plan embracing the 53 outlying districts was the only feasible solution and was within the District Court's equity powers. But the court remanded so that all suburban school districts that might be affected by a metropolitan remedy could be made parties and have an opportunity to be heard as to the scope and implementation of such a remedy, and vacated the order as to the bus acquisitions, subject to its reimposition at an appropriate time. *Held:* The relief ordered by the District Court and affirmed by the Court of Appeals was based upon erroneous standards and was unsupported by record evidence that acts of the outlying districts had any impact on the discrimination found to exist in the Detroit schools. A federal court may not impose a multidistrict, areawide remedy for single-district *de jure* school segregation violations where there is no finding that the other included school districts have failed to operate unitary school systems or have committed acts that effected segregation within the other districts, there is no claim or finding that the school district boundary lines were established with the purpose of fostering racial segregation, and there is no meaningful opportunity for the included neighboring school districts to present evidence or be heard on the propriety of a multidistrict remedy or on the question of constitutional violations by those districts. Pp. 737–753.

(a) The District Court erred in using as a standard the declared objective of development of a metropolitan area plan which, upon implementation, would leave "no school, grade or classroom . . . substantially disproportionate to the overall pupil racial composition" of the metropolitan area as a whole. The clear import of *Swann* v. *Board of Education,* 402 U. S. 1, is that desegregation, in the sense of dismantling a dual school system, does not require any particular racial balance. Pp. 739–741.

(b) While boundary lines may be bridged in circumstances where there has been a constitutional violation calling for interdistrict relief, school district lines may not be casually ignored or treated as a mere administrative convenience; substantial local control of public education in this country is a deeply rooted tradition. Pp. 741–742.

(c) The interdistrict remedy could extensively disrupt and alter the structure of public education in Michigan, since that remedy would require, in effect, consolidation of 54 independent school districts historically administered as separate governmental units into a vast new super school district, and, since—entirely apart from the logistical problems attending large-scale transportation of students—the consolidation would generate other problems in the administration, financing, and operation of this new school system. Pp. 742–743.

(d) From the scope of the interdistrict plan itself, absent a complete restructuring of the Michigan school district laws, the District Court would become, first, a *de facto* "legislative authority" to resolve the complex operational problems involved and thereafter a "school superintendent" for the entire area, a task which few, if any, judges are qualified to perform and one which would deprive the people of local control of schools through elected school boards. Pp. 743–744.

(e) Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must be first shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district; *i. e.*, specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Pp. 744–745.

(f) With no showing of significant violation by the 53 outlying school districts and no evidence of any interdistrict violation or effect, the District Court transcended the original theory of the case as framed by the pleadings, and mandated a metropolitan area remedy, the approval of which would impose on the outlying districts, not shown to have committed any constitutional violation, a standard not previously hinted at in any holding of this Court. P. 745.

(g) Assuming, *arguendo*, that the State was derivatively responsible for Detroit's segregated school conditions, it does not follow

that an interdistrict remedy is constitutionally justified or required, since there has been virtually no showing that either the State or any of the 85 outlying districts engaged in any activity that had a cross-district effect. Pp. 748–749.

(h) An isolated instance of a possible segregative effect as between two of the school districts involved would not justify the broad metropolitanwide remedy contemplated, particularly since that remedy embraced 52 districts having no responsibility for the arrangement and potentially involved 503,000 pupils in addition to Detroit's 276,000 pupils. Pp. 749–750.

484 F. 2d 215, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEWART, J., filed a concurring opinion, *post*, p. 753. DOUGLAS, J., filed a dissenting opinion, *post*, p. 757. WHITE, J., filed a dissenting opinion, in which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined, *post*, p. 762. MARSHALL, J., filed a dissenting opinion, in which DOUGLAS, BRENNAN, and WHITE, JJ., joined, *post*, p. 781.

Frank J. Kelley, Attorney General of Michigan, argued the cause for petitioners in No. 73–434. With him on the brief were *Robert A. Derengoski*, Solicitor General, and *Eugene Krasicky, Gerald F. Young, George L. McCargar*, and *Thomas F. Schimpf*, Assistant Attorneys General. *William M. Saxton* argued the cause for petitioners in Nos. 73–435 and 73–436. With him on the brief in No. 73–435 were *John B. Weaver, Robert M. Vercruysse*, and *Xhafer Orhan*. *Douglas H. West* filed a brief for petitioner in No. 73–436.

J. Harold Flannery and *Nathaniel R. Jones* argued the cause for respondents in all cases. With them on the brief for respondents Bradley et al. were *Jack Greenberg, Norman Chachkin*, and *Louis R. Lucas*. *George T. Roumell, Jr.*, and *C. Nicholas Revelos* filed a brief for respondents Board of Education for the School District of the city of Detroit et al. *John Bruff* and *William Ross* filed a brief for respondent Professional Personnel of Van

Dyke. *Robert J. Lord* filed a brief for respondents Green et al.

Solicitor General Bork argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief was *Assistant Attorney General Pottinger*.†

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

We granted certiorari in these consolidated cases to determine whether a federal court may impose a multi-district, areawide remedy to a single-district *de jure* segregation problem absent any finding that the other included school districts have failed to operate unitary school systems within their districts, absent any claim or finding that the boundary lines of any affected school district were established with the purpose of fostering racial segregation in public schools, absent any finding that the included districts committed acts which effected segregation within the other districts, and absent a

†Briefs of *amici curiae* urging reversal were filed by *Theodore L. Sendak*, Attorney General, *Donald P. Bogard*, Deputy Attorney General, and *William F. Harvey* for the State of Indiana; by *Lewis C. Bose* and *William M. Evans* for the Metropolitan School District of Lawrence Township, Indiana, et al.; by *Richard D. Wagner* and *Richard L. Brown* for the town of Speedway, Indiana, et al.; and by *Harold H. Fuhrman* for the National Suburban League, Ltd.

Briefs of *amici curiae* urging affirmance were filed by *Leonard P. Strickman* for the city of Boston, Massachusetts; by *Alexander A. Goldfarb* for the city of Hartford, Connecticut; by *Sanford Jay Rosen* for the Mexican American Legal Defense and Educational Fund; and by Inter-Faith Centers for Racial Justice, Inc.

Briefs of *amici curiae* were filed by *Charles F. Clippert, Charles E. Keller, Thomas H. Schwarze, John F. Shantz, Raymond McPeters, Walter J. Guth, Jr., Raymond G. Glime, Tony Ferris*, and *Perry Christy* for Bloomfield Hills School District et al.; by *Stephen J. Pollak, Richard M. Sharp*, and *David Rubin* for the National Education Assn.; and by *David I. Caplan* for the Jewish Rights Council.

meaningful opportunity for the included neighboring school districts to present evidence or be heard on the propriety of a multidistrict remedy or on the question of constitutional violations by those neighboring districts.[1]

I

The action was commenced in August 1970 by the respondents, the Detroit Branch of the National Association for the Advancement of Colored People [2] and individual parents and students, on behalf of a class later defined by order of the United States District Court for the Eastern District of Michigan, dated February 16, 1971, to include "all school children in the City of Detroit, Michigan, and all Detroit resident parents who have children of school age." The named defendants in the District Court included the Governor of Michigan, the Attorney General, the State Board of Education, the State Superintendent of Public Instruction, the Board of Education of the city of Detroit, its members, and the city's former superintendent of schools. The State of Michigan as such is not a party to this litigation and references to the State must be read as references to the public officials, state and local, through whom the State is alleged to have acted. In their complaint respondents attacked the constitutionality of a statute of the State of Michigan known as Act 48 of the 1970 Legislature on the ground that it put the State of Michigan in the position of unconstitutionally interfering with the execution and operation of a voluntary plan of partial high school desegregation, known as the April 7, 1970, Plan, which had been adopted by the Detroit Board of Education to be effective beginning

[1] 484 F. 2d 215 (CA6), cert. granted, 414 U. S. 1038 (1973).

[2] The standing of the NAACP as a proper party plaintiff was not contested in the trial court and is not an issue in this case.

with the fall 1970 semester. The complaint also alleged that the Detroit Public School System was and is segregated on the basis of race as a result of the official policies and actions of the defendants and their predecessors in office, and called for the implementation of a plan that would eliminate "the racial identity of every school in the [Detroit] system and . . . maintain now and hereafter a unitary, nonracial school system."

Initially the matter was tried on respondents' motion for a preliminary injunction to restrain the enforcement of Act 48 so as to permit the April 7 Plan to be implemented. On that issue, the District Court ruled that respondents were not entitled to a preliminary injunction since at that stage there was no proof that Detroit had a dual segregated school system. On appeal, the Court of Appeals found that the "implementation of the April 7 plan was [unconstitutionally] thwarted by State action in the form of the Act of the Legislature of Michigan," 433 F. 2d 897, 902 (CA6 1970), and that such action could not be interposed to delay, obstruct, or nullify steps lawfully taken for the purpose of protecting rights guaranteed by the Fourteenth Amendment. The case was remanded to the District Court for an expedited trial on the merits.

On remand, the respondents moved for immediate implementation of the April 7 Plan in order to remedy the deprivation of the claimed constitutional rights. In response, the School Board suggested two other plans, along with the April 7 Plan, and urged that top priority be assigned to the so-called "Magnet Plan" which was "designed to attract children to a school because of its superior curriculum." The District Court approved the Board's Magnet Plan, and respondents again appealed to the Court of Appeals, moving for summary reversal. The Court of Appeals refused to pass on the merits of the Magnet Plan and ruled that the District Court had

not abused its discretion in refusing to adopt the April 7 Plan without an evidentiary hearing. The case was again remanded with instructions to proceed immediately to a trial on the merits of respondents' substantive allegations concerning the Detroit school system. 438 F. 2d 945 (CA6 1971).

The trial of the issue of segregation in the Detroit school system began on April 6, 1971, and continued through July 22, 1971, consuming some 41 trial days. On September 27, 1971, the District Court issued its findings and conclusions on the issue of segregation, finding that "Governmental actions and inaction at all levels, federal, state and local, have combined, with those of private organizations, such as loaning institutions and real estate associations and brokerage firms, to establish and to maintain the pattern of residential segregation throughout the Detroit metropolitan area." 338 F. Supp. 582, 587 (ED Mich. 1971). While still addressing a Detroit-only violation, the District Court reasoned:

> "While it would be unfair to charge the present defendants with what other governmental officers or agencies have done, it can be said that the actions or the failure to act by the responsible school authorities, both city and state, were linked to that of these other governmental units. When we speak of governmental action we should not view the different agencies as a collection of unrelated units. Perhaps the most that can be said is that all of them, including the school authorities, are, in part, responsible for the segregated condition which exists. And we note that just as there is an interaction between residential patterns and the racial composition of the schools, so there is a corresponding effect on the residential pattern by the racial composition of the schools." *Ibid.*

The District Court found that the Detroit Board of Education created and maintained optional attendance zones [3] within Detroit neighborhoods undergoing racial transition and between high school attendance areas of opposite predominant racial compositions. These zones, the court found, had the "natural, probable, foreseeable and actual effect" of allowing white pupils to escape identifiably Negro schools. *Ibid.* Similarly, the District Court found that Detroit school attendance zones had been drawn along north-south boundary lines despite the Detroit Board's awareness that drawing boundary lines in an east-west direction would result in significantly greater desegregation. Again, the District Court concluded, the natural and actual effect of these acts was the creation and perpetuation of school segregation within Detroit.

The District Court found that in the operation of its school transportation program, which was designed to relieve overcrowding, the Detroit Board had admittedly bused Negro Detroit pupils to predominantly Negro schools which were beyond or away from closer white schools with available space.[4] This practice was found to have continued in recent years despite the Detroit Board's avowed policy, adopted in 1967, of utilizing transportation to increase desegregation:

> "With one exception (necessitated by the burning of a white school), defendant Board has never bused

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[3] Optional zones, sometimes referred to as dual zones or dual overlapping zones, provide pupils living within certain areas a choice of attendance at one of two high schools.

[4] The Court of Appeals found record evidence that in at least one instance during the period 1957–1958, Detroit served a suburban school district by contracting with it to educate its Negro high school students by transporting them away from nearby suburban white high schools, and past Detroit high schools which were predominantly white, to all-Negro or predominantly Negro Detroit schools. 484 F. 2d, at 231.

white children to predominantly black schools. The Board has not bused white pupils to black schools despite the enormous amount of space available in inner-city schools. There were 22,961 vacant seats in schools 90% or more black." *Id.*, at 588.

With respect to the Detroit Board of Education's practices in school construction, the District Court found that Detroit school construction generally tended to have a segregative effect with the great majority of schools being built in either overwhelmingly all-Negro or all-white neighborhoods so that the new schools opened as predominantly one-race schools. Thus, of the 14 schools which opened for use in 1970–1971, 11 opened over 90% Negro and one opened less than 10% Negro.

The District Court also found that the State of Michigan had committed several constitutional violations with respect to the exercise of its general responsibility for, and supervision of, public education.[5] The State, for example, was found to have failed, until the 1971 Session of the Michigan Legislature, to provide authorization or

[5] School districts in the State of Michigan are instrumentalities of the State and subordinate to its State Board of Education and legislature. The Constitution of the State of Michigan, Art. 8, § 2, provides in relevant part:

"The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law."

Similarly, the Michigan Supreme Court has stated: "The school district is a State agency. Moreover, it is of legislative creation. . . ." *Attorney General ex rel. Kies* v. *Lowrey*, 131 Mich. 639, 644, 92 N. W. 289, 290 (1902); "'Education in Michigan belongs to the State. It is no part of the local self-government inherent in the township or municipality, except so far as the legislature may choose to make it such. The Constitution has turned the whole subject over to the legislature. . . .'" *Attorney General ex rel. Zacharias* v. *Detroit Board of Education*, 154 Mich. 584, 590, 118 N. W. 606, 609 (1908).

funds for the transportation of pupils within Detroit regardless of their poverty or distance from the school to which they were assigned; during this same period the State provided many neighboring, mostly white, suburban districts the full range of state-supported transportation.

The District Court found that the State, through Act 48, acted to "impede, delay and minimize racial integration in Detroit schools." The first sentence of § 12 of Act 48 was designed to delay the April 7, 1970, desegregation plan originally adopted by the Detroit Board. The remainder of § 12 sought to prescribe for each school in the eight districts criteria of "free choice" and "neighborhood schools," which, the District Court found, "had as their purpose and effect the maintenance of segregation." 338 F. Supp., at 589.[6]

The District Court also held that the acts of the Detroit Board of Education, as a subordinate entity of the State, were attributable to the State of Michigan, thus creating a vicarious liability on the part of the State. Under Michigan law, Mich. Comp. Laws § 388.851 (1970), for example, school building construction plans had to be approved by the State Board of Education, and, prior to 1962, the State Board had specific statutory authority to supervise schoolsite selection. The proofs concerning the effect of Detroit's school construction program were,

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[6] "Sec. 12. The implementation of any attendance provisions for the 1970–71 school year determined by any first class school district board *shall be delayed* pending the date of commencement of functions by the first class school district boards established under the provisions of this amendatory act but such provision shall not impair the right of any such board to determine and implement prior to such date such changes in attendance provisions as are mandated by practical necessity. . . ." Act No. 48, § 12, Mich. Pub. Acts of 1970; Mich. Comp. Laws § 388.182 (1970) (emphasis added).

therefore, found to be largely applicable to show state responsibility for the segregative results.[7]

Turning to the question of an appropriate remedy for these several constitutional violations, the District Court deferred a pending motion[8] by intervening parent de-

[7] The District Court briefly alluded to the possibility that the State, along with private persons, had caused, in part, the housing patterns of the Detroit metropolitan area which, in turn, produced the predominantly white and predominantly Negro neighborhoods that characterize Detroit:

"It is no answer to say that restricted practices grew gradually (as the black population in the area increased between 1920 and 1970), or that since 1948 racial restrictions on the ownership of real property have been removed. The policies pursued by both government and private persons and agencies have a continuing and present effect upon the complexion of the community—as we know, the choice of a residence is a relatively infrequent affair. For many years FHA and VA openly advised and advocated the maintenance of 'harmonious' neighborhoods, *i. e.*, racially and economically harmonious. The conditions created continue." 338 F. Supp. 582, 587 (ED Mich. 1971).

Thus, the District Court concluded:

"The affirmative obligation of the defendant Board has been and is to adopt and implement pupil assignment practices and policies that compensate for and avoid incorporation into the school system the effects of residential racial segregation." *Id.*, at 593.

The Court of Appeals, however, expressly noted that:

"In affirming the District Judge's findings of constitutional violations by the Detroit Board of Education and by the State defendants resulting in segregated schools in Detroit, we have not relied at all upon testimony pertaining to segregated housing except as school construction programs helped cause or maintain such segregation." 484 F. 2d, at 242.

Accordingly, in its present posture, the case does not present any question concerning possible state housing violations.

[8] On March 22, 1971, a group of Detroit residents, who were parents of children enrolled in the Detroit public schools, were permitted to intervene as parties defendant. On June 24, 1971, the District Judge alluded to the "possibility" of a metropolitan school system stating: "[A]s I have said to several witnesses in this case:

fendants to join as additional parties defendant the 85 outlying school districts in the three-county Detroit metropolitan area on the ground that effective relief could not be achieved without their presence.[9] The District Court concluded that this motion to join was "premature," since it "has to do with relief" and no reasonably specific desegregation plan was before the court. 338 F. Supp., at 595. Accordingly, the District Court proceeded to order the Detroit Board of Education to submit desegregation plans limited to the segregation problems found to be existing within the city of Detroit. At the same time, however, the state defendants were directed to submit desegregation plans encompassing the three-county metropolitan area [10] despite the fact that the 85 outlying school

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'How do you desegregate a black city, or a black school system.' " Petitioners' Appendix 243a (hereinafter Pet. App.). Subsequently, on July 16, 1971, various parents filed a motion to require joinder of all of the 85 outlying independent school districts within the tri-county area.

[9] The respondents, as plaintiffs below, opposed the motion to join the additional school districts, arguing that the presence of the state defendants was sufficient and all that was required, even if, in shaping a remedy, the affairs of these other districts was to be affected. 338 F. Supp., at 595.

[10] At the time of the 1970 census, the population of Michigan was 8,875,083, almost half of which, 4,199,931, resided in the tri-county area of Wayne, Oakland, and Macomb. Oakland and Macomb Counties abut Wayne County to the north, and Oakland County abuts Macomb County to the west. These counties cover 1,952 square miles, Michigan Statistical Abstract (9th ed. 1972), and the area is approximately the size of the State of Delaware (2,057 square miles), more than half again the size of the State of Rhode Island (1,214 square miles) and almost 30 times the size of the District of Columbia (67 square miles). Statistical Abstract of the United States (93d ed. 1972). The populations of Wayne, Oakland, and Macomb Counties were 2,666,751; 907,871; and 625,309, respectively, in 1970. Detroit, the State's largest city, is located in Wayne County.

In the 1970–1971 school year, there were 2,157,449 children enrolled in school districts in Michigan. There are 86 independent,

districts of these three counties were not parties to the action and despite the fact that there had been no claim that these outlying districts had committed constitutional violations.[11] An effort to appeal these orders to the Court of Appeals was dismissed on the ground that the orders were not appealable. 468 F. 2d 902 (CA6), cert. denied, 409 U. S. 844 (1972). The sequence of the ensuing actions and orders of the District Court are significant factors and will therefore be catalogued in some detail.

Following the District Court's abrupt announcement that it planned to consider the implementation of a multidistrict, metropolitan area remedy to the segregation problems identified within the city of Detroit, the District Court was again requested to grant the outlying school districts intervention as of right on the ground that the District Court's new request for multidistrict plans "may, as a practical matter, impair or impede [the intervenors'] ability to protect" the welfare of their students. The District Court took the motions to intervene under advisement pending submission of the requested desegregation plans by Detroit and the state officials. On March 7, 1972, the District Court notified all parties and the petitioner school districts seeking intervention, that March 14, 1972, was the deadline for submission of recommendations for conditions of intervention and the

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legally distinct school districts within the tri-county area, having a total enrollment of approximately 1,000,000 children. In 1970, the Detroit Board of Education operated 319 schools with approximately 276,000 students.

[11] In its formal opinion, subsequently announced, the District Court candidly recognized:

"It should be noted that the court has taken no proofs with respect to the establishment of the boundaries of the 86 public school districts in the counties of Wayne, Oakland and Macomb, nor on the issue of whether, with the exclusion of the city of Detroit school district, such school districts have committed acts of de jure segregation." 345 F. Supp. 914, 920 (ED Mich. 1972).

date of the commencement of hearings on Detroit-only desegregation plans. On the second day of the scheduled hearings, March 15, 1972, the District Court granted the motions of the intervenor school districts [12] subject, *inter alia*, to the following conditions:

> "1. No intervenor will be permitted to assert any claim or defense previously adjudicated by the court.
>
> "2. No intervenor shall reopen any question or issue which has previously been decided by the court.
>
> . . . . .
>
> "7. New intervenors are granted intervention for two principal purposes: (a) To advise the court, by brief, of the legal propriety or impropriety of considering a metropolitan plan; (b) To review any plan or plans for the desegregation of the so-called larger Detroit Metropolitan area, and submitting objections, modifications or alternatives to it or them, and in accordance with the requirements of the United States Constitution and the prior orders of this court." 1 Joint Appendix 206 (hereinafter App.).

Upon granting the motion to intervene, on March 15, 1972, the District Court advised the petitioning intervenors that the court had previously set March 22, 1972, as the date for the filing of briefs on the legal propriety of a "metropolitan" plan of desegregation and, accordingly, that the intervening school districts would have one week to muster their legal arguments on the issue.[13]

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[12] According to the District Court, intervention was permitted under Fed. Rule Civ. Proc. 24 (a), "Intervention of Right," and also under Rule 24(b), "Permissive Intervention."

[13] This rather abbreviated briefing schedule was maintained despite the fact that the District Court had deferred consideration of a motion made eight months earlier, to bring the suburban districts into the case. See text accompanying n. 8, *supra*.

Thereafter, and following the completion of hearings on the Detroit-only desegregation plans, the District Court issued the four rulings that were the principal issues in the Court of Appeals.

(a) On March 24, 1972, two days after the intervenors' briefs were due, the District Court issued its ruling on the question of whether it could "consider relief in the form of a metropolitan plan, encompassing not only the City of Detroit, but the larger Detroit metropolitan area." It rejected the state defendants' arguments that no state action caused the segregation of the Detroit schools, and the intervening suburban districts' contention that interdistrict relief was inappropriate unless the suburban districts themselves had committed violations. The court concluded:

> "[I]t is proper for the court to consider metropolitan plans directed toward the desegregation of the Detroit public schools as an alternative to the present intra-city desegregation plans before it and, in the event that the court finds such intra-city plans inadequate to desegregate such schools, the court is of the opinion that it is required to consider a metropolitan remedy for desegregation." Pet. App. 51a.

(b) On March 28, 1972, the District Court issued its findings and conclusions on the three Detroit-only plans submitted by the city Board and the respondents. It found that the best of the three plans "would make the Detroit school system more identifiably Black . . . thereby increasing the flight of Whites from the city and the system." *Id.*, at 55a. From this the court concluded that the plan "would not accomplish desegregation . . . within the corporate geographical limits of the city." *Id.*, at 56a. Accordingly, the District Court held that it "must look beyond the limits of the Detroit school

district for a solution to the problem," and that "[s]chool district lines are simply matters of political convenience and may not be used to deny constitutional rights." *Id.*, at 57a.

(c) During the period from March 28 to April 14, 1972, the District Court conducted hearings on a metropolitan plan. Counsel for the petitioning intervenors was allowed to participate in these hearings, but he was ordered to confine his argument to "the size and expanse of the metropolitan plan" without addressing the intervenors' opposition to such a remedy or the claim that a finding of a constitutional violation by the intervenor districts was an essential predicate to any remedy involving them. Thereafter, on June 14, 1972, the District Court issued its ruling on the "desegregation area" and related findings and conclusions. The court acknowledged at the outset that it had "taken no proofs with respect to the establishment of the boundaries of the 86 public school districts in the counties [in the Detroit area], nor on the issue of whether, with the exclusion of the city of Detroit school district, such school districts have committed acts of de jure segregation." Nevertheless, the court designated 53 of the 85 suburban school districts plus Detroit as the "desegregation area" and appointed a panel to prepare and submit "an effective desegregation plan" for the Detroit schools that would encompass the entire desegregation area.[14] The plan was to be based on 15 clusters, each containing part of the Detroit system and two or more suburban districts,

[14] As of 1970, the 53 school districts outside the city of Detroit that were included in the court's "desegregation area" had a combined student population of approximately 503,000 students compared to Detroit's approximately 276,000 students. Nevertheless, the District Court directed that the intervening districts should be represented by only one member on the desegregation panel while the Detroit Board of Education was granted three panel members. 345 F. Supp., at 917.

and was to "achieve the greatest degree of actual desegregation to the end that, upon implementation, no school, grade or classroom [would be] substantially disproportionate to the overall pupil racial composition." 345 F. Supp. 914, 918 (ED Mich. 1972).

(d) On July 11, 1972, and in accordance with a recommendation by the court-appointed desegregation panel, the District Court ordered the Detroit Board of Education to purchase or lease "at least" 295 school buses for the purpose of providing transportation under an interim plan to be developed for the 1972–1973 school year. The costs of this acquisition were to be borne by the state defendants. Pet. App. 106a–107a.

On June 12, 1973, a divided Court of Appeals, sitting en banc, affirmed in part, vacated in part, and remanded for further proceedings. 484 F. 2d 215 (CA6).[15] The Court of Appeals held, first, that the record supported the District Court's findings and conclusions on the constitutional violations committed by the Detroit Board, *id.*, at 221–238, and by the state defendants, *id.*, at 239–241.[16] It stated that the acts of racial discrimina-

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[15] The District Court had certified most of the foregoing rulings for interlocutory review pursuant to 28 U. S. C. § 1292 (b) (1 App. 265–266) and the case was initially decided on the merits by a panel of three judges. However, the panel's opinion and judgment were vacated when it was determined to rehear the case en banc, 484 F. 2d, at 218.

[16] With respect to the State's violations, the Court of Appeals held: (1) that, since the city Board is an instrumentality of the State and subordinate to the State Board, the segregative actions of the Detroit Board "are the actions of an agency of the State," *id.*, at 238; (2) that the state legislation rescinding Detroit's voluntary desegregation plan contributed to increasing segregation in the Detroit schools, *ibid.*; (3) that under state law prior to 1962 the State Board had authority over school construction plans and therefore had to be held responsible "for the segregative results,"

tion shown in the record are "causally related to the substantial amount of segregation found in the Detroit school system," *id.*, at 241, and that "the District Court was therefore authorized and required to take effective measures to desegregate the Detroit Public School System." *Id.*, at 242.

The Court of Appeals also agreed with the District Court that "any less comprehensive a solution than a metropolitan area plan would result in an all black school system immediately surrounded by practically all white suburban school systems, with an overwhelmingly white majority population in the total metropolitan area." *Id.*, at 245. The court went on to state that it could "not see how such segregation can be any less harmful to the minority students than if the same result were accomplished within one school district." *Ibid.*

Accordingly, the Court of Appeals concluded that "the only feasible desegregation plan involves the crossing of the boundary lines between the Detroit School District and adjacent or nearby school districts for the limited purpose of providing an effective desegregation plan." *Id.*, at 249. It reasoned that such a plan would be appropriate because of the State's violations, and could be implemented because of the State's authority to control local school districts. Without further elaboration, and without any discussion of the claims that no constitutional violation by the outlying districts had been

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ibid.; (4) that the "State statutory scheme of support of transportation for school children directly discriminated against Detroit," *id.*, at 240, by not providing transportation funds to Detroit on the same basis as funds were provided to suburban districts, *id.*, at 238; and (5) that the transportation of Negro students from one suburban district to a Negro school in Detroit must have had the "approval, tacit or express, of the State Board of Education," *ibid.*

shown and that no evidence on that point had been allowed, the Court of Appeals held:

> "[T]he State has committed de jure acts of segregation and . . . the State controls the instrumentalities whose action is necessary to remedy the harmful effects of the State acts." *Ibid.*

An interdistrict remedy was thus held to be "within the equity powers of the District Court." *Id.*, at 250.[17]

The Court of Appeals expressed no views on the propriety of the District Court's composition of the metropolitan "desegregation area." It held that all suburban school districts that might be affected by any metropolitanwide remedy should, under Fed. Rule Civ. Proc. 19, be made parties to the case on remand and be given an opportunity to be heard with respect to the scope and implementation of such a remedy. 484 F. 2d, at 251–252. Under the terms of the remand, however, the District Court was not "required" to receive further evidence on the issue of segregation in the Detroit schools or on the propriety of a Detroit-only remedy, or on the question of whether the affected districts had committed any violation of the constitutional rights of Detroit pupils or others. *Id.*, at 252. Finally, the Court of Appeals vacated the District Court's order directing the acquisition of school buses, subject to the right of the District Court to consider reimposing the order "at the appropriate time." *Ibid.*

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[17] The court sought to distinguish *Bradley* v. *School Board of the City of Richmond*, 462 F. 2d 1058 (CA4 1972), aff'd by an equally divided Court, 412 U. S. 92 (1973), on the grounds that the District Court in that case had ordered an actual consolidation of three school districts and that Virginia's Constitution and statutes, unlike Michigan's, gave the local boards exclusive power to operate the public schools. 484 F. 2d, at 251.

II

Ever since *Brown* v. *Board of Education,* 347 U. S. 483 (1954), judicial consideration of school desegregation cases has begun with the standard:

> "[I]n the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." *Id.,* at 495.

This has been reaffirmed time and again as the meaning of the Constitution and the controlling rule of law.

The target of the *Brown* holding was clear and forthright: the elimination of state-mandated or deliberately maintained dual school systems with certain schools for Negro pupils and others for white pupils. This duality and racial segregation were held to violate the Constitution in the cases subsequent to 1954, including particularly *Green* v. *County School Board of New Kent County,* 391 U. S. 430 (1968); *Raney* v. *Board of Education,* 391 U. S. 443 (1968); *Monroe* v. *Board of Comm'rs,* 391 U. S. 450 (1968); *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971); *Wright* v. *Council of the City of Emporia,* 407 U. S. 451 (1972); *United States* v. *Scotland Neck Board of Education,* 407 U. S. 484 (1972).

The *Swann* case, of course, dealt

> "with the problem of defining in more precise terms than heretofore the scope of the duty of school authorities and district courts in implementing *Brown I* and the mandate to eliminate dual systems and establish unitary systems at once." 402 U. S., at 6.

In *Brown* v. *Board of Education,* 349 U. S. 294 (1955) (*Brown II*), the Court's first encounter with the problem of remedies in school desegregation cases, the Court noted:

> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Tra-

> ditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Id.*, at 300 (footnotes omitted).

In further refining the remedial process, *Swann* held, the task is to correct, by a balancing of the individual and collective interests, "the condition that offends the Constitution." A federal remedial power may be exercised "only on the basis of a constitutional violation" and, "[a]s with any equity case, the nature of the violation determines the scope of the remedy." 402 U. S., at 16.

Proceeding from these basic principles, we first note that in the District Court the complainants sought a remedy aimed at the *condition* alleged to offend the Constitution—the segregation within the Detroit City School District.[18] The court acted on this theory of the case and in its initial ruling on the "Desegregation Area" stated:

> "The task before this court, therefore, is now, and . . . has always been, how to desegregate the Detroit public schools." 345 F. Supp., at 921.

Thereafter, however, the District Court abruptly rejected the proposed Detroit-only plans on the ground that "while [they] would provide a racial mix more in keeping with the Black-White proportions of the student population [they] would accentuate the racial identifiability of the

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[18] Although the list of issues presented for review in petitioners' briefs and petitions for writs of certiorari do not include arguments on the findings of segregative violations on the part of the Detroit defendants, two of the petitioners argue in brief that these findings constitute error. This Court's Rules 23 (1) (c) and 40 (1) (d) (2), at a minimum, limit our review of the Detroit violation findings to "plain error," and, under our decision last Term in *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U. S. 189 (1973), the findings appear to be correct.

[Detroit] district as a Black school system, and would not accomplish desegregation." Pet. App. 56a. "[T]he racial composition of the student body is such," said the court, "that the plan's implementation would clearly make the entire Detroit public school system racially identifiable" (*id.*, at 54a), "leav[ing] many of its schools 75 to 90 per cent Black." *Id.*, at 55a. Consequently, the court reasoned, it was imperative to "look beyond the limits of the Detroit school district for a solution to the problem of segregation in the Detroit public schools . . ." since "[s]chool district lines are simply matters of political convenience and may not be used to deny constitutional rights." *Id.*, at 57a. Accordingly, the District Court proceeded to redefine the relevant area to include areas of predominantly white pupil population in order to ensure that "upon implementation, no school, grade or classroom [would be] substantially disproportionate to the overall pupil racial composition" of the entire metropolitan area.

While specifically acknowledging that the District Court's findings of a condition of segregation were limited to Detroit, the Court of Appeals approved the use of a metropolitan remedy largely on the grounds that it is

> "impossible to declare 'clearly erroneous' the District Judge's conclusion that any Detroit only segregation plan will lead directly to a single segregated Detroit school district overwhelmingly black in all of its schools, surrounded by a ring of suburbs and suburban school districts overwhelmingly white in composition in a State in which the racial composition is 87 per cent white and 13 per cent black." 484 F. 2d, at 249.

Viewing the record as a whole, it seems clear that the District Court and the Court of Appeals shifted the pri-

mary focus from a Detroit remedy to the metropolitan area only because of their conclusion that total desegregation of Detroit would not produce the racial balance which they perceived as desirable. Both courts proceeded on an assumption that the Detroit schools could not be truly desegregated—in their view of what constituted desegregation—unless the racial composition of the student body of each school substantially reflected the racial composition of the population of the metropolitan area as a whole. The metropolitan area was then defined as Detroit plus 53 of the outlying school districts. That this was the approach the District Court expressly and frankly employed is shown by the order which expressed the court's view of the constitutional standard:

> "Within the limitations of reasonable travel time and distance factors, pupil reassignments shall be effected within the clusters described in Exhibit P. M. 12 so as to achieve the greatest degree of actual desegregation to the end that, upon implementation, *no school, grade or classroom* [will be] substantially disproportionate to the overall pupil racial composition." 345 F. Supp., at 918 (emphasis added).

In *Swann*, which arose in the context of a single independent school district, the Court held:

> "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse." 402 U. S., at 24.

The clear import of this language from *Swann* is that desegregation, in the sense of dismantling a dual school system, does not require any particular racial balance in

each "school, grade or classroom."[19] See *Spencer* v. *Kugler*, 404 U. S. 1027 (1972).

Here the District Court's approach to what constituted "actual desegregation" raises the fundamental question, not presented in *Swann*, as to the circumstances in which a federal court may order desegregation relief that embraces more than a single school district. The court's analytical starting point was its conclusion that school district lines are no more than arbitrary lines on a map drawn "for political convenience." Boundary lines may be bridged where there has been a constitutional violation calling for interdistrict relief, but the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to

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[19] Disparity in the racial composition of pupils within a single district may well constitute a "signal" to a district court at the outset, leading to inquiry into the causes accounting for a pronounced racial identifiability of schools within one school system. In *Swann*, for example, we were dealing with a large but single independent school system, and a unanimous Court noted: "Where the ... proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of one race [the school authority has] the burden of showing that such school assignments are genuinely nondiscriminatory." 402 U. S., at 26. See also *Keyes*, *supra*, at 208. However, the use of significant racial imbalance in schools within an autonomous school district as a signal which operates simply to shift the burden of proof, is a very different matter from equating racial imbalance with a constitutional violation calling for a remedy. *Keyes*, *supra*, also involved a remedial order within a single autonomous school district.

quality of the educational process. See *Wright* v. *Council of the City of Emporia*, 407 U. S., at 469. Thus, in *San Antonio School District* v. *Rodriguez*, 411 U. S. 1, 50 (1973), we observed that local control over the educational process affords citizens an opportunity to participate in decisionmaking, permits the structuring of school programs to fit local needs, and encourages "experimentation, innovation, and a healthy competition for educational excellence."

The Michigan educational structure involved in this case, in common with most States, provides for a large measure of local control,[20] and a review of the scope and character of these local powers indicates the extent to which the interdistrict remedy approved by the two courts could disrupt and alter the structure of public edu-

[20] Under the Michigan School Code of 1955, the local school district is an autonomous political body corporate, operating through a Board of Education popularly elected. Mich. Comp. Laws §§ 340.27, 340.55, 340.107, 340.148, 340.149, 340.188. As such, the day-to-day affairs of the school district are determined at the local level in accordance with the plenary power to acquire real and personal property, §§ 340.26, 340.77, 340.113, 340.165, 340.192, 340.352; to hire and contract with personnel, §§ 340.569, 340.574; to levy taxes for operations, § 340.563; to borrow against receipts, § 340.567; to determine the length of school terms, § 340.575; to control the admission of nonresident students, § 340.582; to determine courses of study, § 340.583; to provide a kindergarten program, § 340.584; to establish and operate vocational schools, § 340.585; to offer adult education programs, § 340.586; to establish attendance areas, § 340.589; to arrange for transportation of nonresident students, § 340.591; to acquire transportation equipment, § 340.594; to receive gifts and bequests for educational purposes, § 340.605; to employ an attorney, § 340.609; to suspend or expel students, § 340.613; to make rules and regulations for the operation of schools, § 340.614; to cause to be levied authorized millage, § 340.643a; to acquire property by eminent domain, § 340.711 *et seq.*; and to approve and select textbooks, § 340.882.

cation in Michigan. The metropolitan remedy would require, in effect, consolidation of 54 independent school districts historically administered as separate units into a vast new super school district. See n. 10, *supra*. Entirely apart from the logistical and other serious problems attending large-scale transportation of students, the consolidation would give rise to an array of other problems in financing and operating this new school system. Some of the more obvious questions would be: What would be the status and authority of the present popularly elected school boards? Would the children of Detroit be within the jurisdiction and operating control of a school board elected by the parents and residents of other districts? What board or boards would levy taxes for school operations in these 54 districts constituting the consolidated metropolitan area? What provisions could be made for assuring substantial equality in tax levies among the 54 districts, if this were deemed requisite? What provisions would be made for financing? Would the validity of long-term bonds be jeopardized unless approved by all of the component districts as well as the State? What body would determine that portion of the curricula now left to the discretion of local school boards? Who would establish attendance zones, purchase school equipment, locate and construct new schools, and indeed attend to all the myriad day-to-day decisions that are necessary to school operations affecting potentially more than three-quarters of a million pupils? See n. 10, *supra*.

It may be suggested that all of these vital operational problems are yet to be resolved by the District Court, and that this is the purpose of the Court of Appeals' proposed remand. But it is obvious from the scope of the interdistrict remedy itself that absent a complete restructuring of the laws of Michigan relating to school districts the District Court will become first, a *de facto*

"legislative authority" to resolve these complex questions, and then the "school superintendent" for the entire area. This is a task which few, if any, judges are qualified to perform and one which would deprive the people of control of schools through their elected representatives.

Of course, no state law is above the Constitution. School district lines and the present laws with respect to local control, are not sacrosanct and if they conflict with the Fourteenth Amendment federal courts have a duty to prescribe appropriate remedies. See, *e. g.*, *Wright* v. *Council of the City of Emporia*, 407 U. S. 451 (1972); *United States* v. *Scotland Neck Board of Education*, 407 U. S. 484 (1972) (state or local officials prevented from carving out a new school district from an existing district that was in process of dismantling a dual school system); cf. *Haney* v. *County Board of Education of Sevier County*, 429 F. 2d 364 (CA8 1970) (State contributed to separation of races by drawing of school district lines); *United States* v. *Texas*, 321 F. Supp. 1043 (ED Tex. 1970), aff'd, 447 F. 2d 441 (CA5 1971), cert. denied *sub nom. Edgar* v. *United States*, 404 U. S. 1016 (1972) (one or more school districts created and maintained for one race). But our prior holdings have been confined to violations and remedies within a single school district. We therefore turn to address, for the first time, the validity of a remedy mandating cross-district or interdistrict consolidation to remedy a condition of segregation found to exist in only one district.

The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann*, 402 U. S., at 16. Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must

first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.

The record before us, voluminous as it is, contains evidence of *de jure* segregated conditions only in the Detroit schools; indeed, that was the theory on which the litigation was initially based and on which the District Court took evidence. See *supra*, at 725–726. With no showing of significant violation by the 53 outlying school districts and no evidence of any interdistrict violation or effect, the court went beyond the original theory of the case as framed by the pleadings and mandated a metropolitan area remedy. To approve the remedy ordered by the court would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in *Brown I* and *II* or any holding of this Court.

In dissent, MR. JUSTICE WHITE and MR. JUSTICE MARSHALL undertake to demonstrate that agencies having statewide authority participated in maintaining the dual school system found to exist in Detroit. They are apparently of the view that once such participation is

shown, the District Court should have a relatively free hand to reconstruct school districts outside of Detroit in fashioning relief. Our assumption, *arguendo*, see *infra*, at 748, that state agencies did participate in the maintenance of the Detroit system, should make it clear that it is not on this point that we part company.[21] The difference between us arises instead from established doctrine laid down by our cases. *Brown, supra; Green, supra; Swann, supra; Scotland Neck, supra;* and *Emporia, supra*, each addressed the issue of constitutional wrong in terms of an established geographic and administrative school system populated by both Negro and white children. In such a context, terms such as "unitary" and "dual" systems, and "racially identifiable schools," have meaning, and the necessary federal authority to remedy the constitutional wrong is firmly established. But the remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct. Disparate treatment of white and Negro students occurred within the Detroit school system, and not elsewhere, and on this record the remedy must be limited to that system. *Swann, supra*, at 16.

The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district. Unless petitioners drew the district lines in a discriminatory fashion, or arranged for white stu-

[21] Since the Court has held that a resident of a school district has a fundamental right protected by the Federal Constitution to vote in a district election, it would seem incongruous to disparage the importance of the school district in a different context. *Kramer* v. *Union Free School District No. 15*, 395 U. S. 621, 626 (1969). While the district there involved was located in New York, none of the facts in our possession suggest that the relation of school districts to the State is significantly different in New York from that in Michigan.

dents residing in the Detroit District to attend schools in Oakland and Macomb Counties, they were under no constitutional duty to make provisions for Negro students to do so. The view of the dissenters, that the existence of a dual system in *Detroit* can be made the basis for a decree requiring cross-district transportation of pupils, cannot be supported on the grounds that it represents merely the devising of a suitably flexible remedy for the violation of rights already established by our prior decisions. It can be supported only by drastic expansion of the constitutional right itself, an expansion without any support in either constitutional principle or precedent.[22]

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[22] The suggestion in the dissent of MR. JUSTICE MARSHALL that schools which have a majority of Negro students are not "desegregated," whatever the racial makeup of the school district's population and however neutrally the district lines have been drawn and administered, finds no support in our prior cases. In *Green* v. *County School Board of New Kent County*, 391 U. S. 430 (1968), for example, this Court approved a desegregation plan which would have resulted in each of the schools within the district having a racial composition of 57% Negro and 43% white. In *Wright* v. *Council of the City of Emporia*, 407 U. S. 451 (1972), the optimal desegregation plan would have resulted in the schools' being 66% Negro and 34% white, substantially the same percentages as could be obtained under one of the plans involved in this case. And in *United States* v. *Scotland Neck Board of Education*, 407 U. S. 484, 491 n. 5 (1972), a desegregation plan was implicitly approved for a school district which had a racial composition of 77% Negro and 22% white. In none of these cases was it even intimated that "actual desegregation" could not be accomplished as long as the number of Negro students was greater than the number of white students.

The dissents also seem to attach importance to the metropolitan character of Detroit and neighboring school districts. But the constitutional principles applicable in school desegregation cases cannot vary in accordance with the size or population dispersal of the particular city, county, or school district as compared with neighboring areas.

III

We recognize that the six-volume record presently under consideration contains language and some specific incidental findings thought by the District Court to afford a basis for interdistrict relief. However, these comparatively isolated findings and brief comments concern only one possible interdistrict violation and are found in the context of a proceeding that, as the District Court conceded, included no proof of segregation practiced by any of the 85 suburban school districts surrounding Detroit. The Court of Appeals, for example, relied on five factors which, it held, amounted to unconstitutional state action with respect to the violations found in the Detroit system:

(1) It held the State derivatively responsible for the Detroit Board's violations on the theory that actions of Detroit as a political subdivision of the State were attributable to the State. Accepting, *arguendo*, the correctness of this finding of state responsibility for the segregated conditions within the city of Detroit, it does not follow that an interdistrict remedy is constitutionally justified or required. With a single exception, discussed later, there has been no showing that either the State or any of the 85 outlying districts engaged in activity that had a cross-district effect. The boundaries of the Detroit School District, which are coterminous with the boundaries of the city of Detroit, were established over a century ago by neutral legislation when the city was incorporated; there is no evidence in the record, nor is there any suggestion by the respondents, that either the original boundaries of the Detroit School District, or any other school district in Michigan, were established for the purpose of creating, maintaining, or perpetuating segregation of races. There is no claim and there is no evidence hinting that petitioner outlying school districts and their

predecessors, or the 30-odd other school districts in the tricounty area—but outside the District Court's "desegregation area"—have ever maintained or operated anything but unitary school systems. Unitary school systems have been required for more than a century by the Michigan Constitution as implemented by state law.[23] Where the schools of only one district have been affected, there is no constitutional power in the courts to decree relief balancing the racial composition of that district's schools with those of the surrounding districts.

(2) There was evidence introduced at trial that, during the late 1950's, Carver School District, a predominantly Negro suburban district, contracted to have Negro high school students sent to a predominantly Negro school in Detroit. At the time, Carver was an independent school district that had no high school because, according to the trial evidence, "Carver District . . . did not have a place for adequate high school facilities." 484 F. 2d, at 231. Accordingly, arrangements were made with Northern High School in the abutting Detroit School District so that the Carver high school students could obtain a secondary school education. In 1960 the Oak Park School District, a predominantly white suburban district, annexed the predominantly Negro Carver School District, through the initiative of local officials.

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[23] *People ex rel. Workman* v. *Board of Education of Detroit*, 18 Mich. 400 (1869); Act 34, § 28, Mich. Pub. Acts of 1867. The Michigan Constitution and laws provide that "[e]very school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin," Mich. Const. 1963, Art. 8, § 2; that "[n]o separate school or department shall be kept for any person or persons on account of race or color," Mich. Comp. Laws § 340.355; and that "[a]ll persons, residents of a school district . . . shall have an equal right to attend school therein," *id.*, § 340.356. See also Act 319, Part II, c. 2, § 9, Mich. Pub. Acts of 1927.

Ibid. There is, of course, no claim that the 1960 annexation had a segregative purpose or result or that Oak Park now maintains a dual system.

According to the Court of Appeals, the arrangement during the late 1950's which allowed Carver students to be educated within the Detroit District was dependent upon the "tacit or express" approval of the State Board of Education and was the result of the refusal of the white suburban districts to accept the Carver students. Although there is nothing in the record supporting the Court of Appeals' supposition that suburban white schools refused to accept the Carver students, it appears that this situation, whether with or without the State's consent, may have had a segregative effect on the school populations of the two districts involved. However, since "the nature of the violation determines the scope of the remedy," *Swann*, 402 U. S., at 16, this isolated instance affecting two of the school districts would not justify the broad metropolitanwide remedy contemplated by the District Court and approved by the Court of Appeals, particularly since it embraced potentially 52 districts having no responsibility for the arrangement and involved 503,000 pupils in addition to Detroit's 276,000 students.

(3) The Court of Appeals cited the enactment of state legislation (Act 48) which had the effect of rescinding Detroit's voluntary desegregation plan (the April 7 Plan). That plan, however, affected only 12 of 21 Detroit high schools and had no causal connection with the distribution of pupils by race between Detroit and the other school districts within the tri-county area.

(4) The court relied on the State's authority to supervise schoolsite selection and to approve building construction as a basis for holding the State responsible for the segregative results of the school construction program in Detroit. Specifically, the Court of Appeals asserted

that during the period between 1949 and 1962 the State Board of Education exercised general authority as overseer of site acquisitions by local boards for new school construction, and suggested that this state-approved school construction "fostered segregation throughout the Detroit Metropolitan area." 484 F. 2d, at 241. This brief comment, however, is not supported by the evidence taken at trial since that evidence was specifically limited to proof that schoolsite acquisition and school construction within the city of Detroit produced *de jure* segregation *within* the city itself. *Id.*, at 235–238. Thus, there was no evidence suggesting that the State's activities with respect to either school construction or site acquisition within Detroit affected the racial composition of the school population outside Detroit or, conversely, that the State's school construction and site acquisition activities within the outlying districts affected the racial composition of the schools within Detroit.

(5) The Court of Appeals also relied upon the District Court's finding:

> "This and other financial limitations, such as those on bonding and the working of the state aid formula whereby suburban districts were able to make far larger per pupil expenditures despite less tax effort, have created and perpetuated systematic educational inequalities." *Id.*, at 239.

However, neither the Court of Appeals nor the District Court offered any indication in the record or in their opinions as to how, if at all, the availability of state-financed aid for some Michigan students outside Detroit, but not for those within Detroit, might have affected the racial character of any of the State's school districts. Furthermore, as the respondents recognize, the application of our recent ruling in *San Antonio School District* v. *Rodriguez*, 411 U. S. 1 (1973), to this state education financing system is questionable, and this issue was not

addressed by either the Court of Appeals or the District Court. This, again, underscores the crucial fact that the theory upon which the case proceeded related solely to the establishment of Detroit city violations as a basis for desegregating Detroit schools and that, at the time of trial, neither the parties nor the trial judge was concerned with a foundation for interdistrict relief.[24]

IV

Petitioners have urged that they were denied due process by the manner in which the District Court limited their participation after intervention was allowed, thus precluding adequate opportunity to present evidence that they had committed no acts having a segregative effect in Detroit. In light of our holding that, absent an interdistrict violation, there is no basis for an interdistrict remedy, we need not reach these claims. It is clear, however, that the District Court, with the approval of the Court of Appeals, has provided an interdistrict remedy in the face of a record which shows no constitutional violations that would call for equitable relief except within the city of Detroit. In these circumstances there was no occasion for the parties to address, or for the District Court to consider whether there were racially discriminatory acts for which any of the 53 outlying districts were responsible and which had direct and significant segregative effect on schools of more than one district.

We conclude that the relief ordered by the District Court and affirmed by the Court of Appeals was based upon an erroneous standard and was unsupported by record evidence that acts of the outlying districts effected the discrimination found to exist in the schools of De-

[24] Apparently, when the District Court, *sua sponte,* abruptly altered the theory of the case to include the possibility of multidistrict relief, neither the plaintiffs nor the trial judge considered amending the complaint to embrace the new theory.

troit. Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion leading to prompt formulation of a decree directed to eliminating the segregation found to exist in Detroit city schools, a remedy which has been delayed since 1970.

Reversed and remanded.

MR. JUSTICE STEWART, concurring.

In joining the opinion of the Court, I think it appropriate, in view of some of the extravagant language of the dissenting opinions, to state briefly my understanding of what it is that the Court decides today.

The respondents commenced this suit in 1970, claiming only that a constitutionally impermissible allocation of educational facilities along racial lines had occurred in public schools within a single school district whose lines were coterminous with those of the city of Detroit. In the course of the subsequent proceedings, the District Court found that public school officials had contributed to racial segregation within that district by means of improper use of zoning and attendance patterns, optional-attendance areas, and building and site selection. This finding of a violation of the Equal Protection Clause was upheld by the Court of Appeals, and is accepted by this Court today. See *ante*, at 738 n. 18. In the present posture of the case, therefore, the Court does not deal with questions of substantive constitutional law. The basic issue now before the Court concerns, rather, the appropriate exercise of federal equity jurisdiction.[1]

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[1] As this Court stated in *Brown* v. *Board of Education*, 349 U. S. 294, 300: "[E]quity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These [school desegregation] cases call for the exercise of these traditional attributes of equity power."

No evidence was adduced and no findings were made in the District Court concerning the activities of school officials in districts outside the city of Detroit, and no school officials from the outside districts even participated in the suit until after the District Court had made the initial determination that is the focus of today's decision. In spite of the limited scope of the inquiry and the findings, the District Court concluded that the only effective remedy for the constitutional violations found to have existed within the city of Detroit was a desegregation plan calling for busing pupils to and from school districts outside the city. The District Court found that any desegregation plan operating wholly " 'within the corporate geographical limits of the city' " would be deficient since it " 'would clearly make the entire Detroit public school system racially identifiable as Black.' " 484 F. 2d 215, 244, 243. The Court of Appeals, in affirming the decision that an interdistrict remedy was necessary, noted that a plan limited to the city of Detroit "would result in an all black school system immediately surrounded by practically all white suburban school systems, with an overwhelmingly white majority population in the total metropolitan area." *Id.*, at 245.

The courts were in error for the simple reason that the remedy they thought necessary was not commensurate with the constitutional violation found. Within a single school district whose officials have been shown to have engaged in unconstitutional racial segregation, a remedial decree that affects every individual school may be dictated by "common sense," see *Keyes* v. *School District No. 1, Denver, Colorado,* 413 U. S. 189, 203, and indeed may provide the only effective means to eliminate segregation "root and branch," *Green* v. *County School Board of New Kent County,* 391 U. S. 430, 438, and to "effectuate a transition to a racially nondiscriminatory school

system." *Brown* v. *Board of Education,* 349 U. S. 294, 301. See *Keyes, supra,* at 198–205. But in this case the Court of Appeals approved the concept of a remedial decree that would go beyond the boundaries of the district where the constitutional violation was found, and include schools and schoolchildren in many other school districts that have presumptively been administered in complete accord with the Constitution.

The opinion of the Court convincingly demonstrates, *ante,* at 742–743, that traditions of local control of schools, together with the difficulty of a judicially supervised restructuring of local administration of schools, render improper and inequitable such an interdistrict response to a constitutional violation found to have occurred only within a single school district.

This is not to say, however, that an interdistrict remedy of the sort approved by the Court of Appeals would not be proper, or even necessary, in other factual situations. Were it to be shown, for example, that state officials had contributed to the separation of the races by drawing or redrawing school district lines, see *Haney* v. *County Board of Education of Sevier County,* 429 F. 2d 364; cf. *Wright* v. *Council of the City of Emporia,* 407 U. S. 451; *United States* v. *Scotland Neck Board of Education,* 407 U. S. 484; by transfer of school units between districts, *United States* v. *Texas,* 321 F. Supp. 1043, aff'd, 447 F. 2d 441; *Turner* v. *Warren County Board of Education,* 313 F. Supp. 380; or by purposeful, racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines or for restructuring of district lines might well be appropriate.

In this case, however, no such interdistrict violation was shown. Indeed, no evidence at all concerning the administration of schools outside the city of Detroit was presented other than the fact that these schools contained

a higher proportion of white pupils than did the schools within the city. Since the mere fact of different racial compositions in contiguous districts does not itself imply or constitute a violation of the Equal Protection Clause in the absence of a showing that such disparity was imposed, fostered, or encouraged by the State or its political subdivisions, it follows that no interdistrict violation was shown in this case.[2] The formulation of an interdistrict remedy was thus simply not responsive to the factual record before the District Court and was an abuse of that court's equitable powers.

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[2] My Brother MARSHALL seems to ignore this fundamental fact when he states, *post*, at 799, that "the most essential finding [made by the District Court] was that Negro children in Detroit had been confined by intentional acts of segregation to a growing core of Negro schools surrounded by a receding ring of white schools." This conclusion is simply not substantiated by the record presented in this case. The record here does support the claim made by the respondents that white and Negro students within Detroit who otherwise would have attended school together were separated by acts of the State or its subdivision. However, segregative acts within the city alone cannot be presumed to have produced—and no factual showing was made that they did produce—an increase in the number of Negro students *in the city as a whole*. It is this essential fact of a predominantly Negro school population in Detroit—caused by unknown and perhaps unknowable factors such as in-migration, birth rates, economic changes, or cumulative acts of private racial fears—that accounts for the "growing core of Negro schools," a "core" that has grown to include virtually the entire city. The Constitution simply does not allow federal courts to attempt to change that situation unless and until it is shown that the State, or its political subdivisions, have contributed to cause the situation to exist. No record has been made in this case showing that the racial composition of the Detroit school population or that residential patterns within Detroit and in the surrounding areas were in any significant measure caused by governmental activity, and it follows that the situation over which my dissenting Brothers express concern cannot serve as the predicate for the remedy adopted by the District Court and approved by the Court of Appeals.

In reversing the decision of the Court of Appeals this Court is in no way turning its back on the proscription of state-imposed segregation first voiced in *Brown* v. *Board of Education,* 347 U. S. 483, or on the delineation of remedial powers and duties most recently expressed in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1. In *Swann* the Court addressed itself to the range of equitable remedies available to the courts to effectuate the desegregation mandated by *Brown* and its progeny, noting that the task in choosing appropriate relief is "to correct . . . the condition that offends the Constitution," and that "the nature of the violation determines the scope of the remedy . . . ." *Id.,* at 16.

The disposition of this case thus falls squarely under these principles. The only "condition that offends the Constitution" found by the District Court in this case is the existence of officially supported segregation in and among public schools in Detroit itself. There were no findings that the differing racial composition between schools in the city and in the outlying suburbs was caused by official activity of any sort. It follows that the decision to include in the desegregation plan pupils from school districts outside Detroit was not predicated upon any constitutional violation involving those school districts. By approving a remedy that would reach beyond the limits of the city of Detroit to correct a constitutional violation found to have occurred solely within that city the Court of Appeals thus went beyond the governing equitable principles established in this Court's decisions.

MR. JUSTICE DOUGLAS, dissenting.

The Court of Appeals has acted responsibly in these cases and we should affirm its judgment. This was the fourth time the case was before it over a span of less than three years. The Court of Appeals affirmed the District

Court on the issue of segregation and on the "Detroit-only" plans of desegregation. The Court of Appeals also approved in principle the use of a metropolitan area plan, vacating and remanding only to allow the other affected school districts to be brought in as parties, and in other minor respects.

We have before us today no plan for integration. The only orders entered so far are interlocutory. No new principles of law are presented here. Metropolitan treatment of metropolitan problems is commonplace. If this were a sewage problem or a water problem, or an energy problem, there can be no doubt that Michigan would stay well within federal constitutional bounds if it sought a metropolitan remedy. In *Bradley* v. *School Board of City of Richmond,* 462 F. 2d 1058, aff'd by an equally divided Court, 412 U. S. 92, we had a case involving the Virginia school system where local school boards had "exclusive jurisdiction" of the problem, not "the State Board of Education," 462 F. 2d, at 1067. Here the Michigan educational system is unitary, maintained and supported by the legislature and under the general supervision of the State Board of Education.[1] The State controls the boundaries of school districts.[2] The State supervises schoolsite selection.[3] The construction is done through municipal bonds approved by several state agencies.[4] Education in Michigan is a state project with very little completely local control,[5] except that the schools are financed locally, not on a statewide basis. Indeed

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[1] Mich. Const., Art. 8, §§ 2, 3.

[2] See 484 F. 2d 215, 247–248; Mich. Comp. Laws §§ 340.402, 340.431, 340.447, 388.681 (1970).

[3] Mich. Comp. Laws § 388.851 (1948), as amended by Act 231, Mich. Pub. Acts of 1949, and Act 175, Mich. Pub. Acts 1962.

[4] See Mich. Comp. Laws §§ 132.1 and 132.2 (1970); 3 App. 157.

[5] See 484 F. 2d, at 248–249.

the proposal to put school funding in Michigan on a statewide basis was defeated at the polls in November 1972.[6] Yet the school districts by state law are agencies of the State.[7] State action is indeed challenged as violating the Equal Protection Clause. Whatever the reach of that claim may be, it certainly is aimed at discrimination based on race.

Therefore as the Court of Appeals held there can be no doubt that as a matter of Michigan law the State itself has the final say as to where and how school district lines should be drawn.[8]

When we rule against the metropolitan area remedy we take a step that will likely put the problems of the blacks and our society back to the period that antedated the "separate but equal" regime of *Plessy* v. *Ferguson,* 163 U. S. 537. The reason is simple.

The inner core of Detroit is now rather solidly black; [9] and the blacks, we know, in many instances are likely to

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[6] See Detroit Free Press, Nov. 8, 1972, p. 1A, col. 3. Michigan has recently passed legislation which could eliminate some, but not all, of the inequities in school financing. See Act 101, Mich. Pub. Acts of 1973.

[7] See 484 F. 2d, at 246–247; Mich. Const. Art. 8, §§ 2, 3.

[8] See n. 2, *supra.*

[9] A tremendous change has occurred in the distribution of this country's black population since World War I. See Hauser, Demographic Factors in the Integration of the Negro, Daedalus 847–877 (fall 1965). In 1910, 73% of all blacks lived on farms and in rural areas; by 1960, 73% lived in urban areas, mainly in the largest metropolitan areas. Moreover, due to the fact that the black population is younger than the white population, the concentration of blacks in the cities is even more pronounced for the school-age population. The pattern of change which has existed since World War I is continuing, and hence the proportion of blacks in the urban North and West will continue to increase. Dept. of Health, Education, and Welfare, J. Coleman et al., Equality of Educational Opportunity 39–40 (1966).

be poorer,[10] just as were the Chicanos in *San Antonio School District* v. *Rodriguez*, 411 U. S. 1. By that decision the poorer school districts[11] must pay their own way. It is therefore a foregone conclusion that we have now given the States a formula whereby the poor must pay their own way.[12]

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[10] "There are some definite and systematic directions of difference between the schools attended by minorities and those attended by the majority. It appears to be in the most academically related areas that the schools of minority pupils show the most consistent deficiencies." Dept. of Health, Education, and Welfare, Coleman et al., *supra*, n. 9, at 120.

[11] That some school districts are markedly poorer than others is beyond question. The California Supreme Court has noted that per-pupil expenditures in two different districts—both located in the same county—were $2,223 and $616. *Serrano* v. *Priest*, 5 Cal. 3d 584, 600 n. 15, 487 P. 2d 1241, 1252 n. 15 (1971). In New York the Fleischmann Commission reported that the two Long Island districts of Great Neck and Levittown spent $2,078 and $1,189 respectively per pupil. 1 New York State Commission on the Quality, Cost, and Financing of Elementary and Secondary Education, Fleischmann Report 58 (1973). "A further glaring inequity resulting from the current systems of school finance is that variations in per pupil expenditures among school districts tend to be inversely related to educational need. City students, with greater than average educational deficiencies, consistently have less money spent on their education and have higher pupil/teacher ratios than do their high-income counterparts in the favored schools of suburbia." Glickstein & Want, Inequality in School Financing: The Role of the Law, 25 Stan. L. Rev. 335, 338 (1973).

[12] Cities face an especially difficult problem in paying the cost of education, since they have the "municipal overburden" which results from greater costs for health, public safety, sanitation, public works, transportation, public welfare, public housing, and recreation. Because of municipal overburden, cities on the average devote only about 30% of their budgets to their schools. This compares with the over 50% which is spent on schools by the suburbs. J. Berke & J. Callahan, Inequities in School Finance (1971), reprinted in Senate Select Committee on Equal Educational

Today's decision, given *Rodriguez,* means that there is no violation of the Equal Protection Clause though the schools are segregated by race and though the black schools are not only "separate" but "inferior."

So far as equal protection is concerned we are now in a dramatic retreat from the 7-to-1 decision in 1896 that blacks could be segregated in public facilities, provided they received equal treatment.

As I indicated in *Keyes* v. *School District No. 1 Denver, Colorado,* 413 U. S. 189, 214–217, there is so far as the school cases go no constitutional difference between *de facto* and *de jure* segregation. Each school board performs state action for Fourteenth Amendment purposes when it draws the lines that confine it to a given area, when it builds schools at particular sites, or when it allocates students. The creation of the school districts in Metropolitan Detroit either maintained existing segregation or caused additional segregation. Restrictive covenants maintained by state action or inaction build black ghettos. It is state action when public funds are dispensed by housing agencies to build racial ghettos. Where a community is racially mixed and school authorities segregate schools, or assign black teachers to black schools or close schools in fringe areas and build new schools in black areas and in more distant white areas, the State creates and nurtures a segregated school system, just as surely as did those States involved in *Brown* v. *Board of Education,* 347 U. S. 483, when they maintained dual school systems.

All these conditions and more were found by the District Court to exist. The issue is not whether there should be racial balance but whether the State's use of

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Opportunity, 92d Cong., 2d Sess., Report on Issues in School Finance 129, 142 (Comm. Print 1972); see Glickstein & Want, *supra,* n. 11, at 387.

various devices that end up with black schools and white schools brought the Equal Protection Clause into effect. Given the State's control over the educational system in Michigan, the fact that the black schools are in one district and the white schools are in another is not controlling—either constitutionally or equitably.[13] No specific plan has yet been adopted. We are still at an interlocutory stage of a long drawn-out judicial effort at school desegregation. It is conceivable that ghettos develop on their own without any hint of state action. But since Michigan by one device or another has over the years created black school districts and white school districts, the task of equity is to provide a unitary system for the affected area where, as here, the State washes its hands of its own creations.

MR. JUSTICE WHITE, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join, dissenting.

The District Court and the Court of Appeals found that over a long period of years those in charge of the Michigan public schools engaged in various practices calculated to effect the segregation of the Detroit school system. The Court does not question these findings, nor could it reasonably do so. Neither does it question the obligation of the federal courts to devise a feasible and effective remedy. But it promptly cripples the ability of the judiciary to perform this task, which is of fundamental importance to our constitutional system, by

[13] MR. JUSTICE STEWART indicates that equitable factors weigh in favor of local school control and the avoidance of administrative difficulty given the lack of an "interdistrict" violation. *Ante*, at 755. It would seem to me that the equities are stronger in favor of the children of Detroit who have been deprived of their constitutional right to equal treatment by the State of Michigan.

fashioning a strict rule that remedies in school cases must stop at the school district line unless certain other conditions are met. As applied here, the remedy for unquestioned violations of the equal protection rights of Detroit's Negroes by the Detroit School Board and the State of Michigan must be totally confined to the limits of the school district and may not reach into adjoining or surrounding districts unless and until it is proved there has been some sort of "interdistrict violation"—unless unconstitutional actions of the Detroit School Board have had a segregative impact on other districts, or unless the segregated condition of the Detroit schools has itself been influenced by segregative practices in those surrounding districts into which it is proposed to extend the remedy.

Regretfully, and for several reasons, I can join neither the Court's judgment nor its opinion. The core of my disagreement is that deliberate acts of segregation and their consequences will go unremedied, not because a remedy would be infeasible or unreasonable in terms of the usual criteria governing school desegregation cases, but because an effective remedy would cause what the Court considers to be undue administrative inconvenience to the State. The result is that the State of Michigan, the entity at which the Fourteenth Amendment is directed, has successfully insulated itself from its duty to provide effective desegregation remedies by vesting sufficient power over its public schools in its local school districts. If this is the case in Michigan, it will be the case in most States.

There are undoubted practical as well as legal limits to the remedial powers of federal courts in school desegregation cases. The Court has made it clear that the achievement of any particular degree of racial balance in the school system is not required by the Constitution;

nor may it be the primary focus of a court in devising an acceptable remedy for *de jure* segregation. A variety of procedures and techniques are available to a district court engrossed in fashioning remedies in a case such as this; but the courts must keep in mind that they are dealing with the process of *educating* the young, including the very young. The task is not to devise a system of pains and penalties to punish constitutional violations brought to light. Rather, it is to desegregate an *educational* system in which the races have been kept apart, without, at the same time, losing sight of the central *educational* function of the schools.

Viewed in this light, remedies calling for school zoning, pairing, and pupil assignments, become more and more suspect as they require that schoolchildren spend more and more time in buses going to and from school and that more and more educational dollars be diverted to transportation systems. Manifestly, these considerations are of immediate and urgent concern when the issue is the desegregation of a city school system where residential patterns are predominantly segregated and the respective areas occupied by blacks and whites are heavily populated and geographically extensive. Thus, if one postulates a metropolitan school system covering a sufficiently large area, with the population evenly divided between whites and Negroes and with the races occupying identifiable residential areas, there will be very real practical limits on the extent to which racially identifiable schools can be eliminated within the school district. It is also apparent that the larger the proportion of Negroes in the area, the more difficult it would be to avoid having a substantial number of all-black or nearly all-black schools.

The Detroit school district is both large and heavily populated. It covers 139.6 square miles, encircles two

entirely separate cities and school districts, and surrounds a third city on three sides. Also, whites and Negroes live in identifiable areas in the city. The 1970 public school enrollment in the city school district totaled 289,763 and was 63.6% Negro and 34.8% white.[1] If "racial balance" were achieved in every school in the district, each school would be approximately 64% Negro. A remedy confined to the district could achieve no more desegregation. Furthermore, the proposed intracity remedies were beset with practical problems. None of the plans limited to the school district was satisfactory to the District Court. The most promising proposal, submitted by respondents, who were the plaintiffs in the District Court, would "leave many of its schools 75 to 90 per cent Black." 484 F. 2d 215, 244 (CA6 1973).[2] Transportation on a "vast scale" would be required; 900 buses would have to be purchased for the transportation of pupils who are not now bused. *Id.*, at 243. The District Court also found that the plan "would change a school system which is now Black and White to one that would be perceived as Black, thereby increasing the flight of Whites from the city and the system, thereby increasing the Black student population." *Id.*, at 244. For the District Court, "[t]he conclusion, under the evidence in this case, is inescapable that relief of segregation in the public schools of the

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[1] The percentage of Negro pupils in the Detroit student population rose to 64.9% in 1971, to 67.3% in 1972, and to 69.8% in 1973, amid a metropolitan school population whose racial composition in 1970 was 81% white and 19% Negro. 5 App. 16; Racial-Ethnic Distribution of Students and Employees in the Detroit Public Schools, October 1972, and October 1973; 484 F. 2d 215, 250.

[2] The District Court's ruling on the Detroit-only desegregation plans is set out in full by the Court of Appeals, *id.*, at 242-245, and is not otherwise officially reported.

City of Detroit cannot be accomplished within the corporate geographical limits of the city." *Ibid.*

The District Court therefore considered extending its remedy to the suburbs. After hearings, it concluded that a much more effective desegregation plan could be implemented if the suburban districts were included. In proceeding to design its plan on the basis that student bus rides to and from school should not exceed 40 minutes each way as a general matter, the court's express finding was that "[f]or all the reasons stated heretofore—including time, distance, and transportation factors—desegregation within the area described is physically easier and more practicable and feasible, than desegregation efforts limited to the corporate geographic limits of the city of Detroit." 345 F. Supp. 914, 930 (ED Mich. 1972).

The Court of Appeals agreed with the District Court that the remedy must extend beyond the city limits of Detroit. It concluded that "[i]n the instant case the *only* feasible desegregation plan involves the crossing of the boundary lines between the Detroit School District and adjacent or nearby school districts for the limited purpose of providing an effective desegregation plan." 484 F. 2d, at 249. (Emphasis added.) It also agreed that "any Detroit only desegregation plan will lead directly to a single segregated Detroit school district overwhelmingly black in all of its schools, surrounded by a ring of suburbs and suburban school districts overwhelmingly white in composition in a State in which the racial composition is 87 per cent white and 13 per cent black." *Ibid.* There was "more than ample support for the District Judge's findings of unconstitutional segregation by race resulting in major part from action and inaction of public authorities, both local and State. . . . Under this record a remedial order of a court of equity which left the Detroit school system overwhelmingly black (for the fore-

seeable future) surrounded by suburban school systems overwhelmingly white cannot correct the constitutional violations herein found." *Id.*, at 250. To conclude otherwise, the Court of Appeals announced, would call up "haunting memories of the now long overruled and discredited 'separate but equal doctrine' of Plessy v. Ferguson, 163 U. S. 537 . . . (1896)," and "would be opening a way to nullify Brown v. Board of Education which overruled *Plessy* . . . ." 484 F. 2d, at 249.

This Court now reverses the Court of Appeals. It does not question the District Court's findings that *any* feasible Detroit-only plan would leave many schools 75 to 90 percent black and that the district would become progressively more black as whites left the city. Neither does the Court suggest that including the suburbs in a desegregation plan would be impractical or infeasible because of educational considerations, because of the number of children requiring transportation, or because of the length of their rides. Indeed, the Court leaves unchallenged the District Court's conclusion that a plan including the suburbs would be physically easier and more practical and feasible than a Detroit-only plan. Whereas the most promising Detroit-only plan, for example, would have entailed the purchase of 900 buses, the metropolitan plan would involve the acquisition of no more than 350 new vehicles.

Despite the fact that a metropolitan remedy, if the findings of the District Court accepted by the Court of Appeals are to be credited, would more effectively desegregate the Detroit schools, would prevent resegregation,[3] and would be easier and more feasible from many

[3] The Court has previously disapproved the implementation of proposed desegregation plans which operate to permit resegregation. *Monroe* v. *Board of Comm'rs,* 391 U. S. 450, 459–460 (1968) ("free transfer" plan).

standpoints, the Court fashions out of whole cloth an arbitrary rule that remedies for constitutional violations occurring in a single Michigan school district must stop at the school district line. Apparently, no matter how much less burdensome or more effective and efficient in many respects, such as transportation, the metropolitan plan might be, the school district line may not be crossed. Otherwise, it seems, there would be too much disruption of the Michigan scheme for managing its educational system, too much confusion, and too much administrative burden.

The District Court, on the scene and familiar with local conditions, had a wholly different view. The Court of Appeals also addressed itself at length to matters of local law and to the problems that interdistrict remedies might present to the State of Michigan. Its conclusion, flatly contrary to that of this Court, was that "the constitutional right to equality before the law [is not] hemmed in by the boundaries of a school district" and that an interdistrict remedy

> "is supported by the status of school districts under Michigan law and by the historical control exercised over local school districts by the legislature of Michigan and by State agencies and officials . . . . [I]t is well established under the Constitution and laws of Michigan that the public school system is a State function and that local school districts are instrumentalities of the State created for administrative convenience."[4] 484 F. 2d, at 245–246.

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[4] The Court of Appeals also noted several specific instances of school district mergers ordered by the State Board of Education for financial reasons. 484 F. 2d, at 247. Limitations on the authority of local school districts were also outlined by the Court of Appeals:

"Local school districts, unless they have the approval of the State Board of Education or the Superintendent of Public Instruction, can-

I am surprised that the Court, sitting at this distance from the State of Michigan, claims better insight than the Court of Appeals and the District Court as to whether an interdistrict remedy for equal protection violations practiced by the State of Michigan would involve undue difficulties for the State in the management of its public schools. In the area of what constitutes an acceptable desegregation plan, "we must of necessity rely to a large extent, as this Court has for more than 16 years, on the informed judgment of the district courts in the first instance and on courts of appeals." *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 28 (1971). Obviously, whatever difficulties there might be, they are surmountable; for the Court itself concedes that, had there been sufficient evidence of an interdistrict violation, the District Court could have fashioned a single remedy for the districts implicated rather than a different remedy for each district

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not consolidate with another school district, annex territory, divide or attach parts of other districts, borrow monies in anticipation of State aid, or construct, reconstruct or remodel school buildings or additions to them." *Id.,* at 249. (Footnotes and supporting statutory citations omitted.)

And the Court of Appeals properly considered the State's statutory attempt to undo the adoption of a voluntary high school desegregation plan by the Detroit Board of Education as evidencing state control over local school district affairs. *Ibid.* Finally, it is also relevant to note that the District Court found that the school district boundaries in that segment of the metropolitan area preliminarily designated as the desegregation area "in general bear no relationship to other municipal, county, or special district governments, needs or services," that some educational services are already provided to students on an interdistrict basis requiring their travel from one district to another, and that local communities in the metropolitan area share noneducational interests in common, which do not adhere to school district lines, and have applied metropolitan solutions to other governmental needs. 345 F. Supp. 914, 934–935 (ED Mich. 1972).

in which the violation had occurred or had an impact.

I am even more mystified as to how the Court can ignore the legal reality that the constitutional violations, even if occurring locally, were committed by governmental entities for which the State is responsible and that it is the State that must respond to the command of the Fourteenth Amendment. An interdistrict remedy for the infringements that occurred in this case is well within the confines and powers of the State, which is the governmental entity ultimately responsible for desegregating its schools. The Michigan Supreme Court has observed that "[t]he school district is a State agency," *Attorney General ex rel. Kies* v. *Lowrey*, 131 Mich. 639, 644, 92 N. W. 289, 290 (1902), and that " '[e]ducation in Michigan belongs to the State. It is no part of the local self-government inherent in the township or municipality, except so far as the legislature may choose to make it such. The Constitution has turned the whole subject over to the legislature. . . .' " *Attorney General ex rel. Zacharias* v. *Detroit Board of Education*, 154 Mich. 584, 590, 118 N. W. 606, 609 (1908).

It is unnecessary to catalogue at length the various public misdeeds found by the District Court and the Court of Appeals to have contributed to the present segregation of the Detroit public schools. The legislature contributed directly by enacting a statute overriding a partial high school desegregation plan voluntarily adopted by the Detroit Board of Education. Indirectly, the trial court found the State was accountable for the thinly disguised, pervasive acts of segregation committed by the Detroit Board,[5] for Detroit's school construction

[5] These included the creation and alteration of attendance zones and feeder patterns from the elementary to the secondary schools in a manner naturally and predictably perpetuating racial segregation of students, the transportation of Negro students beyond predomi-

plans that would promote segregation, and for the Detroit school district's not having funds for pupil transportation within the district. The State was also chargeable with responsibility for the transportation of Negro high school students in the late 1950's from the suburban Ferndale School District, past closer suburban and Detroit high schools with predominantly white student bodies, to a predominantly Negro high school within Detroit. *Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* at 20–21, and *Keyes* v. *School District No. 1, Denver, Colorado,* 413 U. S. 189 (1973), make abundantly clear that the tactics employed by the Detroit Board of Education, a local instrumentality of the State, violated the constitutional rights of the Negro students in Detroit's public schools and required equitable relief sufficient to accomplish the maximum, practical desegregation within the power of the political body against which the Fourteenth Amendment directs its proscriptions. No "State" may deny any individual the equal protection of the laws; and if the Constitution and the Supremacy Clause are to have any substance at all, the courts must be free to devise workable remedies against the political entity with the effective power to determine local choice. It is also the case here that the State's legislative interdiction of Detroit's voluntary effort to desegregate its school system was unconstitutional. See *North Carolina State Board of Education* v. *Swann,* 402 U. S. 43 (1971).

The Court draws the remedial line at the Detroit school district boundary, even though the Fourteenth Amendment is addressed to the State and even though

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nantly white schools with available space to predominantly Negro schools, the use of optional attendance areas in neighborhoods in which Negro families had recently begun to settle to permit white students to transfer to predominantly white schools nearer the city limits, and the construction of schools in the heart of residentially segregated areas, thereby maximizing school segregation.

the *State* denies equal protection of the laws when its public agencies, acting in its behalf, invidiously discriminate. The State's default is "the condition that offends the Constitution," *Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* at 16, and state officials may therefore be ordered to take the necessary measures to completely eliminate from the Detroit public schools "all vestiges of state-imposed segregation." *Id.,* at 15. I cannot understand, nor does the majority satisfactorily explain, why a federal court may not order an appropriate interdistrict remedy, if this is necessary or more effective to accomplish this constitutionally mandated task. As the Court unanimously observed in *Swann:* "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Ibid.* In this case, both the right and the State's Fourteenth Amendment violation have concededly been fully established, and there is no acceptable reason for permitting the party responsible for the constitutional violation to contain the remedial powers of the federal court within administrative boundaries over which the transgressor itself has plenary power.

The unwavering decisions of this Court over the past 20 years support the assumption of the Court of Appeals that the District Court's remedial power does not cease at the school district line. The Court's first formulation of the remedial principles to be followed in disestablishing racially discriminatory school systems recognized the variety of problems arising from different local school conditions and the necessity for that "practical flexibility" traditionally associated with courts of equity. *Brown* v. *Board of Education,* 349 U. S. 294, 299–301 (1955) (*Brown II*). Indeed, the district courts to which

the *Brown* cases were remanded for the formulation of remedial decrees were specifically instructed that they might consider, *inter alia,* "revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis . . . ." *Id.,* at 300–301. The malady addressed in *Brown II* was the statewide policy of requiring or permitting school segregation on the basis of race, while the record here concerns segregated schools only in the city of Detroit. The obligation to rectify the unlawful condition nevertheless rests on the State. The permissible revision of school districts contemplated in *Brown II* rested on the State's responsibility for desegregating its unlawfully segregated schools, not on any segregative effect which the condition of segregation in one school district might have had on the schools of a neighboring district. The same situation obtains here and the same remedial power is available to the District Court.

Later cases reinforced the clearly essential rules that state officials are fully answerable for unlawfully caused conditions of school segregation which can effectively be controlled only by steps beyond the authority of local school districts to take, and that the equity power of the district courts includes the ability to order such measures implemented. When the highest officials of the State of Arkansas impeded a federal court order to desegregate the public schools under the immediate jurisdiction of the Little Rock School Board, this Court refused to accept the local board's assertion of its good faith as a legal excuse for delay in implementing the desegregation order. The Court emphasized that "from the point of view of the Fourteenth Amendment, they [the local school board members] stand in this litigation as the agents of the State." *Cooper* v. *Aaron,* 358 U. S. 1, 16 (1958). Per-

haps more importantly for present purposes, the Court went on to state:

> "The record before us clearly establishes that the growth of the Board's difficulties to a magnitude beyond its unaided power to control is the product of state action. Those difficulties . . . can also be brought under control by state action." *Ibid.*

See also *Griffin* v. *School Board*, 377 U. S. 218, 228, 233–234 (1964).

In the context of dual school systems, the Court subsequently made clear the "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch" and to come forward with a desegregation plan that "promises realistically to work *now*." *Green* v. *County School Board of New Kent County*, 391 U. S. 430, 437–438, 439 (1968). "Freedom of choice" plans were rejected as acceptable desegregation measures where "reasonably available other ways . . . promising speedier and more effective conversion to a unitary, nonracial school system . . ." exist. *Id.*, at 441. Imperative insistence on immediate full desegregation of dual school systems "to operate now and hereafter only unitary schools" was reiterated in *Alexander* v. *Holmes County Board of Education*, 396 U. S. 19, 20 (1969), and *Carter* v. *West Feliciana Parish School Board*, 396 U. S. 290 (1970).

The breadth of the equitable authority of the district courts to accomplish these comprehensive tasks was reaffirmed in much greater detail in *Swann* v. *Charlotte-Mecklenburg Board of Education*, *supra*, and the companion case of *Davis* v. *School Comm'rs of Mobile County*, 402 U. S. 33 (1971), where there was unanimous assent to the following propositions:

> "Having once found a violation, the district judge or school authorities should make every effort to

> achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. A district court may and should consider the use of all available techniques including restructuring of attendance zones and both contiguous and noncontiguous attendance zones. . . . The measure of any desegregation plan is its effectiveness." *Id.*, at 37.

No suggestion was made that interdistrict relief was not an available technique. In *Swann* v. *Charlotte-Mecklenburg Board of Education* itself, the Court, without dissent, recognized that the District Judge, in fulfilling his obligation to "make every effort to achieve the greatest possible degree of actual desegregation[,] will thus necessarily be concerned with the elimination of one-race schools." 402 U. S., at 26. Nor was there any dispute that to break up the dual school system, it was within the District Court's "broad remedial powers" to employ a "frank—and sometimes drastic—gerrymandering of school districts and attendance zones," as well as "pairing, 'clustering,' or 'grouping' of schools," to desegregate the "formerly all-Negro schools," despite the fact that these zones might not be compact or contiguous and might be "on opposite ends of the city." *Id.*, at 27. The school board in that case had jurisdiction over a 550-square-mile area encompassing the city of Charlotte and surrounding Mecklenburg County, North Carolina. The Mobile County, Alabama, board in *Davis* embraced a 1,248-square-mile area, including the city of Mobile. Yet the Court approved the District Court's authority to award countywide relief in each case in order to accomplish desegregation of the dual school system.

Even more recently, the Court specifically rejected the claim that a new school district, which admittedly would operate a unitary school system within its borders, was beyond the reach of a court-ordered desegregation plan

for other school districts, where the effectiveness of the plan as to the other districts depended upon the availability of the facilities and student population of the new district. In *Wright* v. *Council of the City of Emporia*, 407 U. S. 451, 470 (1972), we held "that a new school district may not be created where its effect would be to impede the process of dismantling a dual system." MR. JUSTICE STEWART's opinion for the Court made clear that if a proposal to erect new district boundary lines "would impede the dismantling of the [pre-existing] dual system, then a district court, in the exercise of its remedial discretion, may enjoin it from being carried out." *Id.*, at 460. In *United States* v. *Scotland Neck Board of Education*, 407 U. S. 484 (1972), this same standard was applied to forbid North Carolina from creating a new city school district within a larger district which was in the process of dismantling a dual school system. The Court noted that if establishment of the new district were permitted, the "traditional racial identities of the schools in the area would be maintained," *id.*, at 490.

Until today, the permissible contours of the equitable authority of the district courts to remedy the unlawful establishment of a dual school system have been extensive, adaptable, and fully responsive to the ultimate goal of achieving "the greatest possible degree of actual desegregation." There are indeed limitations on the equity powers of the federal judiciary, but until now the Court has not accepted the proposition that effective enforcement of the Fourteenth Amendment could be limited by political or administrative boundary lines demarcated by the very State responsible for the constitutional violation and for the disestablishment of the dual system. Until now the Court has instead looked to practical considerations in effectuating a desegregation

decree such as excessive distance, transportation time, and hazards to the safety of the schoolchildren involved in a proposed plan. That these broad principles have developed in the context of dual school systems compelled or authorized by state statute at the time of *Brown* v. *Board of Education,* 347 U. S. 483 (1954) (*Brown I*), does not lessen their current applicability to dual systems found to exist in other contexts, like that in Detroit, where intentional school segregation does not stem from the compulsion of state law, but from deliberate individual actions of local and state school authorities directed at a particular school system. The majority properly does not suggest that the duty to eradicate completely the resulting dual system in the latter context is any less than in the former. But its reason for incapacitating the remedial authority of the federal judiciary in the presence of school district perimeters in the latter context is not readily apparent.

The result reached by the Court certainly cannot be supported by the theory that the configuration of local governmental units is immune from alteration when necessary to redress constitutional violations. In addition to the well-established principles already noted, the Court has elsewhere required the public bodies of a State to restructure the State's political subdivisions to remedy infringements of the constitutional rights of certain members of its populace, notably in the reapportionment cases. In *Reynolds* v. *Sims,* 377 U. S. 533 (1964), for example, which held that equal protection of the laws demands that the seats in both houses of a bicameral state legislature be apportioned on a population basis, thus necessitating wholesale revision of Alabama's voting districts, the Court remarked:

> "Political subdivisions of States—counties, cities, or whatever—never were and never have been con-

> sidered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions." *Id.*, at 575.

And even more pointedly, the Court declared in *Gomillion* v. *Lightfoot*, 364 U. S. 339, 344–345 (1960), that "[l]egislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution."

Nor does the Court's conclusion follow from the talismanic invocation of the desirability of local control over education. Local autonomy over school affairs, in the sense of the community's participation in the decisions affecting the education of its children, is, of course, an important interest. But presently constituted school district lines do not delimit fixed and unchangeable areas of a local educational community. If restructuring is required to meet constitutional requirements, local authority may simply be redefined in terms of whatever configuration is adopted, with the parents of the children attending schools in the newly demarcated district or attendance zone continuing their participation in the policy management of the schools with which they are concerned most directly. The majority's suggestion that judges should not attempt to grapple with the administrative problems attendant on a reorganization of school attendance patterns is wholly without foundation. It is precisely this sort of task which the district courts have been properly exercising to vindicate the constitutional rights of Negro students since *Brown I* and which the Court has never suggested they lack the capacity to perform. Intradistrict revisions of attendance zones, and pairing and grouping of schools, are techniques unanimously approved in *Swann* v. *Charlotte-Mecklenburg*

Board of Education which entail the same sensitivity to the interest of parents in the education their children receive as would an interdistrict plan which is likely to employ the very same methods. There is no reason to suppose that the District Court, which has not yet adopted a final plan of desegregation, would not be as capable of giving or as likely to give sufficient weight to the interest in community participation in schools in an interdistrict setting, consistent with the dictates of the Fourteenth Amendment. The majority's assumption that the District Court would act otherwise is a radical departure from the practical flexibility previously left to the equity powers of the federal judiciary.

Finally, I remain wholly unpersuaded by the Court's assertion that "the remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Ante,* at 746. In the first place, under this premise the Court's judgment is itself infirm; for had the Detroit school system not followed an official policy of segregation throughout the 1950's and 1960's, Negroes and whites would have been going to school together. There would have been no, or at least not as many, recognizable Negro schools and no, or at least not as many, white schools, but "just schools," and neither Negroes nor whites would have suffered from the effects of segregated education, with all its shortcomings. Surely the Court's remedy will not restore to the Negro community, stigmatized as it was by the dual school system, what it would have enjoyed over all or most of this period if the remedy is confined to present-day Detroit; for the maximum remedy available within that area will leave many of the schools almost totally black, and the system itself will be predominantly black and will become increasingly so. Moreover, when a State has engaged in acts of official segregation over a lengthy

period of time, as in the case before us, it is unrealistic to suppose that the children who were victims of the State's unconstitutional conduct could now be provided the benefits of which they were wrongfully deprived. Nor can the benefits which accrue to school systems in which schoolchildren have not been officially segregated, and to the communities supporting such school systems, be fully and immediately restored after a substantial period of unlawful segregation. The education of children of different races in a desegregated environment has unhappily been lost, along with the social, economic, and political advantages which accompany a desegregated school system as compared with an unconstitutionally segregated system. It is for these reasons that the Court has consistently followed the course of requiring the effects of past official segregation to be eliminated "root and branch" by imposing, in the present, the duty to provide a remedy which will achieve "the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." It is also for these reasons that once a constitutional violation has been found, the district judge obligated to provide such a remedy "will thus necessarily be concerned with the elimination of one-race schools." These concerns were properly taken into account by the District Judge in this case. Confining the remedy to the boundaries of the Detroit district is quite unrelated either to the goal of achieving maximum desegregation or to those intensely practical considerations, such as the extent and expense of transportation, that have imposed limits on remedies in cases such as this. The Court's remedy, in the end, is essentially arbitrary and will leave serious violations of the Constitution substantially unremedied.

I agree with my Brother DOUGLAS that the Court of Appeals has acted responsibly in these cases. Regret-

tably, the majority's arbitrary limitation on the equitable power of federal district courts, based on the invisible borders of local school districts, is unrelated to the State's responsibility for remedying the constitutional wrongs visited upon the Negro schoolchildren of Detroit. It is oblivious to the potential benefits of metropolitan relief, to the noneducational communities of interest among neighborhoods located in and sometimes bridging different school districts, and to the considerable interdistrict cooperation already existing in various educational areas. Ultimately, it is unresponsive to the goal of attaining the utmost actual desegregation consistent with restraints of practicability and thus augurs the frequent frustration of the remedial powers of the federal courts.

Here the District Court will be forced to impose an intracity desegregation plan more expensive to the district, more burdensome for many of Detroit's Negro students, and surely more conducive to white flight than a metropolitan plan would be—all of this merely to avoid what the Detroit School Board, the District Court, and the en banc Court of Appeals considered to be the very manageable and quite surmountable difficulties that would be involved in extending the desegregation remedy to the suburban school districts.

I am therefore constrained to record my disagreement and dissent.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE WHITE join, dissenting.

In *Brown* v. *Board of Education*, 347 U. S. 483 (1954), this Court held that segregation of children in public schools on the basis of race deprives minority group children of equal educational opportunities and therefore denies them the equal protection of the laws under the

Fourteenth Amendment. This Court recognized then that remedying decades of segregation in public education would not be an easy task. Subsequent events, unfortunately, have seen that prediction bear bitter fruit. But however imbedded old ways, however ingrained old prejudices, this Court has not been diverted from its appointed task of making "a living truth" of our constitutional ideal of equal justice under law. *Cooper* v. *Aaron,* 358 U. S. 1, 20 (1958).

After 20 years of small, often difficult steps toward that great end, the Court today takes a giant step backwards. Notwithstanding a record showing widespread and pervasive racial segregation in the educational system provided by the State of Michigan for children in Detroit, this Court holds that the District Court was powerless to require the State to remedy its constitutional violation in any meaningful fashion. Ironically purporting to base its result on the principle that the scope of the remedy in a desegregation case should be determined by the nature and the extent of the constitutional violation, the Court's answer is to provide no remedy at all for the violation proved in this case, thereby guaranteeing that Negro children in Detroit will receive the same separate and inherently unequal education in the future as they have been unconstitutionally afforded in the past.

I cannot subscribe to this emasculation of our constitutional guarantee of equal protection of the laws and must respectfully dissent. Our precedents, in my view, firmly establish that where, as here, state-imposed segregation has been demonstrated, it becomes the duty of the State to eliminate root and branch all vestiges of racial discrimination and to achieve the greatest possible degree of actual desegregation. I agree with both the District Court and the Court of Appeals that, under the facts of this case, this duty cannot be fulfilled unless the State

of Michigan involves outlying metropolitan area school districts in its desegregation remedy. Furthermore, I perceive no basis either in law or in the practicalities of the situation justifying the State's interposition of school district boundaries as absolute barriers to the implementation of an effective desegregation remedy. Under established and frequently used Michigan procedures, school district lines are both flexible and permeable for a wide variety of purposes, and there is no reason why they must now stand in the way of meaningful desegregation relief.

The rights at issue in this case are too fundamental to be abridged on grounds as superficial as those relied on by the majority today. We deal here with the right of all of our children, whatever their race, to an equal start in life and to an equal opportunity to reach their full potential as citizens. Those children who have been denied that right in the past deserve better than to see fences thrown up to deny them that right in the future. Our Nation, I fear, will be ill served by the Court's refusal to remedy separate and unequal education, for unless our children begin to learn together, there is little hope that our people will ever learn to live together.

I

The great irony of the Court's opinion and, in my view, its most serious analytical flaw may be gleaned from its concluding sentence, in which the Court remands for "prompt formulation of a decree directed to eliminating the segregation found to exist in Detroit city schools, a remedy which has been delayed since 1970." *Ante*, at 753. The majority, however, seems to have forgotten the District Court's explicit finding that a Detroit-only decree, the only remedy permitted under today's decision, "would not accomplish desegregation."

Nowhere in the Court's opinion does the majority confront, let alone respond to, the District Court's conclusion that a remedy limited to the city of Detroit would not effectively desegregate the Detroit city schools. I, for one, find the District Court's conclusion well supported by the record and its analysis compelled by our prior cases. Before turning to these questions, however, it is best to begin by laying to rest some mischaracterizations in the Court's opinion with respect to the basis for the District Court's decision to impose a metropolitan remedy.

The Court maintains that while the initial focus of this lawsuit was the condition of segregation within the Detroit city schools, the District Court abruptly shifted focus in mid-course and altered its theory of the case. This new theory, in the majority's words, was "equating racial imbalance with a constitutional violation calling for a remedy." *Ante,* at 741 n. 19. As the following review of the District Court's handling of the case demonstrates, however, the majority's characterization is totally inaccurate. Nowhere did the District Court indicate that racial imbalance between school districts in the Detroit metropolitan area or within the Detroit School District constituted a constitutional violation calling for interdistrict relief. The focus of this case was from the beginning, and has remained, the segregated system of education in the Detroit city schools and the steps necessary to cure that condition which offends the Fourteenth Amendment.

The District Court's consideration of this case began with its finding, which the majority accepts, that the State of Michigan, through its instrumentality, the Detroit Board of Education, engaged in widespread purposeful acts of racial segregation in the Detroit School District. Without belaboring the details, it is sufficient to

note that the various techniques used in Detroit were typical of methods employed to segregate students by race in areas where no statutory dual system of education has existed. See, *e. g., Keyes* v. *School District No. 1, Denver, Colorado,* 413 U. S. 189 (1973). Exacerbating the effects of extensive residential segregation between Negroes and whites, the school board consciously drew attendance zones along lines which maximized the segregation of the races in schools as well. Optional attendance zones were created for neighborhoods undergoing racial transition so as to allow whites in these areas to escape integration. Negro students in areas with overcrowded schools were transported past or away from closer white schools with available space to more distant Negro schools. Grade structures and feeder-school patterns were created and maintained in a manner which had the foreseeable and actual effect of keeping Negro and white pupils in separate schools. Schools were also constructed in locations and in sizes which ensured that they would open with predominantly one-race student bodies. In sum, the evidence adduced below showed that Negro children had been intentionally confined to an expanding core of virtually all-Negro schools immediately surrounded by a receding band of all-white schools.

Contrary to the suggestions in the Court's opinion, the basis for affording a desegregation remedy in this case was not some perceived racial imbalance either between schools within a single school district or between independent school districts. What we confront here is "a systematic program of segregation affecting a substantial portion of the students, schools . . . and facilities within the school system . . . ." *Id.,* at 201. The constitutional violation found here was not some *de facto* racial imbalance, but rather the purposeful, intentional, massive, *de jure* segregation of the Detroit city schools,

which under our decision in *Keyes*, forms "a predicate for a finding of the existence of a dual school system," *ibid.*, and justifies "all-out desegregation." *Id.*, at 214.

Having found a *de jure* segregated public school system in operation in the city of Detroit, the District Court turned next to consider which officials and agencies should be assigned the affirmative obligation to cure the constitutional violation. The court concluded that responsibility for the segregation in the Detroit city schools rested not only with the Detroit Board of Education, but belonged to the State of Michigan itself and the state defendants in this case—that is, the Governor of Michigan, the Attorney General, the State Board of Education, and the State Superintendent of Public Instruction. While the validity of this conclusion will merit more extensive analysis below, suffice it for now to say that it was based on three considerations. First, the evidence at trial showed that the State itself had taken actions contributing to the segregation within the Detroit schools. Second, since the Detroit Board of Education was an agency of the State of Michigan, its acts of racial discrimination were acts of the State for purposes of the Fourteenth Amendment. Finally, the District Court found that under Michigan law and practice, the system of education was in fact a *state* school system, characterized by relatively little local control and a large degree of centralized state regulation, with respect to both educational policy and the structure and operation of school districts.

Having concluded, then, that the school system in the city of Detroit was a *de jure* segregated system and that the State of Michigan had the affirmative duty to remedy that condition of segregation, the District Court then turned to the difficult task of devising an effective remedy. It bears repeating that the District Court's focus at this stage of the litigation remained what it had

been at the beginning—the condition of segregation within the Detroit city schools. As the District Court stated: "From the initial ruling [on segregation] to this day, the basis of the proceedings has been and remains the violation: de jure school segregation. . . . The task before this court, therefore, is now, and . . . has always been, how to desegregate the Detroit public schools."

The District Court first considered three desegregation plans limited to the geographical boundaries of the city of Detroit. All were rejected as ineffective to desegregate the Detroit city schools. Specifically, the District Court determined that the racial composition of the Detroit student body is such that implementation of any Detroit-only plan "would clearly make the entire Detroit public school system racially identifiable as Black" and would "leave many of its schools 75 to 90 per cent Black." The District Court also found that a Detroit-only plan "would change a school system which is now Black and White to one that would be perceived as Black, thereby increasing the flight of Whites from the city and the system, thereby increasing the Black student population." Based on these findings, the District Court reasoned that "relief of segregation in the public schools of the City of Detroit cannot be accomplished within the corporate geographical limits of the city" because a Detroit-only decree "would accentuate the racial identifiability of the district as a Black school system, and would not accomplish desegregation." The District Court therefore concluded that it "must look beyond the limits of the Detroit school district for a solution to the problem of segregation in the Detroit public schools . . . ."

In seeking to define the appropriate scope of that expanded desegregation area, however, the District Court continued to maintain as its sole focus the condition shown to violate the Constitution in this case—the segregation of the Detroit school system. As it stated, the

primary question "remains the determination of the area necessary and practicable effectively to eliminate 'root and branch' the effects of state-imposed and supported segregation and to desegregate the Detroit public schools."

There is simply no foundation in the record, then, for the majority's accusation that the only basis for the District Court's order was some desire to achieve a racial balance in the Detroit metropolitan area.[1] In fact, just the contrary is the case. In considering proposed desegregation areas, the District Court had occasion to criticize one of the State's proposals specifically because it had no basis other than its "particular racial ratio" and did not focus on "relevant factors, like eliminating racially identifiable schools [and] accomplishing maximum actual desegregation of the Detroit public schools." Similarly, in rejecting the Detroit School Board's proposed desegregation area, even though it included more all-white districts and therefore achieved a higher white-Negro ratio, the District Court commented:

> "There is nothing in the record which suggests that these districts need be included in the desegregation area in order to disestablish the racial

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[1] Contrary to the Court's characterization, the use of racial ratios in this case in no way differed from that in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971). Here, as there, mathematical ratios were used simply as "a starting point in the process of shaping a remedy, rather than an inflexible requirement." *Id.*, at 25. It may be expected that a final desegregation plan in this case would deviate from a pure mathematical approach. Indeed, the District Court's most recent order appointing a panel of experts to draft an interdistrict plan requires only that the plan be designed "to achieve the greatest degree of actual desegregation . . . [w]ithin the limitations of reasonable travel time and distance factors." 345 F. Supp. 914, 918 (ED Mich. 1972). Cf. 402 U. S., at 23.

> identifiability of the Detroit public schools. From the evidence, the primary reason for the Detroit School Board's interest in the inclusion of these school districts is not racial desegregation but to increase the average socio-economic balance of all the schools in the abutting regions and clusters."

The Court also misstates the basis for the District Court's order by suggesting that since the only segregation proved at trial was within the Detroit school system, any relief which extended beyond the jurisdiction of the Detroit Board of Education would be inappropriate because it would impose a remedy on outlying districts "not shown to have committed any constitutional violation." *Ante,* at 745.[2] The essential foundation of interdistrict relief in this case was not to correct conditions within outlying districts which themselves engaged in purposeful segregation. Instead, interdistrict relief was seen as a necessary part of any meaningful effort by the State of Michigan to remedy the state-caused segregation within the city of Detroit.

Rather than consider the propriety of interdistrict relief on this basis, however, the Court has conjured up a largely fictional account of what the District Court was attempting to accomplish. With all due respect, the Court, in my view, does a great disservice to the District Judge who labored long and hard with this complex litigation by accusing him of changing horses in midstream and shifting the focus of this case from the pursuit of a remedy for the condition of segregation

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[2] It does not appear that even the majority places any real weight on this consideration since it recognizes that interdistrict relief would be proper where a constitutional violation within one district produces a significant segregative effect in another district, see *ante,* at 744–745, thus allowing interdistrict relief to touch districts which have not themselves violated the Constitution.

within the Detroit school system to some unprincipled attempt to impose his own philosophy of racial balance on the entire Detroit metropolitan area. See *ante,* at 738–739. The focus of this case has always been the segregated system of education in the city of Detroit. The District Court determined that interdistrict relief was necessary and appropriate only because it found that the condition of segregation within the Detroit school system could not be cured with a Detroit-only remedy. It is on this theory that the interdistrict relief must stand or fall. Unlike the Court, I perceive my task to be to review the District Court's order for what it is, rather than to criticize it for what it manifestly is not.

II

As the foregoing demonstrates, the District Court's decision to expand its desegregation decree beyond the geographical limits of the city of Detroit rested in large part on its conclusions (A) that the State of Michigan was ultimately responsible for curing the condition of segregation within the Detroit city schools, and (B) that a Detroit-only remedy would not accomplish this task. In my view, both of these conclusions are well supported by the facts of this case and by this Court's precedents.

A

To begin with, the record amply supports the District Court's findings that the State of Michigan, through state officers and state agencies, had engaged in purposeful acts which created or aggravated segregation in the Detroit schools. The State Board of Education, for example, prior to 1962, exercised its authority to supervise local schoolsite selection in a manner which contributed to segregation. 484 F. 2d 215, 238 (CA6 1973). Furthermore, the State's continuing authority, after 1962,

to approve school building construction plans [3] had intertwined the State with site-selection decisions of the Detroit Board of Education which had the purpose and effect of maintaining segregation.

The State had also stood in the way of past efforts to desegregate the Detroit city schools. In 1970, for example, the Detroit School Board had begun implementation of its own desegregation plan for its high schools, despite considerable public and official resistance. The State Legislature intervened by enacting Act 48 of the Public Acts of 1970, specifically prohibiting implementation of the desegregation plan and thereby continuing the growing segregation of the Detroit school system. Adequate desegregation of the Detroit system was also hampered by discriminatory restrictions placed by the State on the use of transportation within Detroit. While state aid for transportation was provided by statute for suburban districts, many of which were highly urbanized, aid for intracity transportation was excepted. One of the effects of this restriction was to encourage the construction of small walk-in neighborhood schools in Detroit, thereby lending aid to the intentional policy of creating a school system which reflected, to the greatest extent feasible, extensive residential segregation. Indeed, that one of the purposes of the transportation restriction was to impede desegregation was evidenced when the Michigan Legislature amended the State Transportation Aid Act to cover intracity transportation but expressly prohibited the allocation of funds for cross-busing of students within a school district to achieve racial balance.[4] Cf. *North Carolina State Board of Education* v. *Swann*, 402 U. S. 43 (1971).

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[3] See Mich. Comp. Laws § 388.851 (1970).

[4] See § 388.1179.

Also significant was the State's involvement during the 1950's in the transportation of Negro high school students from the Carver School District past a closer white high school in the Oak Park District to a more distant Negro high school in the Detroit system. Certainly the District Court's finding that the State Board of Education had knowledge of this action and had given its tacit or express approval was not clearly erroneous. Given the comprehensive statutory powers of the State Board of Education over contractual arrangements between school districts in the enrollment of students on a nonresident tuition basis, including certification of the number of pupils involved in the transfer and the amount of tuition charged, over the review of transportation routes and distances, and over the disbursement of transportation funds,[5] the State Board inevitably knew and understood the significance of this discriminatory act.

Aside from the acts of purposeful segregation committed by the State Legislature and the State Board of Education, the District Court also concluded that the State was responsible for the many intentional acts of segregation committed by the Detroit Board of Education, an agency of the State. The majority is only willing to accept this finding *arguendo*. See *ante*, at 748. I have no doubt, however, as to its validity under the Fourteenth Amendment.

"The command of the Fourteenth Amendment," it should be recalled, "is that no 'State' shall deny to any person within its jurisdiction the equal protection of the laws." *Cooper* v. *Aaron*, 358 U. S. 1, 16 (1958). While a State can act only through "the officers or agents by whom its powers are exerted," *Ex parte Virginia*, 100 U. S. 339, 347 (1880), actions by an agent or officer of

[5] See §§ 388.629 and 340.600.

the State are encompassed by the Fourteenth Amendment for, "as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." *Ibid.* See also *Cooper* v. *Aaron, supra; Virginia* v. *Rives,* 100 U. S. 313, 318 (1880); *Shelley* v. *Kraemer,* 334 U. S. 1, 14 (1948).

Under Michigan law a "school district is an agency of the State government." *School District of the City of Lansing* v. *State Board of Education,* 367 Mich. 591, 600, 116 N. W. 2d 866, 870 (1962). It is "a legal division of territory, created by the State for educational purposes, to which the State has granted such powers as are deemed necessary to permit the district to function as a State agency." *Detroit Board of Education* v. *Superintendent of Public Instruction,* 319 Mich. 436, 450, 29 N. W. 2d 902, 908 (1947). Racial discrimination by the school district, an agency of the State, is therefore racial discrimination by the State itself, forbidden by the Fourteenth Amendment. See, *e. g., Pennsylvania* v. *Board of Trusts,* 353 U. S. 230 (1957).

We recognized only last Term in *Keyes* that it was the State itself which was ultimately responsible for *de jure* acts of segregation committed by a local school board. A deliberate policy of segregation by the local board, we held, amounted to "state-imposed segregation." 413 U. S., at 200. Wherever a dual school system exists, whether compelled by state statute or created by a local board's systematic program of segregation, "the *State* automatically assumes an affirmative duty 'to effectuate a transition to a racially nondiscriminatory school system' [and] to eliminate from the public schools within their school system 'all vestiges of state-imposed segregation.' " *Ibid.* (emphasis added).

Vesting responsibility with the State of Michigan for Detroit's segregated schools is particularly appropriate as

Michigan, unlike some other States, operates a single statewide system of education rather than several separate and independent local school systems. The majority's emphasis on local governmental control and local autonomy of school districts in Michigan will come as a surprise to those with any familiarity with that State's system of education. School districts are not separate and distinct sovereign entities under Michigan law, but rather are " 'auxiliaries of the State,' " subject to its "absolute power." *Attorney General of Michigan ex rel. Kies* v. *Lowrey*, 199 U. S. 233, 240 (1905). The courts of the State have repeatedly emphasized that education in Michigan is not a local governmental concern, but a state function.

> "Unlike the delegation of other powers by the legislature to local governments, education is not inherently a part of the local self-government of a municipality . . . . Control of our public school system is a State matter delegated and lodged in the State legislature by the Constitution. The policy of the State has been to retain control of its school system, to be administered throughout the State under State laws by local State agencies organized with plenary powers to carry out the delegated functions given [them] by the legislature." *School District of the City of Lansing* v. *State Board of Education, supra,* at 595, 116 N. W. 2d, at 868.

The Supreme Court of Michigan has noted the deep roots of this policy:

> "It has been settled by the Ordinance of 1787, the several Constitutions adopted in this State, by its uniform course of legislation, and by the decisions of this court, that education in Michigan is a matter of State concern, that it is no part of the local self-government of a particular township or munic-

> ipality . . . . The legislature has always dictated the educational policy of the State." *In re School District No. 6*, 284 Mich. 132, 145-146, 278 N. W. 792, 797 (1938).

The State's control over education is reflected in the fact that, contrary to the Court's implication, there is little or no relationship between school districts and local political units. To take the 85 outlying local school districts in the Detroit metropolitan area as examples, 17 districts lie in two counties, two in three counties. One district serves five municipalities; other suburban municipalities are fragmented into as many as six school districts. Nor is there any apparent state policy with regard to the size of school districts, as they now range from 2,000 to 285,000 students.

Centralized state control manifests itself in practice as well as in theory. The State controls the financing of education in several ways. The legislature contributes a substantial portion of most school districts' operating budgets with funds appropriated from the State's General Fund revenues raised through statewide taxation.[6] The State's power over the purse can be and is in fact used to enforce the State's powers over local districts.[7] In addition, although local districts obtain funds through local property taxation, the State has assumed the responsibility to ensure equalized property valuations throughout the State.[8] The State also establishes

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[6] See § 388.611. The State contributed an average of 34% of the operating budgets of the 54 school districts included in the original proposed desegregation area. In 11 of these districts, state contributions exceeded 50% of the operating budgets.

[7] See, *e. g.*, *id.*, § 340.575. See also 1949–1950 Report of the Attorney General 104 (Roth); Vol. 1, 1955 Report of the Attorney General 561 (Kavanagh); 1961–1962 Report of the Attorney General 533 (Kelley).

[8] See Mich. Comp. Laws §§ 211.34 and 340.681.

standards for teacher certification and teacher tenure;[9] determines part of the required curriculum;[10] sets the minimum school term;[11] approves bus routes, equipment, and drivers;[12] approves textbooks;[13] and establishes procedures for student discipline.[14] The State Superintendent of Public Instruction and the State Board of Education have the power to remove local school board members from office for neglect of their duties.[15]

Most significantly for present purposes, the State has wide-ranging powers to consolidate and merge school districts, even without the consent of the districts themselves or of the local citizenry.[16] See, *e. g., Attorney General ex rel. Kies* v. *Lowrey,* 131 Mich. 639, 92 N. W. 289 (1902), aff'd, 199 U. S. 233 (1905). Indeed, recent years have witnessed an accelerated program of school district consolidations, mergers, and annexations, many of which were state imposed. Whereas the State had 7,362 local districts in 1912, the number had been reduced to 1,438 in 1964 and to 738 in 1968.[17] By June 1972, only 608 school districts remained. Furthermore, the State has broad powers to transfer property from one district to another, again without the consent of the local school districts affected by the transfer.[18] See, *e. g., School Dis-*

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[9] § 340.569.

[10] §§ 257.811 (c), 340.361, 340.781, 340.782, 388.371.

[11] § 340.575.

[12] § 388.1171.

[13] § 340.887 (1).

[14] Op. Atty. Gen. No. 4705 (July 7, 1970), 1969–1970 Report of the Attorney General 156 (Kelley).

[15] See Mich. Comp. Laws § 340.253.

[16] See generally §§ 340.401–340.415 (consolidations), 340.431–340.449 (annexations).

[17] See 1 Michigan Senate Journal, 1968, p. 423.

[18] See generally Mich. Comp. Laws §§ 340.461–340.468

trict of the City of Lansing v. *State Board of Education, supra; Imlay Township District* v. *State Board of Education,* 359 Mich. 478, 102 N. W. 2d 720 (1960).

Whatever may be the history of public education in other parts of our Nation, it simply flies in the face of reality to say, as does the majority, that in Michigan, "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools . . . ." *Ante,* at 741. As the State's Supreme Court has said: "We have repeatedly held that education in this State is not a matter of local concern, but belongs to the State at large." *Collins* v. *City of Detroit,* 195 Mich. 330, 335–336, 161 N. W. 905, 907 (1917). See also *Sturgis* v. *County of Allegan,* 343 Mich. 209, 215, 72 N. W. 2d 56, 59 (1955); *Van Fleet* v. *Oltman,* 244 Mich. 241, 244, 221 N. W. 299, 300 (1928); *Child Welfare Society of Flint* v. *Kennedy School District,* 220 Mich. 290, 296, 189 N. W. 1002, 1004 (1922). Indeed, a study prepared for the 1961 Michigan Constitutional Convention noted that the Michigan Constitution's articles on education had resulted in "the establishment of a state system of education in contrast to a series of local school systems." Elementary and Secondary Education and the Michigan Constitution, Michigan Constitutional Convention Studies 1 (1961).

In sum, several factors in this case coalesce to support the District Court's ruling that it was the State of Michigan itself, not simply the Detroit Board of Education, which bore the obligation of curing the condition of segregation within the Detroit city schools. The actions of the State itself directly contributed to Detroit's segregation. Under the Fourteenth Amendment, the State is ultimately responsible for the actions of its local agencies. And, finally, given the structure of Michigan's educational system, Detroit's segregation cannot be

viewed as the problem of an independent and separate entity. Michigan operates a single statewide system of education, a substantial part of which was shown to be segregated in this case.

B

What action, then, could the District Court require the State to take in order to cure Detroit's condition of segregation? Our prior cases have not minced words as to what steps responsible officials and agencies must take in order to remedy segregation in the public schools. Not only must distinctions on the basis of race be terminated for the future, but school officials are also "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green* v. *County School Board of New Kent County,* 391 U. S. 430, 437–438 (1968). See also *Lee* v. *Macon County Board of Education,* 267 F. Supp. 458 (MD Ala.), aff'd *sub nom. Wallace* v. *United States,* 389 U. S. 215 (1967). Negro students are not only entitled to neutral nondiscriminatory treatment in the future. They must receive "what *Brown II* promised them: a school system in which all vestiges of enforced racial segregation have been eliminated." *Wright* v. *Council of the City of Emporia,* 407 U. S. 451, 463 (1972). See also *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 15 (1971). These remedial standards are fully applicable not only to school districts where a dual system was compelled by statute, but also where, as here, a dual system was the product of purposeful and intentional state action. See *Keyes,* 413 U. S., at 200–201.

After examining three plans limited to the city of Detroit, the District Court correctly concluded that none would eliminate root and branch the vestiges of

unconstitutional segregation. The plans' effectiveness, of course, had to be evaluated in the context of the District Court's findings as to the extent of segregation in the Detroit city schools. As indicated earlier, the most essential finding was that Negro children in Detroit had been confined by intentional acts of segregation to a growing core of Negro schools surrounded by a receding ring of white schools.[19] Thus, in 1960, of Detroit's 251

[19] Despite MR. JUSTICE STEWART's claim to the contrary, *ante*, at 756 n. 2, of his concurring opinion, the record fully supports my statement that Negro students were intentionally confined to a core of Negro schools within the city of Detroit. See, *e. g.*, *supra*, at 784–785, 790–792. Indeed, MR. JUSTICE STEWART acknowledges that intentional acts of segregation by the State have separated white and Negro students within the city, and that the resulting core of all-Negro schools has grown to encompass most of the city. In suggesting that my approval of an interdistrict remedy rests on a further conclusion that the State or its political subdivisions have been responsible for the increasing percentage of Negro students in Detroit, my Brother STEWART misconceives the thrust of this dissent. In light of the high concentration of Negro students in Detroit, the District Judge's finding that a Detroit-only remedy cannot effectively cure the constitutional violation within the city should be enough to support the choice of an interdistrict remedy. Whether state action is responsible for the growth of the core of all-Negro schools in Detroit is, in my view, quite irrelevant.

The difficulty with MR. JUSTICE STEWART's position is that he, like the Court, confuses the inquiry required to determine whether there has been a substantive constitutional violation with that necessary to formulate an appropriate remedy once a constitutional violation has been shown. While a finding of state action is of course a prerequisite to finding a violation, we have never held that after unconstitutional state action has been shown, the District Court at the remedial stage must engage in a second inquiry to determine whether additional state action exists to justify a particular remedy. Rather, once a constitutional violation has been shown, the District Court is duty-bound to formulate an effective remedy and, in so doing, the court is entitled—indeed, it is required—to consider all the factual circumstances relevant to the framing of an effective decree. Thus, in *Swann* v. *Charlotte-Mecklenburg Board of Education*

regular-attendance schools, 100 were 90% or more white and 71 were 90% or more Negro. In 1970, of Detroit's 282 regular-attendance schools, 69 were 90% or more white and 133 were 90% or more Negro. While in 1960, 68% of all schools were 90% or more one race, by 1970, 71.6% of the schools fell into that category. The growing core of all-Negro schools was further evidenced in total school district population figures. In 1960 the Detroit system had 46% Negro students and 54% white students, but by 1970, 64% of the students were Negro and only 36% were white. This increase in the proportion of Negro students was the highest of any major Northern city.

It was with these figures in the background that the District Court evaluated the adequacy of the three Detroit-only plans submitted by the parties. Plan A, proposed by the Detroit Board of Education, desegregated the high schools and about a fifth of the middle-level schools. It was deemed inadequate, however, because it did not desegregate elementary schools and left the middle-level schools not included in the plan more segregated than ever. Plan C, also proposed by the Detroit Board, was deemed inadequate because it too covered only some grade levels and would leave elementary schools segregated. Plan B, the plaintiffs' plan, though requiring the transportation of 82,000 pupils and the acquisition of 900 school buses, would make little

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we held that the District Court must take into account the existence of extensive residential segregation in determining whether a racially neutral "neighborhood school" attendance plan was an adequate desegregation remedy, regardless of whether this residential segregation was caused by state action. So here, the District Court was required to consider the facts that the Detroit school system was already predominantly Negro and would likely become all-Negro upon issuance of a Detroit-only decree in framing an effective desegregation remedy, regardless of state responsibility for this situation.

headway in rooting out the vestiges of segregation. To begin with, because of practical limitations, the District Court found that the plan would leave many of the Detroit city schools 75% to 90% Negro. More significantly, the District Court recognized that in the context of a community which historically had a school system marked by rigid *de jure* segregation, the likely effect of a Detroit-only plan would be to "change a school system which is now Black and White to one that would be perceived as Black . . . ." The result of this changed perception, the District Court found, would be to increase the flight of whites from the city to the outlying suburbs, compounding the effects of the present rate of increase in the proportion of Negro students in the Detroit system. Thus, even if a plan were adopted which, at its outset, provided in every school a 65% Negro-35% white racial mix in keeping with the Negro-white proportions of the total student population, such a system would, in short order, devolve into an all-Negro system. The net result would be a continuation of the all-Negro schools which were the hallmarks of Detroit's former dual system of one-race schools.

Under our decisions, it was clearly proper for the District Court to take into account the so-called "white flight" from the city schools which would be forthcoming from any Detroit-only decree. The court's prediction of white flight was well supported by expert testimony based on past experience in other cities undergoing desegregation relief. We ourselves took the possibility of white flight into account in evaluating the effectiveness of a desegregation plan in *Wright, supra,* where we relied on the District Court's finding that if the city of Emporia were allowed to withdraw from the existing system, leaving a system with a higher proportion of Negroes, it " 'may be anticipated that the pro-

portion of whites in county schools may drop as those who can register in private academies' . . . ." 407 U. S., at 464. One cannot ignore the white-flight problem, for where legally imposed segregation has been established, the District Court has the responsibility to see to it not only that the dual system is terminated at once but also that future events do not serve to perpetuate or re-establish segregation. See *Swann,* 402 U. S., at 21. See also *Green,* 391 U. S., at 438 n. 4; *Monroe* v. *Board of Comm'rs,* 391 U. S. 450, 459 (1968).

We held in *Swann, supra,* that where *de jure* segregation is shown, school authorities must make "every effort to achieve the greatest possible degree of actual desegregation." 402 U. S., at 26. This is the operative standard re-emphasized in *Davis* v. *School Comm'rs of Mobile County,* 402 U. S. 33, 37 (1971). If these words have any meaning at all, surely it is that school authorities must, to the extent possible, take all practicable steps to ensure that Negro and white children in fact go to school together. This is, in the final analysis, what desegregation of the public schools is all about.

Because of the already high and rapidly increasing percentage of Negro students in the Detroit system, as well as the prospect of white flight, a Detroit-only plan simply has no hope of achieving actual desegregation. Under such a plan white and Negro students will not go to school together. Instead, Negro children will continue to attend all-Negro schools. The very evil that *Brown I* was aimed at will not be cured, but will be perpetuated for the future.

Racially identifiable schools are one of the primary vestiges of state-imposed segregation which an effective desegregation decree must attempt to eliminate. In *Swann, supra,* for example, we held that "[t]he district judge or school authorities . . . will thus necessarily be concerned with the elimination of one-race schools." 402

U. S., at 26. There is "a presumption," we stated, "against schools that are substantially disproportionate in their racial composition." *Ibid.* And in evaluating the effectiveness of desegregation plans in prior cases, we ourselves have considered the extent to which they discontinued racially identifiable schools. See, *e. g., Green* v. *County School Board of New Kent County, supra; Wright* v. *Council of the City of Emporia, supra.* For a principal end of any desegregation remedy is to ensure that it is no longer "possible to identify a 'white school' or a 'Negro school.'" *Swann, supra,* at 18. The evil to be remedied in the dismantling of a dual system is the "[r]acial identification of the system's schools." *Green,* 391 U. S., at 435. The goal is a system without white schools or Negro schools—a system with "just schools." *Id.,* at 442. A school authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness in achieving this end. See *Swann, supra,* at 25; *Davis, supra,* at 37; *Green, supra,* at 439.

We cautioned in *Swann,* of course, that the dismantling of a segregated school system does not mandate any particular racial balance. 402 U. S., at 24. We also concluded that a remedy under which there would remain a small number of racially identifiable schools was only presumptively inadequate and might be justified. *Id.,* at 26. But this is a totally different case. The flaw of a Detroit-only decree is not that it does not reach some ideal degree of racial balance or mixing. It simply does not promise to achieve actual desegregation at all. It is one thing to have a system where a small number of students remain in racially identifiable schools. It is something else entirely to have a system where all students continue to attend such schools.

The continued racial identifiability of the Detroit schools under a Detroit-only remedy is not simply a reflection of their high percentage of Negro students.

What is or is not a racially identifiable vestige of *de jure* segregation must necessarily depend on several factors. Cf. *Keyes*, 413 U. S., at 196. Foremost among these should be the relationship between the schools in question and the neighboring community. For these purposes the city of Detroit and its surrounding suburbs must be viewed as a single community. Detroit is closely connected to its suburbs in many ways, and the metropolitan area is viewed as a single cohesive unit by its residents. About 40% of the residents of the two suburban counties included in the desegregation plan work in Wayne County, in which Detroit is situated. Many residents of the city work in the suburbs. The three counties participate in a wide variety of cooperative governmental ventures on a metropolitan-wide basis, including a metropolitan transit system, park authority, water and sewer system, and council of governments. The Federal Government has classified the tri-county area as a Standard Metropolitan Statistical Area, indicating that it is an area of "economic and social integration." *United States* v. *Connecticut National Bank*, *ante*, at 670.

Under a Detroit-only decree, Detroit's schools will clearly remain racially identifiable in comparison with neighboring schools in the metropolitan community. Schools with 65% and more Negro students will stand in sharp and obvious contrast to schools in neighboring districts with less than 2% Negro enrollment. Negro students will continue to perceive their schools as segregated educational facilities and this perception will only be increased when whites react to a Detroit-only decree by fleeing to the suburbs to avoid integration. School district lines, however innocently drawn, will surely be perceived as fences to separate the races when, under a Detroit-only decree, white parents withdraw their chil-

dren from the Detroit city schools and move to the suburbs in order to continue them in all-white schools. The message of this action will not escape the Negro children in the city of Detroit. See *Wright,* 407 U. S., at 466. It will be of scant significance to Negro children who have for years been confined by *de jure* acts of segregation to a growing core of all-Negro schools surrounded by a ring of all-white schools that the new dividing line between the races is the school district boundary.

Nor can it be said that the State is free from any responsibility for the disparity between the racial makeup of Detroit and its surrounding suburbs. The State's creation, through *de jure* acts of segregation, of a growing core of all-Negro schools inevitably acted as a magnet to attract Negroes to the areas served by such schools and to deter them from settling either in other areas of the city or in the suburbs. By the same token, the growing core of all-Negro schools inevitably helped drive whites to other areas of the city or to the suburbs. As we recognized in *Swann:*

> "People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods. . . . [Action taken] to maintain the separation of the races with a minimum departure from the formal principles of 'neighborhood zoning' . . . does more than simply influence the short-run composition of the student body . . . . It may well promote segregated residential patterns which, when combined with 'neighborhood zoning,' further lock the school system into the mold of separation of the races. Upon a proper

showing a district court may consider this in fashioning a remedy." 402 U. S., at 20–21.

See also *Keyes*, 413 U. S., at 202. The rippling effects on residential patterns caused by purposeful acts of segregation do not automatically subside at the school district border. With rare exceptions, these effects naturally spread through all the residential neighborhoods within a metropolitan area. See *id.*, at 202–203.

The State must also bear part of the blame for the white flight to the suburbs which would be forthcoming from a Detroit-only decree and would render such a remedy ineffective. Having created a system where whites and Negroes were intentionally kept apart so that they could not become accustomed to learning together, the State is responsible for the fact that many whites will react to the dismantling of that segregated system by attempting to flee to the suburbs. Indeed, by limiting the District Court to a Detroit-only remedy and allowing that flight to the suburbs to succeed, the Court today allows the State to profit from its own wrong and to perpetuate for years to come the separation of the races it achieved in the past by purposeful state action.

The majority asserts, however, that involvement of outlying districts would do violence to the accepted principle that "the nature of the violation determines the scope of the remedy." *Swann, supra*, at 16. See *ante*, at 744–745. Not only is the majority's attempt to find in this single phrase the answer to the complex and difficult questions presented in this case hopelessly simplistic, but more important, the Court reads these words in a manner which perverts their obvious meaning. The nature of a violation determines the scope of the remedy simply because the function of any remedy is to cure the violation to which it is addressed. In school segregation

cases, as in other equitable causes, a remedy which effectively cures the violation is what is required. See *Green,* 391 U. S., at 439; *Davis,* 402 U. S., at 37. No more is necessary, but we can tolerate no less. To read this principle as barring a district court from imposing the only effective remedy for past segregation and remitting the court to a patently ineffective alternative is, in my view, to turn a simple commonsense rule into a cruel and meaningless paradox. Ironically, by ruling out an interdistrict remedy, the only relief which promises to cure segregation in the Detroit public schools, the majority flouts the very principle on which it purports to rely.

Nor should it be of any significance that the suburban school districts were not shown to have themselves taken any direct action to promote segregation of the races. Given the State's broad powers over local school districts, it was well within the State's powers to require those districts surrounding the Detroit school district to participate in a metropolitan remedy. The State's duty should be no different here than in cases where it is shown that certain of a State's voting districts are malapportioned in violation of the Fourteenth Amendment. See *Reynolds* v. *Sims,* 377 U. S. 533 (1964). Overrepresented electoral districts are required to participate in reapportionment although their only "participation" in the violation was to do nothing about it. Similarly, electoral districts which themselves meet representation standards must frequently be redrawn as part of a remedy for other over- and under-inclusive districts. No finding of fault on the part of each electoral district and no finding of a discriminatory effect on each district is a prerequisite to its involvement in the constitutionally required remedy. By the same logic, no finding of fault on the part of the suburban school districts in this case

and no finding of a discriminatory effect on each district should be a prerequisite to their involvement in the constitutionally required remedy.

It is the State, after all, which bears the responsibility under *Brown* of affording a nondiscriminatory system of education. The State, of course, is ordinarily free to choose any decentralized framework for education it wishes, so long as it fulfills that Fourteenth Amendment obligation. But the State should no more be allowed to hide behind its delegation and compartmentalization of school districts to avoid its constitutional obligations to its children than it could hide behind its political subdivisions to avoid its obligations to its voters. *Reynolds* v. *Sims, supra,* at 575. See also *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960).

It is a hollow remedy indeed where "after supposed 'desegregation' the schools remained segregated in fact." *Hobson* v. *Hansen,* 269 F. Supp. 401, 495 (DDC 1967). We must do better than " 'substitute . . . one segregated school system for another segregated school system.' " *Wright,* 407 U. S., at 456. To suggest, as does the majority, that a Detroit-only plan somehow remedies the effects of *de jure* segregation of the races is, in my view, to make a solemn mockery of *Brown I*'s holding that separate educational facilities are inherently unequal and of *Swann*'s unequivocal mandate that the answer to *de jure* segregation is the greatest possible degree of actual desegregation.

III

One final set of problems remains to be considered. We recognized in *Brown II,* and have re-emphasized ever since, that in fashioning relief in desegregation cases, "the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for

adjusting and reconciling public and private needs." *Brown II*, 349 U. S., at 300. See also *Swann, supra.*

Though not resting its holding on this point, the majority suggests that various equitable considerations militate against interdistrict relief. The Court, for example, refers to financing and administrative problems, the logistical problems attending large-scale transportation of students, and the prospect of the District Court's becoming a "*de facto* 'legislative authority' " and " 'school superintendent' for the entire area." *Ante,* at 743–744. The entangling web of problems woven by the Court, however, appears on further consideration to be constructed of the flimsiest of threads.

I deal first with the last of the problems posed by the Court—the specter of the District Court *qua* "school superintendent" and "legislative authority"—for analysis of this problem helps put the other issues in proper perspective. Our cases, of course, make clear that the initial responsibility for devising an adequate desegregation plan belongs with school authorities, not with the District Court. The court's primary role is to review the adequacy of the school authorities' efforts and to substitute its own plan only if and to the extent they default. See *Swann,* 402 U. S., at 16; *Green,* 391 U. S., at 439. Contrary to the majority's suggestions, the District Judge in this case consistently adhered to these procedures and there is every indication that he would have continued to do so. After finding *de jure* segregation the court ordered the parties to submit proposed Detroit-only plans. The state defendants were also ordered to submit a proposed metropolitan plan extending beyond Detroit's boundaries. As the District Court stated, "the State defendants . . . bear the initial burden of coming forward with a proposal that promises to work." The state defendants defaulted in this obligation, however.

Rather than submit a complete plan, the State Board of Education submitted six proposals, none of which was in fact a desegregation plan. It was only upon this default that the District Court began to take steps to develop its own plan. Even then the District Court maximized school authority participation by appointing a panel representing both plaintiffs and defendants to develop a plan. Pet. App. 99a–100a. Furthermore, the District Court still left the state defendants the initial responsibility for developing both interim and final financial and administrative arrangements to implement interdistrict relief. *Id.*, at 104a–105a. The Court of Appeals further protected the interests of local school authorities by ensuring that the outlying suburban districts could fully participate in the proceedings to develop a metropolitan remedy.

These processes have not been allowed to run their course. No final desegregation plan has been proposed by the panel of experts, let alone approved by the District Court. We do not know in any detail how many students will be transported to effect a metropolitan remedy, and we do not know how long or how far they will have to travel. No recommendations have yet been submitted by the state defendants on financial and administrative arrangements. In sum, the practicality of a final metropolitan plan is simply not before us at the present time. Since the State and the panel of experts have not yet had an opportunity to come up with a workable remedy, there is no foundation for the majority's suggestion of the impracticality of interdistrict relief. Furthermore, there is no basis whatever for assuming that the District Court will inevitably be forced to assume the role of legislature or school superintendent.[20]

[20] In fact, the District Court remarked "that this court's task is to enforce constitutional rights not to act as a schoolmaster; the

Were we to hold that it was its constitutional duty to do so, there is every indication that the State of Michigan would fulfill its obligation and develop a plan which is workable, administrable, financially sound, and, most important, in the best interest of quality education for all of the children in the Detroit metropolitan area.

Since the Court chooses, however, to speculate on the feasibility of a metropolitan plan, I feel constrained to comment on the problem areas it has targeted. To begin with, the majority's questions concerning the practicality of consolidation of school districts need not give us pause. The State clearly has the power, under existing law, to effect a consolidation if it is ultimately determined that this offers the best prospect for a workable and stable desegregation plan. See *supra*, at 796–797. And given the 1,000 or so consolidations of school districts which have taken place in the past, it is hard to believe that the State has not already devised means of solving most, if not all, of the practical problems which the Court suggests consolidation would entail.

Furthermore, the majority ignores long-established Michigan procedures under which school districts may enter into contractual agreements to educate their pupils in other districts using state or local funds to finance nonresident education.[21] Such agreements could form an

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court's task is to protect the constitutional rights here found violated with as little intrusion into the education process as possible. The court's objective is to establish the minimum constitutional framework within which the system of public schools may operate now and hereafter in a racially unified, non-discriminatory fashion. Within that framework the body politic, educators, parents, and most particularly the children must be given the maximum opportunity to experiment and secure a high quality, and equal, educational opportunity." Pet. App. 82a.

[21] See, *e. g.*, Mich. Comp. Laws §§ 340.69, 340.121 (d), 340.359, 340.582, 340.582a, 340.590.

easily administrable framework for interdistrict relief short of outright consolidation of the school districts. The District Court found that interdistrict procedures like these were frequently used to provide special educational services for handicapped children, and extensive statutory provision is also made for their use in vocational education.[22] Surely if school districts are willing to engage in interdistrict programs to help those unfortunate children crippled by physical or mental handicaps, school districts can be required to participate in an interdistrict program to help those children in the city of Detroit whose educations and very futures have been crippled by purposeful state segregation.

Although the majority gives this last matter only fleeting reference, it is plain that one of the basic emotional and legal issues underlying these cases concerns the propriety of transportation of students to achieve desegregation. While others may have retreated from its standards, see, *e. g., Keyes,* 413 U. S., at 217 (POWELL, J., concurring in part and dissenting in part), I continue to adhere to the guidelines set forth in *Swann* on this issue. See 402 U. S., at 29–31. And though no final desegregation plan is presently before us, to the extent the outline of such a plan is now visible, it is clear that the transportation it would entail will be fully consistent with these guidelines.

First of all, the metropolitan plan would not involve the busing of substantially more students than already ride buses. The District Court found that, statewide, 35%–40% of all students already arrive at school on a bus. In those school districts in the tri-county Detroit metropolitan area eligible for state reimbursement of transportation costs, 42%–52% of all students rode buses to school. In the tri-county areas as a whole, ap-

[22] See *id.,* §§ 340.330-340.330u.

proximately 300,000 pupils arrived at school on some type of bus, with about 60,000 of these apparently using regular public transit. In comparison, the desegregation plan, according to its present rough outline, would involve the transportation of 310,000 students, about 40% of the population within the desegregation area.

With respect to distance and amount of time traveled, 17 of the outlying school districts involved in the plan are contiguous to the Detroit district. The rest are all within 8 miles of the Detroit city limits. The trial court, in defining the desegregation area, placed a ceiling of 40 minutes one way on the amount of travel time, and many students will obviously travel for far shorter periods. As to distance, the average statewide bus trip is 8½ miles one way, and in some parts of the tri-county area, students already travel for one and a quarter hours or more each way. In sum, with regard to both the number of students transported and the time and distances involved, the outlined desegregation plan "compares favorably with the transportation plan previously operated . . . ." *Swann, supra,* at 30.

As far as economics are concerned, a metropolitan remedy would actually be more sensible than a Detroit-only remedy. Because of prior transportation aid restrictions, see *supra,* at 791, Detroit largely relied on public transport, at student expense, for those students who lived too far away to walk to school. Since no inventory of school buses existed, a Detroit-only plan was estimated to require the purchase of 900 buses to effectuate the necessary transportation. The tri-county area, in contrast, already has an inventory of 1,800 buses, many of which are now under-utilized. Since increased utilization of the existing inventory can take up much of the increase in transportation involved in the interdistrict remedy, the District Court found that only 350 additional buses would

probably be needed, almost two-thirds fewer than a Detroit-only remedy. Other features of an interdistrict remedy bespeak its practicality, such as the possibility of pairing up Negro schools near Detroit's boundary with nearby white schools on the other side of the present school district line.

Some disruption, of course, is the inevitable product of any desegregation decree, whether it operates within one district or on an interdistrict basis. As we said in *Swann*, however:

> "Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided . . . ." 402 U. S., at 28.

Desegregation is not and was never expected to be an easy task. Racial attitudes ingrained in our Nation's childhood and adolescence are not quickly thrown aside in its middle years. But just as the inconvenience of some cannot be allowed to stand in the way of the rights of others, so public opposition, no matter how strident, cannot be permitted to divert this Court from the enforcement of the constitutional principles at issue in this case. Today's holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is the product of neutral principles of law. In

the short run, it may seem to be the easier course to allow our great metropolitan areas to be divided up each into two cities—one white, the other black—but it is a course, I predict, our people will ultimately regret. I dissent.

REPORTER'S NOTE

The next page is purposely numbered 901. The numbers between 815 and 901 were intentionally omitted, in order to make it possible to publish the orders in the current preliminary print of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

ORDERS FROM JUNE 21 THROUGH JULY 25, 1974

JUNE 21, 1974

Dismissal Under Rule 60

No. 73–1755. NEW YORK TYPOGRAPHICAL UNION No. 6 ET AL. *v.* NEW YORK TIMES CO. Ct. App. N. Y. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court.

Miscellaneous Order

No. A–1204. RAPIDES PARISH POLICE JURY ET AL. *v.* JOHN BRADAS ET AL. Application for stay of judgment of the United States District Court for the Western District of Louisiana pending appeal to the United States Court of Appeals for the Fifth Circuit, presented to MR. JUSTICE POWELL and by him referred to the Court, denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

JUNE 24, 1974

Affirmed on Appeal

No. 73–499. DILLENBURG *v.* KRAMER, SECRETARY OF STATE OF WASHINGTON, ET AL. Affirmed on appeal from D. C. W. D. Wash. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument.

No. 73–521. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* BEATY. Appeal from C. A. 5th Cir. Motion of appellee for leave to proceed *in forma*

pauperis granted. Judgment affirmed. MR. JUSTICE REHNQUIST would note probable jurisdiction and set case for oral argument. Reported below: 478 F. 2d 300.

Vacated and Remanded on Appeal

No. 73–5598. NORTON, A MINOR, BY CHILES *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. Appeal from D. C. Md. Motion of appellant for leave to proceed *in forma pauperis* granted. Judgment vacated, and case remanded for further consideration in light of *Jimenez* v. *Weinberger*, 417 U. S. 628 (1974). Reported below: 352 F. Supp. 596.

Certiorari Granted—Vacated and Remanded

No. 73–289. MICHELMAN, TRUSTEE IN BANKRUPTCY *v.* KINGSWOOD ET UX. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Kokoszka* v. *Belford*, 417 U. S. 642 (1974). Reported below: 470 F. 2d 996.

No. 73–877. LOCAL 2150, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Florida Power & Light Co.* v. *International Brotherhood of Electrical Workers, Local 641*, 417 U. S. 790 (1974). Reported below: 486 F. 2d 602.

No. 73–1209. UNITED STATES BOARD OF PAROLE *v.* AMAYA. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Warden* v. *Marrero*, 417 U. S. 653 (1974). MR. JUSTICE DOUGLAS and MR. JUSTICE BLACKMUN would grant certiorari and affirm the judgment for

the reasons stated in MR. JUSTICE BLACKMUN's dissenting opinion in *Warden* v. *Marrero*, 417 U. S. 653, 664 (1974). Reported below: 486 F. 2d 940.

No. 73–1404. MCLAUGHLIN, WARDEN, ET AL. *v.* PRIETO ET AL. C. A. 4th Cir. Motion of respondent Prieto for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for consideration in light of *Warden* v. *Marrero*, 417 U. S. 653 (1974). MR. JUSTICE DOUGLAS and MR. JUSTICE BLACKMUN would grant certiorari and affirm the judgment for the reasons stated in MR. JUSTICE BLACKMUN's dissenting opinion in *Warden* v. *Marrero*, 417 U. S. 653, 664 (1974). Reported below: 486 F. 2d 541.

Miscellaneous Orders

No. A–1190. SCATA *v.* UNITED STATES. Application for stay of mandate of the United States Court of Appeals for the Fifth Circuit presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. Reported below: 492 F. 2d 1100.

No. 48, Orig. MISSISSIPPI *v.* ARKANSAS, 415 U. S. 289. It is ordered that the State of Arkansas file a response to the request of the State of Mississippi for more specific boundary line descriptions on or before July 24, 1974. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this matter.

No. 73–235. DEFUNIS ET AL. *v.* ODEGAARD ET AL., 416 U. S. 312. Motion of respondents to retax costs granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion.

No. 73–822. FRY ET AL. *v.* UNITED STATES. Temp. Emerg. Ct. App. [Certiorari granted, 415 U. S. 912.] Consideration of motion to dismiss writ of certiorari deferred to hearing of case on the merits.

No. 73–1210. INTERSTATE COMMERCE COMMISSION *v.* OREGON PACIFIC INDUSTRIES, INC., ET AL. Appeal from D. C. Ore. [Probable jurisdiction noted, 416 U. S. 968.] Motion of Western Railroad Traffic Assn. for leave to file a brief as *amicus curiae* granted.

No. 73–1766. UNITED STATES *v.* NIXON, PRESIDENT OF THE UNITED STATES, ET AL. [Certiorari granted, 417 U. S. 927]; and

No. 73–1834. NIXON, PRESIDENT OF THE UNITED STATES *v.* UNITED STATES. Petition for certiorari before judgment by C. A. D. C. Cir. [Certiorari granted, 417 U. S. 960.] Consideration of motion of counsel for the President for disclosure and transmittal of grand jury matters deferred to hearing of cases on the merits. MR. JUSTICE REHNQUIST took no part in the consideration of this matter.

Probable Jurisdiction Postponed

No. 73–1346. MCLUCAS, SECRETARY OF THE AIR FORCE, ET AL. *v.* DECHAMPLAIN. Appeal from D. C. D. C. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 367 F. Supp. 1291.

Certiorari Denied

No. 73–324. CLASS OF COUNTY CLERKS AND REGISTRARS OF VOTERS OF CALIFORNIA *v.* RAMIREZ ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 9 Cal. 3d 199, 507 P. 2d 1345.

No. 73–549. BELL SUPERVISORS PROTECTIVE ASSN. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C.

Cir. Certiorari denied. Reported below: 159 U. S. App. D. C. 242 and 272, 487 F. 2d 1113 and 1143.

No. 73–1024. California Newspapers, Inc., dba San Rafael Independent Journal *v.* San Francisco Typographical Union No. 21, International Typographical Union, AFL–CIO; and

No. 73–1199. National Labor Relations Board *v.* San Francisco Typographical Union No. 21, International Typographical Union, AFL–CIO, et al. C. A. 9th Cir. Certiorari denied. Reported below: 486 F. 2d 1347.

No. 73–1397. California *v.* Welton. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 73–5860. Arias *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 484 F. 2d 577.

No. 73–6179. Cameron *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. Reported below: 284 N. C. 165, 200 S. E. 2d 186.

No. 73–6617. Toporoff *v.* Justices of the Supreme Court of New York, First Judicial District, et al. C. A. 2d Cir. Certiorari denied. Reported below: 490 F. 2d 1406.

No. 73–5547. Huguez *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied. Mr. Justice Douglas and Mr. Justice Blackmun would grant certiorari.

No. 73–6319. Meeks *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Mr. Justice Douglas would grant certiorari. Reported below: 11 Ill. App. 3d 973, 297 N. E. 2d 705.

JUNE 25, 1974

Miscellaneous Order

No. A–1220. CALLEY *v.* CALLAWAY, SECRETARY OF THE ARMY, ET AL. C. A. 5th Cir. Application to recall and stay mandate of the United States Court of Appeals for the Fifth Circuit pending applicant's petition for rehearing en banc in that court, presented to MR. JUSTICE POWELL and by him referred to the Court, denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. Reported below: 496 F. 2d 701.

JULY 5, 1974

Dismissal Under Rule 60

No. 73–6840. ELLISON *v.* UNITED STATES. C. A. 5th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 493 F. 2d 1404.

JULY 8, 1974

Affirmed on Appeal

No. 70–102. CAHN, DISTRICT ATTORNEY OF NASSAU COUNTY, ET AL. *v.* LONG ISLAND VIETNAM MORATORIUM COMMITTEE ET AL. Affirmed on appeal from C. A. 2d Cir. MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST dissent and would reverse judgment for the reasons stated in MR. JUSTICE REHNQUIST's dissenting opinion in *Spence* v. *Washington, ante,* p. 416. Reported below: 437 F. 2d 344. [See also No. 70–102, *Gwathmey* v. *Town of East Hampton, infra.*]

No. 73–1222. TIDEWATER OIL CO. *v.* UNITED STATES ET AL.; and

No. 73–1224. PHILLIPS PETROLEUM CO. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. C. D. Cal. Reported below: 367 F. Supp. 1226.

Appeals Dismissed

No. 72–1439. VAN SLYKE *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of substantial federal question. Reported below: 489 S. W. 2d 590.

No. 73–1366. WESTON *v.* ARKANSAS. Appeal from Sup. Ct. Ark. dismissed for want of jurisdiction. MR. JUSTICE DOUGLAS would reverse on the basis of his dissenting opinion in *Gertz* v. *Robert Welch, Inc., ante,* p. 355. Reported below: 255 Ark. 567, 501 S. W. 2d 622.

Vacated and Remanded on Appeal

No. 70–102. GWATHMEY *v.* TOWN OF EAST HAMPTON. Appeal from C. A. 2d Cir. Judgment vacated and case remanded for further consideration in light of *Younger* v. *Harris,* 401 U. S. 37 (1971), and *Samuels* v. *Mackell,* 401 U. S. 66 (1971). MR. JUSTICE DOUGLAS would affirm the judgment for the reasons stated in his dissenting opinion in *Younger* v. *Harris,* 401 U. S. 37, 58 (1971). Reported below: 437 F. 2d 351. [See also No. 70–102, *Cahn* v. *Long Island Vietnam Moratorium Committee, supra.*]

No. 73–380. SUTHERLAND ET AL. *v.* ILLINOIS. Appeal from App. Ct. Ill., 3d Dist. Judgment vacated and case remanded for further consideration in light of *Spence* v. *Washington, ante,* p. 405, and *Smith* v. *Goguen,* 415 U. S. 566 (1974). THE CHIEF JUSTICE, MR. JUSTICE WHITE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST dissent and, without further briefing and oral argument, would affirm the judgment. Reported below: 9 Ill. App. 3d 824, 292 N. E. 2d 746.

No. 73–574. FARRELL *v.* IOWA. Appeal from Sup. Ct. Iowa. Judgment vacated and case remanded for further consideration in light of *Spence* v. *Washington, ante,* p. 405. THE CHIEF JUSTICE, MR. JUSTICE WHITE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST dissent and, without further briefing and oral argument,

would affirm the judgment. Reported below: 209 N. W. 2d 103.

Certiorari Granted—Vacated and Remanded

No. 72–1359. HEFFERNAN *v.* THOMS. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Spence* v. *Washington, ante,* p. 405, and *Steffel* v. *Thompson,* 415 U. S. 452 (1974). MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST dissent and, without further briefing and oral argument, would reverse the judgment for the reasons stated in Part I of MR. JUSTICE WHITE's dissenting opinion in *Smith* v. *Goguen,* 415 U. S. 566, 591 (1974), and in MR. JUSTICE REHNQUIST's dissenting opinion in *Spence* v. *Washington, ante,* p. 416. Reported below: 473 F. 2d 478.

No. 72–1509. PORTER *v.* GUAM PUBLICATIONS, INC., ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Gertz* v. *Robert Welch, Inc., ante,* p. 323. MR. JUSTICE WHITE would affirm the judgment on the ground that the publication was privileged under the laws of Guam. Reported below: 475 F. 2d 744.

No. 73–787. GROSSMAN *v.* STRIEPEKE, SHERIFF. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Taylor* v. *Hayes, ante,* p. 488.

No. 73–1247. BAXTER ET AL. *v.* PALMIGIANO. C. A. 1st Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Wolff* v. *McDonnell, ante,* p. 539. Reported below: 487 F. 2d 1280.

No. 73–1335. TRAVISONO, CORRECTIONS DIRECTOR, ET AL. *v.* GOMES ET AL. C. A. 1st Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Wolff* v. *McDonnell, ante,* p. 539. Reported below: 490 F. 2d 1209.

No. 73–1533. UNITED STATES *v.* HOPKINS. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Dorszynski* v. *United States, ante,* p. 424. Reported below: 491 F. 2d 1127 and 1133.

Miscellaneous Order

No. 73–1766. UNITED STATES *v.* NIXON, PRESIDENT OF THE UNITED STATES, ET AL.; and

No. 73–1834. NIXON, PRESIDENT OF THE UNITED STATES v. UNITED STATES. Petitions for certiorari before judgment to C. A. D. C. Cir. [Certiorari granted, 417 U. S. 927 and 960.] Motion of American Civil Liberties Union for leave to file a brief as *amicus curiae* in No. 73–1766 granted. Motion of respondent Strachan in No. 73–1766 for leave to participate in oral argument denied.

Probable Jurisdiction Noted

No. 73–1309. BIGELOW *v.* VIRGINIA. Appeal from Sup. Ct. Va. Probable jurisdiction noted. Reported below: 214 Va. 341, 200 S. E. 2d 680.

Certiorari Granted

No. 73–5520. CANTRELL ET AL. *v.* FOREST CITY PUBLISHING CO. ET AL. C. A. 6th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 484 F. 2d 150.

Certiorari Denied

No. 73–1052. BUCKLEY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 10 Cal. 3d 237, 514 P. 2d 1201.

No. 73–6374. FERGUSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 73–6470. GOMES ET AL. *v.* TRAVISONO, CORRECTIONS DIRECTOR, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 490 F. 2d 1209.

No. 73–1584. BENSINGER, CORRECTIONS DIRECTOR, ET AL. *v.* BACH. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

JULY 9, 1974

Miscellaneous Orders

No. A–1146. WARM SPRINGS DAM TASK FORCE ET AL. *v.* GRIBBLE ET AL. D. C. N. D. Cal. Motion of Sonoma County Water Agency et al. to vacate stay heretofore granted by MR. JUSTICE DOUGLAS on June 17, 1974, denied.

No. A–1212. WEAVER, DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS, ET AL. *v.* WILSON ET AL. C. A. 7th Cir. Motion of respondent to vacate stay heretofore granted by MR. JUSTICE REHNQUIST on June 20, 1974, denied. Reported below: 499 F. 2d 155.

No. A–1250 (73–1413). STAATS, COMPTROLLER GENERAL, ET AL. *v.* AMERICAN CIVIL LIBERTIES UNION, INC., ET AL. Appeal from D. C. D. C. [Probable jurisdiction noted, 417 U. S. 944.] Application for stay of order of the United States District Court for the District of Columbia pending final disposition of this case, presented to THE CHIEF JUSTICE and by him referred to the Court, granted.

No. A–1272. MINNESOTA ET AL. *v.* RESERVE MINING CO. ET AL. Application to vacate stay order of United States Court of Appeals for the Eighth Circuit, presented to MR. JUSTICE BLACKMUN and by him referred to the Court, denied. MR. JUSTICE DOUGLAS would grant the application. Reported below: See 498 F. 2d 1073.

JULY 11, 1974

Dismissal Under Rule 60

No. 73–6770. TERRY *v.* UNITED STATES. C. A. 9th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court.

JULY 22, 1974

Dismissals Under Rule 60

No. 73–467. BERRY *v.* NATIONAL BROADCASTING CO., INC. C. A. 8th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 480 F. 2d 428.

No. 73–6879. CARTER *v.* KERN, SHERIFF. C. A. 5th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court.

No. 73–6919. CARTER *v.* COURT OF CRIMINAL APPEALS OF TEXAS. Motion for leave to file petition for writ of mandamus and/or prohibition dismissed under Rule 60 of the Rules of this Court.

JULY 25, 1974

Appeals Dismissed

No. 73–1280. WATKINS *v.* SOUTH CAROLINA. Appeal from Sup. Ct. S. C. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS, being of the view that any state ban on obscenity is prohibited by the First

Amendment, made applicable to the States by the Fourteenth (see *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 70 (1973) (DOUGLAS, J., dissenting)), would note jurisdiction and reverse the judgment. Reported below: 262 S. C. 178, 203 S. E. 2d 429.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Appellant was convicted after a jury trial in the Fourth Judicial Circuit of South Carolina (Darlington County) on charges of feloniously exhibiting an obscene motion picture film in violation of the Code of Laws of South Carolina § 16–414.2 (Supp. 1973), which provides:

> "It shall be unlawful for any person knowingly to send or cause to be sent, or to bring or cause to be brought into South Carolina for sale or distribution, or to prepare, publish, print, exhibit, distribute, or to offer to distribute in the State, or to have in his possession with intent to distribute, or to exhibit or to offer to distribute, any obscene matter."

As used in that section,

> "(a) '*Obscene*' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest among which is a shameful or morbid interest in nudity, sex or excretion, and which goes substantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is to be distributed to minors under sixteen years of age, predominant appeal shall be judged with reference to such class of minors.
>
> "(b) '*Matter*' means any book, magazine, newspaper or other printed or written material or any pic-

ture, drawing, photograph, motion picture or other pictorial representation or any statute [*sic*] or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other article, equipment, machine or material.

"(c) '*Distribute*' means to transfer possession of, whether with or without consideration.

"(d) The word '*knowingly*' as used herein means having knowledge of the contents of the subject matter or failing after reasonable opportunity to exercise reasonable inspection which would have disclosed the character of such subject matter." S. C. Code Ann. § 16–414.1 (Supp. 1973).

The Supreme Court of South Carolina affirmed, 259 S. C. 185, 191 S. E. 2d 135 (1972). On appeal to this Court, the judgment of the Supreme Court of South Carolina was vacated and the case remanded for reconsideration in light of *Miller* v. *California*, 413 U. S. 15 (1973). 413 U. S. 905. On remand, the Supreme Court of South Carolina again affirmed the conviction. 262 S. C. 178, 203 S. E. 2d 429.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). Since it is clear that, when tested by that constitutional standard, the word "obscene" in §§ 16–414.1 and 16–414.2 is constitutionally overbroad and therefore facially invalid, I disagree with the holding that the appeal does not present a substantial federal question, and therefore dissent from the Court's dismissal of the appeal.

For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), and because the judgment of the Supreme Court of South Carolina was rendered after *Miller,* I would reverse. In that circumstance, I have no occasion to consider whether the other questions presented plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Moreover, on the basis of the Court's own holding in *Jenkins* v. *Georgia, ante,* p. 153, its dismissal is improper. As permitted by Rule 21 (1) of the Rules of this Court, which provides that the record in a case need not be certified to this Court, the appellant did not certify the allegedly obscene materials involved in this case. It is plain, therefore, that the Court, which has not requested the certification of those materials, has failed to discharge its admitted responsibility under *Jenkins* independently to review those materials under the second and third parts of the *Miller* obscenity test. Nor can it be assumed that the court below performed such a review, since that responsibility was not made clear until *Jenkins.* Appellant has thus never been provided the independent judicial review to which the Court held him entitled in *Jenkins.* At a minimum, the Court should vacate the judgment below and remand for such a review.

Finally, it does not appear from the jurisdictional statement and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States, ante,* p. 141, I believe that, consistent with the Due Process Clause, appellant must be given an opportunity to have his case decided on, and to introduce evidence relevant to, the legal standard upon which his conviction has ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether appellant

should be afforded a new trial under local community standards.

No. 73–1508. MILLER *v.* CALIFORNIA. Appeal from App. Dept., Super. Ct. Cal., County of Orange, dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS, being of the view that any state ban on obscenity is prohibited by the First Amendment, made applicable to the States by the Fourteenth (see *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70 (1973) (DOUGLAS, J., dissenting)), would note jurisdiction and reverse the judgment.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Appellant was convicted in the Orange County, California, Superior Court of distributing obscene matter in violation of California Penal Code § 311.2 (1970), which provides in pertinent part as follows:

> "Every person who knowingly sends or . . . possesses . . . with intent to distribute or to exhibit to others, . . . any obscene matter is guilty of a misdemeanor."

"Obscene matter" is defined in § 311 (a), which provides in pertinent part as follows:

> " 'Obscene matter' means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i. e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance."

The Appellate Department of the Superior Court affirmed, and this Court vacated the judgment of that court and remanded the case for reconsideration in light of this Court's opinion. 413 U. S. 15 (1973). The Appellate Department again affirmed.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). Since it is clear that, when tested by that constitutional standard, the term "obscene matter" in § 311.2, as defined in § 311 (a) is unconstitutionally overbroad and therefore facially invalid, I disagree with the holding that the appeal does not present a substantial federal question, and therefore dissent from the Court's dismissal of the appeal.

For the reasons stated in my dissent in this case, 413 U. S., at 47, and because the second judgment of the Appellate Department of the California Superior Court was, of course, rendered thereafter, I would reverse. In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Finally, it does not appear from the jurisdictional statement and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States, ante,* p. 141, I believe that, consistent with the Due Process Clause, appellant must be given an opportunity to have his case decided on, and to introduce evidence relevant to, the legal standard upon which his conviction

has ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether appellant should be afforded a new trial under local community standards.

Certiorari Granted—Vacated and Remanded

No. 73–844. TRINKLER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Hamling* v. *United States, ante,* p. 87, and *Jenkins* v. *Georgia, ante,* p. 153. MR. JUSTICE DOUGLAS, being of the view that any state ban on obscenity is prohibited by the First Amendment, made applicable to the States by the Fourteenth (see *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70 (1973) (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment. Reported below: 50 Ala. App. 735, 282 So. 2d 344.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioner was convicted in the Circuit Court of Montgomery County, Alabama, of selling allegedly obscene matter in violation of Title 14, § 374 (4), Code of Alabama (Supp. 1973), which provides in pertinent part as follows:

> "Every person who, with knowledge of its contents, . . . sells . . . any obscene printed or written matter . . . shall be guilty of a misdemeanor. . . ."

"Obscene," for purposes of § 374 (4), is defined in § 374 (3) as meaning "lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest." The Alabama Court of Criminal Appeals affirmed the conviction. 50 Ala. App. 735, 282 So. 2d 344.

It is my view that, "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 374 (4), as it incorporates the definition of "obscene" in § 374 (3), is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissenting opinion in *Miller* v. *California*, 413 U. S. 15, 47 (1973), I would therefore grant certiorari, vacate the judgment of the Alabama Court of Criminal Appeals, and remand for further proceedings not inconsistent with my *Paris Adult Theatre I* dissent.* In that circumstance, I have no occasion to consider at this time whether the other questions presented in the petition merit plenary review. See *Heller* v. *New York*, 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

No. 73–1430. BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, ET AL. *v.* NEWBURG AREA COUNCIL, INC., ET AL.;

No. 73–1431. BOARD OF EDUCATION OF LOUISVILLE, KENTUCKY, ET AL. *v.* HAYCRAFT ET AL.; and

No. 73–1445. BOARD OF EDUCATION OF ANCHORAGE, KENTUCKY, ET AL. *v.* HAYCRAFT ET AL. C. A. 6th Cir. Petitions for writs of certiorari granted. Judgments vacated and cases remanded for further consideration in light of *Milliken* v. *Bradley*, *ante*, p. 717. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, MR. JUSTICE WHITE,

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

and MR. JUSTICE MARSHALL would grant certiorari and, without further briefing or oral argument, would affirm the judgments. Reported below: 489 F. 2d 925.

Miscellaneous Orders

No. A–1265 (73–2014). MISSOURI PORTLAND CEMENT CO. *v.* CARGILL, INC. C. A. 2d Cir. Motion of respondent to vacate stay heretofore entered by MR. JUSTICE DOUGLAS on July 12, 1974, granted. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion. Reported below: 498 F. 2d 851.

MR. JUSTICE DOUGLAS, dissenting.

Cargill, desirous of acquiring control of petitioner, made a cash offer for all of petitioner's common stock. Petitioner thereupon filed this suit in the United States District Court for the Southern District of New York to enjoin that tender offer, alleging that acquisition of control of petitioner would violate § 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 18. That court issued the injunction stating in a detailed opinion its view that the acquisition of stock control by Cargill raises serious antitrust issues.

The sole question here is whether Cargill's attempts to take over Missouri Portland will be enjoined, pending the outcome of a trial on the merits of Missouri Portland's claim that a merger of these two companies would violate the antitrust laws. The District Court granted such an injunction, 375 F. Supp. 249, but the Court of Appeals reversed. 498 F. 2d 851. Missouri Portland sought and received a stay of the Court of Appeals' mandate, thus reinstituting the injunction issued by the District Court. Today the Court vacates that stay.

The Court treats the case as if we were in the sensitive First Amendment field where relatively minor restraints may have a "chilling" effect on an important constitu-

tional right. But as I read the Constitution and Bill of Rights, a corporation has no constitutional right to merge, consolidate, or acquire the assets of another company. The old Court in the days of "substantive due process" built an expansive corporate Bill of Rights by reading "liberty" in the Due Process Clause of the Fifth Amendment as including the "liberty" to exploit people, our resources, and our environment. The Court trifles with the antitrust laws when it vacates a stay that only requires Cargill to wait until there is a ruling on the merits before it swallows up Missouri Portland. What the Court does today is a shocking example of the disregard of law to please the management of huge conglomerates. Denial of a stay means a decision on the merits. For once the companies and their personnel are mixed, the momentum to complete the acquisition is almost irresistible. By careless neglect we actually decide that what appears to be a monstrous violation of the law may go on unremedied.

I

The Court of Appeals did not hold that the findings of the District Court were "clearly erroneous." The Court of Appeals considered the issue on the merits to be frivolous and only required Cargill to agree to hold the assets of Missouri Portland in a separate corporation or division so that it can be divested under any subsequent decree of the Court. But that misses the whole point, as I will make clear.

II

Missouri Portland is the Nation's 20th largest producer of Portland cement with 2% of the national capacity and 8% in the 11-state region it serves. The District Court defined the relevant markets here as four

metropolitan areas in which Missouri Portland ranks either first or second in market share. In all of these markets the top four firms have at least 88% of the market.[1]

Cargill is a huge, privately held conglomerate with headquarters in Minneapolis. In fiscal 1973 it had sales of $5.3 billion. Cargill specializes in commodities and thus has special skills in the transportation of heavy, bulk products and in the sale of fungible products. Cement is a heavy, bulky, fungible product, but Cargill is not involved in the cement industry.

Substantial antitrust issues are raised by the proposed takeover of Missouri Portland by Cargill. The District Court found that Cargill is the most likely potential entrant into the cement industry and concluded that a significant anticompetitive effect would result from Cargill's entry via a takeover of an already dominant firm rather than by *de novo* entry or by "toehold" acquisition. Furthermore, the District Court found that the addition of Cargill's huge financial resources to Missouri Portland's already substantial assets will raise significant barriers to entry of others in the relevant markets and will tend to increase the dominance of Missouri Portland in markets which are already heavily concentrated. Finally, the District Court noted that the challenged acquisition would eliminate a potential competitor from the fringe of the market, thereby possibly resulting in an additional anticompetitive effect.

The Court of Appeals disputed all of these conclusions by the District Court. Yet the very fact that disagreement exists between the two lower courts on these points indicates the likely existence of a substantial question. If the District Court's version of the facts is the correct

[1] The four metropolitan markets are St. Louis, Kansas City, Memphis, and Omaha.

one, it seems that the takeover would violate the Clayton Act. See *United States* v. *Falstaff Brewing Corp.*, 410 U. S. 526 (1973); *Ford Motor Co.* v. *United States*, 405 U. S. 562 (1972); *FTC* v. *Procter & Gamble Co.*, 386 U. S. 568 (1967); *United States* v. *Penn-Olin Chemical Co.*, 378 U. S. 158 (1964); *United States* v. *El Paso Natural Gas Co.*, 376 U. S. 651 (1964).

III

The issues raised by the petition for certiorari present a substantial question that involves a conflict between the decisions below and another Court of Appeals. In *Kennecott Copper Corp.* v. *FTC*, 467 F. 2d 67 (CA10 1972), the court held that anticompetitive effect could occur even though the acquiring and acquired corporations did not produce related products but did have related skills.[2] The court below was confronted with facts strikingly similar to those of *Kennecott* as regards the lack of related products but the presence of related skills. That court, however, candidly admitted that it was declining to follow the *Kennecott* decision. 498 F. 2d, at 860 n. 14. In our decision in *United States* v. *Falstaff Brewing Corp., supra,* at 537, we left open the extent to which potential anticompetitive effect will be considered determinative in "conglomerate mergers" such as this one where entry could have been *de novo* or via "toehold" ac-

[2] In addition, the opinion of the court below conflicts with decisions of other Courts of Appeals on the significance of the acquiring corporation's "deep pocket." According to the court below, the facts that the acquiring corporation has great financial resources and that it intends to use these resources are not enough to show potential anticompetitive effect. But see *General Foods Corp.* v. *FTC*, 386 F. 2d 936 (CA3 1967); *United States Steel Corp.* v. *FTC*, 426 F. 2d 592 (CA6 1970); *Ecko Products Co.* v. *FTC*, 347 F. 2d 745 (CA7 1965); *Kennecott Copper Co.* v. *FTC*, 467 F. 2d 67 (CA10 1972).

quisition. Given the conflict between the Circuits on this matter, the present case presents a good vehicle in which we should consider this problem.

IV

Cargill had acquired 18% of the common stock of Missouri Portland before the injunction issued. Now that the injunction has been lifted by the Court of Appeals and this Court, Cargill is free to acquire the controlling interest in Missouri Portland. That means that it can dictate what its subsidiary will do. We are foolhardy to assume that the litigation will then go on. Cargill in control of its subsidiary will make the subsidiary toe the line and be obedient to Cargill's wishes. The substantial antitrust issue apparent in the conflict between the Courts of Appeals will now not likely be resolved. The internal segregation of assets of the two companies is only an idle gesture.

If we fail to live under a rule of law and instead leave the field open to the uncontrolled machinations of conglomerates, Cargill will follow the infamous pattern of IT&T, uncontrolled and uncontrollable. Behind this motion to vacate the stay are very large questions of law and public policy. What is the place of antitrust law in the conglomerate field? Are conglomerates immune as some suggest? If not, what controls over them exist under present antitrust laws? These are questions that are substantial and pressing. The Circuits are in conflict; and the Court goes pellmell for an escape for this conglomerate from a real test under existing antitrust law.

I repeat, there is no constitutional right to take over other companies. Cargill should be required to accept delay as one of the risks it incurred by seeking to gain control of so dominant a firm in the cement industry

rather than being content with a "toehold" acquisition or *de novo* entry.

I would continue the stay in force until the merits of the case have been adjudicated.

No. 73–1162. UNITED STATES *v.* WILSON ET AL. C. A. 2d Cir. [Certiorari granted, 416 U. S. 981.] It is ordered that John S. Martin, Jr., Esquire, of New York, New York, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for respondent Bryan in this case.

Certiorari Denied

No. 73–528. CARLSON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any federal ban on obscenity is prohibited by the First Amendment (see *United States* v. *12 200-ft. Reels of Film*, 413 U. S. 123, 130 (1973) (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioners were convicted in the United States District Court for the Central District of California of mailing allegedly obscene matter in violation of 18 U. S. C. § 1461, which provides in pertinent part as follows:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance . . .
>
> . . . . .
>
> "Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> "Whoever knowingly uses the mails for the mailing . . . of anything declared by this section . . . to be

> nonmailable . . . shall be fined not more than $5,000 or imprisoned not more than five years . . . ."

The Court of Appeals for the Ninth Circuit affirmed the convictions.

I adhere to my dissent in *United States* v. *Orito,* 413 U. S. 139, 147 (1973), in which, speaking of 18 U. S. C. § 1462, which is similar in scope to § 1461, I expressed the view that "[w]hatever the extent of the Federal Government's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face." *Id.,* at 147–148. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore grant certiorari, and, since the judgment of the Court of Appeals for the Ninth Circuit was rendered after *Orito,* reverse.*

Moreover, on the basis of the Court's own holding in *Jenkins* v. *Georgia, ante,* p. 153, its denial of certiorari is improper. As permitted by Rule 21 (1) of the Rules of this Court, which provides that the record in a case need not be certified to this Court, the petitioners did not certify the allegedly obscene materials involved in this case. It is plain, therefore, that the Court, which has not requested the certification of those materials, has failed to discharge its admitted responsibility under *Jenkins* independently to review those materials under the second and third parts of the *Miller* obscenity test. Nor can it be assumed that the court below performed such a review, since that responsibility was not made clear until *Jenkins.* Petitioners have thus never been

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

provided the independent judicial review to which the Court held them entitled in *Jenkins*. At a minimum, the Court should vacate the judgment below and remand for such a review.

Finally, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States, ante,* p. 141, I believe that, consistent with the Due Process Clause of the Fifth Amendment, petitioners must be given an opportunity to have their case decided on, and introduce evidence relevant to, the legal standard upon which their convictions have ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioners should be afforded a new trial under local community standards.

No. 73-584. SIANS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any federal ban on obscenity is prohibited by the First Amendment (see *United States* v. *12 200-ft. Reels of Film,* 413 U. S. 123, 130 (1973) (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment. Reported below: 481 F. 2d 1406.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioner was convicted in the United States District Court for the Northern District of Illinois on charges of using a common carrier for carriage of allegedly obscene matter in violation of 18 U. S. C. § 1462, which provides in pertinent part as follows:

> "Whoever . . . knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

> "(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character . . .
>
> . . . . .
>
> "Shall be fined not more than $5,000 or imprisoned not more than five years, or both . . . ."

The Court of Appeals for the Seventh Circuit affirmed the conviction. 481 F. 2d 1406.

I adhere to my dissent in *United States* v. *Orito*, 413 U. S. 139, 147 (1973), in which, speaking of 18 U. S. C. § 1462, I expressed the view that "[w]hatever the extent of the Federal Government's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face." *Id.*, at 147–148. For the reasons stated in my dissent in *Miller* v. *California*, 413 U. S. 15, 47 (1973), I would therefore grant certiorari, and, since the judgment of the Court of Appeals for the Seventh Circuit was rendered after *Orito*, reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York*, 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Finally, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States*, *ante*, p. 141, I believe that, consistent with the Due Process Clause, petitioner must be given an opportunity to have his case decided on, and to introduce evidence relevant to the

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

legal standard upon which his conviction has ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioner should be afforded a new trial under local community standards.

No. 73–788. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any federal ban on obscenity is prohibited by the First Amendment (see *United States* v. *12 200-ft. Reels of Film*, 413 U. S. 123, 130 (1973) (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioner was convicted in the United States District Court for the Eastern District of Virginia of transporting allegedly obscene materials by common carrier in violation of 18 U. S. C. § 1462, which provides in pertinent part as follows:

> "Whoever . . . knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—
>
> "(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character . . .
>
> . . . . .
>
> "Shall be fined not more than $5,000 or imprisoned not more than five years, or both . . . ."

The Court of Appeals for the Fourth Circuit affirmed in an unreported opinion. This Court vacated the judgment and remanded the case to the Court of Appeals for further consideration in light of *Miller* v. *California*, 413

U. S. 15 (1973), and companion cases. 413 U. S. 912. The Court of Appeals again affirmed the conviction.

I adhere to my dissent in *United States* v. *Orito*, 413 U. S. 139, 147 (1973), in which, speaking of 18 U. S. C. § 1462, I expressed the view that "[w]hatever the extent of the Federal Government's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face." *Id.*, at 147–148. For the reasons stated in my dissent in *Miller* v. *California*, *supra*, at 47, I would therefore grant certiorari, and, since the judgment of the Court of Appeals for the Fourth Circuit was rendered after *Orito*, reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York*, 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Moreover, on the basis of the Court's own holding in *Jenkins* v. *Georgia*, *ante*, p. 153, its denial of certiorari is improper. As permitted by Rule 21 (1) of the Rules of this Court, which provides that the record in a case need not be certified to this Court, the petitioner did not certify the allegedly obscene materials involved in this case. It is plain, therefore, that the Court, which has not requested the certification of those materials, has failed to discharge its admitted responsibility under *Jenkins* independently to review those materials under the second and third parts of the *Miller* obscenity test. Nor can it be assumed that the court below performed such a review, since that responsibility was not made clear until *Jenkins*. Petitioner has thus never been pro-

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

vided the independent judicial review to which the Court held him entitled in *Jenkins*. At a minimum, the Court should vacate the judgment below and remand for such a review.

Finally, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States*, *ante*, p. 141, I believe that, consistent with the Due Process Clause, petitioner must be given an opportunity to have his case decided on, and to introduce evidence relevant to, the legal standard upon which his conviction has ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioner should be afforded a new trial under local community standards.

No. 73–1060. VILLAGE BOOKS, INC., ET AL. *v.* MARSHALL, STATE'S ATTORNEY FOR PRINCE GEORGES COUNTY. Ct. App. Md. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any state ban on obscenity is prohibited by the First Amendment, made applicable to the States by the Fourteenth (see *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 70 (1973) (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment below. Reported below: See 263 Md. 76, 282 A. 2d 126.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioners were enjoined by the Circuit Court for Prince Georges County, Maryland, from selling a group of allegedly obscene books, on the authority of Art. 27, §§ 418 and 418A, of the Annotated Code of Maryland. Section 418A grants jurisdiction to the circuit courts to enjoin the sale or distribution of any publication which is "obscene" within the meaning of § 418. Section 418

provides in pertinent part as follows: "Every person who knowingly sends or causes to be sent . . . into this State . . . or . . . distributes . . . any obscene matter is guilty of a misdemeanor." As respondent concedes, the Maryland courts have defined the term "obscenity" in this section by adopting the test set forth in *Roth* v. *United States,* 354 U. S. 476 (1957). See *Wagonheim* v. *Maryland State Board of Censors,* 255 Md. 297, 304–305, 258 A. 2d 240, 243–244 (1969). The Court of Appeals affirmed, 263 Md. 76, 282 A. 2d 126, and this Court granted certiorari, vacated the judgment of the Court of Appeals, and remanded the case for reconsideration in light of *Miller* v. *California,* 413 U. S. 15 (1973). 413 U. S. 911. That court again affirmed in an unreported opinion.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 418A, as it incorporates the term "obscene" in § 418, is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California, supra,* at 47, I would therefore grant certiorari, and, since the judgment of the Maryland Court of Appeals was rendered after *Miller*, reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

review. See *Heller* v. *New York*, 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Moreover, on the basis of the Court's own holding in *Jenkins* v. *Georgia*, *ante*, p. 153, its denial of certiorari is improper. As permitted by Rule 21 (1) of the Rules of this Court, which provides that the record in a case need not be certified to this Court, the petitioners did not certify the allegedly obscene materials involved in this case. It is plain, therefore, that the Court, which has not requested the certification of those materials, has failed to discharge its admitted responsibility under *Jenkins* independently to review those materials under the second and third parts of the *Miller* obscenity test. Nor can it be assumed that the court below performed such a review, since that responsibility was not made clear until *Jenkins*. Petitioners have thus never been provided the independent judicial review to which the Court held them entitled in *Jenkins*. At a minimum, the Court should vacate the judgment below and remand for such a review.

No. 73–1075. THEVIS *v.* UNITED STATES; and

No. 73–1091. PEACHTREE NEWS CO., INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any federal ban on obscenity is prohibited by the First Amendment (see *United States* v. *12 200-ft. Reels of Film*, 413 U. S. 123, 130 (1973) (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment. Reported below: 484 F. 2d 1149.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioners were convicted in the United States District Court for the Middle District of Florida on charges of using a common carrier for carriage of allegedly obscene

matter in violation of 18 U. S. C. § 1462, which provides in pertinent part as follows:

> "Whoever . . . knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—
>
> "(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character . . .
>
> . . . . .
>
> "Shall be fined not more than $5,000 or imprisoned not more than five years, or both . . . ."

The Court of Appeals for the Fifth Circuit affirmed the convictions on six counts. 484 F. 2d 1149.

I adhere to my dissent in *United States* v. *Orito*, 413 U. S. 139, 147 (1973), in which, speaking of 18 U. S. C. § 1462, I expressed the view that "[w]hatever the extent of the Federal Government's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face." *Id.*, at 147–148. For the reasons stated in my dissent in *Miller* v. *California*, 413 U. S. 15, 47 (1973), I would therefore grant certiorari, and, since the judgment of the Court of Appeals for the Fifth Circuit was rendered after *Orito*, reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York*, 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Moreover, on the basis of the Court's own holding in *Jenkins* v. *Georgia*, *ante*, p. 153, its denials of certiorari are

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the cases be decided on the merits.

improper. As permitted by Rule 21 (1) of the Rules of this Court, which provides that the record in a case need not be certified to this Court, the petitioners did not certify the allegedly obscene materials involved in these cases. It is plain, therefore, that the Court, which has not requested the certification of those materials, has failed to discharge its admitted responsibility under *Jenkins* independently to review those materials under the second and third parts of the *Miller* obscenity test. Nor can it be assumed that the court below performed such a review, since that responsibility was not made clear until *Jenkins*. Petitioners have thus never been provided the independent judicial review to which the Court held them entitled in *Jenkins*. At a minimum, the Court should vacate the judgment below and remand for such a review.

Finally, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States, ante,* p. 141, I believe that, consistent with the Due Process Clause, petitioners must be given an opportunity to have their cases decided on, and to introduce evidence relevant to, the legal standard upon which their convictions have ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for determinations whether petitioners should be afforded new trials under local community standards.

No. 73–1076. CANGIANO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any federal ban on obscenity is prohibited by the First Amendment (see *United States* v. *12 200-ft. Reels of Film,* 413 U. S. 123, 130 (1973)

(DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment. Reported below: 491 F. 2d 905.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioners were convicted in the United States District Court for the Eastern District of New York of transporting allegedly obscene materials in interstate commerce for the purpose of sale in violation of 18 U. S. C. § 1465, which provides in pertinent part as follows:

> "Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, case, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

The Court of Appeals for the Second Circuit affirmed the convictions, 464 F. 2d 320 (1973). This Court vacated the judgment and remanded the case to the Court of Appeals for further consideration in light of *Miller* v. *California*, 413 U. S. 15 (1973), and companion cases. 413 U. S. 913. The Court of Appeals again affirmed the convictions. 491 F. 2d 905.

I adhere to my dissent in *United States* v. *Orito*, 413 U. S. 139, 147 (1973), in which, speaking of 18 U. S. C. § 1462, which is similar in scope to § 1465, I expressed the view that "[w]hatever the extent of the Federal Government's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face." *Id.*,

at 147–148. For the reasons stated in my dissent in *Miller* v. *California, supra,* at 47, I would therefore grant certiorari, and, since the judgment of the Court of Appeals for the Second Circuit was rendered after *Orito,* reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Moreover, on the basis of the Court's own holding in *Jenkins* v. *Georgia, ante,* p. 153, its denial of certiorari is improper. As permitted by Rule 21 (1) of the Rules of this Court, which provides that the record in a case need not be certified to this Court, the petitioners did not certify the allegedly obscene materials involved in this case. It is plain, therefore, that the Court, which has not requested the certification of those materials, has failed to discharge its admitted responsibility under *Jenkins* independently to review those materials under the second and third parts of the *Miller* obscenity test. Nor can it be assumed that the court below performed such a review, since that responsibility was not made clear until *Jenkins.* Petitioners have thus never been provided the independent judicial review to which the Court held them entitled in *Jenkins.* At a minimum, the Court should vacate the judgment below and remand for such a review.

Finally, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States, ante,* p. 141,

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

I believe that, consistent with the Due Process Clause, petitioners must be given an opportunity to have their case decided on, and to introduce evidence relevant to, the legal standard upon which their convictions have ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioners should be afforded a new trial under local community standards.

No. 73–1136. ENSKAT *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any state ban on obscenity is prohibited by the First Amendment, made applicable to the States by the Fourteenth (see *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70 (1973) (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment. Reported below: 33 Cal. App. 3d 900, 109 Cal. Rptr. 433.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioner was convicted in the Superior Court of California, County of Los Angeles, of exhibiting an allegedly obscene motion picture in violation of California Penal Code § 311.2 (1970), which provides in pertinent part as follows:

> "Every person who knowingly sends or . . . possesses . . . with intent to distribute or to exhibit to others, . . . any obscene matter is guilty of a misdemeanor."

"Obscene matter" is defined in § 311 (a), which provides in pertinent part as follows:

> " 'Obscene matter' means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i. e., a shameful or morbid interest in nudity,

> sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance."

Petitioner's appeal was certified by the Appellate Department of the Superior Court to the Court of Appeal which, after rehearing, affirmed. 33 Cal. App. 3d 900, 109 Cal. Rptr. 433. The California Supreme Court denied certiorari.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 311.2, as it incorporates the definition of "obscene matter" of § 311 (a), is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore grant certiorari, and, since the judgment of the California Court of Appeal was rendered after *Miller,* reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Moreover, on the basis of the Court's own holding in *Jenkins* v. *Georgia, ante,* p. 153, its denial of certiorari is improper. As permitted by Rule 21 (1) of the Rules

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

of this Court, which provides that the record in a case need not be certified to this Court, the petitioner did not certify the allegedly obscene materials involved in this case. It is plain, therefore, that the Court, which has not requested the certification of those materials, has failed to discharge its admitted responsibility under *Jenkins* independently to review those materials under the second and third parts of the *Miller* obscenity test. Nor can it be assumed that the court below performed such a review, since that responsibility was not made clear until *Jenkins*. Petitioner has thus never been provided the independent judicial review to which the Court held him entitled in *Jenkins*. At a minimum, the Court should vacate the judgment and remand for such a review.

Finally, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States, ante,* p. 141, I believe that, consistent with the Due Process Clause of the Fourteenth Amendment, petitioner must be given an opportunity to have his case decided on, and to introduce evidence relevant to, the legal standard upon which his conviction has ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioner should be afforded a new trial under local community standards.

No. 73–1161. PARIS ADULT THEATRE I ET AL. *v.* SLATON, DISTRICT ATTORNEY, ET AL. Sup. Ct. Ga. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any state ban on obscenity is prohibited by the First Amendment, made applicable to the States by the Fourteenth (see *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70 (1973) (DOUGLAS, J., dissenting)), would grant certi-

orari and reverse the judgment below. Reported below: 231 Ga. 312, 201 S. E. 2d 456.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Respondents, the local state district attorney and solicitor for the local state trial court, filed civil complaints seeking to enjoin petitioners, Atlanta, Georgia, movie theaters and their owners and managers, from exhibiting two allegedly obscene films, in violation of Georgia Code Ann. § 26–2101 (1972). That section provides, in relevant part:

> "(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do . . . .
>
> "(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. . . .
>
> . . . . .
>
> "(d) A person convicted of distributing obscene material shall for the first offense be punished as for a misdemeanor, and for any subsequent offense shall be punished by imprisonment for not less than one nor more than five years, or by a fine not to exceed $5,000, or both."

The trial judge dismissed respondents' complaints, but the Georgia Supreme Court reversed. 228 Ga. 343, 185

S. E. 2d 768 (1971). This Court vacated the State Supreme Court's judgment and remanded the case for further proceedings. 413 U. S. 49 (1973). On remand, the Georgia Supreme Court affirmed its original decision reversing the trial court and directing the trial court to enter an order enjoining the exhibition of the films.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Id.*, at 113 (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 26–2101 is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California*, 413 U. S. 15, 47 (1973), I would therefore grant certiorari, and, since the judgment of the Georgia Supreme Court was rendered after *Miller*, reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York*, 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Moreover, on the basis of the Court's own holding in *Jenkins* v. *Georgia*, *ante*, p. 153, its denial of certiorari is improper. As permitted by Rule 21 (1) of the Rules of this Court, which provides that the record in a case need not be certified to this Court, the petitioners did not certify the allegedly obscene materials involved in this case. It is plain, therefore, that the Court, which has not requested the certification of those materials, has failed to discharge its admitted responsibility under *Jenkins* independently to review those materials under the second and third parts of the *Miller* obscenity test.

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

Petitioners have thus not been provided the independent judicial review to which the Court held them entitled in *Jenkins*.

Finally, it does not appear from the petition that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States, ante,* p. 141, I believe that, consistent with the Due Process Clause, petitioners must be given an opportunity to have their case decided on, and to introduce evidence relevant to, the legal standard upon which the injunction has ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioners should be afforded a new trial under local community standards.

No. 73–1260. KAPLAN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any federal ban on obscenity is prohibited by the First Amendment (see *United States* v. *12 200-ft. Reels of Film,* 413 U. S. 123, 130 (1973) (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment. Reported below: 311 A. 2d 506.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioner was convicted in the District of Columbia Court of General Sessions of presenting an obscene film in violation of D. C. Code § 22–2001 (a)(1)(B) (1973), which provides in pertinent part: "It shall be unlawful in the District of Columbia for a person knowingly . . . to present . . . any obscene, indecent, or filthy play, dance, motion picture, or other performance." The District of Columbia Court of Appeals affirmed, 277 A. 2d 477, and this Court granted certiorari, vacated the judgment, and remanded the case for further consideration in light of

Miller v. *California,* 413 U. S. 15 (1973), and companion cases. 413 U. S. 913. The Court of Appeals again affirmed. 311 A. 2d 506.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 22–2001 (a)(1)(B) is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California, supra,* at 47, I would therefore grant certiorari, and, since the judgment of the District of Columbia Court of Appeals was rendered after *Miller,* reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Moreover, on the basis of the Court's own holding in *Jenkins* v. *Georgia, ante,* p. 153, its denial of certiorari is improper. As permitted by Rule 21 (1) of the Rules of this Court, which provides that the record in a case need not be certified to this Court, the petitioner did not certify the allegedly obscene materials involved in this case. It is plain, therefore, that the Court, which has not requested the certification of those materials, has failed to discharge its admitted responsibility under *Jenkins* independently to review those materials under the second and third parts of the *Miller* obscenity test. Nor can it be as-

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

sumed that the court below performed such a review, since that responsibility was not made clear until *Jenkins*. Petitioner has thus never been provided the independent judicial review to which the Court held him entitled in *Jenkins*. At a minimum, the Court should vacate the judgment below and remand for such a review.

Finally, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States, ante*, p. 141, I believe that, consistent with the Due Process Clause, petitioner must be given an opportunity to have his case decided on, and to introduce evidence relevant to, the legal standard upon which his conviction has ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioner should be afforded a new trial under local community standards.

No. 73–1605. BUCKLEY ET AL. *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any state ban on obscenity is prohibited by the First Amendment, made applicable to the States by the Fourteenth (see *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 70 (1973) (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment. Reported below: 33 N. Y. 2d 314, 307 N. E. 2d 805.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioners were convicted in the Criminal Court of the City of New York of promotion of obscene material in violation of New York Penal Law § 235.05 (Supp. 1973–1974), which provides in pertinent part:

> "A person is guilty of obscenity in the second degree when, knowing its content and character, he:

"1. Promotes, or possesses with intent to promote, any obscene material.

. . . . . .

"Obscenity in the second degree is a class A misdemeanor."

"Obscene" is defined in § 235.00 (1967), which provides:

"Any material or performance is 'obscene' if (a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters, and (c) it is utterly without redeeming social value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience."

The Appellate Term affirmed the convictions, and the New York Court of Appeals affirmed by a divided court. 33 N. Y. 2d 314, 307 N. E. 2d 805.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 235.05 is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore grant certiorari, and, since the judgment of the New York Court of Appeals was rendered

after *Miller*, reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York*, 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Moreover, on the basis of the Court's own holding in *Jenkins* v. *Georgia*, *ante*, p. 153, its denial of certiorari is improper. As permitted by Supreme Court Rule 21 (1), which provides that the record in a case need not be certified to this Court, the petitioners did not certify the allegedly obscene materials involved in this case. It is plain, therefore, that the Court, which has not requested the certification of those materials, has failed to discharge its admitted responsibility under *Jenkins* independently to review those materials under the second and third parts of the *Miller* obscenity test. Nor can it be assumed that the court below performed such a review, since that responsibility was not made clear until *Jenkins*. Petitioners have thus never been provided the independent judicial review to which the Court held them entitled in *Jenkins*. At a minimum, the Court should vacate the judgment below and remand for such a review.

Finally, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States*, *ante*, p. 141, I believe that, consistent with the Due Process Clause, petitioners must be given an opportunity to have their case decided on, and to introduce evidence relevant to, the legal standard upon which their convictions have ultimately come to depend. Thus, even on its own

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

terms, the Court should vacate the judgment below and remand for a determination whether petitioners should be afforded a new trial under local community standards.

No. 73–5927. MILLICAN, DBA HIP MAGAZINE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any federal ban on obscenity is prohibited by the First Amendment (see *United States* v. *12 200-ft. Reels of Film*, 413 U. S. 123, 130 (1973) (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment. Reported below: 487 F. 2d 331.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioner was convicted in the United States District Court for the Northern District of Georgia of using the mails to distribute allegedly obscene materials in violation of 18 U. S. C. § 1461, which provides in pertinent part as follows:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance . . .
>
> . . . . .
>
> "Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> "Whoever knowingly uses the mails for the mailing . . . of anything declared by this section . . . to be nonmailable, . . . shall be fined not more than $5,000 or imprisoned not more than five years . . . ."

The Court of Appeals for the Fifth Circuit affirmed. 487 F. 2d 331.

I adhere to my dissent in *United States* v. *Orito*, 413 U. S. 139, 147 (1973), in which, speaking of 18 U. S. C. § 1462, which is similar in scope to § 1461, I expressed the view that "[w]hatever the extent of the Federal Govern-

ment's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face." *Id.*, at 147–148. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore grant certiorari, and, since the judgment of the Court of Appeals for the Fifth Circuit was rendered after *Orito,* reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Moreover, on the basis of the Court's own holding in *Jenkins* v. *Georgia, ante,* p. 153, its denial of certiorari is improper. As permitted by Rule 21 (1) of the Rules of this Court, which provides that the record in a case need not be certified to this Court, the petitioner did not certify the allegedly obscene materials involved in this case. It is plain, therefore, that the Court, which has not requested the certification of those materials, has failed to discharge its admitted responsibility under *Jenkins* independently to review those materials under the second and third parts of the *Miller* obscenity test. Nor can it be assumed that the court below fully performed such a review, since that responsibility was not made clear until *Jenkins.* Petitioner has thus never been provided the independent judicial review to which the Court held him entitled in *Jenkins.* At a minimum, the Court should vacate the judgment below and remand for such a review.

Finally, it does not appear from the petition and response that the obscenity of the disputed materials

*Although four of us would grant certiorari and reverse the judgments, the Justices who join this opinion do not insist that the case be decided on the merits.

was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States*, *ante*, p. 141, I believe that, consistent with the Due Process Clause, petitioner must be given an opportunity to have his case decided on, and to introduce evidence relevant to, the legal standard upon which his conviction has ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioner should be afforded a new trial under local community standards.

No. 73–937. J–R DISTRIBUTORS, INC., ET AL. *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any state ban on obscenity is prohibited by the First Amendment, made applicable to the States by the Fourteenth (see *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 70 (1973) (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment. Reported below: 82 Wash. 2d 584, 512 P. 2d 1049.

MR. JUSTICE WHITE.

In this case and in 13 other cases involving issues dealing with obscenity, MR. JUSTICE BRENNAN complains that by denying certiorari or dismissing an appeal, the Court has failed to pass independently on the obscenity of the materials involved. This is a task which he has insisted, see *Jacobellis* v. *Ohio*, 378 U. S. 184, 187–190 (1964), the Court must perform under the approach to obscenity which he espoused and explicated for the Court in *Roth* v. *United States*, 354 U. S. 476 (1957); which he refined for himself and others in *Jacobellis* v. *Ohio*, *supra*; *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966); *Ginzburg* v. *United States*, 383 U. S. 463 (1966); *Mishkin* v. *New York*, 383 U. S. 502 (1966); and *Ginsberg* v. *New York*, 390 U. S. 629 (1968); but which he has now repudiated.

Brother BRENNAN's complaints are wide of the mark. Obscenity cases, like others, are not immune from the standards generally governing the exercise of our appellate jurisdiction. The Court has never indicated that plenary review is mandatory in every case dealing with the issue of obscenity.

In five of these cases,[1] the issue whether the materials involved are obscene was not presented to this Court and the publications themselves were not lodged here. Rule 23 (1)(c) of this Court's Rules provides that "[o]nly the questions set forth in the petition or fairly comprised therein will be considered by the court." Rule 15 (1)(c) with respect to appeals is to the identical effect. I suggest that we are entitled to follow our own Rules. See R. Stern & E. Gressman, Supreme Court Practice § 6.37, pp. 297–299 (4th ed. 1969).

In six other cases,[2] the issue of obscenity *vel non* is among the questions presented here, but the materials themselves have not been filed with this Court. While our Rules permit parties to dispense with filing the entire record at the petition for certiorari stage, a petitioner is completely free at that time to file all or any part of the record he deems necessary or desirable to present clearly the issues he wants reviewed. Indeed, our Rule 23 (4) states that "[t]he failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition." Had the petitioner in any of

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[1] *Carlson* v. *United States, supra; Village Books, Inc.* v. *Marshall, supra; Cangiano* v. *United States, supra; Kaplan* v. *United States, supra;* and *Watkins* v. *South Carolina, supra.*

[2] *Brown* v. *United States, supra; Thevis* v. *United States, supra; Peachtree News Co., Inc.* v. *United States, supra; Enskat* v. *California, supra; Paris Adult Theatre I* v. *Slaton, supra;* and *Millican* v. *United States, supra.*

these cases desired that serious attention be given to the materials themselves, he could have filed them here. Moreover, in each instance either the Court of Appeals or the state appellate court expressly addressed the issue of obscenity and found the materials obscene under proper standards. Under these circumstances, denying certiorari is wholly consistent with our practice.

Finally, I join in denying petitions for certiorari in this case and two other cases, *Buckley* v. *New York, supra,* and *Sians* v. *United States, supra.* In *Buckley,* the materials in question have been lodged with the Court, and the issue of their obscenity is raised in the petition for certiorari. They were examined and described by the Court of Appeals for the State of New York and were held to be obscene under both *Miller* and pre-*Miller* standards. Examination of the materials has not persuaded me that certiorari should be granted. The same is true of *Sians.* The materials, an unremitting series of explicit photographs of a wide spectrum of sexual conduct, including homosexual acts, anal intercourse, fellatio, cunnilingus, and group orgies, were held obscene under any standard by the Court of Appeals. I would not review that judgment.

In *J–R Distributors, Inc.,* the case in which this opinion is filed, the issue of the obscenity of the materials involved was raised in the petition for certiorari, and part, but not all, of them was lodged with this Court. I join in denying the petition for certiorari. Although some of the materials have not been filed here and are therefore not before us, the Washington Supreme Court found all of them obscene under both *Roth* and *Miller* standards. As for the materials on file, it is sufficiently clear to me that they fall within the category of hard-core pornography unprotected by the First Amendment that plenary review is not required. One of the publications involved is Sex Between Humans and Animals. MR.

JUSTICE BRENNAN would apparently hold that the First Amendment prohibits government from denying consenting adults access to such material, but I do not construe the First Amendment as preventing the States from prohibiting the distribution of a publication whose dominant theme is represented by repeated photographs of men and women performing sex acts with a variety of animals.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioners were convicted for violations of Revised Code of Washington § 9.68.010 (Supp. 1972), which provides:

> "Every person who—
>
> "(1) Having knowledge of the contents thereof shall exhibit, sell, distribute, display for sale or distribution, or having knowledge of the contents thereof shall have in his possession with the intent to sell or distribute any book, magazine, pamphlet, comic book, newspaper, writing, photograph, motion picture film, phonograph record, tape or wire recording, picture, drawing, figure, image, or any object or thing which is obscene; or
>
> "(2) Having knowledge of the contents thereof shall cause to be performed or exhibited, or shall engage in the performance or exhibition of any show, act, play, dance or motion picture which is obscene;
>
> "Shall be guilty of a gross misdemeanor.
>
> "The provisions of this section shall not apply to acts done in the scope of his employment by a motion picture operator or projectionist employed by the owner or manager of a theatre or other place for the showing of motion pictures, unless the motion picture operator or projectionist has a financial in-

terest in such theatre or place wherein he is so employed or unless he caused to be performed or exhibited such performance or motion picture without the knowledge and consent of the manager or owner of the theatre or other place of showing."

The Supreme Court of Washington affirmed the convictions, 82 Wash. 2d 584, 512 P. 2d 1049, and subsequently denied a petition for rehearing.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 9.68.010 is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore grant certiorari, and, since the judgment of the Washington Supreme Court was rendered after *Miller,* reverse.[1] In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Moreover, on the basis of the Court's own holding in *Jenkins* v. *Georgia, ante,* p. 153, its denial of certiorari is improper. As permitted by Rule 21 (1) of the Rules of this Court, which provides that the record in a case need not be certified to this Court, certain of these petitioners did not certify the allegedly obscene materials involved

[1] Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

in this case.[2] It is plain, therefore, that the Court, which has not requested the certification of those materials, has failed to discharge its admitted responsibility under *Jenkins* independently to review those materials under the second and third parts of the *Miller* obscenity test. Nor can it be assumed that the court below performed such a review, since that responsibility was not made clear until *Jenkins*. Those petitioners have thus never been provided the independent judicial review to which the Court held them entitled in *Jenkins*. At a minimum, the Court should vacate the judgment below and remand for such a review.

No. 73–908. COTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any federal ban on obscenity is prohibited by the First Amendment (see *United States* v. *12 200-ft. Reels of Film*, 413 U. S. 123, 130 (1973) (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment. Reported below: 470 F. 2d 755.

No. 73–1241. ADULT FILM ASSOCIATION OF AMERICA ET AL. *v.* LUCAS, U. S. DISTRICT JUDGE (SAXBE, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., REAL PARTIES IN INTEREST). C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any federal ban on obscenity is prohibited by the First Amendment (see *United States* v. *12 200-ft Reels of Film*, 413 U. S. 123, 130 (1973) (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment below.

No. 73–1339. BOYD *v.* OHIO. Ct. App. Ohio, Allen County. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any state ban on obscenity is pro-

[2] Petitioners Samuel Kravitz, Albert T. Duane, and James M. Tidyman were convicted of exhibiting allegedly obscene films, none of which has been certified to this Court.

hibited by the First Amendment, made applicable to the States by the Fourteenth (see *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 70 (1973) (DOUGLAS, J., dissenting)), would grant certiorari and reverse the judgment. Reported below: 35 Ohio App. 2d 147, 300 N. E. 2d 752.

No. 73–2001. MITCHELL ET AL. *v.* SIRICA, U. S. DISTRICT JUDGE. C. A. D. C. Cir. Motion to expedite granted. Certiorari denied. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this motion and petition. Reported below: —— U. S. App. D. C. ——, —— F. 2d ——.

Rehearing Denied

No. 73–1650. KERNER *v.* UNITED STATES, 417 U. S. 976. Motion to expedite granted. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion and petition.

Assignment Orders

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Second Circuit during the period beginning November 25, 1974, and ending November 29, 1974, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States District Court for the Southern District of New York during the period beginning December 2, 1974, and ending December 24, 1974, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 955 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions in the current preliminary print of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

IN RE GRAND JURY PROCEEDINGS (LEWIS, APPLICANT)

ON APPLICATION FOR STAY OF EXECUTION AND/OR BAIL PENDING APPEAL

No. A-1268. Decided July 4, 1974

Applicant newsman, with no criminal record, who had given FBI copies of tapes and documents delivered to him by an underground group but whom District Court held in contempt for refusing to deliver originals, is released on personal recognizance pending Court of Appeals' decision on the merits.

MR. JUSTICE DOUGLAS, Circuit Justice.

Applicant asks for release on bail or a stay of the execution of the District Court's order committing him for contempt pending decision of his case on the merits by the Court of Appeals. He had given the FBI copies of certain tapes and documents delivered to him by an underground group but refused to deliver the originals. So far as I am advised, he was held in contempt for that refusal. Substantial First Amendment claims are raised under the majority ruling in *Branzburg* v. *Hayes*, 408 U. S. 665, as evident from *Gibson* v. *Florida Legislative Investigation Committee*, 372 U. S. 539, 546. I indicate no view on the merits. But since the applicant is a newsman entitled to all First Amendment protections and has no criminal record, I have entered an order releasing him on his personal recognizance, pending decision of his appeal by the Court of Appeals.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS—1971, 1972, AND 1973

	ORIGINAL			APPELLATE			MISCELLANEOUS			TOTALS		
Terms	1971	1972	1973	1971	1972	1973	1971	1972	1973	1971	1972	1973
Number of cases on dockets	18	21	14	2,070	2,183	2,480	2,445	2,436	2,585	4,533	4,640	5,079
Number disposed of during terms	8	8	4	1,628	1,771	1,868	2,009	1,969	2,004	3,645	3,748	3,876
Number remaining on dockets	10	13	10	442	412	612	436	467	581	888	892	1,203

	TERMS		
	1971	1972	1973
Cases argued during term	[1] 177	177	170
Number disposed of by full opinions	143	159	161
Number disposed of by per curiam opinions	[2] 24	18	8
Number set for reargument	[3] 9	0	1
Cases granted review this term	[4] 163	154	183
Cases reviewed and decided without oral argument	286	265	188
Total cases to be available for argument at outset of following term	99	76	89

[1] Includes No. 9 Orig. (pending)
[2] Includes A–483 and No. 50 Orig.
[3] Includes 4 cases which were reargued in O.T. 1971
[4] Includes A–483 and No. 9 Orig.

JULY 26, 1974

INDEX

ABSTRACT INJURIES. See **Standing to Sue**, 1, 6.

ABUSE OF DISCRETION. See **Juries**, 1; **Obscenity**, 2, 4–5.

ACCESS DOCTRINE. See **Appeals**, 2; **Constitutional Law**, V, 5.

ACCESS TO COURTS. See **Constitutional Law**, I, 5–7; **Prisoners.**

ADMINISTRATION OF STATE PRISONS. See **Civil Rights Act of 1871**; **Constitutional Law**, I, 5–7; VI; **Prisoners.**

ADMISSIBILITY OF EVIDENCE. See **Obscenity**, 2.

"ADULT" BOOKS. See **Constitutional Law**, I, 2–4; IV; V, 4; **Obscenity**, 1–6.

ADVERTISING BROCHURES. See **Constitutional Law**, I, 2–4; IV; V, 4; **Obscenity**, 1–6.

ADVERTISING SPACE. See **Constitutional Law**, II, 2; V, 2.

ALL-NEGRO SCHOOLS. See **School Desegregation.**

ALL-WHITE SCHOOLS. See **School Desegregation.**

AMERICAN FLAG. See **Constitutional Law**, V, 1.

ANTITRUST ACTS.

1. *Clayton Act—Bank merger—Effect of failure to show alternative methods of entry.*—In civil antitrust action under § 7 of Clayton Act to challenge proposed merger between two commercial banks in State of Washington, Government's failure to establish that acquiring bank has alternative methods of entry offering a reasonable likelihood of producing significant procompetitive effects is determinative of its contention that without regard to possibility of future deconcentration of Spokane market, challenged merger is illegal because it eliminates acquiring bank as a perceived potential entrant. Assuming that commercial bankers in Spokane are aware of regulatory barriers that render acquiring bank an unlikely or insignificant potential entrant except by merger with target bank, it is improbable, in light of such barriers, that acquiring bank exerts any meaningful procompetitive influence over Spokane banks by "standing in the wings." United States v. Marine Bancorporation, p. 602.

2. *Clayton Act—Bank merger—Geographic market—Considerations.*—On remand of civil antitrust action brought by United States

ANTITRUST ACTS—Continued.
under § 7 of Clayton Act challenging proposed merger between two commercial banks in Connecticut, District Court must make a determination as to geographic market in which each of the banks operates and to which bulk of its customers may turn for alternative commercial bank services, and in making that determination it will be aided by following considerations: (i) Government has burden of producing evidence to define localized banking markets; (ii) in satisfying that burden (as District Court correctly held) Government cannot rely only on Standard Metropolitan Statistical Areas; and (iii) town boundaries, although significant, are not controlling. United States v. Connecticut National Bank, p. 656.

3. *Clayton Act—Bank merger—"Line of commerce."*—In a civil antitrust action by United States under § 7 of Clayton Act challenging proposed merger between two commercial banks in Connecticut, District Court erred in holding that appropriate "line of commerce" within meaning of § 7 included both commercial banks and savings banks. United States v. Connecticut National Bank, p. 656.

4. *Clayton Act—Bank merger—Potential-competition doctrine—Prima facie case.*—In civil antitrust action under § 7 of Clayton Act to challenge proposed merger between two commercial banks in State of Washington, Government's evidence of concentration ratios in Spokane commercial banking market established a prima facie case that that market was sufficiently concentrated to invoke potential-competition doctrine, and appellee banks did not demonstrate that such ratios inaccurately depicted economic characteristics of Spokane market. United States v. Marine Bancorporation, p. 602.

5. *Clayton Act—Bank merger—Relevant geographic market.*—In a civil antitrust action by United States under § 7 of Clayton Act challenging proposed merger between two commercial banks in Connecticut, District Court erred in ruling that relevant geographic market is State as a whole. In a potential-competition case like this, relevant geographic market must be defined as localized area in which acquired bank is in significant, direct competition with other banks, albeit not acquiring bank. United States v. Connecticut National Bank, p. 656.

6. *Clayton Act—Bank merger—Relevant product and geographic markets.*—As "a necessary predicate" to deciding whether proposed merger between two commercial banks in State of Washington contravenes Clayton Act, District Court properly found that relevant product market was "business of commercial banking" and

ANTITRUST ACTS—Continued.

that relevant geographic market was Spokane metropolitan area. Entire State is not, despite Government's contrary contention, an appropriate "section of the country" within meaning of § 7 of Act, since for purpose of this case appropriate "section of the country" and "relevant geographic market" are same, being area in which acquired firm is an actual, direct competitor, and since moreover Government has not shown that effect of merger on a statewide basis "may be substantially to lessen competition" within meaning of § 7. United States v. Marine Bancorporation, p. 602.

7. *Clayton Act—Bank merger—"Section of the country."*—In civil antitrust action under § 7 of Clayton Act challenging proposed merger of two commercial banks in Connecticut, Government's contention that State as a whole, though not a banking market, is a "section of the country" within meaning of § 7 is without merit. United States v. Connecticut National Bank, p. 656.

8. *Clayton Act—Bank merger—Target bank—Failure of proof as to future expansion.*—In civil antitrust action under § 7 of Clayton Act to challenge proposed merger of two commercial banks in State of Washington, record amply supports District Court's finding that Government "failed to establish . . . that there is any reasonable probability that [target bank] will expand into other banking markets," since at no time in its 70-year history has target bank established branches outside Spokane area, acquired another bank, or received a merger offer other than one at issue here. United States v. Marine Bancorporation, p. 602.

9. *Clayton Act—Bank merger—Violation—Failure of proof.*—In view of legal barriers to entry, notably state-law prohibitions against *de novo* branching, branching from branch office, and multibank holding companies, Government failed to sustain its burden of proof that challenged merger between two commercial banks in State of Washington violates § 7 of Clayton Act by eliminating likelihood that, but for the merger, acquiring bank would enter Spokane *de novo* by means of sponsorship-acquisition or through a foothold acquisition of a small state bank in Spokane area, since it was not shown that either of proposed alternative methods of entry was feasible or offered a substantial likelihood of ultimately producing deconcentration of Spokane market or other significant procompetitive effects. United States v. Marine Bancorporation, p. 602.

10. *Clayton Act—Market extension mergers—Commercial banks—Potential-competition doctrine—Federal and state regulations.*—While geographic market extension mergers by commercial banks must pass muster under potential-competition doctrine, application

ANTITRUST ACTS—Continued.

of doctrine to commercial banking must take into account extensive and unique federal and state regulatory restraints on entry into that line of commerce, including controls over number of bank charters to be granted, prior bank regulatory agency approval of opening of branches, and state-law restrictions, such as those in Washington involved in this case, on *de novo* geographic expansion through branching and multibank holding companies. United States v. Marine Bancorporation, p. 602.

APPEALS. See also **Constitutional Law**, V, 5; **Federal Rules of Criminal Procedure**, 1.

1. *Denial of request to object to jury instructions—Noncompliance with Fed. Rule Crim. Proc. 30—Nonprejudicial error.*—Court of Appeals did not err in refusing to reverse petitioners' convictions for District Court's failure to comply with Rule 30 by denying petitioners' counsel's request to make additional objections to instructions out of presence of jury, since this Court's independent examination of record confirms Court of Appeals' view that petitioners were not prejudiced thereby. Hamling v. United States, p. 87.

2. *Final judgment—Ripeness for review.*—Florida Supreme Court's judgment, reversing trial court, holding that Florida's "right of reply" statute did not violate constitutional guarantees, and that civil remedies, including damages, were available for violation of statute, and remanding for further proceedings, is "final" under 28 U. S. C. § 1257, and thus is ripe for review by this Court. Miami Herald Publishing Co. v. Tornillo, p. 241.

3. *"Final" order—Order denying motion to quash subpoena duces tecum and requiring production of evidence—Presidential tapes and documents.*—District Court's order denying President's motion to quash subpoena *duces tecum* for production before trial of certain Presidential tape recordings and documents and requiring *in camera* examination of subpoenaed material in connection with prosecutions of certain staff members of White House and political supporters of President, was appealable as a "final" order under 28 U. S. C. § 1291, was therefore properly "in," 28 U. S. C. § 1254, Court of Appeals when petition for certiorari before judgment was filed in this Court, and is now properly before this Court for review. Although such an order is normally not final and subject to appeal, an exception is made in a "limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims." Such an exception is proper in unique

APPEALS—Continued.

circumstances of this case where it would be inappropriate to subject President to procedure of securing review by resisting order and inappropriate to require that District Court proceed by a traditional contempt citation in order to provide appellate review. United States v. Nixon, p. 683.

APPEAL TO PRURIENT INTEREST. See **Constitutional Law,** I, 2–4; IV; V, 3–4; VIII; **Obscenity.**

ARMED FORCES. See **Constitutional Law,** I, 1.

ARMED FORCES RESERVES. See **Standing to Sue,** 1, 6.

ATTENDANCE ZONES. See **School Desegregation,** 1, 3.

ATTORNEY-PRISONER MAIL. See **Constitutional Law,** VI.

ATTORNEYS. See **Constitutional Law,** I, 8; **Contempt,** 1, 3; **Defamation,** 4.

BAIL.

Newsman—Contempt—Personal recognizance.—Applicant newsman, with no criminal record, who had given FBI copies of tapes and documents delivered to him by an underground group but whom District Court held in contempt for refusing to deliver originals, is released on personal recognizance pending Court of Appeals' decision on merits. In re Lewis (DOUGLAS, J., in chambers), p. 1301.

BANKS. See **Antitrust Acts.**

BOARDS OF EDUCATION. See **School Desegregation.**

BOOKS. See **Constitutional Law,** I, 2–4; IV; V, 4; **Obscenity,** 1–8.

BRIDGEPORT. See **Antitrust Acts,** 2–3, 5, 7.

BROADCASTERS. See **Defamation,** 6–7.

BURDEN OF PROOF. See **Antitrust Acts,** 1–2, 4, 6, 8–9.

BUS ADVERTISING. See **Constitutional Law,** II, 2; V, 2.

BUSING. See **School Desegregation.**

CALIFORNIA. See **Constitutional Law,** II, 1; **Mootness.**

CANDIDATES. See **Appeals,** 2; **Constitutional Law,** II, 2; V, 2, 5.

CAPITAL FACILITIES. See **Internal Revenue Code,** 1.

CAPITALIZATION OF CONSTRUCTION-RELATED DEPRECIATION. See **Internal Revenue Code,** 2.

CAPTIVE AUDIENCES. See **Constitutional Law**, II, 2; V, 2.

CAR CARD ADVERTISING SPACE. See **Constitutional Law**, II, 2; V, 2.

"CARNAL KNOWLEDGE." See **Constitutional Law**, V, 3; VIII; **Obscenity**, 9.

CASE OR CONTROVERSY. See **Standing to Sue**, 1–2, 5–6.

CENTRAL INTELLIGENCE AGENCY ACT. See **Standing to Sue**, 2–4.

CHICAGO. See **Defamation**, 4.

CITIZENS. See **Standing to Sue**, 6.

CIVIL ANTITRUST ACTIONS. See **Antitrust Acts.**

CIVIL RIGHTS. See **Civil Rights Act of 1871**; **Constitutional Law**, I, 5–7; **Prisoners.**

CIVIL RIGHTS ACT OF 1871. See also **Constitutional Law**, I, 5–7; **Prisoners.**

Relief for improper revocation of good-time credits.—Though Court of Appeals correctly held that restoration of good-time credits in a prisoner's action under 42 U. S. C. § 1983 is foreclosed under *Preiser* v. *Rodriguez*, 411 U. S. 475, damages and declaratory and other relief for improper revocation of good-time credits are cognizable under that provision. Wolff v. McDonnell, p. 539.

CLASS ACTIONS. See **Mootness.**

CLAYTON ACT. See **Antitrust Acts.**

COLLECTIVE BARGAINING. See **Defamation**, 1–3; **Labor.**

COMMERCIAL BANKING. See **Antitrust Acts.**

COMMUNICATIONS. See **Constitutional Law**, III; V, 1; VI.

"COMMUNIST-FRONTERS." See **Defamation**, 4.

COMMUNITY STANDARDS. See **Constitutional Law**, IV, 1; VIII; **Obscenity**, 2, 9.

COMPENSATORY DAMAGES. See **Defamation**, 5.

CONCRETE INJURIES. See **Standing to Sue**, 1, 3.

CONFIDENTIALITY OF HIGH-LEVEL COMMUNICATIONS. See **Constitutional Law**, III.

CONFRONTATION. See **Constitutional Law**, I, 5.

CONGRESS. See **Standing to Sue**, 1, 6.

CONNECTICUT. See **Antitrust Acts**, 2–3, 5, 7.

CONSOLIDATIONS. See **Antitrust Acts**, 2–3, 5, 7.

CONSTITUTIONAL LAW. See also **Appeals**, 2–3; **Civil Rights Act of 1871**; **Contempt**, 2; **Defamation**, 4–7; **Juries**; **Justiciability**; **Labor**; **Mootness**; **Obscenity**, 9; **Prisoners**; **School Desegregation**, 1–2; **Standing to Sue.**

I. Due Process.

1. *Art. 134, Uniform Code of Military Justice—Lack of vagueness.*—This Court will not decide whether District Court had jurisdiction of an action challenging a court-martial conviction under Art. 80 of UCMJ of an attempt to commit an offense under Art. 134, on ground, *inter alia,* that Art. 134 is unconstitutionally vague, since assuming, *arguendo,* that District Court did have jurisdiction, decision in *Parker* v. *Levy,* 417 U. S. 733, requires reversal of Court of Appeals' decision on merits reversing District Court's denial of relief and holding that Art. 134 is unconstitutionally vague. Secretary of the Navy v. Avrech, p. 676.

2. *Obscenity—Federal criminal statute—Notice.*—Title 18 U. S. C. § 1461, making it a crime to mail obscene matter, when "applied according to the proper standards for judging obscenity do[es] not . . . fail to give men in acting adequate notice of what is prohibited." Hamling v. United States, p. 87.

3. *Obscenity—Federal criminal statute—Vagueness.*—Construing 18 U. S. C. § 1461, making it a crime to mail obscene matter, as being limited to sort of "patently offensive representations or description of that specific 'hard core' sexual conduct given as examples in *Miller* v. *California* [413 U. S. 15]," statute is not unconstitutionally vague, it being plain that brochure in question is a form of hard-core pornography well within permissibly proscribed depictions described in *Miller.* Enumeration of specific categories of obscene material in *Miller* did not purport to proscribe, for purposes of § 1461, conduct that had not previously been thought criminal but instead added a "clarifying gloss" to prior construction, making statute's meaning "more definite." Hamling v. United States, p. 87.

4. *Obscenity—Federal criminal statute—Vagueness.*—Rejection in *Miller* v. *California,* 413 U. S. 15, of "social value" formulation of *Memoirs* v. *Massachusetts,* 383 U. S. 413, did not mean that 18 U. S. C. § 1461, making it a crime to mail obscene matter, was unconstitutionally vague at time of petitioners' pre-*Miller* convictions because it did not provide them with sufficient guidance as to proper test of "social value," that formula having been rejected

CONSTITUTIONAL LAW—Continued.

not for vagueness reasons but because it departed from obscenity definition of *Roth* v. *United States*, 354 U. S. 476, and entailed a virtually impossible prosecutorial burden. Hamling v. United States, p. 87.

5. *Prison disciplinary proceedings.*—A prisoner is not wholly stripped of constitutional protections, and though prison disciplinary proceedings do not implicate full panoply of rights due a defendant in a criminal prosecution, such proceedings must be governed by a mutual accommodation between institutional needs and generally applicable constitutional requirements. Wolff v. McDonnell, p. 539.

6. *Prison disciplinary proceedings—Loss of good-time credits—Minimal requirements.*—Since prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, procedure for determining whether such misconduct has occurred must observe certain minimal due process requirements (though not full range of procedures mandated in *Morrissey* v. *Brewer*, 408 U. S. 471, and *Gagnon* v. *Scarpelli*, 411 U. S. 778, for parole and probation revocation hearings) consonant with unique institutional environment and therefore involving a more flexible approach reasonably accommodating interests of inmates and needs of institution. Wolff v. McDonnell, p. 539.

7. *Prison disciplinary proceedings—Retroactivity.*—Court of Appeals erred in holding that due process requirements in prison disciplinary proceedings were to be applied retroactively by requiring expunging of prison records of improper misconduct determinations. Wolff v. McDonnell, p. 539.

8. *Summary punishment for contempt—Lack of opportunity to be heard.*—Respondent trial judge's conduct, in proceeding summarily after state criminal trial to punish petitioner counsel for accused for alleged contempt committed during trial without giving him an opportunity to be heard in defense or mitigation before he was finally adjudged guilty and sentence was imposed, does not square with Due Process Clause of Fourteenth Amendment. Reasonable notice of specific charges and opportunity to be heard are essential in view of heightened potential for abuse posed by contempt power. Taylor v. Hayes, p. 488.

II. Equal Protection of the Laws.

1. *Disenfranchisement of felons.*—California, in disenfranchising convicted felons who have completed their sentences and paroles, does not violate Equal Protection Clause of Fourteenth Amendment. Section 1 of Fourteenth Amendment, which contains Equal Protec-

CONSTITUTIONAL LAW—Continued.

tion Clause, in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement that was expressly exempted from less drastic sanction of reduced representation that § 2 imposed for other forms of disenfranchisement. Richardson v. Ramirez, p. 24.

2. *No political ads on city rapid transit system.*—Judgment holding that city's refusal to permit political advertising on its rapid transit system did not violate a candidate's equal protection rights, is affirmed. Lehman v. City of Shaker Heights, p. 298.

III. Executive Privilege.

1. *Presidential communications—Criminal trial—Generalized assertion.*—Although courts will afford utmost deference to Presidential acts in performance of an Art. II function, when a claim of Presidential privilege as to materials subpoenaed for use in a criminal trial is based, as it is here, not on ground that military or diplomatic secrets are implicated, but merely on ground of a generalized interest in confidentiality, President's generalized assertion of privilege must yield to demonstrated, specific need for evidence in a pending criminal trial and fundamental demands of due process of law in fair administration of justice. United States v. Nixon, p. 683.

2. *Presidential communications—Criminal trial—In camera inspection.*—Neither doctrine of separation of powers nor generalized need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, confidentiality of Presidential communications is not significantly diminished by producing material for a criminal trial under protected conditions of *in camera* inspection, and any absolute executive privilege under Art. II of Constitution would plainly conflict with function of courts under Constitution. United States v. Nixon, p. 683.

IV. Federal Obscenity Prosecution.

Instruction to jury—National community standards—Propriety.—In federal prosecution for mailing obscene matter occurring prior to *Miller* v. *California,* 413 U. S. 15, instruction to jury on application of national community standards of obscenity was not constitutionally improper, since in rejecting view that First and Fourteenth Amendments require that proscription of obscenity be based on uniform national standards, the Court in *Miller* and companion cases did not require as a constitutional matter substitution of some

CONSTITUTIONAL LAW—Continued.

smaller geographical area into same sort of formula; test was stated in terms of understanding of "average person applying contemporary community standards." The Court's holding in *Miller* that California could constitutionally proscribe obscenity in terms of a "statewide" standard did not mean that any such precise geographic area is required as a matter of constitutional law. Reversal is required in pre-*Miller* cases only where there is a probability that excision of references to "nation as a whole" in instruction dealing with community standards would have materially affected deliberations of jury. Hamling v. United States, p. 87.

V. First Amendment.

1. *Freedom of speech—"Improper use" flag statute.*—Washington's "improper use" statute forbidding exhibition of United States flag to which is attached or superimposed figures, symbols, or other extraneous material, as applied to appellant's activity in displaying out of his apartment window a United States flag upside down with a peace symbol taped thereto as a protest against then recent actions in Cambodia and fatal events at Kent State University, impermissibly infringed a form of protected expression. Spence v. Washington, p. 405.

2. *Freedom of speech—No political ads on city rapid transit system.*—Judgment holding that city's refusal to permit political advertising on its rapid transit system did not violate a candidate's free speech rights, is affirmed. Lehman v. City of Shaker Heights, p. 298.

3. *Freedom of speech—Obscenity—Constitutional standards—State obscenity statute—Film's lack of patent offensiveness.*—Film "Carnal Knowledge" is not obscene under constitutional standards announced in *Miller* v. *California*, 413 U. S. 15, and appellant's conviction of violating Georgia obscenity statute for showing film in a theater therefore contravened First and Fourteenth Amendments. Juries do not have unbridled discretion in determining what is "patently offensive" since "no one will be subject to prosecution for the sale or exposure of obscene materials [that do not] depict or describe patently offensive 'hard core' sexual conduct . . . ." This Court's own view of film impels conclusion that film's depiction of sexual conduct is not patently offensive. Camera does not focus on bodies of actors during scenes of "ultimate sexual acts," nor are actors' genitals exhibited during those scenes. Film shows occasional nudity, but nudity alone does not render material obscene under *Miller*'s standards. Jenkins v. Georgia, p. 153.

CONSTITUTIONAL LAW—Continued.

4. *Freedom of speech—Obscenity—Federal criminal statute.*—Title 18 U. S. C. § 1461, making it a crime to mail obscene matter, when "applied according to the proper standard for judging obscenity do[es] not offend constitutional safeguards against convictions based upon protected material." Hamling v. United States, p. 87.

5. *Freedom of the press—"Right of reply" statute.*—Florida's "right of reply" statute which grants a political candidate a right to equal space to answer criticism and attacks on his record by a newspaper, and makes it a misdemeanor for newspaper to fail to comply, violates First Amendment's guarantee of a free press. Miami Herald Publishing Co. v. Tornillo, p. 241.

VI. Regulation of Attorney-Prisoner Mail.

State may constitutionally require that mail from an attorney to a prisoner be identified as such and that his name and address appear on communication; and—as a protection against contraband—that authorities may open such mail in inmate's presence. A lawyer desiring to correspond with a prisoner may also be required *first* to identify himself and his client to prison officials to ensure that letters marked "privileged" are actually from members of bar. Wolff v. McDonnell, p. 539.

VII. Sixth Amendment.

Right to jury trial—Contempt.—In case of post-verdict adjudications of various acts of contempt committed during trial, Sixth Amendment requires a jury trial if sentences imposed aggregate more than six months, even though no sentence for more than six months was imposed for any one act of contempt. Codispoti v. Pennsylvania, p. 506.

VIII. State Obscenity Prosecution.

Instruction to jury—Community standards.—There is no constitutional requirement that juries be instructed in state obscenity cases to apply standards of a hypothetical statewide community—*Miller* v. *California,* 413 U. S. 15, approving, but not mandating, such an instruction—and jurors may properly be instructed to apply "community standards," without a specification of "community" by trial court. Jenkins v. Georgia, p. 153.

CONSTITUTIONAL PRIVILEGE FOR DEFAMATION. See **Defamation,** 6–7.

CONSTRUCTION OF CAPITAL FACILITIES. See **Internal Revenue Code.**

CONSTRUCTION OF STATUTES. See **Antitrust Acts**, 3, 6–7; **Federal Youth Corrections Act**; **Habeas Corpus**, 1.

CONSTRUCTION-RELATED DEPRECIATION. See **Internal Revenue Code**, 2.

CONTEMPORARY COMMUNITY STANDARDS. See **Constitutional Law**, IV, 1; VIII; **Obscenity**, 2, 9.

CONTEMPT. See also **Bail**; **Constitutional Law**, I, 8; VII.

1. *Attorney—Final disposition of charges—Substitution of judges.*—Because it appears from record that "marked personal feelings were present on both sides" with respect to respondent trial judge and petitioner counsel for accused during state criminal trial, and that marks of "unseemly conduct [had] left personal stings," another judge should have been substituted for respondent for purpose of finally disposing of contempt charges against petitioner. Taylor v. Hayes, p. 488.

2. *Right to jury trial—Alleged contemnor.*—Though a crime carrying more than a six-month sentence is a serious offense triable by jury, an alleged contemnor is not entitled to a jury trial simply because a strong possibility exists that upon conviction he will face a substantial term of imprisonment regardless of punishment actually imposed. Codispoti v. Pennsylvania, p. 506.

3. *Right to jury trial—Petty offenses.*—Since no more than a six-month sentence was actually imposed, the eight contempts for which petitioner, as counsel for accused during state criminal trial, was adjudged guilty, whether considered singly or collectively, constituted petty offenses and hence trial by jury was not required. It is not improper to permit State, as in this instance, after conviction, to reduce a sentence to six months or less rather than retry contempt with a jury, since "criminal contempt is not a crime of the sort that requires the right to jury trial regardless of the penalty involved." Taylor v. Hayes, p. 488.

CONTINUANCES. See **Juries**, 1.

COURTS-MARTIAL. See **Constitutional Law**, I, 1.

CRIMINAL CONTEMPT. See **Constitutional Law**, I, 8; VII; **Contempt.**

CRIMINAL LAW. See **Appeals**, 1, 3; **Constitutional Law**, I, 1–4, 8; III; IV; V, 1, 3–4; VII; VIII; **Contempt**; **Federal Rules of Criminal Procedure**; **Federal Youth Corrections Act**; **Juries**; **Justiciability**; **Obscenity.**

CROSS-EXAMINATION. See **Constitutional Law**, I, 5–6.

DAMAGES. See **Civil Rights Act of 1871; Defamation,** 5.

DECLARATORY JUDGMENTS. See **Civil Rights Act of 1871.**

DEFAMATION. See also **Labor.**

1. *Labor disputes—Erroneous instruction to jury.*—In appellee letter carriers' libel actions against appellant union for including appellees in "List of Scabs" published in union's newsletter, trial court's instruction defining malice in common-law terms was erroneous and reflected a misunderstanding of *Linn* v. *Plant Guard Workers,* 383 U. S. 53, which adopted reckless-or-knowing-falsehood test of *New York Times Co.* v. *Sullivan,* 376 U. S. 254. Letter Carriers v. Austin, p. 264.

2. *Labor disputes—Robust debate—Executive Order—Federal employment.*—Federal labor laws favor uninhibited, robust, and wide-open debate in labor disputes. Relevant law here, in appellee letter carriers' libel actions against appellant union for including appellees in "List of Scabs" published in union's newsletter, is Executive Order No. 11491, governing labor relations in federal employment. Basic provisions of Executive Order are like those of National Labor Relations Act, and similarly afford wide latitude for union freedom of speech. Partial pre-emption of *Linn* v. *Plant Guard Workers,* 383 U. S. 53, by which federal law pre-empts state law to extent that State seeks to make actionable defamatory statements in labor disputes published without knowledge of their falsity or reckless disregard of truth, is thus equally applicable here. Letter Carriers v. Austin, p. 264.

3. *Labor disputes—State law as pre-empted by federal law.*—Although *Linn* v. *Plant Guard Workers,* 383 U. S. 53, held that federal labor law does not completely pre-empt application of state laws to libels published during labor disputes, that decision recognized that federal law does pre-empt state law to extent that State seeks to make actionable defamatory statements in labor disputes published without knowledge of their falsity or reckless disregard of truth. Letter Carriers v. Austin, p. 264.

4. *Plaintiff attorney as neither public official nor public figure.*—Petitioner, an attorney who had represented a murder victim's family in civil litigation against policeman convicted of committing murder, was neither a public official nor a public figure for purposes of his libel action against respondent for having published an article in its magazine which falsely stated that petitioner had arranged policeman's "frameup," implied that petitioner had a criminal record, and labeled him a "Communist-fronter." Neither petitioner's past service on certain city committees nor his appear-

DEFAMATION—Continued.

ance as an attorney at coroner's inquest into death of murder victim made him a public official, and his role in policeman's affair did not make him a public figure. Gertz v. Robert Welch, Inc., p. 323.

5. *Private persons—Preclusion of presumed or punitive damages.*—States may not permit recovery of presumed or punitive damages in defamation actions when liability is not based on knowledge of falsity or reckless disregard for truth, and private defamation plaintiff who establishes liability under a less demanding standard than test of *New York Times Co.* v. *Sullivan*, 376 U. S. 254, may recover compensation only for actual injury. Gertz v. Robert Welch, Inc., p. 323.

6. *Private persons—Public issue—Applicability of New York Times standard.*—A publisher or broadcaster of defamatory falsehoods about an individual who is neither a public official nor a public figure may not claim protection of *New York Times Co.* v. *Sullivan*, 376 U. S. 254, against liability for defamation on ground that defamatory statements concern an issue of public or general interest. Gertz v. Robert Welch, Inc., p. 323.

7. *Private persons—State standard of liability.*—So long as they do not impose liability without fault, States may define for themselves appropriate standard of liability for a publisher or broadcaster of defamatory falsehood which injures a private individual and whose substance makes substantial danger to reputation apparent. Gertz v. Robert Welch, Inc., p. 323.

DE JURE SEGREGATION. See **School Desegregation.**

DE NOVO HEARINGS. See **Habeas Corpus**, 3.

DEPRECIATION DEDUCTIONS. See **Internal Revenue Code**, 2.

DEPRIVATION OF GOOD-TIME CREDITS. See **Civil Rights Act of 1871**; **Constitutional Law**, I, 6.

DESEGREGATION PLANS. See **School Desegregation.**

DETROIT. See **School Desegregation.**

DEVIANT SEXUAL GROUPS. See **Constitutional Law**, I, 2–4; **Obscenity**, 5.

DIPLOMATIC SECRETS. See **Constitutional Law**, III.

DISCRETION. See **Juries**, 1; **Obscenity**, 2, 4–6.

DISCRIMINATION. See **School Desegregation.**

DISENFRANCHISEMENT OF FELONS. See **Constitutional Law**, II, 1; **Mootness.**

DISPLAY OF AMERICAN FLAG ON PRIVATE PROPERTY. See **Constitutional Law**, V, 1.

DISSEMINATION OF OBSCENE MATERIAL. See **Constitutional Law**, I, 2–4; IV; V, 4; **Obscenity**, 9.

DISTRICT COURTS. See **Federal Youth Corrections Act**; **Habeas Corpus.**

DOCUMENTARY EVIDENCE. See **Constitutional Law**, I, 5–6.

DOCUMENTS. See **Bail.**

DUE PROCESS. See **Constitutional Law**, I; III; V, 3–4.

EDITORIALS. See **Appeals**, 2; **Constitutional Law**, V, 5.

ELECTIONS. See **Constitutional Law**, II, 1; **Mootness.**

ELECTRONIC RECORDINGS. See **Habeas Corpus**, 3.

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law**, II; V, 2; **School Desegregation.**

EQUAL SPACE. See **Appeals**, 2; **Constitutional Law**, V, 5.

EQUITY. See **School Desegregation**, 3–4.

EVIDENCE. See **Antitrust Acts**, 2, 4; **Obscenity**, 1–2, 4.

EVIDENTIARY HEARINGS. See **Habeas Corpus.**

EXCLUSION OF YOUNG FROM JURIES. See **Juries**, 1.

EXECUTIVE BRANCH. See **Justiciability.**

EXECUTIVE ORDERS. See **Defamation**, 2.

EXECUTIVE PRIVILEGE. See **Appeals**, 3; **Constitutional Law**, III; **Federal Rules of Criminal Procedure**; **Justiciability.**

EX-FELONS. See **Constitutional Law**, II, 1; **Mootness.**

FEDERAL BUREAU OF INVESTIGATION. See **Bail.**

FEDERAL EMPLOYEES. See **Defamation**, 1–3; **Labor.**

FEDERAL MAGISTRATES ACT. See **Habeas Corpus**, 2.

FEDERAL RULES OF CRIMINAL PROCEDURE. See also **Appeals**, 3; **Constitutional Law**, III; **Juries**; **Justiciability.**

1. *Denial of motion to quash subpoena—Compliance with Rule 17 (c).*—From this Court's examination of material submitted by Special Prosecutor in support of his motion, following indictment alleging violation of federal statutes by certain staff members of White House and political supporters of President, for subpoena *duces tecum* for production before trial of certain Presidential tape recordings and documents, much of which material is under seal, it

FEDERAL RULES OF CRIMINAL PROCEDURE—Continued.

is clear that District Court's denial of President's motion to quash comported with Rule 17 (c) and that Special Prosecutor has made a sufficient showing to justify a subpoena for production *before* trial. United States v. Nixon, p. 683.

2. *Subpoenaed material—Presidential communications—In camera examination.*—On basis of this Court's examination of record, it cannot be concluded that District Court erred in ordering *in camera* examination of certain Presidential tape recordings and documents produced, pursuant to Rule 17 (c), under subpoena *duces tecum* before criminal trial of certain staff members of White House and political supporters of President, which material shall now forthwith be transmitted to District Court. United States v. Nixon, p. 683.

3. *Subpoenaed material—Presidential communications—In camera examination—Release.*—Since a President's communications encompass a vastly wider range of sensitive material than would be true of an ordinary individual, public interest requires that Presidential confidentiality be afforded greatest protection consistent with fair administration of justice, and District Court has a heavy responsibility to ensure that material involving Presidential conversations irrelevant to or inadmissible in criminal prosecution of certain staff members of White House and political supporters of President, ordered produced before trial under subpoena *duces tecum,* pursuant to Rule 17 (c), be accorded high degree of respect due a President and that such material be returned under seal to its lawful custodian. Until released to Special Prosecutor no *in camera* material is to be released to anyone. United States v. Nixon, p. 683.

FEDERAL-STATE RELATIONS. See **Defamation,** 2–3; **Labor.**

FEDERAL YOUTH CORRECTIONS ACT.

Sentencing as adult—"No benefit" finding.—In sentencing a youth offender as an adult under other applicable penal statutes, § 5010 (d) of Act requires a federal district court to "find" that offender would not benefit from treatment under Act, but does not require that such "finding" be accompanied by supporting reasons. Dorszynski v. United States, p. 424.

FELONIES. See **Constitutional Law,** II, 1; **Mootness.**

FILMS. See **Constitutional Law,** V, 3; VIII; **Obscenity,** 9.

FINAL JUDGMENTS. See **Appeals,** 2.

FINAL ORDERS. See **Appeals,** 3.

FINDINGS. See **Constitutional Law,** I, 5–6; **Federal Youth Corrections Act.**

FIRST AMENDMENT. See **Appeals**, 2; **Constitutional Law**, V; VIII; **Defamation**, 2, 4–7; **Labor.**

FLAG MISUSE. See **Constitutional Law**, V, 1.

FLORIDA. See **Appeals**, 2; **Constitutional Law**, V, 5.

FOURTEENTH AMENDMENT. See **Constitutional Law**, I, 5–8; II; V, 1–3, 5; VI; VIII; **School Desegregation.**

FREEDOM OF SPEECH. See **Constitutional Law**, V, 1–4; **Defamation**; **Labor.**

FREEDOM OF THE PRESS. See **Appeals**, 2; **Constitutional Law**, V, 5; **Defamation**, 4–7.

GENERAL ARTICLES OF UNIFORM CODE OF MILITARY JUSTICE. See **Constitutional Law**, I, 1.

GENERALIZED GRIEVANCES. See **Standing to Sue**, 1–3, 5.

GENERALIZED INTEREST IN CONFIDENTIALITY. See **Constitutional Law**, III.

GEOGRAPHIC MARKET. See **Antitrust Acts**, 2, 5–6, 10.

GOOD-TIME CREDITS. See **Civil Rights Act of 1871**; **Constitutional Law**, I, 5–6.

GOVERNMENTAL COMPULSION. See **Appeals**, 2; **Constitutional Law**, V, 5.

HABEAS CORPUS.

1. *Evidentiary hearings—Necessity that district judge conduct hearings.*—Title 28 U. S. C. § 2243, like its predecessor, Rev. Stat. § 761, requires that district judge personally conduct evidentiary hearings in federal habeas corpus cases. Wingo v. Wedding, p. 461.

2. *Evidentiary hearings—Prohibition against magistrate's conducting hearings—Invalidity of local rule of court.*—It is clear from text and legislative history of Federal Magistrates Act that Congress did not intend to alter requirements of 28 U. S. C. § 2243, and therefore local rule of District Court, insofar as it authorizes full-time magistrate to hold habeas corpus evidentiary hearings, is invalid because it is "inconsistent with the . . . laws of the United States" under § 636 (b) of Act, and because § 636 (b) itself precludes a district judge from assigning a magistrate duty of conducting an evidentiary hearing and limits magistrate's review to proposing, not holding, such a hearing. Wingo v. Wedding, p. 461.

3. *Evidentiary hearings—Prohibition against magistrate's conducting hearings—Invalidity of local rule of court—Electronic record-*

HABEAS CORPUS—Continued.

ing.—Invalidity of local rule of District Court, insofar as it authorizes full-time magistrate to hold habeas corpus evidentiary hearings, is not cured by procedure calling for electronic recording of hearings and, when requested, *de novo* consideration of such recording by district judge. Such procedure does not enable district judge to evaluate credibility by personally hearing and observing witnesses. Wingo v. Wedding, p. 461.

HARD-CORE PORNOGRAPHY. See **Constitutional Law**, I, 3; V, 3–4; **Obscenity**, 4–5, 7, 9.

HEARINGS. See **Constitutional Law**, I, 5–7; **Habeas Corpus.**

IMMUNITY FROM JUDICIAL PROCESS. See **Constitutional Law**, III.

IMPARTIAL TRIBUNALS. See **Constitutional Law**, I, 5–7.

"IMPROPER USE" FLAG STATUTES. See **Constitutional Law**, V, 1.

IN CAMERA INSPECTION. See **Appeals**, 3; **Constitutional Law**, III; **Federal Rules of Criminal Procedure.**

INCOME TAXES. See **Internal Revenue Code.**

INCOMPATIBILITY CLAUSE. See **Standing to Sue**, 1, 6.

INJURY TO REPUTATION. See **Defamation**, 6–7.

INMATE LEGAL ASSISTANCE PROGRAMS. See **Prisoners.**

INMATES. See **Civil Rights Act of 1871**; **Constitutional Law**, I, 5–7; VI; **Prisoners.**

INSPECTION OF ATTORNEY-PRISONER MAIL. See **Constitutional Law**, VI.

INSTITUTIONAL INTERESTS. See **Constitutional Law**, I, 5–7; VI.

INSTRUCTIONS TO JURY. See **Appeals**, 1; **Constitutional Law**, IV, VIII; **Defamation**, 1; **Obscenity**, 1, 4–6, 9.

INTERDISTRICT SCHOOL DESEGREGATION. See **School Desegregation**, 1, 3–4.

INTERNAL REVENUE CODE.

1. *"Amount paid out" for construction—Nondeductibility—Cost of transportation equipment.*—Considering literal language of § 263 (a) of Code in denying a deduction for "[a]ny amount paid out" for construction or permanent improvement of facilities, and its

INTERNAL REVENUE CODE—Continued.

purpose to reflect basic principle that a capital expenditure may not be deducted from current income, as well as regulations indicating that for purposes of § 263 (a) "amount paid out" equates with "cost incurred," there is no question that cost of respondent taxpayer's transportation equipment used in constructing capital facilities was "paid out" in same manner as other construction-related items, such as supplies, materials, and wages, which taxpayer capitalized. Commissioner v. Idaho Power Co., p. 1.

2. *Equipment depreciation—Construction of capital facilities—Capitalization.*—Equipment depreciation allocable to taxpayer's construction of capital facilities must be capitalized under § 263 (a) (1) of Code. Accepted accounting practice and established tax principles require capitalization of cost of acquiring a capital asset, including cost incurred in a taxpayer's construction of capital facilities. Purpose of depreciation accounting is allocation of expense of using an asset over tax periods benefited by that asset. Commissioner v. Idaho Power Co., p. 1.

INTRA-EXECUTIVE CONFLICTS. See **Justiciability.**

ISSUES OF PUBLIC OR GENERAL INTEREST. See **Defamation,** 6.

JUDGES. See **Constitutional Law,** I, 8; **Contempt,** 1, 3.

JURIES. See also **Constitutional Law,** IV; V, 3; VIII; **Obscenity,** 1, 3.

1. *Federal prosecution—Jury selection—Alleged exclusion of young people.*—Petitioners' argument in federal criminal prosecution that District Court abused its discretion in refusing to grant continuance until a new jury with a presumably greater ratio of young people could be drawn is without merit, it having been almost four years since jury wheel had last been filled, and there having been no showing of a discriminatory exclusion of an identifiable group entitled to a group-based protection. Hamling v. United States, p. 87.

2. *Federal prosecution—Voir dire examination—Sufficiency—Compliance with Fed. Rule Crim. Proc. 24 (a).*—District Court's *voir dire* examination in federal criminal prosecution was sufficient to test qualifications and competency of prospective jurors and complied with Rule 24 (a), and that court did not constitutionally err in not asking certain questions propounded by petitioners. Hamling v. United States, p. 87.

JURISDICTION. See **Appeals,** 3; **Constitutional Law,** I, 1; **Justiciability.**

JURY INSTRUCTIONS. See **Appeals,** 1; **Constitutional Law,** IV; VIII; **Defamation,** 1; **Obscenity,** 1, 4–6, 9.

JURY-SELECTION PROCEDURES. See **Juries.**

JURY TRIALS. See **Constitutional Law,** VII; **Contempt,** 2–3.

JUSTICIABILITY. See also **Constitutional Law,** III; **Standing to Sue,** 1, 3, 5.

Dispute between Special Prosecutor and President—Production of Presidential tapes and documents.—Dispute between Special Prosecutor and President as to whether District Court in criminal prosecutions of certain staff members of White House and political supporters of President lacked jurisdiction to issue subpoena *duces tecum* for certain Presidential tape recordings and documents as to which President claimed executive privilege, because matter was an intrabranch dispute between a subordinate and superior officer of Executive Branch and hence not subject to judicial resolution, presents a justiciable controversy. United States v. Nixon, p. 683.

KENTUCKY. See **Constitutional Law,** I, 8; **Contempt,** 1, 3.

KNOWING FALSEHOODS. See **Defamation,** 2, 5.

LABOR. See also **Defamation,** 1–3.

Labor disputes—Freedom of speech—"Scab."—In appellee letter carriers' libel actions against appellant union for including appellees in "List of Scabs" published in union's newsletter together with pejorative definition of "scab" using words like "traitor," state award did not comport with protection for freedom of speech in labor disputes recognized in *Linn* v. *Plant Guard Workers,* 383 U. S. 53. Use of epithet "scab," which was literally and factually true and is common parlance in labor disputes, was protected under federal law. Publication of pejorative definition was likewise not actionable, since use of words like "traitor" cannot be construed as representations of fact and their use in a figurative sense to manifest union's strong disagreement with views of workers opposing unionization is also protected by federal law. Letter Carriers v. Austin, p. 264.

LABOR DISPUTES. See **Defamation,** 1–3; **Labor.**

LABOR UNIONS. See **Defamation,** 1–3; **Labor.**

LESSENING OF COMPETITION. See **Antitrust Acts,** 6.

LIBEL. See **Defamation; Labor.**

LIBERTY. See **Constitutional Law,** I, 5–7.

LINE OF COMMERCE. See **Antitrust Acts,** 3.

LOCAL RULES OF COURT. See **Habeas Corpus**, 2–3.

LOGICAL NEXUS. See **Standing to Sue**, 4, 6.

LOSS OF GOOD-TIME CREDITS. See **Civil Rights Act of 1871**; **Constitutional Law**, I, 6.

MAGAZINES. See **Defamation**, 4.

MAGISTRATES. See **Habeas Corpus**, 2–3.

MAILING OBSCENE MATTER. See **Constitutional Law**, I, 2–4; IV; V, 4; **Obscenity**, 1–8.

MALICE. See **Defamation**, 1.

MARKET EXTENSION MERGERS. See **Antitrust Acts**, 8–10.

MERGERS. See **Antitrust Acts.**

METROPOLITAN SCHOOL DESEGREGATION. See **School Desegregation**, 2, 4.

MICHIGAN. See **School Desegregation.**

MILITARY SECRETS. See **Constitutional Law**, III, 2.

MOOTNESS. See also **Constitutional Law**, II, 1.

Disenfranchisement of felons—Effect of case's unusual procedural history.—In view of its unusual procedural history in Supreme Court of California, class action challenging constitutionality of provisions of California Constitution and implementing statutes disenfranchising ex-felons is not moot, even though county officials named as defendants decided not to contest action and told court they would henceforth register to vote ex-felons, including respondents, whose sentences and paroles had expired. Richardson v. Ramirez, p. 24.

MOTION PICTURES. See **Constitutional Law**, V, 3; VIII; **Obscenity**, 9.

MOTIONS TO QUASH SUBPOENAS. See **Appeals**, 3; **Federal Rules of Criminal Procedure**, 1; **Justiciability.**

MOVIE THEATERS. See **Constitutional Law**, V, 3; VIII; **Obscenity**, 9.

MULTIDISTRICT SCHOOL DESEGREGATION. See **School Desegregation**, 1, 3–4.

NATIONAL LABOR RELATIONS ACT. See **Defamation**, 1–3; **Labor.**

NATIONAL STANDARD. See **Constitutional Law**, IV; **Obscenity**, 1–8.

NEBRASKA. See **Civil Rights Act of 1871; Constitutional Law,** I, 5–7; VI; **Prisoners.**

NEGROES. See **School Desegregation.**

NEW HAVEN. See **Antitrust Acts,** 2–3, 5, 7.

NEWSMEN. See **Bail.**

NEWSPAPERS. See **Appeals,** 2; **Constitutional Law,** V, 5.

"NO BENEFIT" FINDINGS. See **Federal Youth Corrections Act.**

NONDEDUCTIBLE CAPITAL EXPENDITURES. See **Internal Revenue Code,** 1.

NOTICE. See **Constitutional Law,** I, 2–6.

NUDITY. See **Constitutional Law,** V, 3; VIII; **Obscenity,** 9.

OBJECTIONS TO JURY INSTRUCTIONS. See **Appeals,** 1.

OBSCENITY. See also **Constitutional Law,** I, 2–4; IV; V, 3–4; VIII.

1. *Advertising brochure—Sufficient evidence—Test.*—Jury's determination that advertising brochure with sexually explicit photographic material related to illustrated version of official report on obscenity, was supported by evidence and was consistent with obscenity formulation of *Memoirs* v. *Massachusetts,* 383 U. S. 413. Hamling v. United States, p. 87.

2. *Mailing obscene matter—Admissibility of evidence—Comparable materials.*—District Court in prosecution for mailing obscene matter did not abuse its discretion in excluding allegedly comparable materials (materials with second-class mailing privileges, or judicially found to have been nonobscene, or available on newsstands), since, *inter alia,* expert testimony had been allowed on relevant community standards; and similar materials or judicial determinations with respect thereto do not necessarily prove nonobscenity of materials accused is charged with circulating; and with respect to whether proferred evidence is cumulative, clearly relevant, or confusing, trial court has considerable latitude. Hamling v. United States, p. 87.

3. *Mailing obscene matter—Inconsistency in verdicts—Separability.*—In federal prosecution for mailing an obscene illustrated version of an official report on obscenity and an advertising brochure relating to such illustrated report, inability of jury to reach verdict on counts charging distribution of illustrated report had no relevance to its finding that brochure was obscene, consistency in verdicts not being required, and brochure being separable from illustrated report. Hamling v. United States, p. 87.

OBSCENITY—Continued.

4. *Mailing obscene matter—Jury instruction as to pandering.*—Since evidence of pandering can be relevant in determining obscenity, as long as proper constitutional definition of obscenity is applied, it was not improper for District Court in prosecution for mailing obscene advertising brochure to instruct jury in connection with test of *Memoirs* v. *Massachusetts*, 383 U. S. 413, that it could also consider whether brochure had been pandered by looking to manner of its distribution and editorial content. Hamling v. United States, p. 87.

5. *Mailing obscene matter—Jury instruction on prurient appeal.*—In prosecution for mailing obscene advertising brochure, District Court's instruction that in deciding whether predominant appeal of brochure was to a prurient interest in sex jury could consider whether some portions appealed to a specifically defined deviant group as well as to average person was not erroneous, since in measuring prurient appeal, jury (which was instructed that it must find that material as a whole appealed generally to a prurient interest in sex) may consider material's prurient appeal to clearly defined deviant sexual groups. Hamling v. United States, p. 87.

6. *Mailing obscene matter—Jury instructions on scienter.*—District Court in prosecution for mailing obscene matter did not err in its instructions to jury on scienter, including its instruction that "[petitioners'] belief as to the obscenity or nonobscenity of the materials is irrelevant," it being constitutionally sufficient that prosecution show that a defendant had knowledge of contents of materials that he distributes, and that he knew character and nature of materials. Hamling v. United States, p. 87.

7. *Mailing obscene matter—Pre-Miller conduct—Effect of applicability of Miller standards.*—Standards established in *Miller* v. *California*, 413 U. S. 15, and companion cases do not, as applied to petitioners' pre-*Miller* conduct, require a reversal of their convictions for mailing obscene matter. Defendants like petitioners, who were convicted prior to decisions in *Miller* cases but whose convictions were on direct appeal at that time, should receive any benefit available to them from those decisions. Hamling v. United States, p. 87.

8. *Mailing obscene matter—Sufficiency of indictment.*—Indictment under 18 U. S. C. § 1461 for mailing obscene matter was sufficiently definite. Language of § 1461 was not "too vague to support conviction for crime," and indictment gave petitioners adequate notice of charges against them, since at time petitioners were indicted statutory term "obscene," a legal term of art and not a generic ex-

OBSCENITY—Continued.

pression, had a definite legal meaning. Hamling v. United States, p. 87.

9. *Motion picture—Pre-Miller conduct—Effect of applicability of Miller standards.*—Appellant, whose conviction of violating Georgia obscenity statute for showing obscene film in a theater was on appeal at time of announcement of *Miller* v. *California*, 413 U. S. 15, is entitled to any benefit available thereunder. Jenkins v. Georgia, p. 153.

OHIO. See **Constitutional Law**, II, 2; V, 2.

OPPORTUNITY TO BE HEARD. See **Constitutional Law**, I, 8.

OUTLYING SCHOOL DISTRICTS. See **School Desegregation**, 4.

PATENT OFFENSIVENESS. See **Constitutional Law**, I, 3; V, 3; **Obscenity**, 8–9.

PEACE SYMBOL. See **Constitutional Law**, V, 1.

PERSONAL RECOGNIZANCE. See **Bail.**

PETTY OFFENSES. See **Contempt**, 3.

PHOTOGRAPHS. See **Constitutional Law**, I, 3; **Obscenity**, 1, 3.

POLITICAL ADVERTISING. See **Constitutional Law**, II, 2; V, 2.

POLITICAL CANDIDATES. See **Appeals**, 2; **Constitutional Law**, II, 2; V, 2, 5.

PORNOGRAPHY. See **Constitutional Law**, I, 3; V, 3; **Obscenity.**

POTENTIAL-COMPETITION DOCTRINE. See **Antitrust Acts**, 4, 10.

PRE-EMPTION. See **Defamation**, 2–3.

PRESIDENT. See **Appeals**, 3; **Constitutional Law**, III; **Federal Rules of Criminal Procedure**; **Justiciability.**

PRESIDENTIAL PRIVILEGE. See **Appeals**, 3; **Constitutional Law**, III; **Federal Rules of Criminal Procedure**, 3; **Justiciability.**

PRESS CRITICISM OF POLITICAL CANDIDATES. See **Appeals**, 2; **Constitutional Law**, V, 5.

PRESUMED DAMAGES. See **Defamation**, 5.

PRIOR NOTICE. See **Constitutional Law**, I, 5–6.

PRISON DISCIPLINARY PROCEEDINGS. See **Civil Rights Act of 1871**; **Constitutional Law**, I, 5–7.

PRISONERS. See also **Civil Rights Act of 1871; Constitutional Law,** I, 5–7; VI; **Habeas Corpus,** 1.

Legal assistance—Civil rights actions.—District Court, as Court of Appeals suggested, is to assess adequacy of legal assistance available for preparation of prisoners' civil rights actions, applying standard of *Johnson* v. *Avery,* 393 U. S. 483, 490, that "unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for postconviction relief, inmates could not be barred from furnishing assistance to each other." Wolff v. McDonnell, p. 539.

PRIVATE INDIVIDUALS. See **Defamation,** 5–7.

PRIVATELY OWNED AMERICAN FLAGS. See **Constitutional Law,** V, 1.

PROCEDURAL DUE PROCESS. See **Constitutional Law,** I, 5–6, 8.

PROCEDURE. See **Appeals,** 1, 3; **Federal Rules of Criminal Procedure; Juries.**

PRODUCT MARKET. See **Antitrust Acts,** 6.

PROTECTED EXPRESSION. See **Constitutional Law,** V, 1, 3–4.

PRURIENT APPEALS. See **Constitutional Law,** V, 3–4; **Obscenity,** 4–5.

PUBLIC EXPENDITURES. See **Standing to Sue,** 2–4.

PUBLIC FIGURES. See **Defamation,** 4.

PUBLIC FUNDS. See **Standing to Sue,** 2–4.

PUBLIC ISSUES. See **Defamation,** 6.

PUBLIC OFFICIALS. See **Defamation,** 4.

PUBLIC SCHOOLS. See **School Desegregation.**

PUBLIC TRANSIT ADVERTISING. See **Constitutional Law,** II, 2; V, 2.

PUBLISHERS. See **Defamation,** 4, 6–7.

PUNITIVE DAMAGES. See **Defamation,** 5.

QUASHING OF SUBPOENAS. See **Appeals,** 3; **Federal Rules of Criminal Procedure,** 1; **Justiciability.**

RACIAL DISCRIMINATION. See **School Desegregation.**

RACIAL RATIOS. See **School Desegregation,** 2.

RECKLESS-OR-KNOWING-FALSEHOOD TEST. See **Defamation,** 1–3, 5.

RECOGNIZANCE. See **Bail.**

REDUCTION OF SENTENCE. See **Contempt**, 3.

REGISTRATION TO VOTE. See **Constitutional Law**, II, 1; **Mootness.**

RELEVANT GEOGRAPHIC MARKET. See **Antitrust Acts**, 2, 5–7.

RELEVANT PRODUCT MARKET. See **Antitrust Acts**, 6.

REMEDIES. See **School Desegregation**, 1, 3–4.

REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY. See **Constitutional Law**, I, 3; **Obscenity**, 1, 3.

RESERVIST MEMBERS OF CONGRESS. See **Standing to Sue**, 1, 6.

RESTORATION OF GOOD-TIME CREDITS. See **Civil Rights Act of 1871**; **Constitutional Law**, I, 5–6.

RETROACTIVITY. See **Constitutional Law**, I, 7.

REVOCATION OF GOOD-TIME CREDITS. See **Civil Rights Act of 1871**; **Constitutional Law**, I, 5–6.

RIGHT OF CONFRONTATION. See **Constitutional Law**, I, 5–6.

"RIGHT OF REPLY" STATUTES. See **Appeals**, 2; **Constitutional Law**, V, 5.

RIGHT TO COUNSEL. See **Constitutional Law**, I, 5–6; VII; **Prisoners.**

RIGHT TO CROSS-EXAMINATION. See **Constitutional Law**, I, 5–6.

RIGHT TO EQUAL SPACE. See **Appeals**, 2; **Constitutional Law**, V, 5.

RIGHT TO JURY TRIAL. See **Constitutional Law**, VII; **Contempt**, 2–3.

RIGHT TO LIBERTY. See **Constitutional Law**, I, 5–6.

RIGHT TO PRESENT EVIDENCE. See **Constitutional Law**, I, 5–6.

ROBUST DEBATE. See **Defamation**, 2.

RULES OF CRIMINAL PROCEDURE. See **Appeals**, 3; **Constitutional Law**, III; **Federal Rules of Criminal Procedure**; **Juries.**

"SCABS." See **Defamation**, 1–2; **Labor.**

SCHOOL BUSING. See **School Desegregation.**

SCHOOL DESEGREGATION.

1. *Interdistrict segregation—Consolidation or cross-district remedy—Necessary showing.*—Before boundaries of separate and autonomous school districts may be set aside by consolidating separate units for remedial purposes or by imposing a cross-district remedy, it must be first shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district; *i. e.*, specifically, it must be shown that racially discriminatory acts of state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Milliken v. Bradley, p. 717.

2. *Metropolitan area plan—Erroneous standard.*—District Court, in desegregating Detroit schools, erred in using as a standard declared objective of a metropolitan area plan which, upon implementation, would leave "no school, grade, or classroom . . . substantially disproportionate to the overall pupil racial composition" of metropolitan area as a whole. Clear import of *Swann* v. *Board of Education,* 402 U. S. 1, is that desegregation, in sense of dismantling a dual school system, does not require any particular racial balance. Milliken v. Bradley, p. 717.

3. *School district lines—Interdistrict relief.*—While boundary lines may be bridged in circumstances where there has been a constitutional violation calling for interdistrict relief in desegregating schools, school district lines may not be casually ignored or treated as a mere administrative convenience; substantial local control of public education in this country is a deeply rooted tradition. Milliken v. Bradley, p. 717.

4. *Single-district de jure violations—Propriety of multidistrict, areawide remedy.*—Relief ordered by District Court and affirmed by Court of Appeals, consisting of desegregation plan encompassing 53 of 85 outlying suburban school districts plus Detroit, was based upon erroneous standards and was unsupported by record evidence that acts of outlying districts had any impact on discrimination found to exist in Detroit schools. A federal court may not impose a multidistrict, areawide remedy for single-district *de jure* school segregation violations where there is no finding that other included school districts have failed to operate unitary school systems or have committed acts that effected segregation within other districts, no claim or finding that school district boundary lines were established with purpose of fostering racial segregation, and no meaningful opportunity for included neighboring school districts to present evidence or be heard on propriety of a multidistrict remedy or on question

SCHOOL DESEGREGATION—Continued.

of constitutional violations by those districts. Milliken v. Bradley, p. 717.

SCHOOL DISTRICTS. See **School Desegregation.**

SECTION OF THE COUNTRY. See **Antitrust Acts,** 7.

SELECTION OF JURIES. See **Juries.**

SENTENCES. See **Constitutional Law,** I, 8; **Contempt,** 2–3; **Federal Youth Corrections Act.**

SEPARATION OF POWERS. See **Constitutional Law,** III; **Justiciability.**

SEXUAL CONDUCT. See **Constitutional Law,** V, 3; VIII; **Obscenity,** 9.

SEXUALLY EXPLICIT MATERIAL. See **Constitutional Law,** I, 3; V, 3; **Obscenity.**

SIXTH AMENDMENT. See **Constitutional Law,** VII; **Contempt,** 2–3.

SLANDER. See **Defamation.**

SPECIAL PROSECUTOR. See **Appeals,** 3; **Constitutional Law,** III; **Federal Rules of Criminal Procedure; Justiciability.**

SPOKANE. See **Antitrust Acts,** 1, 4, 6, 8–10.

STANDING TO SUE.

1. *Citizens—Challenge to constitutionality of Reserve membership of Members of Congress—Generalized interest.*—In class action by respondents (an association of present and former members of Armed Forces Reserve opposing United States involvement in Vietnam, and five association members) challenging Reserve membership of Members of Congress as violating Incompatibility Clause of Art. I, § 6, cl. 2, of Constitution, respondents had no standing to sue as citizens, since claimed nonobservance of Incompatibility Clause which they assert deprives citizens of faithful discharge of legislative duties of Reservist Members of Congress implicates only generalized interest of all citizens in constitutional governance and is thus merely an abstract injury rather than concrete injury that is essential to Art. III's "case or controversy" requirement. Schlesinger v. Reservists to Stop the War, p. 208.

2. *Federal taxpayer—Challenge to constitutionality of Central Intelligence Agency Act.*—Respondent federal taxpayer lacks standing to maintain suit alleging that CIA Act violated Art. I, § 9, cl. 7, of

STANDING TO SUE—Continued.

Constitution insofar as that clause requires a regular statement and account of public funds. United States v. Richardson, p. 166.

3. *Federal taxpayer—Challenge to constitutionality of Central Intelligence Agency Act—Generalized grievance.*—Respondent federal taxpayer's claim, in action challenging constitutionality of CIA Act, that without detailed information on CIA's expenditures he cannot properly follow legislative or executive action and thereby fulfill his obligations as a voter is a generalized grievance insufficient under *Frothingham* v. *Mellon,* 262 U. S. 447, or *Flast* v. *Cohen,* 392 U. S. 83, to show that "he has sustained or is immediately in danger of sustaining a direct injury as the result" of such action. United States v. Richardson, p. 166.

4. *Federal taxpayer—Challenge to constitutionality of Central Intelligence Agency Act—Lack of logical nexus.*—Respondent's challenge that CIA Act violated Art. I, § 9, cl. 7, of Constitution, not being addressed to taxing or spending power but to statutes regulating accounting and reporting procedures, provides no "logical nexus" between his status as "taxpayer" and asserted failure of Congress to require more detailed reports of expenditures of CIA. United States v. Richardson, p. 166.

5. *Federal taxpayer—Generalized grievances.*—*Flast* v. *Cohen,* 392 U. S. 83, which stressed need for meeting requirements of Art. III, did not "undermine the salutary principle . . . established by *Frothingham* [v. *Mellon,* 262 U. S. 447] . . . that a taxpayer may not 'employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System.'" United States v. Richardson, p. 166.

6. *Federal taxpayers—Challenge to constitutionality of Reserve membership of Members of Congress—Logical nexus.*—In class action by respondents (an association of present and former members of Armed Forces Reserve opposing United States involvement in Vietnam, and five association members) challenging Reserve membership of Members of Congress as violating Incompatibility Clause of Art. I, § 6, cl. 2, of Constitution, respondents lacked standing to sue as taxpayers, since they failed to establish required "logical nexus between the [taxpayer] status asserted and the claim sought to be adjudicated." Schlesinger v. Reservists to Stop the War, p. 208.

STATEMENT AND ACCOUNT CLAUSE. See **Standing to Sue,** 2–5.

STATE PRISONERS. See **Civil Rights Act of 1871; Constitutional Law,** I, 5–7; VI; **Habeas Corpus; Prisoners.**

STATUTORY CONSTRUCTION. See **Antitrust Acts,** 3, 7; **Federal Youth Corrections Act; Habeas Corpus,** 1–2.

STUDENT DESEGREGATION. See **School Desegregation.**

SUBPOENAS DUCES TECUM. See **Appeals,** 3; **Constitutional Law,** III; **Federal Rules of Criminal Procedure; Justiciability.**

SUBSTITUTION OF JUDGES. See **Contempt,** 1.

SUBURBAN SCHOOL DISTRICTS. See **School Desegregation,** 4.

SUPREME COURT. See also **Appeals,** 2–3.

1. Notation of the death of Mr. Chief Justice Warren (retired), p. v.

2. Assignment of Mr. Justice Clark (retired) to the United States Court of Appeals for the Second Circuit, p. 955.

3. Assignment of Mr. Justice Clark (retired) to the United States District Court for the Southern District of New York, p. 955.

SYMBOLISM. See **Constitutional Law,** V, 1.

TAPE RECORDINGS. See **Appeals,** 3; **Bail; Constitutional Law,** III; **Federal Rules of Criminal Procedure; Habeas Corpus,** 3; **Justiciability.**

TAX DEDUCTIONS. See **Internal Revenue Code.**

TAXES. See **Internal Revenue Code.**

TAXING AND SPENDING POWER. See **Standing to Sue,** 2–5.

TAXPAYERS. See **Standing to Sue,** 2–5.

THEATERS. See **Constitutional Law,** V, 3; VIII; **Obscenity,** 9.

TRANSPORTATION EQUIPMENT. See **Internal Revenue Code,** 1.

TRANSPORTATION OF STUDENTS. See **School Desegregation.**

TRIAL BY JURY. See **Constitutional Law,** VII; **Contempt,** 2–3.

TRIAL COURT'S SENTENCING FUNCTION. See **Federal Youth Corrections Act.**

TRIALS. See **Appeals,** 1; **Juries.**

UNCONSTITUTIONAL APPLICATION. See **Constitutional Law,** V, 1.

UNDERGROUND GROUPS. See **Bail.**

UNIFORM CODE OF MILITARY JUSTICE. See **Constitutional Law,** I, 1.

UNION NEWSLETTERS. See **Defamation**, 1–2; **Labor.**

UNION ORGANIZING CAMPAIGNS. See **Defamation**, 1–3; **Labor.**

UNITARY SCHOOL SYSTEMS. See **School Desegregation.**

UNITED STATES FLAG. See **Constitutional Law**, V, 1.

VAGUENESS. See **Constitutional Law**, I, 1–4.

VIETNAM. See **Standing to Sue**, 1, 6.

VOIR DIRE. See **Juries**, 2.

VOTER REGISTRATION. See **Constitutional Law**, II, 1; **Mootness.**

VOTING RIGHTS. See **Constitutional Law**, II, 1; **Mootness.**

WASHINGTON. See **Antitrust Acts**, 1, 4, 6, 8–10.

WITNESSES. See **Constitutional Law**, I, 5–6.

WORDS AND PHRASES.

1. *"Amount paid out."* § 263 (a)(1), Internal Revenue Code of 1954, 26 U. S. C. § 263 (a)(1). Commissioner v. Idaho Power Co., p. 1.

2. *"Final judgment."* 28 U. S. C. § 1257. Miami Herald Publishing Co. v. Tornillo, p. 241.

3. *"Final order."* 28 U. S. C. § 1291. United States v. Nixon, p. 683.

4. *"In."* 28 U. S. C. § 1254. United States v. Nixon, p. 683.

5. *"Line of commerce."* § 7, Clayton Act, 15 U. S. C. § 18. United States v. Connecticut National Bank, p. 656.

6. *"Section of the country."* § 7, Clayton Act, 15 U. S. C. § 18. United States v. Marine Bancorporation, p. 602; United States v. Connecticut National Bank, p. 656.

YOUTH OFFENDERS. See **Federal Youth Corrections Act.**

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