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UNITED STATES REPORTS

VOLUME 427

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1975

JUNE 24 (CONCLUDED) THROUGH JUNE 30, 1976

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief 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.
JOHN PAUL STEVENS, Associate Justice.

RETIRED

STANLEY REED, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
TOM C. CLARK, Associate Justice.

OFFICERS OF THE COURT

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ROBERT H. BORK, Solicitor General.
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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, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1975

ALDINGER *v.* HOWARD, TREASURER OF SPOKANE COUNTY, ET AL.

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

No. 74–6521. Argued March 24, 1976—Decided June 24, 1976

After petitioner had been discharged without a hearing by respondent county treasurer from her job in his office, she brought suit against the treasurer, the respondent county, and other county officers in Federal District Court under 42 U. S. C. § 1983, claiming that her discharge violated her federal constitutional rights and seeking injunctive relief and damages. Jurisdiction over the federal claim was asserted under 28 U. S. C. § 1343 (3), which gives federal district courts jurisdiction over "any civil action authorized by law to be commenced by any person" to redress the deprivation, under color of state law, of federal constitutional rights, and pendent jurisdiction was alleged to lie over a state-law claim against the county. The District Court dismissed the action as to the county on the ground that since the county was not suable as a "person" under § 1983, there was no independent basis of jurisdiction over it, and that thus the court had no power to exercise pendent jurisdiction over the claim against the county. On an appeal from this dismissal the Court of Appeals affirmed. *Held:* A fair reading of the language used in § 1343 (3), together with the scope of § 1983, under which counties are excluded from the "person[s]" answerable to the

plaintiff "in an action at law [or] suit in equity" to redress the enumerated deprivations, requires a holding that the joinder of a municipal corporation, like the county here, for purposes of asserting a state-law claim not within federal jurisdiction, is without the District Court's statutory jurisdiction. While with respect to litigation where nonfederal questions or claims were bound up with the federal claim upon which the parties were already in federal court, there is nothing in Art. III's grant of judicial power that prevents adjudication of the nonfederal portions of the parties' dispute, it is quite another thing to permit a nonfederal claim *in turn* to be the basis for joining a party over whom no independent federal jurisdiction exists, simply because that claim derives from the "common nucleus of operative fact," giving rise to the dispute between the parties to the federal claim. *Mine Workers* v. *Gibbs,* 383 U. S. 715, distinguished. The addition of a completely new party under such circumstances would run counter to the well-established principle that federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress. Pp. 6–19.

513 F. 2d 1257, affirmed.

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

Norman Rosenberg argued the cause for petitioner. With him on the brief was *R. Max Etter, Sr.*

Donald C. Brockett argued the cause and filed a brief for respondents.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

This case presents the "subtle and complex question with far-reaching implications," alluded to but not answered in *Moor* v. *County of Alameda,* 411 U. S. 693, 715 (1973), and *Philbrook* v. *Glodgett,* 421 U. S. 707, 720 (1975): whether the doctrine of pendent jurisdiction extends to confer jurisdiction over a party as to whom

no independent basis of federal jurisdiction exists. In this action, where jurisdiction over the main, federal claim against various officials of Spokane County, Wash., was grounded in 28 U. S. C. § 1343 (3), the Court of Appeals for the Ninth Circuit held that pendent jurisdiction was not available to adjudicate petitioner's state-law claims against Spokane County, over which party federal jurisdiction was otherwise nonexistent. While noting that its previous holdings to this effect were left undisturbed by *Moor,* which arose from that Circuit, the Court of Appeals was "not unaware of the widespread rejection" of its position in almost all other Federal Circuits. 513 F. 2d 1257, 1261 (1975). We granted certiorari to resolve the conflict on this important question. 423 U. S. 823 (1975). We affirm.

I

This case arises at the pleading stage, and the allegations in petitioner's complaint are straightforward. Petitioner was hired in 1971 by respondent Howard, the Spokane County treasurer, for clerical work in that office. Two months later Howard informed petitioner by letter that although her job performance was "excellent," she would be dismissed, effective two weeks hence, because she was allegedly "living with [her] boy friend." Howard's action, petitioner alleged, was taken pursuant to a state statute which provides that the appointing county officer "may revoke each appointment at pleasure."[1] Though a hearing was requested, none was held before or after the effective date of the discharge.

Petitioner's action in the United States District Court for the Eastern District of Washington, as embodied in her second amended complaint, claimed principally under

[1] Wash. Rev. Code § 36.16.070 (1974).

the Civil Rights Act of 1871, 42 U. S. C. § 1983,[2] that the discharge violated her substantive constitutional rights under the First, Ninth, and Fourteenth Amendments, and was procedurally defective under the latter's Due Process Clause. An injunction restraining the dismissal and damages for salary loss were sought against Howard, his wife, the named county commissioners, and the county. Jurisdiction over the federal claim was asserted under 28 U. S. C. § 1343 (3),[3] and pendent jurisdiction was alleged to lie over the "state law claims against the parties." As to the county, the state-law

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

[3] "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . . . .

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . ."

The Court of Appeals also noted that petitioner's complaint alleged that jurisdiction lay under 28 U. S. C. § 1331, and that the amount in controversy exceeded $10,000. This was apparently an attempt to plead a cause of action directly under the Fourteenth Amendment, irrespective of the implementing civil rights legislation. The Court of Appeals, however, stated that petitioner had "consistently chosen to rely upon" 42 U. S. C. § 1983, together with 28 U. S. C. § 1343 (3), and pendent jurisdiction as the bases for her action against Spokane County. Thus, neither the District Court nor the Court of Appeals reached the question whether the complaint stated a cause of action over which § 1331 jurisdiction would lie. Petitioner did not raise the question in her petition for certiorari, and it is therefore not before us.

claim was said to rest on state statutes waiving the county's sovereign immunity and providing for vicarious liability arising out of tortious conduct of its officials. 513 F. 2d, at 1358. The District Court dismissed the action as to the county on the ground that since it was not suable as a "person" under § 1983, there was no independent basis of jurisdiction over the county, and thus "this court [has no] power to exercise pendent jurisdiction over the claims against Spokane County." From this final judgment, see Fed. Rule Civ. Proc. 54 (b), petitioner appealed.

The Court of Appeals first rejected petitioner's claim that her § 1983 action against the county fell within the District Court's § 1343 (3) jurisdiction, as obviously foreclosed by this Court's decisions in *Moor, supra,* and *City of Kenosha* v. *Bruno,* 412 U. S. 507 (1973). Turning to petitioner's pendent-jurisdiction argument, the Court of Appeals noted, 513 F. 2d, at 1260, that the District Court had made no alternative ruling on the "suitability of this case for the discretionary exercise of pendent jurisdiction" under the second part of the rule enunciated in *Mine Workers* v. *Gibbs,* 383 U. S. 715, 726–727 (1966). But since this Court in *Moor* had expressly left undisturbed the Ninth Circuit's refusal to apply pendent jurisdiction over a nonfederal party, the instant panel felt free to apply that rule as set out in *Hymer* v. *Chai,* 407 F. 2d 136 (CA9 1969), and *Moor* v. *Madigan,* 458 F. 2d 1217 (CA9 1972), aff'd in part, rev'd in part, 411 U. S. 693 (1973). This kind of case, the Court of Appeals reasoned, presented the "weakest rationale" for extension of *Gibbs* to pendent parties: (1) The state claims are pressed against a party who would otherwise not be in federal court; [4] (2) diversity cases generally present more

[4] There is no diversity of citizenship under 28 U. S. C. § 1332 among the parties here, since all are citizens of the State of Washington.

attractive opportunities for exercise of pendent-party jurisdiction, since all claims therein by definition arise from state law; (3) federal courts should be wary of extending court-created doctrines of jurisdiction to reach parties who are expressly excluded by Congress from liability, and hence federal jurisdiction, in the federal statute sought to be applied to the defendant in the main claim; (4) pendent state-law claims arising in a civil rights context will "almost inevitably" involve the federal court in difficult and unsettled questions of state law, with the accompanying potential for jury confusion. 513 F. 2d, at 1261–1262.

II

The question whether "pendent" federal jurisdiction encompasses not merely the litigation of additional *claims* between parties with respect to whom there is federal jurisdiction, but also the joining of additional *parties* with respect to whom there is no independent basis of federal jurisdiction, has been much litigated in other federal courts [5] and much discussed by commentators [6] since this Court's decision in *Gibbs*. *Gibbs*, in turn, is the most recent in a long line of our cases dealing with the relationship between the judicial power of the United States and the actual contours of the cases and controversies to which that power is extended by Art. III.

In *Osborn* v. *Bank of the United States*, 9 Wheat. 738

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[5] See, *e. g.*, cases cited in *Moor* v. *County of Alameda*, 411 U. S. 693, 713–714, nn. 29–30 (1973).

[6] See, *e. g.*, 3A J. Moore, Federal Practice ¶ 18.07[1.–4] (2d ed. 1974); P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 921–926 (2d ed. 1973); C. Wright, Law of Federal Courts § 19 (2d ed. 1970); Fortune, Pendent Jurisdiction—The Problem of "Pendenting Parties," 34 U. Pitt. L. Rev. 1 (1972); Shakman, The New Pendent Jurisdiction of the Federal Courts, 20 Stan. L. Rev. 262 (1968).

(1824), Mr. Chief Justice Marshall in his opinion for the Court addressed the argument that the presence in a federal lawsuit of questions which were not dependent on the construction of a law of the United States prevented the federal court from exercising Art. III jurisdiction, even in a case in which the plaintiff had been authorized by Congress to sue in federal court. Noting that "[t]here is scarcely any case, every part of which depends" upon federal law, *id.*, at 820, the Chief Justice rejected the contention:

> "If it be a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings. . . .
>
> "We think, then, that when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it." *Id.*, at 822–823.

This doctrine was later applied in *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175 (1909), to hold that where federal jurisdiction is properly based on a colorable federal claim, the court has the "right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only." *Id.*, at 191. In *Moore* v. *N. Y. Cotton Exchange,* 270 U. S. 593, 609–610 (1926),

the Court in similar fashion sustained jurisdiction over a defendant's compulsory counterclaim arising out of the same transaction upon which the plaintiff's federal antitrust claim was grounded, although the latter had been dismissed for failure to state a claim, and the former had no independent federal jurisdictional basis. A few years later, in *Hurn* v. *Oursler,* 289 U. S. 238 (1933), the Court drew upon the foregoing cases to establish federal jurisdiction to decide a state-law claim joined with a federal copyright infringement claim, where both were considered "two distinct grounds in support of a single cause of action," although the federal ground had proved unsuccessful. *Id.,* at 246.

In *Gibbs,* the respondent brought an action in federal court against petitioner UMW, asserting parallel claims—a federal statutory claim and a claim under the common law of Tennessee—arising out of alleged concerted union efforts to deprive him of contractual and employment relationships with the coal mine's owners. Though the federal claim was ultimately dismissed after trial, and though diversity was absent, the lower courts sustained jurisdiction over the state-law claim, and affirmed the damages award based thereon. Before reaching the merits (on which the lower courts were reversed), this Court addressed the argument that under the rule of pendent jurisdiction as set out in *Hurn* v. *Oursler, supra,* at 245–246, *Gibbs* had merely stated "two separate and distinct causes of action" as opposed to "two distinct grounds in support of a single cause of action," in which former case the federal court lacked the power to "retain and dispose" of the "non-federal *cause of action.*" The Court stated that since the *Hurn* test was formulated before the unification of law and equity by the Federal Rules of Civil Procedure, it was therefore unnecessarily tied to the outmoded concept of a "cause of

action" developed under code pleading rules. Recognizing that the Federal Rules themselves cannot expand federal-court jurisdiction, the Court nevertheless found in them a sufficient basis to go beyond *Hurn*'s "unnecessarily grudging" approach to parallel claims, and to adopt a more flexible treatment within the contours of Art. III, § 2. Thus, in a federal-question case, where the federal claim is of sufficient substance, and the factual relationship between "that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case,' " pendent jurisdiction extends to the state claim. 383 U. S., at 725. The Court, in the second aspect of the *Gibbs* formulation, went on to enumerate the various factors bearing on a district court's discretionary decision whether the power should be exercised in a given parallel-claims case, emphasizing that "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." *Id.*, at 726.

These cases, from *Osborn* to *Gibbs*, show that in treating litigation where nonfederal questions or claims were bound up with the federal claim upon which the parties were already in federal court, this Court has found nothing in Art. III's grant of judicial power which prevented adjudication of the nonfederal portions of the parties' dispute. None of them, however, adverted to the separate question, involved in the instant case, of whether a nonfederal claim could *in turn* be the basis for joining a party over whom no independent federal jurisdiction exists, simply because that claim could be derived from the "common nucleus of operative fact" giving rise to the dispute between the parties to the federal claim.

But while none of the foregoing line of cases discussed the joining of additional parties, other decisions of this Court have developed a doctrine of "ancillary juris-

diction," and it is in part upon this development—and its relationship to *Gibbs*—that petitioner relies to support "pendent party" jurisdiction here. Under this doctrine, the Court has identified certain considerations which justified the joining of parties with respect to whom there was no independent basis of federal jurisdiction. In *Freeman* v. *Howe,* 24 How. 450 (1861), the Court held that the state court had no jurisdiction over a replevin action brought by creditor claimants to property that had already been attached by the federal marshal in a federal diversity action. The claimants argued that a want of state-court jurisdiction would leave them without a remedy, since diversity between them and the marshal was lacking. This Court stated that an equitable action in federal court by those claimants, seeking to prevent injustice in the diversity suit, would not have been "an original suit, but ancillary and dependent, supplementary merely to the original suit," and thus maintainable irrespective of diversity of citizenship. *Id.,* at 460. A similar approach was taken in *Stewart* v. *Dunham,* 115 U. S. 61 (1885), where, after a creditors' suit to set aside an allegedly fraudulent conveyance was removed to federal court on grounds of diversity, other nondiverse creditors were permitted to intervene to assert an identical interest. Since it was merely a matter of form whether the latter appeared as parties or came in later under a final decree to prove their claims before a master, the federal court "could incidentally decree in favor of [the nondiverse] creditors[, and s]uch a proceeding would be ancillary to the jurisdiction acquired between the original parties . . . ." *Id.,* at 64. *Dunham* was in turn held controlling in *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U. S. 356 (1921). There, suing in diversity, out-of-state "Class A" members of an Indiana fraternal benefit society had sought a decree adjudicating their common interests in the control and disposition of

the society's funds. After successfully defending that action, the society brought a second suit in federal court seeking to protect that judgment as against an identical state-court action brought by members of "Class A" who were of Indiana citizenship. Since under *Dunham* "intervention of the Indiana citizens in the [original] suit would not have defeated the jurisdiction already acquired," 255 U. S., at 366, the earlier judgment was binding against them, and the federal court had ancillary jurisdiction over the society's suit to enjoin the later state action, irrespective of diversity.

The doctrine of ancillary jurisdiction developed in the foregoing cases is bottomed on the notion that since federal jurisdiction in the principal suit effectively controls the property or fund under dispute, other claimants thereto should be allowed to intervene in order to protect their interests, without regard to jurisdiction.[7] As this Court stated in *Fulton Bank* v. *Hozier,* 267 U. S. 276, 280 (1925):

> "The general rule is that when a federal court has properly acquired jurisdiction over a cause it may entertain, by intervention, dependent or ancillary controversies; but no controversy can be regarded as dependent or ancillary unless it has direct re-

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[7] As one commentator has stated:

"Once it is agreed that a state court cannot interfere with property in the control of the federal court, the notion of ancillary jurisdiction put forward in Freeman v. Howe cannot be avoided. Unless the federal court has ancillary jurisdiction to hear the claims of all persons to the property, regardless of their citizenship, some persons, with a valid claim to the property, would be deprived of any forum in which to press that claim." C. Wright, Law of Federal Courts § 9 (2d ed. 1970).

Ben-Hur sets out a corollary to *Howe:* ancillary jurisdiction extends to subsequent suits brought to effectuate a federal court's judgment determining the rights to such property.

lation to property or assets actually or constructively drawn into the court's possession or control by the principal suit."

The decisional bridge between these two relatively discrete lines of cases appears to be this Court's decision in *Moore.* Since the defendant's nonfederal counterclaim in *Moore* arose out of the same transaction giving rise to the antitrust dispute between the parties, and federal jurisdiction was sustained over the former, the Court in *Hurn,* though faced with a plaintiff's assertion of pendent jurisdiction over an additional nonfederal claim, thought the two cases, "in principle, cannot be distinguished." *Hurn,* 289 U. S., at 242. It was *Hurn*'s "unnecessarily grudging" test of pendent jurisdiction, of course, which the Court expanded in *Gibbs.* On the other hand, because *Moore* was a suit in equity, the jurisdiction sustained there has been rationalized as falling under the umbrella of ancillary jurisdiction,[8] though *Moore* neither used that term nor cited to *Fulton Bank, supra.* Petitioner thus suggests that since *Moore,* read as an "ancillary" case, adopted a "transactional" test of jurisdiction quite similar to that set out in *Gibbs,* there is presently no "principled" distinction between the two doctrines. Since under the Federal Rules "joinder of claims, parties and remedies is strongly encouraged," *Gibbs,* 383 U. S., at 724, her use of the Rules here is as a matter of jurisdictional power assertedly limited only by whether the claim against the county "derive[s] from a common nucleus of operative fact." *Id.,* at 725. Hence, petitioner concludes, based on *Gibbs'* treatment of pendent claims, and the use of ancillary jurisdiction to

[8] See Shulman & Jaegerman, Some Jurisdictional Limitations on Federal Procedure, 45 Yale L. J. 393, 413 (1936); 3 J. Moore, Federal Practice ¶ 13.15 (2d ed. 1974); C. Wright, Law of Federal Courts § 9 (2d ed. 1970).

bring in additional parties, that her nonfederal claim against a nonfederal defendant falls within pendent jurisdiction since it satisfies *Gibbs'* test on its face.

For purposes of addressing the jurisdictional question in this case, however, we think it quite unnecessary to formulate any general, all-encompassing jurisdictional rule. Given the complexities of the many manifestations of federal jurisdiction, together with the countless factual permutations possible under the Federal Rules, there is little profit in attempting to decide, for example, whether there are any "principled" differences between pendent and ancillary jurisdiction; or, if there are, what effect *Gibbs* had on such differences. Since it is upon *Gibbs'* language that the lower federal courts have relied in extending the kind of pendent-party jurisdiction urged by petitioner here, we think the better approach is to determine what *Gibbs* did and did not decide, and to identify what we deem are important differences between the jurisdiction sustained in *Gibbs* and that asserted here.

Gibbs and its lineal ancestor, *Osborn,* were couched in terms of Art. III's grant of judicial power in "Cases . . . arising under this Constitution, the Laws of the United States, and [its] Treaties," since they (and implicitly the cases which linked them) represented inquiries into the scope of Art. III jurisdiction in litigation where the "common nucleus of operative fact" gave rise to nonfederal questions or claims between the parties. None of them posed the need for a further inquiry into the underlying statutory grant of federal jurisdiction or a flexible analysis of concepts such as "question," "claim," and "cause of action," because Congress had not addressed itself by statute to this matter. In short, Congress had said nothing about the scope of the word "Cases" in Art. III which would offer guidance on the

kind of elusive question addressed in *Osborn* and *Gibbs:* whether and to what extent jurisdiction extended to a parallel state claim against the existing federal defendant.

Thus, it was perfectly consistent with Art. III, and the particular grant of subject-matter jurisdiction upon which the federal claim against the defendant in those cases was grounded, to require that defendant to answer as well to a second claim deriving from the "common nucleus" of fact, though it be of state-law vintage. This would not be an "unfair" use of federal power by the suing party, he already having placed the defendant properly in federal court for a substantial federal cause of action. Judicial economy would also be served because the plaintiff's claims were "such that he would ordinarily be expected to try them all in one judicial proceeding . . . ." *Gibbs,* 383 U. S., at 725.

The situation with respect to the joining of a new party, however, strikes us as being both factually and legally different from the situation facing the Court in *Gibbs* and its predecessors. From a purely factual point of view, it is one thing to authorize two parties, already present in federal court by virtue of a case over which the court has jurisdiction, to litigate in addition to their federal claim a state-law claim over which there is no independent basis of federal jurisdiction. But it is quite another thing to permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to join an entirely different defendant on the basis of a state-law claim over which there is no independent basis of federal jurisdiction, simply because his claim against the first defendant and his claim against the second defendant "derive from a common nucleus of operative fact." *Ibid.* True, the same considerations of judicial economy would be served

insofar as plaintiff's claims "are such that he would ordinarily be expected to try them all in one judicial proceeding . . . ." *Ibid.* But the addition of a completely new party would run counter to the well-established principle that federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress. We think there is much sense in the observation of Judge Sobeloff, writing for the Court of Appeals in *Kenrose Mfg. Co.* v. *Fred Whitaker Co.*, 512 F. 2d 890, 894 (CA4 1972):

> "The value of efficiency in the disposition of lawsuits by avoiding multiplicity may be readily conceded, but that is not the only consideration a federal court should take into account in assessing the presence or absence of jurisdiction. Especially is this true where, as here, the efficiency plaintiff seeks so avidly is available without question in the state courts."

There is also a significant legal difference. In *Osborn* and *Gibbs* Congress was silent on the extent to which the defendant, already properly in federal court under a statute, might be called upon to answer nonfederal questions or claims; the way was thus left open for the Court to fashion its own rules under the general language of Art. III. But the extension of *Gibbs* to this kind of "pendent party" jurisdiction—bringing in an additional defendant at the behest of the plaintiff—presents rather different statutory jurisdictional considerations. Petitioner's contention that she should be entitled to sue Spokane County as a new third party, and then to try a wholly state-law claim against the county, all of which would be "pendent" to her federal claim against respondent county treasurer, must be decided, not in the context of congressional silence or tacit encouragement, but in

quite the opposite context. The question here, which it was not necessary to address in *Gibbs* or *Osborn,* is whether by virtue of the statutory grant of subject-matter jurisdiction, upon which petitioner's principal claim against the treasurer rests, Congress has addressed itself to the *party* as to whom jurisdiction pendent to the principal claim is sought. And it undoubtedly has done so.

III

Congress has in specific terms conferred Art. III jurisdiction on the district courts to decide actions brought to redress deprivations of civil rights. Under the opening language of § 1343,[9] those courts "shall have original jurisdiction of any *civil action authorized by law* to be commenced by any person . . ." (emphasis added). The civil rights action set out in § 1983 [10] is, of course, included within the jurisdictional grant of subsection (3) of § 1343. Yet petitioner does not, and indeed could not, contest the fact that as to § 1983, counties are excluded from the "person[s]" answerable to the plaintiff "in an action at law [or] suit in equity" to redress the enumerated deprivations.[11] Petitioner must necessarily argue that in spite of the language emphasized above Congress left it open for the federal courts to fashion a jurisdictional doctrine under the general language of Art. III enabling them to circumvent this exclusion, as long as the civil rights action and the state-law claim arise from a "common nucleus of operative fact." But the question whether jurisdiction over the instant lawsuit extends not only to a related state-law claim, but to the defendant against whom that claim is made, turns initially, not on the general

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

[10] See n. 2, *supra.*

[11] *Monroe* v. *Pape,* 365 U. S. 167, 187–191 (1961); *City of Kenosha* v. *Bruno,* 412 U. S. 507, 511–513 (1973).

contours of the language in Art. III, *i. e.*, "Cases . . . arising under," but upon the deductions which may be drawn from congressional statutes as to whether Congress wanted to grant this sort of jurisdiction to federal courts. Parties such as counties, whom Congress *excluded* from liability in § 1983, and therefore by reference in the grant of jurisdiction under § 1343 (3), can argue with a great deal of force that the scope of that "civil action" over which the district courts have been given statutory jurisdiction should not be so broadly read as to bring them *back* within that power merely because the facts also give rise to an ordinary civil action against them under state law. In short, as against a plaintiff's claim of *additional* power over a "pendent party," the reach of the statute conferring jurisdiction should be construed in light of the scope of the cause of action as to which federal judicial power *has* been extended by Congress.

Resolution of a claim of pendent-party jurisdiction, therefore, calls for careful attention to the relevant statutory language. As we have indicated, we think a fair reading of the language used in § 1343, together with the scope of § 1983, requires a holding that the joinder of a municipal corporation, like the county here, for purposes of asserting a state-law claim not within federal diversity jurisdiction, is without the statutory jurisdiction of the district court.[12]

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[12] The floor debates on the statute which became § 1983, relied upon by our Brother BRENNAN, insofar as any common understanding may be distilled from their diverse strains, indicate a recognition of the authority of United States courts to entertain suits against municipal corporations under their then-existing diversity jurisdiction. It is, of course, a fair inference from this theme that nothing in § 1983 or § 1343 was intended to disturb such jurisdiction, and it seems scarcely necessary to add that nothing we say in this opinion disturbs it in the slightest. All that we hold is that where the asserted basis of federal jurisdiction over a municipal

There are, of course, many variations in the language which Congress has employed to confer jurisdiction upon the federal courts, and we decide here only the issue of so-called "pendent party" jurisdiction with respect to a claim brought under §§ 1343 (3) and 1983. Other statutory grants and other alignments of parties and claims might call for a different result. When the grant of jurisdiction to a federal court is exclusive, for example, as in the prosecution of tort claims against the United States under 28 U. S. C. § 1346, the argument of judicial economy and convenience can be coupled with the additional argument that *only* in a federal court may all of the claims be tried together.[13] As we indicated at the outset of this opinion, the question of pendent-party jurisdiction is "subtle and complex," and we believe that it would be as unwise as it would be unnecessary to lay down any sweeping pronouncement upon the existence or exercise of such jurisdiction. Two observations suffice for the disposition of the type of case before us. If the new party sought to be joined is not otherwise subject to federal jurisdiction, there is a more serious obstacle to the exercise of pendent jurisdiction than if parties already before the court are required to litigate a state-law claim. Before it can be concluded that such jurisdiction exists, a federal court must satisfy itself not only that Art. III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence.

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corporation is not diversity of citizenship, but is a claim of jurisdiction pendent to a suit brought against a municipal officer within § 1343, the refusal of Congress to authorize suits against municipal corporations under the cognate provisions of § 1983 is sufficient to defeat the asserted claim of pendent-party jurisdiction.

[13] See, *e. g.*, *Hipp* v. *United States*, 313 F. Supp. 1152 (EDNY 1970). Contra, *Williams* v. *United States*, 405 F. 2d 951 (CA9 1969).

We conclude that in this case Congress has by implication declined to extend federal jurisdiction over a party such as Spokane County. The judgment of the Court of Appeals for the Ninth Circuit is therefore

Affirmed.

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

Mine Workers v. *Gibbs,* 383 U. S. 715, 725–726 (1966), held:

> "Pendent jurisdiction, in the sense of judicial *power,* exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ,' U. S. Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. . . . The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.
>
> "That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exer-

cise jurisdiction over state claims, even though bound to apply state law to them." (Footnotes omitted.)

I

Gibbs concerned a state-law claim jurisdictionally pendent to one of federal law, but no reason appears why the identical principles should not equally apply to pendent state-law claims involving the joinder of additional parties. In either case the Art. III question concerns only the subject matter and not the *in personam* jurisdiction of the federal courts. In either case the question of Art. III power in the federal judiciary to exercise subject-matter jurisdiction concerns whether the claims asserted are such as "would ordinarily be expected to [be tried] in one judicial proceeding," and the question of discretion addresses "considerations of judicial economy, convenience and fairness to litigants." [1]

To recognize that the addition of parties under the pendent jurisdiction of the federal courts will sometimes alter the balance of "judicial economy, convenience and fairness," or sometimes threaten to embroil federal courts in the resolution of uncertain questions of state law, and thereby make the exercise of this discretionary jurisdiction inappropriate, is only to speak to the question

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[1] This has been the holding of the Court of Appeals for the Second Circuit in a series of opinions by Judge Friendly. *Almenares* v. *Wyman*, 453 F. 2d 1075 (1971); *Leather's Best, Inc.* v. *S. S. Mormaclynx*, 451 F. 2d 800 (1971); *Astor-Honor, Inc.* v. *Grosset & Dunlap, Inc.*, 441 F. 2d 627 (1971); *United States* v. *Heyward-Robinson Co.*, 430 F. 2d 1077 (1970) (concurring opinion). See also 7 C. Wright & A. Miller, Federal Practice and Procedure § 1659 (1972); Fortune, Pendent Jurisdiction—The Problem of "Pendenting Parties," 34 U. Pitt. L. Rev. 1 (1972); Note, UMW v. Gibbs and Pendent Jurisdiction, 81 Harv. L. Rev. 657 (1968); Comment, Pendent and Ancillary Jurisdiction: Towards a Synthesis of Two Doctrines, 22 U. C. L. A. L. Rev. 1263 (1975).

of the proper exercise of judicial discretion in the circumstances and does not vitiate the *Gibbs* analysis or its application to the question of pendent-party jurisdiction. To fail to recognize the applicability of *Gibbs* to the situation of pendent parties as well as claims would often compel a result aptly described by the Court of Appeals for the Eighth Circuit:

> "'[I]t would be an unjustifiable waste of judicial and professional time—indeed, a travesty on sound judicial administration—to allow plaintiff to try his [federal and state claims against certain codefendants] in Federal court but to require him to prosecute a claim involving precisely the same facts against [a codefendant joined pursuant only to the pendent state-law claim] in a State court.'" *Schulman* v. *Huck Finn, Inc.*, 472 F. 2d 864, 866 (1973) (quoting 350 F. Supp. 853, 858 (Minn. 1972)).

In upholding an exercise of pendent-party jurisdiction under *Gibbs* principles in that case, the Court of Appeals reaffirmed, 472 F. 2d, at 867, an earlier decision of that court by my Brother BLACKMUN, *Hatridge* v. *Aetna Cas. & Surety Co.*, 415 F. 2d 809 (1969). Therein my Brother BLACKMUN, applying *Gibbs* principles in finding appropriate the exercise of federal pendent-party jurisdiction, set forth an analysis with which I am in complete accord:

> "[In] appropriate cases [pendent-party jurisdiction] makes good sense; it avoids forum shopping and multiple actions; it tends to reduce costs for litigants; and it avoids the waste of already heavily burdened judicial time." *Id.*, at 817.

II

The Court today does not disclaim the applicability of *Gibbs* to the question of federal pendent-party juris-

diction. Rather, recognizing *sub silentio* the absurd results it would create by a disclaimer of the possibility of federal pendent-party jurisdiction—whether under the label of "ancillary" jurisdiction or that of "pendent party," see *Moor* v. *County of Alameda,* 411 U. S. 693, 714–715 (1973)—in a variety of possible contexts under various jurisdictional statutes and the Federal Rules of Civil Procedure,[2] the Court declines "to lay down any sweeping pronouncement upon the existence or exercise of such jurisdiction." *Ante,* at 18. The Court instead reaches its result—the proclamation of a *per se* rule forbidding pendent jurisdiction over claims arising under state law against local governmental units when joined with a § 1983 claim even where such claims "derive from a common nucleus of operative fact"—by purporting to find that "in this case Congress has by implication" expressed its disapproval of federal pendent-party jurisdiction "over a party such as Spokane County." *Ante,* at 19. That result is demonstrably untenable.

The Court seeks to justify its *per se* rule by analysis of the congressional will as expressed in the federal statutes involved—28 U. S. C. § 1343 (3) and 42 U. S. C. § 1983.[3] The test the Court announces is "whether by

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[2] As, for example, where a defendant seeks to join under Fed. Rule Civ. Proc. 14 a third-party defendant over whom there is no independent subject-matter jurisdiction. The analysis in *Gibbs* placed emphasis on the fact that the Federal Rules "embody 'the whole tendency of our decisions . . . to require a plaintiff to try his . . . whole case at one time,' . . . and to that extent emphasize the basis of pendent jurisdiction." 383 U. S., at 725 n. 13. The Federal Rules directly encourage the joinder of parties as well as claims. *E. g.,* Fed. Rules Civ. Proc. 13 (h), 14, 19, 20, 22, 24, and 25.

[3] I agree, of course, that Congress may preclude the exercise of pendent-party jurisdiction as to particular parties or particular types of claims and that congressional determination would be binding on

virtue of the statutory grant of subject-matter jurisdiction, upon which petitioner's principal claim . . . rests, Congress has addressed itself to the *party* as to whom jurisdiction pendent to the principal claim is sought." *Ante,* at 16. At one level of analysis, this test is of course meaningless, being capable of application to *all* cases, because all instances of asserted pendent-party jurisdiction will by definition involve a party as to whom Congress has impliedly "addressed itself" by not expressly conferring subject-matter jurisdiction on the federal courts. But, the Court says, it is drawing "deductions . . . from [the] congressional statutes as to whether Congress wanted to grant this sort of jurisdiction to federal courts," *ante,* at 17, and it "conclude[s] that in this case Congress has by implication declined." *Ante,* at 19. It is apparent, however, that analysis of the statutory enactments involved, their legislative history, and the congressional policies embodied therein belies the Court's assertion that its purported test for determining the propriety of pendent-party jurisdiction yields the result reached today.

A

The purely jurisdictional statute involved in this case, 28 U. S. C. § 1343 (3), in no way speaks to the issue of pendent-party jurisdiction in respect to joinder of defendants under pendent state-law claims. On its face that statute speaks only to jurisdiction over civil actions

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this Court. It is worthy of note, however, that Congress has not in the past expressed disapproval of our developments in the law of pendent and ancillary jurisdiction, and "[t]he only congressional enactments on this subject have, in fact, extended rather than restricted ancillary jurisdiction in a number of situations." Baker, Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction, 33 U. Pitt. L. Rev. 759, 763 (1972).

"authorized by law to be commenced by any person," and plainly does not address the question of what parties shall be joined as defendants. Accordingly, the Court necessarily argues its proposition from "the scope of the cause of action," *ante,* at 17, created by § 1983. But the legislative history of that enactment plainly gives no support to the Court's argument that Congress by implication intended to preclude the exercise of federal jurisdiction over state-law claims against local governmental units where such jurisdiction would otherwise lie under application of standard principles.

Our precedents, *Monroe* v. *Pape,* 365 U. S. 167 (1961), and *Moor* v. *County of Alameda, supra,* firmly establish that the sole rationale for construing the "persons" susceptible of liability under § 1983 as excluding local units of government lies in the legislative history of the so-called Sherman Amendment to the Act of April 20, 1871, § 1 of which enacted into law the first version of the present § 1983.[4] The Senate approved one version of the Amendment proposed by Senator Sherman which would have expressly provided for local governmental liability,[5] and the House rejected it.[6] The Conference Committee reported another version[7] and the House rejected the Conference Report.[8] Thereafter, the Senate acceded to the House rejection of the Sherman Amendment and both Houses substituted in its place § 6 of the 1871 Act, the first version of the present 42 U. S. C. § 1986.[9] The rejection of the Sherman Amendment, and nothing more, has been the basis upon which we have

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[4] Cong. Globe, 42d Cong., 1st Sess., App. 335 (1871).

[5] *Id.,* at 704–705.

[6] *Id.,* at 725.

[7] *Id.,* at 749.

[8] *Id.,* at 800–801.

[9] *Id.,* at 804.

construed § 1983 liability as not encompassing local governmental units. *Monroe* v. *Pape, supra,* at 188–191; *Moor* v. *County of Alameda,* 411 U. S., at 707–710. But as those cases recognize, the reason for the House rejection of the Amendment, as stated by Mr. Poland, House Manager of the Conference Committee Report, was that "the House had solemnly decided that in their judgment Congress had no constitutional power to *impose any obligation* upon county and town organizations, the mere instrumentality for the administration of State law." Cong. Globe, 42d Cong., 1st Sess., 804 (1871) (emphasis supplied). See *Monroe* v. *Pape, supra,* at 190; *Moor* v. *County of Alameda, supra,* at 708. This judgment of the House respecting its lack of constitutional power to "impose . . . liability" *"as a matter of federal law," id.,* at 710 n. 27 (emphasis in original), on local governmental units pervades the legislative history of the aborted Sherman Amendment.[10]

In marked contrast in the legislative history of that proposed Amendment, however, is the absence of expression of hostility to federal judicial forums entertaining claims arising under state law. The opponents of the Sherman Amendment were, as the legislative history reveals, fully aware of several existing state laws respecting local government tort liability.[11] Moreover, the opponents of the proposed Amendment, who consistently objected to the imposition of liability upon local governmental units as a matter of substantive federal law, also consistently expressed their views respecting the enter-

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[10] *Id.,* at 788 (remarks of Mr. Kerr); *id.,* at 791 (remarks of Mr. Willard); *id.,* at 793 (remarks of Mr. Poland); *id.,* at 795 (remarks of Mr. Blair); *ibid.* (remarks of Mr. Burchard); *id.,* at 799 (remarks of Mr. Farnsworth).

[11] *Id.,* at 792 (Mass.); *id.,* at 799 (N. Y.); *id.,* at 800 (Pa.); *ibid.* (Ky.).

tainment in federal forums of state-law claims against local governmental units.

> "[M]y colleague on this committee says that it is a common practice for the courts of the United States, in the exercise of the judicial powers granted to them in the Constitution, to enforce the performance of judgments against municipalities of this kind, such as counties and cities. I answer him that he, as well as any other intelligent lawyer of this House, well knows that that proposition is true to this extent only, that *the Federal courts in the exercise of this grant of judicial powers may, where they have the jurisdiction under the Constitution, compel these municipalities to execute their contracts, and that is all.* To execute their contracts; but let it be remembered that no decree of a Federal court has gone to the extent of saying that any one of these divisions should execute its own contracts *except in precise compliance with the law of the State, in precise accordance with its own contract and the law upon which it was based, and not in pursuance of any law dictated to it by Congress. In other words, the extent of judicial power hitherto exercised in that direction has been confined to the execution of civil contracts,* such as the payment of corporation and municipal bonds issued under State authority, *where the courts of the United States had jurisdiction, and then only according to the law of the State recognizing and enforcing fully and kindly, and in all respects within the precise letter of the Constitution, the right of the State to govern itself,* to regulate its municipal interests, to say whether a county or State may subscribe to a railroad, may issue or put out bonds and securities in a particular way, how those securities may be made payable and their

payment made certain. *If any county or city fails to perform its obligations its contracts can be enforced.*" Cong. Globe, 42d Cong., 1st Sess., 789 (1871) (remarks of Mr. Kerr) (emphasis supplied).

"The gentleman from Ohio [Mr. Shellabarger] said this morning that the Supreme Court has decided in favor of this power on the part of Congress. It has done no such thing. Where a State has authorized a city or county to make a contract, and when, under the law of the State, they have made a contract binding themselves, the Supreme Court of the United States has said that they were liable to be sued for the enforcement of that contract. That is all the Supreme Court of the United States have [*sic*] ever decided in regard to the liability of municipal corporations. When the State which created them has authorized them to bind themselves by a contract, and they have done so, the court has very properly said that the courts were open for the enforcement of such contracts, as for enforcing the contracts of other parties. *I PRESUME, TOO, THAT WHERE A STATE HAD IMPOSED A DUTY UPON SUCH MUNICIPALITY, AND PROVIDED THEY SHOULD BE LIABLE FOR ANY DAMAGES CAUSED BY FAILURE TO PERFORM SUCH DUTY, THAT AN ACTION WOULD BE ALLOWED TO BE MAINTAINED AGAINST THEM IN THE COURTS OF THE UNITED STATES UNDER THE ORDINARY RESTRICTIONS AS TO JURISDICTION. But the enforcing a liability, existing by their own contract, or by a State law, in the courts, is a very widely different thing from devolving a new duty or liability upon them by the national Government,* which has no power either to create or destroy them,

and no power or control over them whatever." *Id.*, at 794 (remarks of Mr. Poland) (emphasis supplied).

"Congress has never asserted or attempted to assert, so far as I know, any such authority. That amendment claims the power in the General Government to go into the States of this Union and lay such obligations as it may please upon the municipalities, which are the creations of the States alone. Now, sir, that is an exceedingly wide and sweeping power. I am unable to find a proper foundation for it. Though I am not disposed here and now to discuss it very minutely, I wish to say that thus far I am unable to see where the authority can rest. I listened with the utmost respect, and with all the attention in my power, to the argument of the gentleman from Ohio, [Mr. Shellabarger,] the chairman of the committee of conference, to see if I could ascertain just where he placed it, and I think I shall do him no wrong when I say that he wholly failed to show the House where the power resides. He did undertake to find some parallel in other action of the judiciary of the United States toward these municipalities, growing out of contracts; but, sir, *when a municipality, under the authority given by a State, makes a contract it thereby lays itself liable to every remedy upon that contract, and it is liable to be sued by its own consent, and with the consent of the State that created it, in any court having jurisdiction of the subject matter of that contract.*

"This we all understand very well; but here it is proposed, not to carry into effect an obligation which rests upon the municipality, but to create that obligation, and that is the provision I am un-

able to assent to." Id., at 795 (remarks of Mr. Blair) (emphasis supplied).

". . . [I]n the first place, I wish to remark that the decisions that have been referred to, those of Knox *vs.* Lee county and the others, go to this extent only, if I understand rightly their scope: that *where a State imposes a duty upon county officers or State municipal corporations, the exercise of which is necessary to give effect to judgments or decrees of the United States courts, the latter can enforce the performance of that duty.* In other words, where by the laws of a State the board of supervisors of a county, or the common council of a city, are authorized to levy a tax and collect funds to pay a judgment, for the purpose of enforcing satisfaction of the judgment, the United States court, by *mandamus* can compel those State officers, those officers of a municipal corporation, to perform that duty.

"But there is no duty imposed by the Constitution of the United States, or usually by State laws, upon a county to protect the people of that county against the commission of the offenses herein enumerated, such as the burning of buildings or any other injury to property or injury to person. Police powers are not conferred upon counties as corporations; they are conferred upon cities that have qualified legislative power. *AND SO FAR AS CITIES ARE CONCERNED, WHERE THE EQUAL PROTECTION REQUIRED TO BE AFFORDED BY A STATE IS IMPOSED UPON A CITY BY STATE LAWS, PERHAPS THE UNITED STATES COURTS COULD ENFORCE ITS PERFORMANCE." Ibid.* (remarks of Mr. Burchard) (emphasis supplied).[12]

[12] I can find only one expression of hostility to the federal courts—

It is difficult to imagine a clearer recognition by opponents of extension of liability under federal law to a "person" of the difference between the application of federal substantive law to a given party and the entertainment of state-law claims respecting that party in federal court, or an instance where the legislative action is more clearly premised upon that distinction. Although the Court purports to be "deduc[ing]" the expressed congressional will as manifested in statutes and their legislative history, today's result is wholly belied by these crystal-clear expressions.

B

Today's result not only is insupportable under the Court's purported test for ascertaining the propriety of pendent-party jurisdiction in the federal courts, but,

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and that ambiguous in its context—in the entire legislative history of the proposed Sherman Amendment:

"I care comparatively little about the Sherman amendment, either in its original or modified form. It is too grossly and palpably unconstitutional to receive the sanction of any court that even a Radical President or Senate might organize. The Supreme Court, thank God, has yet a decent respect for constitutional liberty and law, and it will dismiss with the contempt it merits the first case that comes before it seeking to enforce the judgments provided for in this bill, and that will be an end of the Sherman amendment. Therefore, I am not afraid of the practical effect of that piece of narrow-minded, fanatical, and malicious legislation; it overleaps itself. The old English 'hue and cry,' or any other relic of barbarism, cannot save it.

"Our written Constitution, its limitations and restrictions, were intended to put an end forever to the exercise of all such legislative and judicial authority by the Federal Government, and leave all these matters to the several States and the people thereof. I care nothing about the minor charges, but I do protest against the continuance and application of the law of July 17, 1862, to the numerous classes of cases provided for in the proposed bill." *Id.*, at 789–790 (remarks of Mr. Beck).

more importantly, it wholly disregards the congressional intent and policy in enacting the various Civil Rights Acts including the present § 1983. For, to an extent perhaps unparalleled in our history, the post-Civil War Civil Rights Acts had as a focal point the provision that claims brought under those Acts should be entertained in federal judicial forums. The Civil Rights Acts were enacted in an era of "national feeling born of the Civil War. Nationalism was triumphant; in national administration was sought its vindication." F. Frankfurter & J. Landis, The Business of the Supreme Court 64 (1928). Contemporaneous with the passage of the Civil Rights Acts was the Act of March 3, 1875, which, in conferring general federal-question jurisdiction upon the federal courts, thereby made those courts "the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States." *Id.*, at 65; *Zwickler* v. *Koota*, 389 U. S. 241, 247 (1967). "In thus expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims." *Id.*, at 248.

Although there has been disagreement among us upon the question of the precise scope of § 1983, none of us has heretofore denied "the fact that a powerful impulse behind the creation of [§ 1983] *was the purpose that it be available in, and be shaped through, original federal tribunals,*" or has forgotten *"how important providing a federal trial court was among the several purposes of the Ku Klux Act."* *Monroe* v. *Pape*, 365 U. S., at 252, 251 (Frankfurter, J., dissenting) (emphasis supplied).[13]

"The predecessor of § 1983 was . . . an important

[13] "See the remarks of Mr. Dawes, a member of the Committee

part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment. As a

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which reported the Ku Klux bill, [Cong. Globe, 42d Cong., 1st Sess.] 476:

" 'The first remedy proposed by this bill is a resort to the courts of the United States. Is that a proper place in which to find redress for any such wrongs? If there be power to call into the courts of the United States an offender against these rights, privileges, and immunities, and hold him to an account there, either civilly or criminally, for their infringement, I submit to the calm and candid judgment of every member of this House that there is no tribunal so fitted, where equal and exact justice would be more likely to be meted out in temper, in moderation, in severity, if need be, but always according to the law and the fact, as that great tribunal of the Constitution.'

"And see, *e. g.*, the remarks of Mr. Coburn, *id.*, at 459–460:

" 'Whenever, then, there is a denial of equal protection by the State, the courts of justice of the nation stand with open doors, ready to receive and hear with impartial attention the complaints of those who are denied redress elsewhere. Here may come the weak and poor and downtrodden, with assurance that they shall be heard. Here may come the man smitten with many stripes and ask for redress. Here may come the nation, in her majesty, and demand the trial and punishment of offenders, when all, all other tribunals are closed. . . .

" 'Can these means be made effectual? Can we thus suppress these wrongs? I will say we can but try. The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood; they will be able to rise above prejudices or bad passions or terror more easily. The marshal, clothed with more power than the sheriff, can make arrests with certainty, and, with the aid of the General Government, can seize offenders in spite of any banded and combined resistance such as may be expected. Thus, at least, these men, who disregard all law, can be brought to trial. Here we stop. The court is to do the rest, acting under all its solemn obligations of duty to country

> result of the new structure of law that emerged in the post-Civil War era—and especially of the Fourteenth Amendment, which was its centerpiece—the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established. . . . Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Mitchum* v. *Foster*, 407 U. S. 225, 238–239 (1972) (footnotes omitted).

An extensive review of the legislative history of § 1983 in *Monroe* v. *Pape, supra,* at 173–180, led this Court to conclude:

> "It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." 365 U. S., at 180; *id.*, at 193 (Harlan, J., concurring).

Review of that same legislative history in *Mitchum* v. *Foster, supra,* at 238–242,[14] led us to proclaim it

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and God. Can we trust it, or are we afraid of our own institutions? Does the grim shadow of the State step into the national court, like a goblin, and terrify us? Does this harmless and helpless ghost drive us from that tribunal—the State that mocks at justice, the State that licenses outlawry, the State that stands dumb when the lash and the torch and the pistol are lifted every night over the quiet citizen? We believe that we can trust our United States courts, and we propose to do so.'" *Monroe* v. *Pape*, 365 U. S., at 253–254, n. 83 (Frankfurter, J., dissenting).

[14] *E. g.*:

"As Representative Lowe stated, the 'records of the [state]

"evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.

. . . . . .

"Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century . . . . The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" 407 U. S., at 242.

But by the announcement of its *per se* rule today, the Court undermines past teachings that the availability of a federal forum for claims brought pursuant to § 1983 is crucially important, and in one fell swoop erases the leg-

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tribunals are searched in vain for evidence of effective redress [of federally secured rights] . . . . What less than this [the Civil Rights Act of 1871] will afford an adequate remedy? The Federal Government cannot serve a writ of mandamus upon State Executives or upon State courts to compel them to protect the rights, privileges and immunities of citizens . . . . The case has arisen . . . when the Federal Government must resort to its own agencies to carry its own authority into execution. Hence this bill throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired.' Cong. Globe, 42d Cong., 1st Sess., 374–376 (1871)." *Mitchum* v. *Foster*, 407 U. S., at 240.

islative intent that those teachings reflect.[15] After today, a suitor seeking redress in a federal forum under § 1983 and redress for the same wrongs under state law must split his case, and he is remitted to duplicative litigation no matter how expensive, wasteful, and needless. Regardless of the balance of the discretionary factors enunciated in *Gibbs;* regardless of the clarity of state law respecting the pendent claim against the local governmental unit, cf. Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Prob. 216, 232–233 (1948);[16] regardless of the absolute

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[15] See Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Prob. 216, 230 (1948):

"[I]n [the] instance [of] the rights of action specially conferred by Congress in the Civil Rights Laws. . . . Congress has declared the historic judgment that within this precious area, often calling for a trial by jury, there is to be no slightest risk of nullification by state process. The danger is unhappily not past. It would be moving in the wrong direction to reduce the jurisdiction in this field—not because the interest of the state is smaller in such cases, but because its interest is outweighed by other factors of the highest national concern." (Footnote omitted.)

[16] "There is a vice in federal adjudication on state grounds inhering in the fact that federal courts are not the authorized expositors of state law; there is no mechanism by which their errors in such matters can be corrected on appeal by state courts. There is a vice also, as we have recognized by liberal rules of joinder, in forcing plaintiffs who have multiple bases of action to pursue their remedies in pieces and in different courts. It is, however, possible to find a balance for these evils. The balance is achieved if jurisdiction is extended generally to claims that under joinder rules may be asserted in a single action, subject to discretion in the court to dismiss without prejudice claims resting upon state law. When uncertainty obtains as to prevailing local doctrine, when that doctrine is enmeshed in clashing policies that render any legal formulation an intrinsically changing concept, the discretion would

identity of factual issues between the two claims, see Kates & Kouba, Liability of Public Entities Under Section 1983 of the Civil Rights Act, 45 S. Cal. L. Rev. 131, 162–163 (1972); regardless of the monetary expense and other disadvantages of duplicate litigation, see Fortune, Pendent Jurisdiction—The Problem of "Pendenting Parties," 34 U. Pitt. L. Rev. 1, 8–9 (1972); regardless of the waste of judicial time and the "travesty on sound judicial administration," *supra,* at 21, the Court by its *per se* rule forces upon a litigant the indefensible choice of either suffering the costs of duplicate litigation or forgoing his right, a right emphatically emphasized in the congressional policy, to a federal forum in which to be heard on his federal claim. To say that the suitor has available a state forum in which conveniently to litigate both his claims, *ante,* at 15,[17] is patently to ignore the real issue, for it is painfully obvious that this does not result in a neutral choice by the suitor among available forums; rather it imparts a fundamental bias against utilization of the federal forum owing to the deterrent effect imposed by the needless requirement of duplicate litigation if the federal forum is chosen. P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 922–923 (2d ed. 1973). Accordingly, rather than

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be exercised to limit federal adjudication to the federal grounds. When, on the contrary, the issue turns on principles well settled by the state, the federal courts can safely undertake the full adjudication of the case." *Id.,* at 232–233 (footnotes omitted).

[17] The Court today appears to decide *sub silentio* a hitherto unresolved question by implying that § 1983 claims are not claims exclusively cognizable in federal court but may also be entertained by state courts. See *ante,* at 15, 18. This is a conclusion with which I agree.

paying "due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims," *Zwickler* v. *Koota,* 389 U. S., at 248, the Court today rides roughshod over this congressionally imposed duty and reaches a result that flies in the face of the expressed congressional intent. I dissent.

UNITED STATES *v.* SANTANA ET AL.

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

No. 75–19. Argued April 27, 1976—Decided June 24, 1976

On the basis of information that respondent Santana had in her possession marked money used to make a heroin "buy" arranged by an undercover agent, police officers went to Santana's house where she was standing in the doorway holding a paper bag, but as the officers approached she retreated into the vestibule of her house where they caught her. When she tried to escape, envelopes containing what was later determined to be heroin fell to the floor from the paper bag, and she was found to have been carrying some of the marked money on her person. Respondent Alejandro, who had been sitting on the front steps, was caught when he tried to make off with the dropped envelopes of heroin. After their indictment for possessing heroin with intent to distribute, respondents moved to suppress the heroin and marked money. The District Court granted the motion on the ground that although the officers had probable cause to make the arrests, Santana's retreat into the vestibule did not justify a warrantless entry into the house on the ground of "hot pursuit." The Court of Appeals affirmed. *Held:*

1. Santana, while standing in the doorway of her house, was in a "public place" for purposes of the Fourth Amendment, since she was not in an area where she had any expectation of privacy and was not merely visible to the public but was exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house. Thus, when the police, who concededly had probable cause to do so, sought to arrest her, they merely intended to make a warrantless arrest in a public place upon probable cause and did not violate the Fourth Amendment. *United States* v. *Watson,* 423 U. S. 411. P. 42

2. By retreating into a private place, Santana could not defeat an otherwise proper arrest that had been set in motion in a public place. Since there was a need to act quickly to prevent destruction of evidence, there was a true "hot pursuit," which need not be an extended hue and cry "in and about [the] public streets," and thus a warrantless entry to make the arrest was

justified, *Warden* v. *Hayden,* 387 U. S. 294, as was the search incident to that arrest. Pp. 42–43.

Reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, POWELL, and STEVENS, JJ., joined. WHITE, J., filed a concurring opinion, *post,* p. 43. STEVENS, J., filed a concurring opinion, in which STEWART, J., joined, *post,* p. 44. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post,* p. 45.

Frank H. Easterbrook argued the cause for the United States *pro hac vice.* With him on the brief were *Solicitor General Bork, Assistant Attorney General Thornburgh, Deputy Solicitor General Frey,* and *Peter M. Shannon, Jr.*

Dennis H. Eisman argued the cause for respondent Santana. With him on the brief was *Gerald A. Stein.**

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

I

On August 16, 1974, Michael Gilletti, an undercover officer with the Philadelphia Narcotics Squad arranged a heroin "buy" with one Patricia McCafferty (from whom he had purchased narcotics before). McCafferty told him it would cost $115 "and we will go down to Mom Santana's for the dope."

Gilletti notified his superiors of the impending transaction, recorded the serial numbers of $110 (*sic*) in marked bills, and went to meet McCafferty at a prearranged location. She got in his car and directed him to drive to 2311 North Fifth Street, which, as she had

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**Frank Carrington, Wayne W. Schmidt, Vernon S. Gill,* and *William K. Lambie* filed a brief for the Americans for Effective Law Enforcement, Inc., et al. as *amici curiae* urging reversal.

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previously informed him, was respondent Santana's residence.

McCafferty took the money and went inside the house, stopping briefly to speak to respondent Alejandro who was sitting on the front steps. She came out shortly afterwards and got into the car. Gilletti asked for the heroin; she thereupon extracted from her bra several glassine envelopes containing a brownish-white powder and gave them to him.

Gilletti then stopped the car, displayed his badge, and placed McCafferty under arrest. He told her that the police were going back to 2311 North Fifth Street and that he wanted to know where the money was. She said, "Mom has the money." At this point Sergeant Pruitt and other officers came up to the car. Gilletti showed them the envelope and said "Mom Santana has the money." Gilletti then took McCafferty to the police station.

Pruitt and the others then drove approximately two blocks back to 2311 North Fifth Street. They saw Santana standing in the doorway of the house [1] with a brown paper bag in her hand. They pulled up to within 15 feet of Santana and got out of their van, shouting "police," and displaying their identification. As the officers approached, Santana retreated into the vestibule of her house.

The officers followed through the open door, catching her in the vestibule. As she tried to pull away, the bag tilted and "two bundles of glazed paper packets with a white powder" fell to the floor. Respondent

[1] An Officer Strohm testified that he recognized Santana, whom he had seen before. He also indicated that she was standing directly in the doorway—one step forward would have put her outside, one step backward would have put her in the vestibule of her residence.

Alejandro tried to make off with the dropped envelopes but was forcibly restrained. When Santana was told to empty her pockets she produced $135, $70 of which could be identified as Gilletti's marked money. The white powder in the bag was later determined to be heroin.

An indictment was filed in the United States District Court for the Eastern District of Pennsylvania charging McCafferty with distribution of heroin, in violation of 21 U. S. C. § 841, and respondents with possession of heroin with intent to distribute in violation of the same section. McCafferty pleaded guilty. Santana and Alejandro moved to suppress the heroin and money found during and after their arrests.

The District Court granted respondents' motion.[2] In an oral opinion the court found that "[t]here was strong probable cause that Defendant Santana had participated in the transaction with Defendant McCafferty." However, the court continued:

> "One of the police officers . . . testified that the mission was to arrest Defendant Santana. Another police officer testified that the mission was to recover the bait money. Either one would require a warrant, one a warrant of arrest under ordinary circumstances and one a search warrant."

The court further held that Santana's "reentry from the doorway into the house" did not support allowing the police to make a warrantless entry into the house on the grounds of "hot pursuit," because it took "hot pursuit" to mean "a chase in and about public streets." The court did find, however, that the police

[2] It is not apparent on what grounds respondent Alejandro had standing to protest the seizures. However, the Government did not raise this issue below and consequently we do not reach it.

acted under "extreme emergency" conditions. The Court of Appeals affirmed this decision without opinion.

II

In *United States* v. *Watson,* 423 U. S. 411 (1976), we held that the warrantless arrest of an individual in a public place upon probable cause did not violate the Fourth Amendment. Thus the first question we must decide is whether, when the police first sought to arrest Santana, she was in a public place.

While it may be true that under the common law of property the threshold of one's dwelling is "private," as is the yard surrounding the house, it is nonetheless clear that under the cases interpreting the Fourth Amendment Santana was in a "public" place. She was not in an area where she had any expectation of privacy. "What a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection." *Katz* v. *United States,* 389 U. S. 347, 351 (1967). She was not merely visible to the public but was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house. *Hester* v. *United States,* 265 U. S. 57, 59 (1924). Thus, when the police, who concededly had probable cause to do so, sought to arrest her, they merely intended to perform a function which we have approved in *Watson.*

The only remaining question is whether her act of retreating into her house could thwart an otherwise proper arrest. We hold that it could not. In *Warden* v. *Hayden,* 387 U. S. 294 (1967), we recognized the right of police, who had probable cause to believe that an armed robber had entered a house a few minutes before, to make a warrantless entry to arrest the robber and to search for weapons. This case, involving a true "hot

pursuit," [3] is clearly governed by *Warden;* the need to act quickly here is even greater than in that case while the intrusion is much less. The District Court was correct in concluding that "hot pursuit" means some sort of a chase, but it need not be an extended hue and cry "in and about [the] public streets." The fact that the pursuit here ended almost as soon as it began did not render it any the less a "hot pursuit" sufficient to justify the warrantless entry into Santana's house. Once Santana saw the police, there was likewise a realistic expectation that any delay would result in destruction of evidence. See *Vale* v. *Louisiana,* 399 U. S. 30, 35 (1970). Once she had been arrested the search, incident to that arrest, which produced the drugs and money was clearly justified. *United States* v. *Robinson,* 414 U. S. 218 (1973); *Chimel* v. *California,* 395 U. S. 752, 762–763 (1969).

We thus conclude that a suspect may not defeat an arrest which has been set in motion in a public place, and is therefore proper under *Watson,* by the expedient of escaping to a private place. The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE WHITE, concurring.

It is not disputed here that the officers had probable cause to arrest Santana and to believe that she was in the house. In these circumstances, a warrant was not required to enter the house to make the arrest, at least

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[3] *Warden* was based upon the "exigencies of the situation," 387 U. S., at 298, and did not use the term "hot pursuit" or even involve a "hot pursuit" in the sense that that term would normally be understood. That phrase first appears in *Johnson* v. *United States,* 333 U. S. 10, 16 n. 7 (1948), where it was recognized that some element of a chase will usually be involved in a "hot pursuit" case.

where entry by force was not required. This has been the longstanding statutory or judicial rule in the majority of jurisdictions in the United States, see ALI, A Model Code of Pre-arraignment Procedure 306–314, 696–697 (1975), and has been deemed consistent with state constitutions, as well as the Fourth Amendment. It is also the Institute's recommended rule. *Id.*, § 120.6. I agree with the Court that the arrest here did not violate the Fourth Amendment.

My Brother MARSHALL, *post,* p. 45, and *United States* v. *Watson,* 423 U. S. 411, 433 (1976) (dissenting opinion), would reinterpret the Fourth Amendment to sweep aside this widely held rule and to establish a constitutional standard requiring warrants for arrests except where exigent circumstances clearly exist. The States are, of course, free to limit warrantless arrests, as is Congress; but I would not impose his suggested nationwide edict, founded as it is on a belief in the superior wisdom of the Members of this Court and their power to divine that the country's practice to this date with respect to arrests is unreasonable within the meaning of the Fourth Amendment.

MR. JUSTICE STEVENS, with whom MR. JUSTICE STEWART joins, concurring.

When Officer Gilletti placed McCafferty under arrest, the police had sufficient information to obtain a warrant for the arrest of Santana in her home. It is therefore important to note that their failure to obtain a warrant at that juncture was both (a) a justifiable police decision, and (b) even if not justifiable, harmless.

The decision was justified by the significant risk that the marked money would no longer be in Santana's possession if the police waited until a warrant could be obtained. The failure to seek a warrant was harmless

because it would have been proper to keep the Santana residence under surveillance while the warrant was being sought; since she ventured into plain view, a warrantless arrest would have been justified before the warrant could have been procured.

I therefore join the opinion of the Court.

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

Earlier this Term, I expressed the view that, in the absence of exigent circumstances, the police may not arrest a suspect without a warrant. *United States* v. *Watson,* 423 U. S. 411, 433 (1976) (dissenting opinion). For this reason, I cannot join either the opinion of the Court or that of MR. JUSTICE WHITE, each of which disregards whether exigency justified the police decision to approach Santana's home without a warrant for the purpose of arresting her. Nor can I accept MR. JUSTICE STEVENS' approach, for while acknowledging that some notion of exigency must be asserted to justify the police conduct in this case, MR. JUSTICE STEVENS fails to consider that the exigency present in this case was produced solely by police conduct. I would remand the case to allow the District Court to determine whether that police conduct was justifiable or was solely an attempt to circumvent the warrant requirement.

The Court declines today to settle the oft-reserved question of whether and under what circumstances a police officer may enter the home of a suspect in order to make a warrantless arrest. *United States* v. *Watson, supra,* at 418 n. 6; *Gerstein* v. *Pugh,* 420 U. S. 103, 113 n. 13 (1975); *Coolidge* v. *New Hampshire,* 403 U. S. 443, 480–481 (1971); *Jones* v. *United States,* 357 U. S. 493, 499–500 (1958). Seizing upon the fortuity that Santana was standing in her doorway when the police

approached her home for the purpose of entering and arresting her, the Court ignores MR. JUSTICE WHITE's repeated advocacy of the common-law rule on warrantless entries, *ante,* p. 43; *Coolidge* v. *New Hampshire, supra,* at 511–512, n. 1 (WHITE, J., concurring and dissenting),[1] and treats this case as a simple application of *Watson.*

It is somewhat more than that, for the Court takes the opportunity to refine the contours of that decision. Thus, if I correctly read the Court's citation to the "open fields" doctrine of *Hester* v. *United States,* 265 U. S. 57, 59 (1924), the Court holds that the police may enter upon private property to make warrantless arrests of persons who are in plain view and outdoors; and the Court applies that doctrine today to persons who are arguably within their homes but who are "as exposed" to the public as if they were outside. But the Court's encroachment upon the reserved question is limited.

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[1] MR. JUSTICE WHITE would have us bequeath our duty to interpret the Constitution to the States and Congress. As I said in response to a similar argument in *Watson:*

"[T]he doctrine of deference that the Court invokes is contrary to the principles of constitutional analysis practiced since *Marbury* v. *Madison,* 1 Cranch 137 (1803). . . . [I]t is well settled that the mere existence of statutes or practice, even of long standing, is no defense to an unconstitutional practice. '[N]o one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it.' *Walz* v. *Tax Comm'n,* 397 U. S. 664, 678 (1970). See also *Almeida-Sanchez* v. *United States,* 413 U. S. 266 (1973); *Roe* v. *Wade,* 410 U. S. 113 (1973); *Furman* v. *Georgia,* 408 U. S. 238 (1972); *Reynolds* v. *Sims,* 377 U. S. 533 (1964). Our function in constitutional cases is weightier than the Court today suggests: where reasoned analysis shows a practice to be constitutionally deficient, our obligation is to the Constitution, not the Congress." 423 U. S., at 443 (dissenting opinion) (footnote omitted).

Thus, the Court's citation of *Katz* v. *United States,* 389 U. S. 347, 351 (1967), does not suggest that a plain view of a suspect is alone sufficient to justify warrantless entry and seizure in the home. Indeed, the Court's rejection of sight alone as a basis for warrantless entry and arrest is made patent, in MR. JUSTICE STEWART's phrase, by negative implication from the Court's need to elaborate a hot pursuit justification for the police following Santana into her home. Cf. *Coolidge* v. *New Hampshire, supra,* at 480–481. Presumably, if plain view were the touchstone, Santana would have been just as liable to warrantless arrest as she retreated several feet inside her open door as she was when standing in the doorway.

The Court's doctrine, then, appears *sui generis,* useful only in arresting persons who are "as exposed to public view, speech, hearing, and touch," *ante,* at 42, as though in the unprotected outdoors. Narrow though it may be, however, the Court's approach does not depend on whether exigency justifies an arrest on private property, and thus I cannot join it.

MR. JUSTICE STEVENS focuses on what I believe to be the right question in this case—whether there were exigent circumstances—and reaches an affirmative answer because he finds a "significant risk that the marked money would no longer be in Santana's possession if the police waited until a warrant could be obtained." *Ante,* at 44. I agree that there were exigent circumstances in this case. McCafferty was arrested a block and a half down the street from Santana's home. Although the arresting officers did not see anyone in Santana's home watching the arrest, App. 16, one officer testified: "We were a block and a half from her home when the arrest was made. I am sure that the word would have been back within a matter of seconds or minutes." *Id.,* at 51. That is undoubtedly a reasonable conclusion to draw

from the facts of the arrest; and the danger that the evidence would be destroyed and the suspects gone before a warrant could be obtained would ordinarily justify the police's quick return to Santana's home and the warrantless entry and arrest. If that is the basis of the "significant risk" to which MR. JUSTICE STEVENS refers, I have no difference with him on that score.[2]

I do not believe, however, that these exigent circumstances automatically validate Santana's arrest. The exigency that justified the entry and arrest was solely a product of police conduct. Had Officer Gilletti driven McCafferty to a more remote location before arresting her, it appears that no exigency would have been created by the arrest; in such an event a warrant would have been necessary, in my view, before Santana could have been arrested. *United States* v. *Watson,* 423 U. S., at 433 (MARSHALL, J., dissenting). It is not apparent on this record why Officer Gilletti arrested McCafferty so close to Santana's home when the arresting officers were clearly aware that such a nearby arrest would necessitate the prompt arrest of Santana. App. 51. While a police decision that the time is right to arrest a suspect should properly be given great deference, cf. *Hoffa* v. *United States,* 385 U. S. 293, 310 (1966), the power to arrest is an awesome one and is subject to abuse. An arrest may permit a search of premises incident to the arrest, a search that otherwise could be carried out only upon probable cause and pursuant to a search warrant. Likewise, an arrest in circumstances such as those presented here may create exigency that may justify a search

[2] I assume that MR. JUSTICE STEVENS is not suggesting that exigent circumstances justifying a warrantless search or arrest are always present—regardless of whether the suspect is aware the police are on his trail—whenever police have probable cause to believe the suspect is in possession of evidence. Cf. *Vale* v. *Louisiana,* 399 U. S. 30 (1970).

or another arrest. When an arrest is so timed that it is no more than an attempt to circumvent the warrant requirement, I would hold the subsequent arrest or search unlawful. See *Coolidge* v. *New Hampshire,* 403 U. S., at 469–471; *Vale* v. *Louisiana,* 399 U. S. 30, 35 (1970); *Chimel* v. *California,* 395 U. S. 752, 767 (1969); *Abel* v. *United States,* 362 U. S. 217, 226 and 230 (1960); *United States* v. *Rabinowitz,* 339 U. S. 56, 82 (1950) (Frankfurter, J., dissenting); *United States* v. *Lefkowitz,* 285 U. S. 452, 467 (1932). Accordingly, I would remand this case for consideration of whether the police decision to arrest McCafferty a block and a half from Santana's home was for the sole purpose of creating the exigent circumstances that otherwise would justify Santana's subsequent arrest.[3]

[3] Because I cannot agree that police may arrest a suspect in a public place solely upon probable cause, I cannot agree with MR. JUSTICE STEVENS that any police error in deciding to return to Santana's home for the purpose of entering and arresting her was harmless.

YOUNG, MAYOR OF DETROIT, ET AL. *v.* AMERICAN MINI THEATRES, INC., ET AL.

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

No. 75–312. Argued March 24, 1976—Decided June 24, 1976

Respondent operators of two adult motion picture theaters brought this action against petitioner city officials for injunctive relief and a declaratory judgment of unconstitutionality regarding two 1972 Detroit zoning ordinances that amended an "Anti-Skid Row Ordinance" adopted 10 years earlier. The 1972 ordinances provide that an adult theater may not (apart from a special waiver) be located within 1,000 feet of any two other "regulated uses" or within 500 feet of a residential area. The term "regulated uses" applies to 10 different kinds of establishments in addition to adult theaters, including adult book stores, cabarets, bars, taxi dance halls, and hotels. If the theater is used to present "material distinguished or characterized by an emphasis on matter depicting . . . 'Specified Sexual Activities' or 'Specified Anatomical Areas'" it is an "adult" establishment. The District Court upheld the ordinances, and granted petitioners' motion for summary judgment. The Court of Appeals reversed, holding that the ordinances constituted a prior restraint on constitutionally protected communication and violated equal protection. Respondents, in addition to asserting the correctness of that court's ruling with respect to those constitutional issues, contend that the ordinances are void for vagueness. While not attacking the specificity of the definitions of sexual activities or anatomical areas, respondents maintain (1) that they cannot determine how much of the described activity may be permissible before an exhibition is "characterized by an emphasis" on such matter, and (2) that the ordinances do not specify adequate procedures or standards for obtaining a waiver of the 1,000-foot restriction. *Held:*

1. The ordinances as applied to these respondents do not violate the Due Process Clause of the Fourteenth Amendment on the ground of vagueness. Pp. 58–61.

(a) Neither of the asserted elements of vagueness has affected these respondents, both of which propose to offer adult fare on a regular basis and allege no ground for claiming or anticipating any waiver of the 1,000-foot restriction. Pp. 58–59.

(b) The ordinances will have no demonstrably significant effect on the exhibition of films protected by the First Amendment. To the extent that any area of doubt exists as to the amount of sexually explicit activity that may be portrayed before material can be said to be "characterized by an emphasis" on such matter, there is no reason why the ordinances are not "readily subject to a narrowing construction by the state courts." This would therefore be an inappropriate case to apply the principle urged by respondents that they be permitted to challenge the ordinances, not because their own rights of free expression are violated, but because of the assumption that the ordinances' very existence may cause others not before the court to refrain from constitutionally protected speech or expression. Pp. 59–61.

2. The ordinances are not invalid under the First Amendment as prior restraints on protected communication because of the licensing or zoning requirements. Though adult films may be exhibited commercially only in licensed theaters, that is also true of all films. That the place where films may be exhibited is regulated does not violate free expression, the city's interest in planning and regulating the use of property for commercial purposes being clearly adequate to support the locational restriction. Pp. 62–63.

518 F. 2d 1014, reversed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL (except for Part III), and REHNQUIST, JJ., joined. POWELL, J., filed a concurring opinion, *post,* p. 73. STEWART, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post,* p. 84. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, STEWART, and MARSHALL, JJ., joined, *post,* p. 88.

Maureen Pulte Reilly argued the cause for petitioners. With her on the brief were *Kermit G. Bailer* and *John E. Cross.*

John H. Weston argued the cause for respondents American Mini Theatres, Inc., et al. With him on the brief were *David M. Brown, Stanley Fleishman,* and *Sam Rosenwein. Stephen M. Taylor* argued the cause for respondent Nortown Theatre, Inc. With him on the brief was *Robert Eugene Smith.*

MR. JUSTICE STEVENS delivered the opinion of the Court.*

Zoning ordinances adopted by the city of Detroit differentiate between motion picture theaters which exhibit sexually explicit "adult" movies and those which do not. The principal question presented by this case is whether that statutory classification is unconstitutional because it is based on the content of communication protected by the First Amendment.[1]

Effective November 2, 1972, Detroit adopted the ordinances challenged in this litigation. Instead of concentrating "adult" theaters in limited zones, these ordinances require that such theaters be dispersed. Specifically, an adult theater may not be located within 1,000 feet of any two other "regulated uses" or within 500 feet of a residential area.[2] The term "regulated uses" includes 10 different kinds of establishments in addition to adult theaters.[3]

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*Part III of this opinion is joined by only THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST.

[1] "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." This Amendment is made applicable to the States by the Due Process Clause of the Fourteenth Amendment. *Edwards* v. *South Carolina*, 372 U. S. 229.

[2] The District Court held that the original form of the 500-foot restriction was invalid because it was measured from "any building containing a residential, dwelling or rooming unit." The city did not appeal from that ruling, but adopted an amendment prohibiting the operation of an adult theater within 500 feet of any area zoned for residential use. The amended restriction is not directly challenged in this litigation.

[3] In addition to adult motion picture theaters and "mini" theaters, which contain less than 50 seats, the regulated uses include adult bookstores; cabarets (group "D"); establishments for the sale of beer or intoxicating liquor for consumption on the premises; hotels or motels; pawnshops; pool or billiard halls; public lodging houses; secondhand stores; shoeshine parlors; and taxi dance halls.

The classification of a theater as "adult" is expressly predicated on the character of the motion pictures which it exhibits. If the theater is used to present "material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas,' " [4] it is an adult establishment.[5]

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[4] These terms are defined as follows:

"For the purpose of this Section, 'Specified Sexual Activities' is defined as:

"1. Human Genitals in a state of sexual stimulation or arousal;

"2. Acts of human masturbation, sexual intercourse or sodomy;

"3. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

"And 'Specified Anatomical Areas' is defined as:

"1. Less than completely and opaquely covered: (a) human genitals, pubic region, (b) buttock, and (c) female breast below a point immediately above the top of the areola; and

"2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered."

[5] There are three types of adult establishments—bookstores, motion picture theaters, and mini motion picture theaters—defined respectively as follows:

"Adult Book Store

"An establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas,' (as defined below), or an establishment with a segment or section devoted to the sale or display of such material.

"Adult Motion Picture Theater

"An enclosed building with a capacity of 50 or more persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas,' (as defined below) for observation by patrons therein.

"Adult Mini Motion Picture Theater

"An enclosed building with a capacity for less than 50 persons used for presenting material distinguished or characterized by an

The 1972 ordinances were amendments to an "Anti-Skid Row Ordinance" which had been adopted 10 years earlier. At that time the Detroit Common Council made a finding that some uses of property are especially injurious to a neighborhood when they are concentrated in limited areas.[6] The decision to add adult motion picture theaters and adult book stores to the list of businesses which, apart from a special waiver,[7] could not be located within 1,000 feet of two other "regulated uses," was, in part, a response to the significant growth in the number

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emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas,' (as defined below), for observation by patrons therein."

[6] Section 66.000 of the Official Zoning Ordinance (1972) recited:

"In the development and execution of this Ordinance, it is recognized that there are some uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances thereby having a deleterious effect upon the adjacent areas. Special regulation of these uses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood. These special regulations are itemized in this section. The primary control or regulation is for the purpose of preventing a concentration of these uses in any one area (i. e. not more than two such uses within one thousand feet of each other which would create such adverse effects)."

[7] The ordinance authorizes the Zoning Commission to waive the 1,000-foot restriction if it finds:

"a) That the proposed use will not be contrary to the public interest or injurious to nearby properties, and that the spirit and intent of this Ordinance will be observed.

"b) That the proposed use will not enlarge or encourage the development of a 'skid row' area.

"c) That the establishment of an additional regulated use in the area will not be contrary to any program of neigh[bor]hood conservation nor will it interfere with any program of urban renewal.

"d) That all applicable regulations of this Ordinance will be observed."

of such establishments.[8] In the opinion of urban planners and real estate experts who supported the ordinances, the location of several such businesses in the same neighborhood tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere.

Respondents are the operators of two adult motion picture theaters. One, the Nortown, was an established theater which began to exhibit adult films in March 1973. The other, the Pussy Cat, was a corner gas station which was converted into a "mini theater," but denied a certificate of occupancy because of its plan to exhibit adult films. Both theaters were located within 1,000 feet of two other regulated uses and the Pussy Cat was less than 500 feet from a residential area. The respondents brought two separate actions against appropriate city officials, seeking a declaratory judgment that the ordinances were unconstitutional and an injunction against their enforcement. Federal jurisdiction was properly invoked[9] and the two cases were consolidated for decision.[10]

The District Court granted defendants' motion for summary judgment. On the basis of the reasons stated

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[8] A police department memorandum addressed to the assistant corporation counsel stated that since 1967 there had been an increase in the number of adult theaters in Detroit from 2 to 25, and a comparable increase in the number of adult book stores and other "adult-type businesses."

[9] Respondents alleged a claim for relief under 42 U. S. C. § 1983, invoking the jurisdiction of the federal court under 28 U. S. C. § 1343 (3).

[10] Both cases were decided in a single opinion filed jointly by Judge Kennedy and Judge Gubow. *Nortown Theatre* v. *Gribbs,* 373 F. Supp. 363 (ED Mich. 1974).

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by the city for adopting the ordinances, the court concluded that they represented a rational attempt to preserve the city's neighborhoods.[11] The court analyzed and rejected respondents' argument that the definition and waiver provisions in the ordinances were impermissibly vague; it held that the disparate treatment of adult theaters and other theaters was justified by a compelling state interest and therefore did not violate the Equal Protection Clause; [12] and finally it concluded that the regulation of the places where adult films could be shown did not violate the First Amendment.[13]

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[11] "When, as here, the City has stated a reason for adopting an ordinance which is a subject of legitimate concern, that statement of purpose is not subject to attack.

"Nor may the Court substitute its judgment for that of the Common Council of the City of Detroit as to the methods adopted to deal with the City's legitimate concern to preserve neighborhoods, so long as there is some rational relationship between the objective of the Ordinance and the methods adopted." *Id.*, at 367.

[12] "Because the Ordinances distinguish adult theatres and bookstores from ordinary theatres and bookstores on the basis of the content of their respective wares, the classification is one which restrains conduct protected by the First Amendment. See Interstate Circuit, Inc. v. Dallas, 390 U. S. 676 . . . (1968). The appropriate standard for reviewing the classification, therefore, is a test of close scrutiny. Harper v. Virginia Board of Elections, 383 U. S. 663, 670 . . . (1966); NAACP v. Button, 371 U. S. 415, 438 . . . (1963). Under this test, the validity of the classification depends on whether it is necessary to further a compelling State interest.

"The compelling State interest which the Defendants point to as justifying the restrictions on locations of adult theatres and bookstores is the preservation of neighborhoods, upon which adult establishments have been found to have a destructive impact. The affidavit of Dr. Mel Ravitz clearly establishes that the prohibition of more than one regulated use within 1000 feet is necessary to promote that interest. This provision therefore does not offend the equal protection clause." *Id.*, at 369.

[13] "Applying those standards to the instant case, the power to license and zone businesses and prohibit their location in certain

The Court of Appeals reversed. *American Mini Theatres, Inc.* v. *Gribbs,* 518 F. 2d 1014 (CA6 1975). The majority opinion concluded that the ordinances imposed a prior restraint on constitutionally protected communication and therefore "merely establishing that they were designed to serve a compelling public interest" provided an insufficient justification for a classification of motion picture theaters on the basis of the content of the materials they purvey to the public.[14] Relying primarily on *Police Department of Chicago* v. *Mosley,* 408 U. S. 92, the court held the ordinance invalid under the Equal Protection Clause. Judge Celebrezze, in dissent, ex-

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areas is clearly within the constitutional power of the City. The government interest, i. e. the preservation and stabilization of neighborhoods in the City of Detroit, is unrelated to the suppression of free expression. First Amendment rights are indirectly related, but only in the sense that they cannot be freely exercised in specific locations. Plaintiffs would not contend that they are entitled to operate a theatre or bookstore, which are commercial businesses, in a residentially zoned area; nor could they claim the right to put on a performance for profit in a public street. Admittedly the regulation here is more restrictive, but it is of the same character." *Id.,* at 371.

[14] "The City did not discharge its heavy burden of justifying the prior restraint which these ordinances undoubtedly impose by merely establishing that they were designed to serve a compelling public interest. Since fundamental rights are involved, the City had the further burden of showing that the method which it chose to deal with the problem at hand was necessary and that its effect on protected rights was only incidental. The City could legally regulate movie theatres and bookstores under its police powers by providing that such establishments be operated only in particular areas. . . . However, this ordinance selects for special treatment particular business enterprises which fall within the general business classifications permissible under zoning laws and classifies them as regulated uses solely by reference to the content of the constitutionally protected materials which they purvey to the public." 518 F. 2d, at 1019–1020.

pressed the opinion that the ordinance was a valid "'time, place and manner' regulation," rather than a regulation of speech on the basis of its content.[15]

Because of the importance of the decision, we granted certiorari, 423 U. S. 911.

As they did in the District Court, respondents contend (1) that the ordinances are so vague that they violate the Due Process Clause of the Fourteenth Amendment; (2) that they are invalid under the First Amendment as prior restraints on protected communication; and (3) that the classification of theaters on the basis of the content of their exhibitions violates the Equal Protection Clause of the Fourteenth Amendment. We consider their arguments in that order.

I

There are two parts to respondents' claim that the ordinances are too vague. They do not attack the specificity of the definition of "Specified Sexual Activities" or "Specified Anatomical Areas." They argue, however, that they cannot determine how much of the described activity may be permissible before the exhibition is "characterized by an emphasis" on such matter. In addition, they argue that the ordinances are vague because they do not specify adequate procedures or standards for obtaining a waiver of the 1,000-foot restriction.

We find it unnecessary to consider the validity of either of these arguments in the abstract. For even if there may be some uncertainty about the effect of the

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[15] He stated in part:

"I do not view the 1000-foot provision as a regulation of speech on the basis of its content. Rather, it is a regulation of the right to locate a business based on the side-effects of its location. The interest in preserving neighborhoods is not a subterfuge for censorship." *Id.*, at 1023.

ordinances on other litigants, they are unquestionably applicable to these respondents. The record indicates that both theaters propose to offer adult fare on a regular basis.[16] Neither respondent has alleged any basis for claiming or anticipating any waiver of the restriction as applied to its theater. It is clear, therefore, that any element of vagueness in these ordinances has not affected these respondents. To the extent that their challenge is predicated on inadequate notice resulting in a denial of procedural due process under the Fourteenth Amendment, it must be rejected. Cf. *Parker* v. *Levy,* 417 U. S. 733, 754–757.

Because the ordinances affect communication protected by the First Amendment, respondents argue that they may raise the vagueness issue even though there is no uncertainty about the impact of the ordinances on their own rights. On several occasions we have determined that a defendant whose own speech was unprotected had standing to challenge the constitutionality of a statute which purported to prohibit protected speech, or even speech arguably protected.[17] This ex-

[16] Both complaints allege that only adults are admitted to these theaters. Nortown expressly alleges that it "desires to continue exhibiting adult-type motion picture films at said theater." Neither respondent has indicated any plan to exhibit pictures even arguably outside the coverage of the ordinances.

[17] "Such claims of facial overbreadth have been entertained in cases involving statutes which, by their terms, seek to regulate 'only spoken words.' *Gooding* v. *Wilson,* 405 U. S. 518, 520 (1972). See *Cohen* v. *California,* 403 U. S. 15 (1971); *Street* v. *New York,* 394 U. S. 576 (1969); *Brandenburg* v. *Ohio,* 395 U. S. 444 (1969); *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942). In such cases, it has been the judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes. Over-

ception from traditional rules of standing to raise constitutional issues has reflected the Court's judgment that the very existence of some statutes may cause persons not before the Court to refrain from engaging in constitutionally protected speech or expression. See *Broadrick* v. *Oklahoma,* 413 U. S. 601, 611–614. The exception is justified by the overriding importance of maintaining a free and open market for the interchange of ideas. Nevertheless, if the statute's deterrent effect on legitimate expression is not "both real and substantial," and if the statute is "readily subject to a narrowing construction by the state courts," see *Erznoznik* v. *City of Jacksonville,* 422 U. S. 205, 216, the litigant is not permitted to assert the rights of third parties.

We are not persuaded that the Detroit zoning ordinances will have a significant deterrent effect on the exhibition of films protected by the First Amendment.

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breadth attacks have also been allowed where the Court thought rights of association were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations. See *Keyishian* v. *Board of Regents,* 385 U. S. 589 (1967); *United States* v. *Robel,* 389 U. S. 258 (1967); *Aptheker* v. *Secretary of State,* 378 U. S. 500 (1964); *Shelton* v. *Tucker,* [364 U. S. 479 (1960)]. Facial overbreadth claims have also been entertained where statutes, by their terms, purport to regulate the time, place, and manner of expressive or communicative conduct, see *Grayned* v. *City of Rockford, supra,* at 114–121; *Cameron* v. *Johnson,* 390 U. S., at 617–619; *Zwickler* v. *Koota,* 389 U. S. 241, 249–250 (1967); *Thornhill* v. *Alabama,* 310 U. S. 88 (1940), and where such conduct has required official approval under laws that delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights. See *Shuttlesworth* v. *Birmingham,* 394 U. S. 147 (1969); *Cox* v. *Louisiana,* 379 U. S. 536, 553–558 (1965); *Kunz* v. *New York,* 340 U. S. 290 (1951); *Lovell* v. *Griffin,* 303 U. S. 444 (1938)." *Broadrick* v. *Oklahoma,* 413 U. S. 601, 612–613.

As already noted, the only vagueness in the ordinances relates to the amount of sexually explicit activity that may be portrayed before the material can be said to be "characterized by an emphasis" on such matter. For most films the question will be readily answerable; to the extent that an area of doubt exists, we see no reason why the ordinances are not "readily subject to a narrowing construction by the state courts." Since there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance, and since the limited amount of uncertainty in the ordinances is easily susceptible of a narrowing construction, we think this is an inappropriate case in which to adjudicate the hypothetical claims of persons not before the Court.

The only area of protected communication that may be deterred by these ordinances comprises films containing material falling within the specific definitions of "Specified Sexual Activities" or "Specified Anatomical Areas." The fact that the First Amendment protects some, though not necessarily all, of that material from total suppression does not warrant the further conclusion that an exhibitor's doubts as to whether a borderline film may be shown in his theater, as well as in theaters licensed for adult presentations, involves the kind of threat to the free market in ideas and expression that justifies the exceptional approach to constitutional adjudication recognized in cases like *Dombrowski* v. *Pfister,* 380 U. S. 479.

The application of the ordinances to respondents is plain; even if there is some area of uncertainty about their application in other situations, we agree with the District Court that respondents' due process argument must be rejected.

II

Petitioners acknowledge that the ordinances prohibit theaters which are not licensed as "adult motion picture theaters" from exhibiting films which are protected by the First Amendment. Respondents argue that the ordinances are therefore invalid as prior restraints on free speech.

The ordinances are not challenged on the ground that they impose a limit on the total number of adult theaters which may operate in the city of Detroit. There is no claim that distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare. Viewed as an entity, the market for this commodity is essentially unrestrained.

It is true, however, that adult films may only be exhibited commercially in licensed theaters. But that is also true of all motion pictures. The city's general zoning laws require all motion picture theaters to satisfy certain locational as well as other requirements; we have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments, either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the city. The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances.

Putting to one side for the moment the fact that adult motion picture theaters must satisfy a locational restriction not applicable to other theaters, we are also persuaded that the 1,000-foot restriction does not, in itself, create an impermissible restraint on protected communication. The city's interest in planning and regulating the use of property for commercial purposes

is clearly adequate to support that kind of restriction applicable to all theaters within the city limits. In short, apart from the fact that the ordinances treat adult theaters differently from other theaters and the fact that the classification is predicated on the content of material shown in the respective theaters, the regulation of the place where such films may be exhibited does not offend the First Amendment.[18] We turn, therefore, to the question whether the classification is consistent with the Equal Protection Clause.

III

A remark attributed to Voltaire characterizes our zealous adherence to the principle that the government may not tell the citizen what he may or may not say. Referring to a suggestion that the violent overthrow of tyranny might be legitimate, he said: "I disapprove of what you say, but I will defend to the death your right to say it." [19] The essence of that comment has been repeated time after time in our decisions invalidating attempts by the government to impose selective controls upon the dissemination of ideas.

Thus, the use of streets and parks for the free expression of views on national affairs may not be conditioned upon the sovereign's agreement with what a speaker may intend to say.[20] Nor may speech be curtailed because it

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[18] Reasonable regulations of the time, place, and manner of protected speech, where those regulations are necessary to further significant governmental interests, are permitted by the First Amendment. See, *e. g., Kovacs* v. *Cooper,* 336 U. S. 77 (limitation on use of sound trucks); *Cox* v. *Louisiana,* 379 U. S. 559 (ban on demonstrations in or near a courthouse with the intent to obstruct justice); *Grayned* v. *City of Rockford,* 408 U. S. 104 (ban on willful making, on grounds adjacent to a school, of any noise which disturbs the good order of the school session).

[19] S. Tallentyre, The Friends of Voltaire 199 (1907).

[20] See *Hague* v. *CIO,* 307 U. S. 496, 516 (opinion of Roberts, J.).

invites dispute, creates dissatisfaction with conditions the way they are, or even stirs people to anger.[21] The sovereign's agreement or disagreement with the content of what a speaker has to say may not affect the regulation of the time, place, or manner of presenting the speech.

If picketing in the vicinity of a school is to be allowed to express the point of view of labor, that means of expression in that place must be allowed for other points of view as well. As we said in *Mosley:*

> "The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. *Cohen* v. *California,* 403 U. S. 15, 24 (1971); *Street* v. *New York,* 394 U. S. 576 (1969); *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 269–270 (1964), and cases cited; *NAACP* v. *Button,* 371 U. S. 415, 445 (1963); *Wood* v. *Georgia,* 370 U. S. 375, 388–389 (1962); *Terminiello* v. *Chicago,* 337 U. S. 1, 4 (1949); *De Jonge* v. *Oregon,* 299 U. S. 353, 365 (1937). To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its con-

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[21] *Terminiello* v. *Chicago,* 337 U. S. 1, 4.

tent would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' *New York Times Co.* v. *Sullivan, supra,* at 270.

"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." 408 U. S., at 95–96. (Footnote omitted.)

This statement, and others to the same effect, read literally and without regard for the facts of the case in which it was made, would absolutely preclude any regulation of expressive activity predicated in whole or in part on the content of the communication. But we learned long ago that broad statements of principle, no matter how correct in the context in which they are made, are sometimes qualified by contrary decisions before the absolute limit of the stated principle is reached.[22] When we review this Court's actual adjudications in the First Amendment area, we find this to have been the case

[22] See, *e. g., Kastigar* v. *United States,* 406 U. S. 441, 454–455; *United Gas Co.* v. *Continental Oil Co.,* 381 U. S. 392, 404.

with the stated principle that there may be no restriction whatever on expressive activity because of its content.

The question whether speech is, or is not, protected by the First Amendment often depends on the content of the speech. Thus, the line between permissible advocacy and impermissible incitation to crime or violence depends, not merely on the setting in which the speech occurs, but also on exactly what the speaker had to say.[23] Similarly, it is the content of the utterance that determines whether it is a protected epithet or an unprotected "fighting comment." [24] And in time of war "the publication of the sailing dates of transports or the number and location of troops" may unquestionably be restrained, see *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697, 716, although publication of news stories with a different content would be protected.

Even within the area of protected speech, a difference in content may require a different governmental response. In *New York Times Co.* v. *Sullivan,* 376 U. S. 254, we recognized that the First Amendment places limitations on the States' power to enforce their libel laws. We held that a public official may not recover damages from a critic of his official conduct without proof of "malice" as specially defined in that opinion.[25] Implicit in the opinion is the assumption that if the content of the newspaper article had been different—that is, if its subject matter had not been a public official—a lesser standard of proof would have been adequate.

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[23] See *Bond* v. *Floyd,* 385 U. S. 116, 133–134; *Harisiades* v. *Shaughnessy,* 342 U. S. 580, 592; *Musser* v. *Utah,* 333 U. S. 95, 99–101.

[24] In *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 574, we held that a statute punishing the use of "damned racketeer[s]" and "damned Facist[s]" did not unduly impair liberty of expression.

[25] "Actual malice" is shown by proof that a statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U. S., at 280.

In a series of later cases, in which separate individual views were frequently stated, the Court addressed the broad problem of when the *New York Times* standard of malice was required by the First Amendment. Despite a diversity of opinion on whether it was required only in cases involving public figures, or also in cases involving public issues, and on whether the character of the damages claim mattered, a common thread which ran through all the opinions was the assumption that the rule to be applied depended on the content of the communication.[26] But that assumption did not contradict the underlying reason for the rule which is generally described as a prohibition of regulation based on the content of protected communication. The essence of that rule is the need for absolute neutrality by the government; its regulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator.[27] Thus, although

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[26] See, for example, the discussion of the " 'public or general interest' test" for determining the applicability of the *New York Times* standard in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 346, and the reference, *id.*, at 348, to a factual misstatement "whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential." The mere fact that an alleged defamatory statement is false does not, of course, place it completely beyond the protection of the First Amendment. "The First Amendment requires that we protect some falsehood in order to protect speech that matters." *Id.*, at 341.

[27] Thus, Professor Kalven wrote in The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 29:

"[The Equal Protection Clause] is likely to provide a second line of defense for vigorous users of the public forum. If some groups are exempted from a prohibition on parades and pickets, the rationale for regulation is fatally impeached. The objection can then no longer be keyed to interferences with other uses of the public places, but would appear to implicate the kind of message that the groups were transmitting. The regulation would thus slip from the neu-

the content of a story must be examined to decide whether it involves a public figure or a public issue, the Court's application of the relevant rule may not depend on its favorable or unfavorable appraisal of that figure or that issue.

We have recently held that the First Amendment affords some protection to commercial speech.[28] We have also made it clear, however, that the content of a particular advertisement may determine the extent of its protection. A public rapid transit system may accept some advertisements and reject others.[29] A state statute may permit highway billboards to advertise businesses located in the neighborhood but not elsewhere,[30] and regulatory commissions may prohibit businessmen from making statements which, though literally true, are potentially deceptive.[31] The measure of constitutional pro-

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trality of time, place, and circumstance into a concern about content. The result is that equal-protection analysis in the area of speech issues would merge with considerations of censorship. And this is precisely what Mr. Justice Black argued in *Cox:*

" 'But by specifically permitting picketing for the publication of labor union views, Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. It is thus trying to prescribe by law what matters of public interest people it allows to assemble on its streets may and may not discuss. This seems to me to be censorship in a most odious form . . .' [379 U. S., at 581]."

[28] *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U. S. 748.

[29] *Lehman* v. *City of Shaker Heights,* 418 U. S. 298 (product advertising accepted, while political cards rejected).

[30] *Markham Advertising Co.* v. *State,* 73 Wash. 2d 405, 439 P. 2d 248 (1968), appeal dismissed for want of a substantial federal question, 393 U. S. 316.

[31] In *NLRB* v. *Gissel Packing Co.,* 395 U. S. 575, 617, the Court upheld a federal statute which balanced an employer's free speech right to communicate with his employees against the employees' rights to associate freely by providing that the expres-

tection to be afforded commercial speech will surely be governed largely by the content of the communication.[32]

More directly in point are opinions dealing with the question whether the First Amendment prohibits the State and Federal Governments from wholly suppressing sexually oriented materials on the basis of their "obscene character." In *Ginsberg* v. *New York,* 390 U. S. 629, the Court upheld a conviction for selling to a minor magazines which were concededly not "obscene" if shown to adults. Indeed, the Members of the Court who would accord the greatest protection to such materials have repeatedly indicated that the State could prohibit the distribution or exhibition of such materials to juveniles and unconsenting adults.[33] Surely the First Amendment does

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sion of "'any views, argument, or opinion'" should not be "'evidence of an unfair labor practice,'" *so long as* such expression contains "'no threat of reprisal or force or promise of benefit'" which would involve interference, restraint, or coercion of employees in the exercise of their right to self-organization.

The power of the Federal Trade Commission to restrain misleading, as well as false, statements in labels and advertisements has long been recognized. See, *e. g., Jacob Siegel Co.* v. *FTC,* 327 U. S. 608; *FTC* v. *National Comm'n on Egg Nutrition,* 517 F. 2d 485 (CA7 1975); *E. F. Drew & Co.* v. *FTC,* 235 F. 2d 735, 740 (CA2 1956).

[32] As MR. JUSTICE STEWART pointed out in *Virginia Pharmacy Board* v. *Virginia Consumer Council, supra,* at 779 (concurring opinion), the "differences between commercial price and product advertising . . . and ideological communication" permits regulation of the former that the First Amendment would not tolerate with respect to the latter.

[33] In *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 73, MR. JUSTICE BRENNAN, in a dissent joined by MR. JUSTICE STEWART and MR. JUSTICE MARSHALL, explained his approach to the difficult problem of obscenity under the First Amendment:

"I would hold, therefore, 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

not foreclose such a prohibition; yet it is equally clear that any such prohibition must rest squarely on an appraisal of the content of material otherwise within a constitutionally protected area.

Such a line may be drawn on the basis of content without violating the government's paramount obligation of neutrality in its regulation of protected communication. For the regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political, or philosophical message a film may be intended to communicate; whether a motion picture ridicules or characterizes one point of view or another, the effect of the ordinances is exactly the same.

Moreover, even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis

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Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents. Nothing in this approach precludes those governments from taking action to serve what may be strong and legitimate interests through regulation of the manner of distribution of sexually oriented material." *Id.*, at 113.

for placing them in a different classification from other motion pictures.

The remaining question is whether the line drawn by these ordinances is justified by the city's interest in preserving the character of its neighborhoods. On this question we agree with the views expressed by District Judges Kennedy and Gubow. The record discloses a factual basis for the Common Council's conclusion that this kind of restriction will have the desired effect.[34] It is not our function to appraise the wisdom of its decision to require adult theaters to be separated rather than concentrated in the same areas. In either event, the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.

Since what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited,[35] even though the determination of whether a

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[34] The Common Council's determination was that a concentration of "adult" movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films. It is this secondary effect which these zoning ordinances attempt to avoid, not the dissemination of "offensive" speech. In contrast, in *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205, the justifications offered by the city rested primarily on the city's interest in protecting its citizens from exposure to unwanted, "offensive" speech. The only secondary effect relied on to support that ordinance was the impact on traffic—an effect which might be caused by a distracting open-air movie even if it did not exhibit nudity.

[35] The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech. Here, however, the District Court specifically found that "[t]he Ordinances do not affect the operation of existing establishments but only the location of new ones. There are myriad locations in

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particular film fits that characterization turns on the nature of its content, we conclude that the city's interest in the present and future character of its neighborhoods adequately supports its classification of motion pictures. We hold that the zoning ordinances requiring that adult

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the City of Detroit which must be over 1000 feet from existing regulated establishments. This burden on First Amendment rights is slight." 373 F. Supp., at 370.

It should also be noted that the definitions of "Specified Sexual Activities" and "Specified Anatomical Areas" in the zoning ordinances, which require an emphasis on such matter and primarily concern conduct, are much more limited than the terms of the public nuisance ordinance involved in *Erznoznik, supra,* which broadly prohibited scenes which could not be deemed inappropriate even for juveniles.

"The ordinance is not directed against sexually explicit nudity, nor is it otherwise limited. Rather, it sweepingly forbids display of all films containing *any* uncovered buttocks or breasts, irrespective of context or pervasiveness. Thus it would bar a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous. The ordinance also might prohibit newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach. Clearly all nudity cannot be deemed obscene even as to minors. See *Ginsberg* v. *New York, supra.* Nor can such a broad restriction be justified by any other governmental interest pertaining to minors. Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." 422 U. S., at 213–214.

Moreover, unlike the ordinances in this case, the *Erznoznik* ordinance singled out movies "containing even the most fleeting and innocent glimpses of nudity . . . ." *Id.,* at 214.

The Court's opinion in *Erznoznik* presaged our holding today by noting that the presumption of statutory validity "has less force when a classification turns on the subject matter of expression." *Id.,* at 215. Respondents' position is that the presumption has no force, or more precisely, that any classification based on subject matter is absolutely prohibited.

motion picture theaters not be located within 1,000 feet of two other regulated uses does not violate the Equal Protection Clause of the Fourteenth Amendment.

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE POWELL, concurring.

Although I agree with much of what is said in the Court's opinion, and concur in Parts I and II, my approach to the resolution of this case is sufficiently different to prompt me to write separately.[1] I view the case as presenting an example of innovative land-use regulation, implicating First Amendment concerns only incidentally and to a limited extent.

I

One-half century ago this Court broadly sustained the power of local municipalities to utilize the then relatively novel concept of land-use regulation in order to meet effectively the increasing encroachments of urbanization upon the quality of life of their citizens. *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926). The Court there noted the very practical consideration underlying the necessity for such power: "[W]ith the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities." *Id.*, at 386–387. The Court also

[1] I do not think we need reach, nor am I inclined to agree with, the holding in Part III (and supporting discussion) that nonobscene, erotic materials may be treated differently under First Amendment principles from other forms of protected expression. I do not consider the conclusions in Part I of the opinion to depend on distinctions between protected speech.

laid out the general boundaries within which the zoning power may operate: Restrictions upon the free use of private land must find their justifications in "some aspect of the police power, asserted for the public welfare"; the legitimacy of any particular restriction must be judged with reference to all of the surrounding circumstances and conditions; and the legislative judgment is to control in cases in which the validity of a particular zoning regulation is "fairly debatable." *Id.*, at 387, 388.

In the intervening years zoning has become an accepted necessity in our increasingly urbanized society, and the types of zoning restrictions have taken on forms far more complex and innovative than the ordinance involved in *Euclid.* In *Village of Belle Terre* v. *Boraas,* 416 U. S. 1 (1974), we considered an unusual regulation enacted by a small Long Island community in an apparent effort to avoid some of the unpleasantness of urban living. It restricted land use within the village to single-family dwellings and defined "family" in such a way that no more than two unrelated persons could inhabit the same house. We upheld this ordinance, noting that desires to avoid congestion and noise from both people and vehicles were "legitimate guidelines in a land-use project addressed to family needs" and that it was quite within the village's power to "make the area a sanctuary for people." *Id.*, at 9.

II

Against this background of precedent, it is clear beyond question that the Detroit Common Council had broad regulatory power to deal with the problem that prompted enactment of the Anti-Skid Row Ordinance. As the Court notes, *ante,* at 54, and n. 6, the Council was motivated by its perception that the "regulated uses," when concentrated, worked a "deleterious effect upon the

adjacent areas" and could "contribute to the blighting or downgrading of the surrounding neighborhood." The purpose of preventing the deterioration of commercial neighborhoods was certainly within the concept of the public welfare that defines the limits of the police power. See *Berman* v. *Parker,* 348 U. S. 26, 32–33 (1954). Respondents apparently concede the legitimacy of the ordinance as passed in 1962, but challenge the amendments 10 years later that brought within its provisions adult theaters as well as adult bookstores and "topless" cabarets. Those amendments resulted directly from the Common Council's determination that the recent proliferation of these establishments and their tendency to cluster in certain parts of the city would have the adverse effect upon the surrounding areas that the ordinance was aimed at preventing.

Respondents' attack on the amended ordinance, insofar as it affects them, can be stated simply. Contending that it is the "character of the right, not of the limitation," which governs the standard of judicial review, see *Thomas* v. *Collins,* 323 U. S. 516, 530 (1945), and that zoning regulations therefore have no talismanic immunity from constitutional challenge, cf. *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 269 (1964), they argue that the 1972 amendments abridge First Amendment rights by restricting the places at which an adult theater may locate on the basis of nothing more substantial than unproved fears and apprehensions about the effects of such a business upon the surrounding area. Cf., *e. g., Terminiello* v. *Chicago,* 337 U. S. 1 (1949); *Cox* v. *Louisiana,* 379 U. S. 536 (1965). And, even if Detroit's interest in preventing the deterioration of business areas is sufficient to justify the impact upon freedom of expression, the ordinance is nevertheless invalid because it im-

permissibly discriminates between types of theaters solely on the basis of their content. See *Police Dept. of Chicago* v. *Mosley,* 408 U. S. 92 (1972).

I reject respondents' argument for the following reasons.

III

This is the first case in this Court in which the interests in free expression protected by the First and Fourteenth Amendments have been implicated by a municipality's commercial zoning ordinances. Respondents would have us mechanically apply the doctrines developed in other contexts. But this situation is not analogous to cases involving expression in public forums or to those involving individual expression or, indeed, to any other prior case. The unique situation presented by this ordinance calls, as cases in this area so often do, for a careful inquiry into the competing concerns of the State and the interests protected by the guarantee of free expression.

Because a substantial burden rests upon the State when it would limit in any way First Amendment rights, it is necessary to identify with specificity the nature of the infringement in each case. The primary concern of the free speech guarantee is that there be full opportunity for expression in all of its varied forms to convey a desired message. Vital to this concern is the corollary that there be full opportunity for everyone to receive the message. See, *e. g., Whitney* v. *California,* 274 U. S. 357, 377 (1927) (Brandeis, J., concurring); *Cohen* v. *California,* 403 U. S. 15, 24 (1971); *Procunier* v. *Martinez,* 416 U. S. 396, 408–409 (1974); *Kleindienst* v. *Mandel,* 408 U. S. 753, 762–765 (1972); *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U. S. 748, 763–765 (1976). Motion pictures, the medium of expression involved here, are fully within the protection of the First

Amendment. *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 501–503 (1952). In the quarter century since *Burstyn* motion pictures and an analogous medium, printed books, have been before this Court on many occasions, and the person asserting a First Amendment claim often has been a theater owner or a bookseller. Our cases reveal, however, that the central concern of the First Amendment in this area is that there be a free flow from creator to audience of whatever message a film or a book might convey. Mr. Justice Douglas stated the core idea succinctly: "In this Nation every writer, actor, or producer, no matter what medium of expression he may use, should be freed from the censor." *Superior Films* v. *Department of Education,* 346 U. S. 587, 589 (1954) (concurring opinion). In many instances, for example with respect to certain criminal statutes or censorship or licensing schemes, it is only the theater owner or the bookseller who can protect this interest. But the central First Amendment concern remains the need to maintain free access of the public to the expression. See, *e. g., Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436, 442 (1957); *Smith* v. *California,* 361 U. S. 147, 150, 153–154 (1959); *Interstate Circuit* v. *Dallas,* 390 U. S. 676, 683–684 (1968); compare *Marcus* v. *Search Warrant,* 367 U. S. 717, 736 (1961), and *A Quantity of Books* v. *Kansas,* 378 U. S. 205, 213 (1964), with *Heller* v. *New York,* 413 U. S. 483, 491–492 (1973); and cf. *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58, 70–71 (1963).

In this case, there is no indication that the application of the Anti-Skid Row Ordinance to adult theaters has the effect of suppressing production of or, to any significant degree, restricting access to adult movies. The Nortown concededly will not be able to exhibit adult movies at its present location, and the ordinance limits the po-

tential location of the proposed Pussy Cat. The constraints of the ordinance with respect to location may indeed create economic loss for some who are engaged in this business. But in this respect they are affected no differently from any other commercial enterprise that suffers economic detriment as a result of land-use regulation. The cases are legion that sustained zoning against claims of serious economic damage. See, *e. g., Zahn* v. *Board of Public Works,* 274 U. S. 325 (1927).

The inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of this ordinance upon freedom of expression. This prompts essentially two inquiries: (i) Does the ordinance impose any content limitation on the creators of adult movies or their ability to make them available to whom they desire, and (ii) does it restrict in any significant way the viewing of these movies by those who desire to see them? On the record in this case, these inquiries must be answered in the negative. At most the impact of the ordinance on these interests is incidental and minimal.[2] Detroit has silenced no message, has invoked no censorship, and has imposed no limitation upon those who wish to view them. The ordinance is addressed only to the places at which this type of

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[2] The communication involved here is not a kind in which the content or effectiveness of the message depends in some measure upon where or how it is conveyed. Cf. *Cox* v. *Louisiana,* 379 U. S. 536 (1965); *Brown* v. *Louisiana,* 383 U. S. 131 (1966); *Police Dept. of Chicago* v. *Mosley,* 408 U. S. 92, 93 (1972).

There is no suggestion that the Nortown is, or that the Pussy Cat would be, anything more than a commercial purveyor. They do not profess to convey their own personal messages through the movies they show, so that the only communication involved is that contained in the movies themselves. Cf. *United States* v. *O'Brien,* 391 U. S. 367, 376 (1968); *Spence* v. *Washington,* 418 U. S. 405, 409–411 (1974).

expression may be presented, a restriction that does not interfere with content. Nor is there any significant overall curtailment of adult movie presentations, or the opportunity for a message to reach an audience. On the basis of the District Court's finding, *ante,* at 71–72, n. 35, it appears that if a sufficient market exists to support them the number of adult movie theaters in Detroit will remain approximately the same, free to purvey the same message. To be sure some prospective patrons may be inconvenienced by this dispersal.[3] But other patrons, depending upon where they live or work, may find it more convenient to view an adult movie when adult theaters are not concentrated in a particular section of the city.

In these circumstances, it is appropriate to analyze the permissibility of Detroit's action under the four-part test of *United States* v. *O'Brien,* 391 U. S. 367, 377 (1968). Under that test, a governmental regulation is sufficiently justified, despite its incidental impact upon First Amendment interests, "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free

[3] The burden, it should be noted, is no different from that imposed by more common ordinances that restrict to commercial zones of a city movie theaters generally as well as other types of businesses presenting similar traffic, parking, safety, or noise problems. After a half century of sustaining traditional zoning of this kind, there is no reason to believe this Court would invalidate such an ordinance as violative of the First Amendment. The only difference between such an ordinance and the Detroit ordinance lies in the reasons for regulating the location of adult theaters. The special public interest that supports this ordinance is certainly as substantial as the interests that support the normal area zoning to which all movie theaters, like other commercial establishments, long have been subject.

expression; and if the incidental restriction on . . . First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Ibid.* The factual distinctions between a prosecution for destruction of a Selective Service registration certificate, as in *O'Brien,* and this case are substantial, but the essential weighing and balancing of competing interests are the same. Cf. *Procunier* v. *Martinez,* 416 U. S., at 409–412.

There is, as noted earlier, no question that the ordinance was within the power of the Detroit Common Council to enact. See *Berman* v. *Parker,* 348 U. S., at 32. Nor is there doubt that the interests furthered by this ordinance are both important and substantial. Without stable neighborhoods, both residential and commercial, large sections of a modern city quickly can deteriorate into an urban jungle with tragic consequences to social, environmental, and economic values. While I agree with respondents that no aspect of the police power enjoys immunity from searching constitutional scrutiny, it also is undeniable that zoning, when used to preserve the character of specific areas of a city, is perhaps "the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life." *Village of Belle Terre* v. *Boraas,* 416 U. S., at 13 (MARSHALL, J., dissenting).

The third and fourth tests of *O'Brien* also are met on this record. It is clear both from the chronology and from the facts that Detroit has not embarked on an effort to suppress free expression. The ordinance was already in existence, and its purposes clearly set out, for a full decade before adult establishments were brought under it. When this occurred, it is clear—indeed it is not seriously challenged—that the governmental interest prompting the inclusion in the ordinance of adult establishments was wholly unrelated to any suppression of

free expression.[4] Nor is there reason to question that the degree of incidental encroachment upon such expression was the minimum necessary to further the purpose

[4] Respondents attack the nature of the evidence upon which the Common Council acted in bringing adult entertainment establishments under the ordinance, and which petitioners submitted to the District Court in support of it. That evidence consisted of reports and affidavits from sociologists and urban planning experts, as well as some laymen, on the cycle of decay that had been started in areas of other cities, and that could be expected in Detroit, from the influx and concentration of such establishments. Respondents insist that a major part of that cycle is a kind of "self-fulfilling prophecy" in which a business establishment neighboring on several of the "regulated uses" perceives that the area is going downhill economically, and moves out, with the result that a less desirable establishment takes its place—thus fulfilling the prophecy made by the more reputable business. As noted earlier, *supra,* at 75, respondents have tried to analogize these types of fears to the apprehension found insufficient in previous cases to justify stifling free expression. But cases like *Cox* and *Terminiello,* upon which respondents rely, involved individuals desiring to express *their own messages* rather than commercial exhibitors of films or vendors of books. When an individual or a group of individuals is silenced, the message itself is silenced and free speech is stifled. In the context of movies and books, the more apt analogy to *Cox* or *Terminiello* would be the censorship cases, in which a State or a municipality attempted to suppress copies of particular works, or the licensing cases in which that danger was presented. But a zoning ordinance that merely specifies where a theater may locate, and that does not reduce significantly the number or accessibility of theaters presenting particular films, stifles no expression.

Moreover, the Common Council did not inversely zone adult theaters in an effort to protect citizens against the *content* of adult movies. If that had been its purpose, or the effect of the amendment to the ordinance, the case might be analogous to those cited by MR. JUSTICE STEWART's dissent, *post,* at 85. Moreover, an intent or purpose to restrict the communication itself because of its nature would make the *O'Brien* test inapplicable. See *O'Brien,* 391 U. S., at 382; *Spence* v. *Washington,* 418 U. S., at 414 n. 8; cf. *Stromberg* v. *California,* 283 U. S. 359 (1931). But the Common Council simply acted to protect the economic integrity of

of the ordinance. The evidence presented to the Common Council indicated that the urban deterioration was threatened, not by the concentration of *all* movie theaters with other "regulated uses," but only by a concentration of those that elected to specialize in adult movies.[5] The case would present a different situation had Detroit brought within the ordinance types of theaters that had not been shown to contribute to the deterioration of surrounding areas.[6]

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large areas of its city against the effects of a predictable interaction between a concentration of certain businesses and the responses of people in the area. If it had been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location.

[5] Respondents have argued that the Common Council should have restricted adult theaters' hours of operation or their exterior advertising instead of refusing to allow their clustering with other "regulated uses." Most of the ill effects, however, appear to result from the clustering itself rather than the operational characteristics of individual theaters. Moreover, the ordinance permits an exception to its 1,000-foot restriction in appropriate cases. See *ante*, at 54 n. 7.

[6] In my view MR. JUSTICE STEWART's dissent misconceives the issue in this case by insisting that it involves an impermissible time, place, and manner restriction based on the content of expression. It involves nothing of the kind. We have here merely a decision by the city to treat certain movie theaters differently because they have markedly different effects upon their surroundings. See n. 3, *supra*. Moreover, even if this were a case involving a special governmental response to the content of one type of movie, it is possible that the result would be supported by a line of cases recognizing that the government can tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated. See, *e. g.*, *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503, 509–511 (1969); *Procunier* v. *Martinez*, 416 U. S. 396, 413–414 (1974); *Greer* v. *Spock*, 424 U. S. 828, 842–844 (1976) (POWELL, J., concurring); cf. *CSC* v. *Letter Carriers*, 413 U. S. 548 (1973). It is not analogous to *Police Dept.*

IV

The dissenting opinions perceive support for their position in *Erznoznik* v. *City of Jacksonville,* 422 U. S. 205 (1975). I believe this perception is a clouded one. The Jacksonville and Detroit ordinances are quite dissimilar, and our analysis of the infirmities of the former is inapplicable to the latter. In *Erznoznik,* an ordinance purporting to prevent a nuisance, not a comprehensive zoning ordinance, prohibited the showing of films containing nudity by drive-in theaters when the screens were visible from a public street or place. The governmental interests advanced as justifying the ordinance were three: (i) to protect citizens from unwilling exposure to possibly offensive materials; (ii) to protect children from such materials; and (iii) to prevent the slowing of passing traffic and the likelihood of resulting accidents. We found the Jacksonville ordinance on its face either overbroad or underinclusive with respect to each of these asserted purposes. As to the first purpose, the ordinance was overbroad because it proscribed the showing of any nudity, however innocent or educational. Moreover, potential viewers who deemed particular nudity to be offensive were not captives; they had only to look elsewhere. *Id.,* at 210–212; see *Cohen* v. *California,* 403 U. S., at 21. As to minors the Jacksonville ordinance was overbroad because it "might prohibit newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach." 422 U. S., at 213. Finally, the ordinance was not rationally tailored to support its asserted purpose as a traffic regulation. By proscribing "even the most fleeting and innocent glimpses of nudity," it was strikingly underinclusive—omitting "a wide va-

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of Chicago v. *Mosley,* 408 U. S. 92 (1972), in which no governmental interest justified a distinction between the types of messages permitted in the public forum there involved.

riety of other scenes in the customary screen diet . . . [that] would be [no] less distracting to the passing motorist." *Id.*, at 214–215.

In sum, the ordinance in *Erznoznik* was a misconceived attempt directly to regulate content of expression. The Detroit zoning ordinance, in contrast, affects expression only incidentally and in furtherance of governmental interests wholly unrelated to the regulation of expression. At least as applied to respondents, it does not offend the First Amendment. Although courts must be alert to the possibility of direct rather than incidental effect of zoning on expression, and especially to the possibility of using the power to zone as a pretext for suppressing expression, it is clear that this is not such a case.

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

The Court today holds that the First and Fourteenth Amendments do not prevent the city of Detroit from using a system of prior restraints and criminal sanctions to enforce content-based restrictions on the geographic location of motion picture theaters that exhibit nonobscene but sexually oriented films. I dissent from this drastic departure from established principles of First Amendment law.

This case does not involve a simple zoning ordinance,[1] or a content-neutral time, place, and manner restriction,[2]

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[1] Contrast *Village of Belle Terre* v. *Boraas*, 416 U. S. 1, which upheld a zoning ordinance that restricted no substantive right guaranteed by the Constitution.

[2] Here, as in *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, and *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205, the State seeks to impose a selective restraint on speech with a particular content. It is not all movie theaters which must comply with Ordinances No. 742–G and No. 743–G, but only those "used for present-

or a regulation of obscene expression or other speech that is entitled to less than the full protection of the First Amendment.[3] The kind of expression at issue here is no doubt objectionable to some, but that fact does not diminish its protected status any more than did the particular content of the "offensive" expression in *Erznoznik* v. *City of Jacksonville,* 422 U. S. 205 (display of nudity on a drive-in movie screen); *Lewis* v. *City of New Orleans,* 415 U. S. 130 (utterance of vulgar epithet); *Hess* v. *Indiana,* 414 U. S. 105 (utterance of vulgar remark); *Papish* v. *University of Missouri Curators,* 410 U. S. 667 (indecent remarks in campus newspaper); *Cohen* v. *California,* 403 U. S. 15 (wearing of clothing inscribed with a vulgar remark); *Brandenburg* v. *Ohio,* 395 U. S. 444 (utterance of racial slurs); or *Kingsley Pictures Corp.* v. *Regents,* 360 U. S. 684 (alluring portrayal of adultery as proper behavior).

What this case does involve is the constitutional permissibility of selective interference with protected speech whose content is thought to produce distasteful effects. It is elementary that a prime function of the First Amendment is to guard against just such interference.[4] By refusing to invalidate Detroit's ordinance the Court rides roughshod over cardinal principles of First Amend-

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ing material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas' . . . ." The ordinances thus " 'sli[p] from the neutrality of time, place, and circumstance into a concern about content.' This is never permitted." *Police Dept. of Chicago* v. *Mosley, supra,* at 99 (citation omitted). See, *e. g., Hudgens* v. *NLRB,* 424 U. S. 507, 520; *Grayned* v. *City of Rockford,* 408 U. S. 104, 115.

[3] The regulatory scheme contains no provision for a judicial determination of obscenity. As the Court of Appeals correctly held, the material displayed must therefore be presumed to be fully protected by the First Amendment. 518 F. 2d 1014, 1019.

[4] See, *e. g., Terminiello* v. *Chicago,* 337 U. S. 1, 4–5.

ment law, which require that time, place, and manner regulations that affect protected expression be content neutral except in the limited context of a captive or juvenile audience.[5] In place of these principles the Court invokes a concept wholly alien to the First Amendment. Since "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice," *ante,* at 70, the Court implies that these films are not entitled to the full protection of the Constitution. This stands "Voltaire's immortal comment," *ibid.,* on its head. For if the guarantees of the First Amendment were reserved for expression that more than a "few of us" would take up arms to defend, then the right of free expression would be defined and circumscribed by current popular opinion. The guarantees of the Bill of Rights were designed to protect against precisely such majoritarian limitations on individual liberty.[6]

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[5] See, *e. g., Hudgens* v. *NLRB, supra; Erznoznik* v. *City of Jacksonville, supra; Police Dept. of Chicago* v. *Mosley, supra.* This case does not involve state regulation narrowly aimed at preventing objectionable communication from being thrust upon an unwilling audience. See *Erznoznik* v. *City of Jacksonville, supra,* at 209. Contrast *Lehman* v. *City of Shaker Heights,* 418 U. S. 298; *Rowan* v. *Post Office Dept.,* 397 U. S. 728. Nor is the Detroit ordinance narrowly aimed at protecting children from exposure to sexually oriented displays that would not be judged obscene by adult standards. Contrast *Ginsberg* v. *New York,* 390 U. S. 629.

[6] See, *e. g., Terminiello* v. *Chicago, supra,* at 4–5. The Court stresses that Detroit's content-based regulatory system does not preclude altogether the display of sexually oriented films. But, as the Court noted in a similar context in *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U. S. 546, this is constitutionally irrelevant, for "'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.'" *Id.,* at 556, quoting *Schneider* v. *State,* 308 U. S. 147, 163. See also *Interstate Circuit* v. *Dallas,* 390 U. S. 676; *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58.

The fact that the "offensive" speech here may not address "important" topics—"ideas of social and political significance," in the Court's terminology, *ante,* at 61—does not mean that it is less worthy of constitutional protection. "Wholly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons." *Winters* v. *New York,* 333 U. S. 507, 528 (Frankfurter, J., dissenting); accord, *Cohen* v. *California, supra,* at 25. Moreover, in the absence of a judicial determination of obscenity, it is by no means clear that the speech is not "important" even on the Court's terms. "[S]ex and obscenity are not synonymous. . . . The portrayal of sex, *e. g.,* in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." *Roth* v. *United States,* 354 U. S. 476, 487 (footnotes omitted). See also *Kingsley Pictures Corp.* v. *Regents, supra,* at 688–689.

I can only interpret today's decision as an aberration. The Court is undoubtedly sympathetic, as am I, to the well-intentioned efforts of Detroit to "clean up" its streets and prevent the proliferation of "skid rows." But it is in those instances where protected speech grates most unpleasantly against the sensibilities that judicial vigilance must be at its height.

Heretofore, the Court has not shied from its responsibility to protect "offensive" speech from governmental interference. Just last Term in *Erznoznik* v. *City of Jacksonville, supra,* the Court held that a city could not, consistently with the First and Fourteenth Amendments, make it a public nuisance for a drive-in movie theater to show films containing nudity if the screen were visible

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from a public street or place. The factual parallels between that case and this one are striking. There, as here, the ordinance did not forbid altogether the "distasteful" expression but merely required an alteration in the physical setting of the forum. There, as here, the city's principal asserted interest was in minimizing the "undesirable" effects of speech having a particular content. And, most significantly, the particular content of the restricted speech at issue in *Erznoznik* precisely parallels the content restriction embodied in § 1 of Detroit's definition of "Specified Anatomical Areas." Compare Jacksonville Municipal Code § 330.313 with Detroit Ordinance No. 742–G, § 32. 0007. In short, *Erznoznik* is almost on "all fours" with this case.

The Court must never forget that the consequences of rigorously enforcing the guarantees of the First Amendment are frequently unpleasant. Much speech that seems to be of little or no value will enter the marketplace of ideas, threatening the quality of our social discourse and, more generally, the serenity of our lives. But that is the price to be paid for constitutional freedom.

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

I join MR. JUSTICE STEWART's dissent, and write separately to identify an independent ground on which, for me, the challenged ordinance is unconstitutional. That ground is vagueness.

I

We should put ourselves for a moment in the shoes of the motion picture exhibitor. Let us suppose that, having previously offered only a more innocuous fare, he

decides to vary it by exhibiting on certain days films from a series which occasionally deals explicitly with sex. The exhibitor must determine whether this places his theater into the "adult" class prescribed by the challenged ordinance. If the theater is within that class, it must be licensed, and it may be entirely prohibited, depending on its location.

"Adult" status *vel non* depends on whether the theater is "used for presenting" films that are "distinguished or characterized by an emphasis on" certain specified activities, including sexual intercourse, or specified anatomical areas.[1] It will be simple enough, as the operator screens films, to tell when one of these areas or activities is being depicted, but if the depiction represents only a part of the films' subject matter, I am at a loss to know how he will tell whether they are "distinguished or characterized by an emphasis" on those areas and activities. The ordinance gives him no guidance. Neither does it instruct him on how to tell whether, assuming the films in question are thus "distinguished or characterized," his theater is being "used for presenting" such films. That phrase could mean *ever* used, *often* used, or *predominantly* used, to name a few possibilities.

Let us assume the exhibitor concludes that the film series will render his showhouse an "adult" theater. He still must determine whether the operation of the theater is prohibited by virtue of there being two other "regulated uses" within 1,000 feet. His task of determining whether his own theater is "adult" is suddenly multiplied by however many neighbors he may have that arguably are within that same class. He must, in other

[1] See *ante,* at 52–55, and nn. 3–7. I reproduce, or cite specifically to, only those sections of the challenged ordinance that are not set out in the Court's opinion.

words, know and evaluate not only his own films, but those of any competitor within 1,000 feet. And neighboring theaters are not his only worry, since the list of regulated uses also includes "adult" bookstores, "Group 'D' Cabaret[s]," sellers of alcoholic beverages for consumption on the premises, hotels, motels, pawnshops, pool halls, public lodging houses, "secondhand stores," shoeshine parlors, and "taxi dance halls." The exhibitor must master all these definitions. Some he will find very clear, of course; others less so. A neighboring bookstore is "adult," for example, if a "substantial or significant portion of its stock in trade" is "distinguished or characterized" in the same way as the films shown in an "adult" theater.

The exhibitor's compounded task of applying the statutory definitions to himself and his neighbors, furthermore, is an ongoing one. At any moment he could become a violator of the ordinance because some neighbor has slipped into a "regulated use" classification. He must know, for example, if the adjacent hotel has opened a bar or shoeshine "parlor" on the premises, though he may still be uncertain whether the hotel as a whole constitutes more than one "regulated use." He must also know the moment when the stock in trade of neighboring bookstores and theaters comes to be of such a character, and predominance, as to render them "adult." Lest he let down his guard, he should remember that if he miscalculates on any of these issues, he may pay a fine or go to jail.[2]

It would not be surprising if, under the circumstances, the exhibitor chose to forgo showing the film series altogether. Such deterrence of protected First Amendment activity in the "gray area" of a statute's possible

[2] Official Zoning Ordinance of Detroit § 69.000.

coverage is, of course, one of the vices of vagueness. A second is the tendency of vague statutory standards to grant excessive and effectively unreviewable discretion to the officials who enforce those standards. That vice is also present here. It is present because the vague standards already described are left to the interpretation and application of law enforcement authorities.[3] It is introduced even more dangerously by the indefinite standards under which city officials are empowered to grant or deny licenses for "adult" theaters, and also waivers of the 1,000-foot rule.[4]

All "adult" theaters must be licensed, and licenses are dispensed by the mayor. The ordinance does not specify the criteria for licensing, except in one respect. The mayor is empowered to refuse an "adult" theater license, or revoke it at any time,

> "upon proof submitted to him of the violation . . . , within the preceding two years, of any criminal statute . . . or [zoning] ordinance . . . which evidences a flagrant disregard for the safety or welfare of either the patrons, employees, or persons residing or doing business nearby." Code of Detroit § 5–2–3.

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[3] A special opportunity for arbitrary or discriminatory application of the ordinance is apparently supplied by the operation of the 1,000-foot rule. Presumably, only one of three "regulated uses" within a 1,000-foot area must be eliminated in order for the remaining two to become legal. For all that appears from the ordinance, the choice of which use to eliminate is left entirely to the enforcement authorities.

[4] These two features of the ordinance constitute prior restraints and are challengeable on that ground alone. Cf. *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U. S. 546 (1975). Since, for me, the most glaring defect in the operation of these restraints is the vagueness of the standards governing their applications, however, only the vagueness point is pursued here.

If the operation of an "adult" theater would violate the 1,000-foot rule, the exhibitor must obtain the approval not only of the mayor but of the City Planning Commission, which is empowered to waive the rule. It may grant a waiver if it finds that the operation of an "adult" theater, in addition to satisfying several more definite criteria, "will not be contrary to the public interest or injurious to nearby properties," or violative of "the spirit and intent" of the ordinance.

II

Just the other day, in *Hynes* v. *Mayor of Oradell,* 425 U. S. 610 (1976), we reaffirmed the principle that in the First Amendment area " 'government may regulate . . . only with narrow specificity,' " *NAACP* v. *Button,* 371 U. S. 415, 433 (1963), avoiding the use of language that is so vague that "men of common intelligence must necessarily guess at its meaning." *Connally* v. *General Constr. Co.,* 269 U. S. 385, 391 (1926). In *Hynes* we invalidated for its vagueness an ordinance that required "Civic Groups and Organizations," and also anyone seeking to "call from house to house . . . for a recognized charitable . . . or . . . political campaign or cause," to register with the local police "for identification only." We found it intolerably unclear what "Groups and Organizations" were encompassed, what was meant by a "cause," and what was required by way of "identification." I fail to see how a statutory prohibition as difficult to understand and apply as the 1,000-foot rule for "adult" theaters can survive if the ordinance in *Hynes* could not.

The vagueness in the licensing and waiver standards of this ordinance is more pernicious still. The mayor's power to deny a license because of "flagrant disregard" for the "safety or welfare" of others is apparently exercisable only over those who have committed some

infraction within the previous two years,[5] but I do not see why even those persons should be subject to standardless licensing discretion of precisely the kind that this Court so many times has condemned. See *Shuttlesworth* v. *Birmingham,* 394 U. S. 147 (1969); *Staub* v. *City of Baxley,* 355 U. S. 313 (1958); *Kunz* v. *New York,* 340 U. S. 290 (1951); *Niemotko* v. *Maryland,* 340 U. S. 268 (1951); *Saia* v. *New York,* 334 U. S. 558 (1948); *Schneider* v. *State,* 308 U. S. 147, 163–164 (1939); *Hague* v. *CIO,* 307 U. S. 496 (1939); *Lovell* v. *Griffin,* 303 U. S. 444 (1938). For the exhibitor who must obtain a waiver of the 1,000-foot rule, the City Planning Commission likewise functions effectively as a censor, constrained only by its perception of the "public interest" and the "spirit and intent" of the ordinance. This Court repeatedly has invalidated such vague standards for prior approval of film exhibitions. See *Interstate Circuit* v. *Dallas,* 390 U. S. 676, 683 (1968), and cases cited.[6] Indeed, a standard much like the waiver stand-

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[5] The ordinance empowers the mayor to act "upon proof submitted to him of [a] violation." It is possible that he may entertain evidence not only of convictions but also of violations themselves, even though these have not been otherwise adjudicated. Whether legal infractions must be otherwise adjudicated or not, the mayor clearly retains the power to revoke a license for "flagrant disregard," should infractions occur at any time after the license's issuance.

[6] *Interstate Circuit* disposes of any argument that excessively vague standards may be permitted here because the film exhibitions are not banned entirely, but merely prohibited in a particular place. The ordinance invalidated in *Interstate Circuit* required exhibitors to submit films for official determination whether persons under 16 should be excluded from the film exhibitions. It thus threatened the exhibitor with a loss of only part of his audience. The effect of the present ordinance is more severe, since if the exhibitor has only one theater, he is completely foreclosed. See also *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U. S., at 556 n. 8.

ard in this case was the one found wanting in *Gelling* v. *Texas,* 343 U. S. 960 (1952) (censor could ban films "of such character as to be prejudicial to the best interests of the people of said City").

It is true that the mayor and the Planning Commission review the applications of theaters, rather than individual films. It might also be argued that at least if they adhere to the "spirit and intent" of the ordinance, their principal concern will be with the blighting of the cityscape, rather than that of the minds of their constituents. But neither of these aspects of the case alters its basic and dispositive facts: persons seeking to exhibit "adult," but protected, films must secure, in many cases, the prior approval of the mayor and City Planning Commission; they inevitably will make their decisions by reference to the content of the proposed exhibitions; they are not constrained in doing so by "narrowly drawn, reasonable and definite standards." *Niemotko* v. *Maryland,* 340 U. S., at 271. This may be a permissible way to control pawnshops, pool halls, and the other "regulated uses" for which the ordinance was originally designed. It is not an acceptable way, in the light of the First Amendment's presence, to decide who will be permitted to exhibit what films in what places.

III

The Court today does not really question these settled principles, or raise any doubt that if they were applied in this case, the challenged ordinance would not survive. The Court reasons, instead, that these principles need not be applied in this case because the plaintiffs themselves are clearly within the ordinance's proscriptions, and thus not affected by its vagueness. Our usual practice, as the Court notes, is to entertain facial challenges based on vagueness and overbreadth by anyone subject to a statute's proscription. The reasons given for de-

parting from this practice are (1) that the ordinance will have no "significant deterrent effect on the exhibition of films protected by the First Amendment"; (2) that the ordinance is easily susceptible of "a narrowing construction"; and (3) that "there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance." *Ante,* at 60, 61.

As to the first reason, I disagree on the facts, as is clear from the initial section of this opinion.[7] As to the second, no easy "narrowing construction" is proposed, and I doubt that one exists, particularly since (due to the operation of the 1,000-foot rule) not only the "used for presenting" and "characterized by an emphasis" language relating to "adult" theaters, and the "flagrant disregard" and "public interest" language of the licensing and waiver provisions, but also the definitions of *other* regulated uses must all be reduced to specificity. See also *Hynes* v. *Mayor of Oradell,* 425 U. S., at 622 ("we are without power to remedy the [vagueness] defects by giving the ordinance constitutionally precise content").

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[7] In *Erznoznik* v. *City of Jacksonville,* 422 U. S. 205 (1975), the case on which the Court relies for the proposition that only statutes having a "significant deterrent effect" may be facially challenged, such an effect in fact was found to exist. The ordinance there at issue prohibited drive-in theaters from exhibiting films in which nude parts of the human body would be "visible from any public street or public place." We perceived a "real and substantial" deterrent effect in the "unwelcome choice" to which the ordinance put exhibitors: "either [to] restrict their movie offerings or construct adequate protective fencing which may be extremely expensive or even physically impracticable." *Id.,* at 217. In the present case the second horn of the dilemma is even sharper: the construction (or acquisition) of an entirely new theater.

As to the third reason, that "adult" material is simply entitled to less protection, it certainly explains the lapse in applying settled vagueness principles, as indeed it explains this whole case. In joining MR. JUSTICE STEWART I have joined his forthright rejection of the notion that First Amendment protection is diminished for "erotic materials" that only a "few of us" see the need to protect.

We should not be swayed in this case by the characterization of the challenged ordinance as merely a "zoning" regulation, or by the "adult" nature of the affected material. By whatever name, this ordinance prohibits the showing of certain films in certain places, imposing criminal sanctions for violation of the ban. And however distasteful we may suspect the films to be, we cannot approve their suppression without any judicial finding that they are obscene under this Court's carefully delineated and considered standards.

Syllabus

UNITED STATES *v.* AGURS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75–491. Argued April 28, 1976—Decided June 24, 1976

Respondent was convicted of second-degree murder for killing one Sewell with a knife during a fight. Evidence at the trial disclosed, *inter alia,* that Sewell, just before the killing, had been carrying two knives, including the one with which respondent stabbed him, that he had been repeatedly stabbed, but that respondent herself was uninjured. Subsequently, respondent's counsel moved for a new trial, asserting that he had discovered that Sewell had a prior criminal record (including guilty pleas to charges of assault and carrying a deadly weapon, apparently a knife) that would have tended to support the argument that respondent acted in self-defense, and that the prosecutor had failed to disclose this information to the defense. The District Court denied the motion on the ground that the evidence of Sewell's criminal record was not material, because it shed no light on his character that was not already apparent from the uncontradicted evidence, particularly the fact that he had been carrying two knives, the court stressing the inconsistency between the self-defense claim and the fact that Sewell had been stabbed repeatedly while respondent was unscathed. The Court of Appeals reversed, holding that the evidence of Sewell's criminal record was material and that its nondisclosure required a new trial because the jury might have returned a different verdict had the evidence been received. *Held:* The prosecutor's failure to tender Sewell's criminal record to the defense did not deprive respondent of a fair trial as guaranteed by the Due Process Clause of the Fifth Amendment, where it appears that the record was not requested by defense counsel and gave rise to no inference of perjury, that the trial judge remained convinced of respondent's guilt beyond a reasonable doubt after considering the criminal record in the context of the entire record, and that the judge's firsthand appraisal of the entire record was thorough and entirely reasonable. *Mooney* v. *Holohan,* 294 U. S. 103; *Brady* v. *Maryland,* 373 U. S. 83, distinguished. Pp. 103–114.

(a) A prosecutor does not violate the constitutional duty of

disclosure unless his omission is sufficiently significant to result in the denial of the defendant's right to a fair trial. Pp. 107–109.

(b) Whether or not procedural rules authorizing discovery of everything that might influence a jury might be desirable, the Constitution does not demand such broad discovery; and the mere possibility that an item of undisclosed information might have aided the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense. Pp. 109–110.

(c) Nor is the prosecutor's constitutional duty of disclosure measured by his moral culpability or willfulness; if the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor. P. 110.

(d) The proper standard of materiality of undisclosed evidence, and the standard applied by the trial judge in this case, is that if the omitted evidence creates a reasonable doubt of guilt that did not otherwise exist, constitutional error has been committed. Pp. 112–114.

167 U. S. App. D. C. 28, 510 F. 2d 1249, reversed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 114.

Deputy Solicitor General Frey argued the cause for the United States. With him on the briefs were *Solicitor General Bork, Assistant Attorney General Thornburgh, John F. Cooney, Jerome M. Feit,* and *Robert H. Plaxico.*

Edwin J. Bradley argued the cause for respondent. With him on the brief were *Michael E. Geltner, William Greenhalgh,* and *Sherman L. Cohn.*

MR. JUSTICE STEVENS delivered the opinion of the Court.

After a brief interlude in an inexpensive motel room, respondent repeatedly stabbed James Sewell, causing his death. She was convicted of second-degree murder. The question before us is whether the prosecutor's failure

to provide defense counsel with certain background information about Sewell, which would have tended to support the argument that respondent acted in self-defense, deprived her of a fair trial under the rule of *Brady* v. *Maryland,* 373 U. S. 83.

The answer to the question depends on (1) a review of the facts, (2) the significance of the failure of defense counsel to request the material, and (3) the standard by which the prosecution's failure to volunteer exculpatory material should be judged.

I

At about 4:30 p. m. on September 24, 1971, respondent, who had been there before, and Sewell, registered in a motel as man and wife. They were assigned a room without a bath. Sewell was wearing a bowie knife in a sheath, and carried another knife in his pocket. Less than two hours earlier, according to the testimony of his estranged wife, he had had $360 in cash on his person.

About 15 minutes later three motel employees heard respondent screaming for help. A forced entry into their room disclosed Sewell on top of respondent struggling for possession of the bowie knife. She was holding the knife; his bleeding hand grasped the blade; according to one witness he was trying to jam the blade into her chest. The employees separated the two and summoned the authorities. Respondent departed without comment before they arrived. Sewell was dead on arrival at the hospital.

Circumstantial evidence indicated that the parties had completed an act of intercourse, that Sewell had then gone to the bathroom down the hall, and that the struggle occurred upon his return. The contents of his pockets were in disarray on the dresser and no money was found; the jury may have inferred that respondent took Sewell's money and that the fight started when Sewell re-entered the room and saw what she was doing.

On the following morning respondent surrendered to the police. She was given a physical examination which revealed no cuts or bruises of any kind, except needle marks on her upper arm. An autopsy of Sewell disclosed that he had several deep stab wounds in his chest and abdomen, and a number of slashes on his arms and hands, characterized by the pathologist as "defensive wounds." [1]

Respondent offered no evidence. Her sole defense was the argument made by her attorney that Sewell had initially attacked her with the knife, and that her actions had all been directed toward saving her own life. The support for this self-defense theory was based on the fact that she had screamed for help. Sewell was on top of her when help arrived, and his possession of two knives indicated that he was a violence-prone person.[2] It took the jury about 25 minutes to elect a foreman and return a verdict.

Three months later defense counsel filed a motion for a new trial asserting that he had discovered (1) that Sewell had a prior criminal record that would have further evidenced his violent character; (2) that the prosecutor had failed to disclose this information to the defense; and (3) that a recent opinion of the United States Court of Appeals for the District of Columbia Circuit made it clear that such evidence was admissible even if not known to the defendant.[3] Sewell's prior record included a plea of guilty to a charge of assault and carry-

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[1] The alcohol level in Sewell's blood was slightly below the legal definition of intoxication.

[2] Moreover, the motel clerk testified that Sewell's wife had said he "would use a knife"; however, Mrs. Sewell denied making this statement. There was no dispute about the fact that Sewell carried the bowie knife when he registered.

[3] See *United States* v. *Burks*, 152 U. S. App. D. C. 284, 286, 470 F. 2d 432, 434 (1972).

ing a deadly weapon in 1963, and another guilty plea to a charge of carrying a deadly weapon in 1971. Apparently both weapons were knives.

The Government opposed the motion, arguing that there was no duty to tender Sewell's prior record to the defense in the absence of an appropriate request; that the evidence was readily discoverable in advance of trial and hence was not the kind of "newly discovered" evidence justifying a new trial; and that, in all events, it was not material.

The District Court denied the motion. It rejected the Government's argument that there was no duty to disclose material evidence unless requested to do so,[4]

[4] "THE COURT: What are you saying? How can you request that which you don't know exists. That is the very essence of Brady.

. . . . . .

"THE COURT: Are you arguing to the Court that the status of the law is that if you have a report indicating that fingerprints were taken and that the fingerprints on the item . . . which the defendant is alleged to have assaulted somebody turn out not to be the defendant's, that absent a specfic request for that information, you do not have any obligation to defense counsel?

"MR. CLARKE: No, Your Honor. There is another aspect which comes to this, and that is whether or not the Government knowingly puts on perjured testimony. It has an obligation to correct that perjured testimony.

"THE COURT: I am not talking about perjured testimony. You don't do anything about it. You say nothing about it. You have got the report there. You know that possibly it could be exculpatory. Defense counsel doesn't know about it. He has been misinformed about it. Suppose he doesn't know about it. And because he has made no specific request for that information, you say that the status of the law under Brady is that you have no obligation as a prosecutor to open your mouth?

"MR. CLARKE: No. Your Honor . . . .

"But as the materiality of the items becomes less to the point where it is not material, there has to be a request, or else the Government, just like the defense, is not on notice." App. 147–149.

assumed that the evidence was admissible, but held that it was not sufficiently material. The District Court expressed the opinion that the prior conviction shed no light on Sewell's character that was not already apparent from the uncontradicted evidence, particularly the fact that he carried two knives; the court stressed the inconsistency between the claim of self-defense and the fact that Sewell had been stabbed repeatedly while respondent was unscathed.

The Court of Appeals reversed.[5] The court found no lack of diligence on the part of the defense and no misconduct by the prosecutor in this case. It held, however, that the evidence was material, and that its nondisclosure required a new trial because the jury might have returned a different verdict if the evidence had been received.[6]

The decision of the Court of Appeals represents a significant departure from this Court's prior holding; because we believe that that court has incorrectly interpreted the constitutional requirement of due process, we reverse.

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[5] 167 U. S. App. D. C. 28, 510 F. 2d 1249 (1975). The opinion of the Court of Appeals disposed of the direct appeal filed after respondent was sentenced as well as the two additional appeals taken from the two orders denying motions for new trial. After the denial of the first motion, respondent's counsel requested leave to withdraw in order to enable substitute counsel to file a new motion for a new trial on the ground that trial counsel's representation had been ineffective because he did not request Sewell's criminal record for the reason that he incorrectly believed that it was inadmissible. The District Court denied that motion. Although that action was challenged on appeal, the Court of Appeals did not find it necessary to pass on the validity of that ground. We think it clear, however, that counsel's failure to obtain Sewell's prior criminal record does not demonstrate ineffectiveness.

[6] Although a majority of the active judges of the Circuit, as well as one of the members of the panel, expressed doubt about the validity of the panel's decision, the court refused to rehear the case en banc.

II

The rule of *Brady* v. *Maryland,* 373 U. S. 83, arguably applies in three quite different situations. Each involves the discovery, after trial, of information which had been known to the prosecution but unknown to the defense.

In the first situation, typified by *Mooney* v. *Holohan,* 294 U. S. 103, the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury.[7] In a series of subsequent cases, the Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair,[8] and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.[9] It is this line of cases on which the

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[7] In *Mooney* it was alleged that the petitioner's conviction was based on perjured testimony "which was knowingly used by the prosecuting authorities in order to obtain that conviction, and also that these authorities deliberately suppressed evidence which would have impeached and refuted the testimony thus given against him." 294 U. S., at 110.

The Court held that such allegations, if true, would establish such fundamental unfairness as to justify a collateral attack on petitioner's conviction.

"It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." *Id.,* at 112.

[8] *Pyle* v. *Kansas,* 317 U. S. 213; *Alcorta* v. *Texas,* 355 U. S. 28; *Napue* v. *Illinois,* 360 U. S. 264; *Miller* v. *Pate,* 386 U. S. 1; *Giglio* v. *United States,* 405 U. S. 150; *Donnelly* v. *DeChristoforo,* 416 U. S. 637.

[9] See *Giglio, supra,* at 154, quoting from *Napue, supra,* at 271.

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Court of Appeals placed primary reliance. In those cases the Court has applied a strict standard of materiality, not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process. Since this case involves no misconduct, and since there is no reason to question the veracity of any of the prosecution witnesses, the test of materiality followed in the *Mooney* line of cases is not necessarily applicable to this case.

The second situation, illustrated by the *Brady* case itself, is characterized by a pretrial request for specific evidence. In that case defense counsel had requested the extrajudicial statements made by Brady's accomplice, one Boblit. This Court held that the suppression of one of Boblit's statements deprived Brady of due process, noting specifically that the statement had been requested and that it was "material." [10] A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.

Brady was found guilty of murder in the first degree. Since the jury did not add the words "without capital punishment" to the verdict, he was sentenced to death. At his trial Brady did not deny his involvement in the deliberate killing, but testified that it was his accomplice,

[10] "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U. S., at 87. Although in *Mooney* the Court had been primarily concerned with the willful misbehavior of the prosecutor, in *Brady* the Court focused on the harm to the defendant resulting from nondisclosure. See discussions of this development in Note, The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant, 74 Yale L. J. 136 (1964); and Comment, *Brady v. Maryland* and The Prosecutor's Duty to Disclose, 40 U. Chi. L. Rev. 112 (1972).

Boblit, rather than he, who had actually strangled the decedent. This version of the event was corroborated by one of several confessions made by Boblit but not given to Brady's counsel despite an admittedly adequate request.

After his conviction and sentence had been affirmed on appeal,[11] Brady filed a motion to set aside the judgment, and later a post-conviction proceeding, in which he alleged that the State had violated his constitutional rights by suppressing the Boblit confession. The trial judge denied relief largely because he felt that Boblit's confession would have been inadmissible at Brady's trial. The Maryland Court of Appeals disagreed; [12] it ordered a new trial on the issue of punishment. It held that the withholding of material evidence, even "without guile," was a denial of due process and that there were valid theories on which the confession might have been admissible in Brady's defense.

This Court granted certiorari to consider Brady's contention that the violation of his constitutional right to a fair trial vitiated the entire proceeding.[13] The holding that the suppression of exculpatory evidence violated Brady's right to due process was affirmed, as was the separate holding that he should receive a new trial on the issue of punishment but not on the issue of guilt or innocence. The Court interpreted the Maryland Court

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[11] 220 Md. 454, 154 A. 2d 434 (1959).

[12] 226 Md. 422, 174 A. 2d. 167 (1961).

[13] "The petitioner was denied due process of law by the State's suppression of evidence before his trial began. The proceeding must commence again from the stage at which the petitioner was overreached. The denial of due process of law vitiated the verdict and the sentence. *Rogers* v. *Richmond,* 365 U. S. 534, 545. The verdict is not saved because other competent evidence would support it. *Culombe* v. *Connecticut,* 367 U. S. 568, 621." Brief for Petitioner in *Brady* v. *Maryland,* No. 490, O. T. 1962, p. 6.

of Appeals opinion as ruling that the confession was inadmissible on that issue. For that reason, the confession could not have affected the outcome on the issue of guilt but could have affected Brady's punishment. It was material on the latter issue but not the former. And since it was not material on the issue of guilt, the entire trial was not lacking in due process.

The test of materiality in a case like *Brady* in which specific information has been requested by the defense is not necessarily the same as in a case in which no such request has been made.[14] Indeed, this Court has not yet decided whether the prosecutor has any obligation to provide defense counsel with exculpatory information when no request has been made. Before addressing that question, a brief comment on the function of the request is appropriate.

In *Brady* the request was specific. It gave the prosecutor notice of exactly what the defense desired. Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.

In many cases, however, exculpatory information in the possession of the prosecutor may be unknown to defense counsel. In such a situation he may make no request at all, or possibly ask for "all *Brady* material" or for "anything exculpatory." Such a request really gives the prosecutor no better notice than if no request is

[14] See Comment, 40 U. Chi. L. Rev., *supra*, n. 10, at 115–117.

made. If there is a duty to respond to a general request of that kind, it must derive from the obviously exculpatory character of certain evidence in the hands of the prosecutor. But if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made. Whether we focus on the desirability of a precise definition of the prosecutor's duty or on the potential harm to the defendant, we conclude that there is no significant difference between cases in which there has been merely a general request for exculpatory matter and cases, like the one we must now decide, in which there has been no request at all. The third situation in which the *Brady* rule arguably applies, typified by this case, therefore embraces the case in which only a general request for "*Brady* material" has been made.

We now consider whether the prosecutor has any constitutional duty to volunteer exculpatory matter to the defense, and if so, what standard of materiality gives rise to that duty.

III

We are not considering the scope of discovery authorized by the Federal Rules of Criminal Procedure, or the wisdom of amending those Rules to enlarge the defendant's discovery rights. We are dealing with the defendant's right to a fair trial mandated by the Due Process Clause of the Fifth Amendment to the Constitution. Our construction of that Clause will apply equally to the comparable clause in the Fourteenth Amendment applicable to trials in state courts.

The problem arises in two principal contexts. First, in advance of trial, and perhaps during the course of a trial as well, the prosecutor must decide what, if anything, he should voluntarily submit to defense counsel.

Second, after trial a judge may be required to decide whether a nondisclosure deprived the defendant of his right to due process. Logically the same standard must apply at both times. For unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose.

Nevertheless, there is a significant practical difference between the pretrial decision of the prosecutor and the post-trial decision of the judge. Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure. But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial.

The Court of Appeals appears to have assumed that the prosecutor has a constitutional obligation to disclose any information that might affect the jury's verdict. That statement of a constitutional standard of materiality approaches the "sporting theory of justice" which the Court expressly rejected in *Brady*.[15] For a jury's

[15] "In the present case a unanimous Court of Appeals has said that nothing in the suppressed confession 'could have reduced the appellant Brady's offense below murder in the first degree.' We read that statement as a ruling on the admissibility of the confession on the issue of innocence or guilt. A sporting theory of justice might assume that if the suppressed confession had been used at the first trial, the judge's ruling that it was not admissible on the issue of innocence or guilt might have been flouted by the jury just as might have been done if the court had first admitted a confession and then stricken it from the record. But we cannot

appraisal of a case "might" be affected by an improper or trivial consideration as well as by evidence giving rise to a legitimate doubt on the issue of guilt. If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice.

Whether or not procedural rules authorizing such broad discovery might be desirable, the Constitution surely does not demand that much. While expressing the opinion that representatives of the State may not "suppress substantial material evidence," former Chief Justice Traynor of the California Supreme Court has pointed out that "they are under no duty to report sua sponte to the defendant all that they learn about the case and about their witnesses." *In re Imbler,* 60 Cal. 2d 554, 569, 387 P. 2d 6, 14 (1963). And this Court recently noted that there is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." *Moore* v. *Illinois,* 408 U. S. 786, 795.[16] The mere possibility that an item of undisclosed information

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raise that trial strategy to the dignity of a constitutional right and say that the deprival of this defendant of that sporting chance through the use of a bifurcated trial (cf. *Williams* v. *New York,* 337 U. S. 241) denies him due process or violates the Equal Protection Clause of the Fourteenth Amendment." 373 U. S., at 90–91 (footnote omitted).

[16] In his opinion concurring in the judgment in *Giles* v. *Maryland,* 386 U. S. 66, 98, Mr. Justice Fortas stated:

"This is not to say that convictions ought to be reversed on the ground that information merely repetitious, cumulative, or embellishing of facts otherwise known to the defense or presented to the court, or without importance to the defense for purposes of the preparation of the case or for trial was not disclosed to defense counsel. It is not to say that the State has an obligation to communicate preliminary, challenged, or speculative information."

might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense.

Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor.[17] If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it. Cf. *Giglio* v. *United States*, 405 U. S. 150, 154. Conversely, if evidence actually has no probative significance at all, no purpose would be served by requiring a new trial simply because an inept prosecutor incorrectly believed he was suppressing a fact that would be vital to the defense. If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.

As the District Court recognized in this case, there are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request.[18] For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he

[17] In *Brady* this Court, as had the Maryland Court of Appeals, expressly rejected the good faith or the bad faith of the prosecutor as the controlling consideration: "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, *irrespective of the good faith or bad faith of the prosecution.* The principle of *Mooney* v. *Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." 373 U. S., at 87. (Emphasis added.) If the nature of the prosecutor's conduct is not controlling in a case like *Brady,* surely it should not be controlling when the prosecutor has not received a specific request for information.

[18] The hypothetical example given by the District Judge in this case was fingerprint evidence demonstrating that the defendant could not have fired the fatal shot.

must always be faithful to his client's overriding interest that "justice shall be done." He is the "servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." *Berger* v. *United States,* 295 U. S. 78, 88. This description of the prosecutor's duty illuminates the standard of materiality that governs his obligation to disclose exculpatory evidence.

On the one hand, the fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal.[19] If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice.

On the other hand, since we have rejected the suggestion that the prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel, we cannot consistently treat every nondisclosure as though it were error. It necessarily follows that the judge should not order a new trial every time he is unable to

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[19] This is the standard generally applied by lower courts in evaluating motions for new trial under Fed. Rule Crim. Proc. 33 based on newly discovered evidence. See, *e. g., Ashe* v. *United States,* 288 F. 2d 725, 733 (CA6 1961); *United States* v. *Thompson,* 493 F. 2d 305, 310 (CA9 1974), cert. denied, 419 U. S. 834; *United States* v. *Houle,* 490 F. 2d 167, 171 (CA2 1973), cert. denied, 417 U. S. 970; *United States* v. *Meyers,* 484 F. 2d 113, 116 (CA3 1973); *Heald* v. *United States,* 175 F. 2d 878, 883 (CA10 1949). See also 2 C. Wright, Federal Practice and Procedure § 557 (1969).

characterize a nondisclosure as harmless under the customary harmless-error standard. Under that standard when error is present in the record, the reviewing judge must set aside the verdict and judgment unless his "conviction is sure that the error did not influence the jury, or had but very slight effect." *Kotteakos* v. *United States,* 328 U. S. 750, 764. Unless every nondisclosure is regarded as automatic error, the constitutional standard of materiality must impose a higher burden on the defendant.

The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt.[20] Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record.[21] If there is no reasonable doubt about

[20] It has been argued that the standard should focus on the impact of the undisclosed evidence on the defendant's ability to prepare for trial, rather than the materiality of the evidence to the issue of guilt or innocence. See Note, The Prosecutor's Constitutional Duty to Reveal Evidence to the Defense, 74 Yale L. J. 136 (1964). Such a standard would be unacceptable for determining the materiality of what has been generally recognized as *"Brady* material" for two reasons. First, that standard would necessarily encompass incriminating evidence as well as exculpatory evidence, since knowledge of the prosecutor's entire case would always be useful in planning the defense. Second, such an approach would primarily involve an analysis of the adequacy of the notice given to the defendant by the State, and it has always been the Court's view that the notice component of due process refers to the charge rather than the evidentiary support for the charge.

[21] "If, for example, one of only two eyewitnesses to a crime had told the prosecutor that the defendant was definitely not its perpetrator and if this statement was not disclosed to the defense, no court would hesitate to reverse a conviction resting on the testimony

guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

This statement of the standard of materiality describes the test which courts appear to have applied in actual cases although the standard has been phrased in different language.[22] It is also the standard which the trial judge applied in this case. He evaluated the significance of Sewell's prior criminal record in the context of the full trial which he recalled in detail. Stressing in particular the incongruity of a claim that Sewell was the aggressor with the evidence of his multiple wounds and respondent's unscathed condition, the trial judge indicated his unqualified opinion that respondent was guilty. He

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of the other eyewitness. But if there were fifty eyewitnesses, forty-nine of whom identified the defendant, and the prosecutor neglected to reveal that the other, who was without his badly needed glasses on the misty evening of the crime, had said that the criminal looked something like the defendant but he could not be sure as he had only had a brief glimpse, the result might well be different." Comment, 40 U. Chi. L. Rev., *supra*, n. 10, at 125.

[22] See, *e. g.*, *Stout* v. *Cupp*, 426 F. 2d 881, 882–883 (CA9 1970); *Peterson* v. *United States*, 411 F. 2d 1074, 1079 (CA8 1969); *Lessard* v. *Dickson*, 394 F. 2d 88, 90–92 (CA9 1968), cert. denied, 393 U. S. 1004; *United States* v. *Tomaiolo*, 378 F. 2d 26, 28 (CA2 1967). One commentator has identified three different standards this way:

"As discussed previously, in earlier cases the following standards for determining materiality for disclosure purposes were enunciated: (1) evidence which may be merely helpful to the defense; (2) evidence which raised a reasonable doubt as to defendant's guilt; (3) evidence which is of such a character as to create a substantial likelihood of reversal." Comment, Materiality and Defense Requests: Aids in Defining the Prosecutor's Duty of Disclosure, 59 Iowa L. Rev. 433, 445 (1973).

See also Note, The Duty of the Prosecutor to Disclose Exculpatory Evidence, 60 Col. L. Rev. 858 (1960).

noted that Sewell's prior record did not contradict any evidence offered by the prosecutor, and was largely cumulative of the evidence that Sewell was wearing a bowie knife in a sheath and carrying a second knife in his pocket when he registered at the motel.

Since the arrest record was not requested and did not even arguably give rise to any inference of perjury, since after considering it in the context of the entire record the trial judge remained convinced of respondent's guilt beyond a reasonable doubt, and since we are satisfied that his firsthand appraisal of the record was thorough and entirely reasonable, we hold that the prosecutor's failure to tender Sewell's record to the defense did not deprive respondent of a fair trial as guaranteed by the Due Process Clause of the Fifth Amendment. Accordingly, the judgment of the Court of Appeals is

Reversed.

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

The Court today holds that the prosecutor's constitutional duty to provide exculpatory evidence to the defense is not limited to cases in which the defense makes a request for such evidence. But once having recognized the existence of a duty to volunteer exculpatory evidence, the Court so narrowly defines the category of "material" evidence embraced by the duty as to deprive it of all meaningful content.

In considering the appropriate standard of materiality governing the prosecutor's obligation to volunteer exculpatory evidence, the Court observes:

> "[T]he fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been

> discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal [the standard generally applied to a motion under Fed. Rule Crim. Proc. 33 based on newly discovered evidence [1]]. If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice." *Ante,* at 111 (footnote omitted).

I agree completely.

The Court, however, seemingly forgets these precautionary words when it comes time to state the proper standard of materiality to be applied in cases involving neither the knowing use of perjury nor a specific defense request for an item of information. In such cases, the prosecutor commits constitutional error, the Court holds, "if the omitted evidence creates a reasonable doubt that did not otherwise exist." *Ante,* at 112. As the Court's subsequent discussion makes clear, the defendant challenging the prosecutor's failure to disclose evidence is entitled to relief, in the Court's view, only if the withheld evidence actually creates a reasonable doubt as to guilt in the judge's mind. The burden thus imposed on the defendant is at least as "severe" as, if not more

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[1] The burden generally imposed upon such a motion has also been described as a burden of demonstrating that the newly discovered evidence would probably produce a different verdict in the event of a retrial. See, *e. g., United States* v. *Kahn,* 472 F. 2d 272, 287 (CA2 1973); *United States* v. *Rodriguez,* 437 F. 2d 940, 942 (CA5 1971); *United States* v. *Curran,* 465 F. 2d 260, 264 (CA7 1972).

"severe" than,[2] the burden he generally faces on a Rule 33 motion. Surely if a judge is able to say that evidence actually creates a reasonable doubt as to guilt in his mind (the Court's standard), he would also conclude that the evidence "probably would have resulted in acquittal" (the general Rule 33 standard). In short, in spite of its own salutary precaution, the Court treats the case in which the prosecutor withholds evidence no differently from the case in which evidence is newly discovered from a neutral source. The "prosecutor's obligation to serve the cause of justice" is reduced to a status, to borrow the Court's words, of "no special significance." *Ante,* at 111.

Our overriding concern in cases such as the one before us is the defendant's right to a fair trial. One of the most basic elements of fairness in a criminal trial is that available evidence tending to show innocence, as well as that tending to show guilt, be fully aired before the jury; more particularly, it is that the State in its zeal to convict a defendant not suppress evidence that might exonerate him. See *Moore* v. *Illinois,* 408 U. S. 786, 810 (1972) (opinion of MARSHALL, J.). This fundamental notion of fairness does not pose any irreconcilable conflict for the prosecutor, for as the Court reminds us, the prosecutor "must always be faithful to his client's overriding interest that 'justice shall be done.'" *Ante,* at 111. No interest of the State is served, and no duty of the prosecutor advanced, by the suppression of evidence favorable to the defendant. On the contrary, the prosecutor fulfills his most basic responsibility when he fully airs all the relevant evidence at his command.

I recognize, of course, that the exculpatory value to the defense of an item of information will often not be apparent to the prosecutor in advance of trial. And

[2] See *United States* v. *Keogh,* 391 F. 2d 138, 148 (CA2 1968), in which Judge Friendly implies that the standard the Court adopts is more severe than the standard the Court rejects.

while the general obligation to disclose exculpatory information no doubt continues during the trial, giving rise to a duty to disclose information whose significance becomes apparent as the case progresses, even a conscientious prosecutor will fail to appreciate the significance of some items of information. See *United States* v. *Keogh*, 391 F. 2d 138, 147 (CA2 1968). I agree with the Court that these considerations, as well as the general interest in finality of judgments, preclude the granting of a new trial in every case in which the prosecutor has failed to disclose evidence of some value to the defense. But surely these considerations do not require the rigid rule the Court intends to be applied to all but a relatively small number of such cases.

Under today's ruling, if the prosecution has not made knowing use of perjury, and if the defense has not made a specific request for an item of information, the defendant is entitled to a new trial only if the withheld evidence actually creates a reasonable doubt as to guilt in the judge's mind. With all respect, this rule is completely at odds with the overriding interest in assuring that evidence tending to show innocence is brought to the jury's attention. The rule creates little, if any, incentive for the prosecutor conscientiously to determine whether his files contain evidence helpful to the defense. Indeed, the rule reinforces the natural tendency of the prosecutor to overlook evidence favorable to the defense, and creates an incentive for the prosecutor to resolve close questions of disclosure in favor of concealment.

More fundamentally, the Court's rule usurps the function of the jury as the trier of fact in a criminal case. The Court's rule explicitly establishes the judge as the trier of fact with respect to evidence withheld by the prosecution. The defendant's fate is sealed so long as the evidence does not create a reasonable doubt as to guilt in the judge's mind, regardless of whether the

evidence is such that reasonable men could disagree as to its import—regardless, in other words, of how "close" the case may be.[3]

The Court asserts that this harsh standard of materiality is the standard that "courts appear to have applied in actual cases although the standard has been phrased in different language." *Ante,* at 113 (footnote omitted). There is no basis for this assertion. None of the cases cited by the Court in support of its statement suggests that a judgment of conviction should be sustained so long as the judge remains convinced beyond a reasonable doubt of the defendant's guilt.[4] The prevail-

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[3] To emphasize the harshness of the Court's rule, the defendant's fate is determined finally by the judge only if the judge does not entertain a reasonable doubt as to guilt. If evidence withheld by the prosecution does create a reasonable doubt as to guilt in the judge's mind, that does not end the case—rather, the defendant (one might more accurately say the prosecution) is "entitled" to have the case decided by a jury.

[4] In *Stout* v. *Cupp,* 426 F. 2d 881 (CA9 1970), a habeas proceeding, the court simply quoted the District Court's finding that if the suppressed evidence had been introduced, "the jury would not have reached a different result." *Id.,* at 883. There is no indication that the quoted language was intended as anything more than a finding of fact, which would, quite obviously, dispose of the defendant's claim under any standard that might be suggested. In *Peterson* v. *United States,* 411 F. 2d. 1074 (CA8 1969), the court appeared to require a showing that the withheld evidence "was 'material' and would have aided the defense." *Id.,* at 1079. The court in *Lessard* v. *Dickson,* 394 F. 2d 88 (CA9 1968), found it determinative that the withheld evidence "could hardly be regarded as being able to have much force against the inexorable array of incriminating circumstances with which [the defendant] was surrounded." *Id.,* at 91. The jury, the court noted, would not have been "likely to have had any [difficulty]" with the argument defense counsel would have made with the withheld evidence. *Id.,* at 92. Finally, *United States* v. *Tomaiolo,* 378 F. 2d 26 (CA2 1967), required the defendant to show that the evidence was "material and of some substantial use to the defendant." *Id.,* at 28.

ing view in the federal courts of the standard of materiality for cases involving neither a specific request for information nor other indications of deliberate misconduct—a standard with which the cases cited by the Court are fully consistent—is quite different. It is essentially the following: If there is a significant chance that the withheld evidence, developed by skilled counsel, would have induced a reasonable doubt in the minds of enough jurors to avoid a conviction, then the judgment of conviction must be set aside.[5] This standard, unlike the Court's, reflects a recognition that the determination must be in terms of the impact of an item of evidence on the jury, and that this determination cannot always be made with certainty.[6]

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[5] See, *e. g., United States* v. *Morell,* 524 F. 2d 550, 553 (CA2 1975); *Ogden* v. *Wolff,* 522 F. 2d 816, 822 (CA8 1975); *Woodcock* v. *Amaral,* 511 F. 2d 985, 991 (CA1 1974); *United States* v. *Miller,* 499 F. 2d 736, 744 (CA10 1974); *Shuler* v. *Wainwright,* 491 F. 2d 1213, 1223 (CA5 1974); *United States* v. *Kahn,* 472 F. 2d, at 287; *Clarke* v. *Burke,* 440 F. 2d 853, 855 (CA7 1971); *Hamric* v. *Bailey,* 386 F. 2d 390, 393 (CA4 1967).

[6] That there is a significant difference between the Court's standards and what has been described as the prevailing view is made clear by Judge Friendly, writing for the court in *United States* v. *Miller,* 411 F. 2d 825 (CA2 1969). After stating the court's conclusion that a new trial was required because of the Government's failure to disclose to the defense the pretrial hypnosis of its principal witness, Judge Friendly observed:

"We have reached this conclusion with some reluctance, particularly in light of the considered belief of the able and conscientious district judge, who has lived with this case for years, that review of the record in light of all the defense new trial motions left him 'convinced of the correctness of the jury's verdict.' We, who also have had no small exposure to the facts, are by no means convinced otherwise. The test, however, is not how the newly discovered evidence concerning the hypnosis would affect the trial judge or ourselves but whether, with the Government's case against [the defendant] already subject to serious attack, there was a significant chance that this added item, developed by skilled counsel as it

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The Court approves—but only for a limited category of cases—a standard virtually identical to the one I have described as reflecting the prevailing view. In cases in which "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury," *ante,* at 103, the judgment of conviction must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Ibid.* This lesser burden on the defendant is appropriate, the Court states, primarily because the withholding of evidence contradicting testimony offered by witnesses called by the prosecution "involve[s] a corruption of the truth-seeking function of the trial process." *Ante,* at 104. But surely the truth-seeking process is corrupted by the withholding of evidence favorable to the defense, regardless of whether the evidence is directly contradictory to evidence offered by the prosecution. An example offered by Mr. Justice Fortas serves to illustrate the point. "[L]et us assume that the State possesses information that blood was found on the victim, and that this blood is of a type which does not match that of the accused or of the victim. Let us assume that no related testimony was offered by the State." *Giles* v. *Maryland,* 386 U. S. 66, 100 (1967) (concurring in judgment). The suppression of the information unquestionably corrupts the truth-seeking process, and the burden on the defendant in establishing his entitlement to a new trial ought be no different from the burden he would face if related testimony had been elicited by the prosecution. See *id.,* at 99–101.

The Court derives its "reasonable likelihood" standard for cases involving perjury from cases such as *Napue* v.

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would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction. We cannot conscientiously say there was not." *Id.,* at 832 (footnote omitted).

Illinois, 360 U. S. 264 (1959), and *Giglio* v. *United States,* 405 U. S. 150 (1972). But surely the results in those cases, and the standards applied, would have been no different if perjury had not been involved. In *Napue* and *Giglio,* co-conspirators testifying against the defendants testified falsely, in response to questioning by defense counsel, that they had not received promises from the prosecution. The prosecution failed to disclose that promises had in fact been made. The corruption of the truth-seeking process stemmed from the suppression of evidence affecting the overall credibility of the witnesses, see *Napue, supra,* at 269; *Giglio, supra,* at 154, and that corruption would have been present whether or not defense counsel had elicited statements from the witnesses denying that promises had been made.

It may be that, contrary to the Court's insistence, its treatment of perjury cases reflects simply a desire to deter deliberate prosecutorial misconduct. But if that were the case, we might reasonably expect a rule imposing a lower threshold of materiality than the Court imposes—perhaps a harmless-error standard. And we would certainly expect the rule to apply to a broader category of misconduct than the failure to disclose evidence that contradicts testimony offered by witnesses called by the prosecution. For the prosecutor is guilty of misconduct when he deliberately suppresses evidence that is clearly relevant and favorable to the defense, regardless, once again, of whether the evidence relates directly to testimony given in the course of the Government's case.

This case, however, does not involve deliberate prosecutorial misconduct. Leaving open the question whether a different rule might appropriately be applied in cases involving deliberate misconduct,[7] I would hold that the

[7] It is the presence of deliberate prosecutorial misconduct and a desire to deter such misconduct, presumably, that leads the Court to recognize a rule more readily permitting new trials in cases in-

defendant in this case had the burden of demonstrating that there is a significant chance that the withheld evidence, developed by skilled counsel, would have induced a reasonable doubt in the minds of enough jurors to avoid a conviction. This is essentially the standard applied by the Court of Appeals, and I would affirm its judgment.

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volving a specific defense request for information. The significance of the defense request, the Court states, is simply that it gives the prosecutor notice of what is important to the defense; once such notice is received, the failure to disclose is "seldom, if ever, excusable." *Ante,* at 106. It would seem to follow that if an item of information is of such obvious importance to the defense that it could not have escaped the prosecutor's attention, its suppression should be treated in the same manner as if there had been a specific request. This is precisely the approach taken by some courts. See, *e. g., United States* v. *Morell,* 524 F. 2d, at 553; *United States* v. *Miller,* 499 F. 2d, at 744; *United States* v. *Kahn,* 472 F. 2d, at 287; *United States* v. *Keogh,* 391 F. 2d, at 146–147.

UNITED STATES *v.* HOPKINS, SPECIAL ADMINISTRATOR

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

No. 75–246. Argued April 19–20, 1976—Decided June 24, 1976

Asserting jurisdiction under the Tucker Act, which provides for suits in the Court of Claims upon any express or implied contract with military exchanges, respondent's decedent brought suit against the United States alleging that his discharge from his position as a civilian employee of the Army and Air Force Exchange Service (AAFES) breached an employment contract. The Government moved to dismiss for lack of jurisdiction, claiming that the Tucker Act was not applicable to employment contracts and alternatively that AAFES employees do not have a contractual relationship with their employer but serve by "appointment." Denying this motion, the Court of Claims, after determining that AAFES employees could never serve by appointment, held that it had jurisdiction because respondent's decedent's relationship with the AAFES was based upon an implied contract of employment and such contract was covered by the Tucker Act, as amended in 1970. *Held:* Since the Tucker Act applies, by its terms, to "any express or implied contract," it is applicable to employment contracts as well as those for goods or other services, and hence respondent's decedent's allegations that his discharge constituted a breach of an employment contract was sufficient, under the Act as amended in 1970, to withstand the Government's motion to dismiss. But in determining whether the decedent was employed by virtue of a contract or by appointment, the Court of Claims gave insufficient attention to applicable administrative regulations relating to the status of AAFES employees, and thus erred in its threshold determination that such employees could *never* serve by appointment.

206 Ct. Cl. 303, 513 F. 2d 1360, affirmed in part and vacated and remanded in part.

Robert B. Reich argued the cause *pro hac vice* for the United States. With him on the briefs were *Solicitor*

General Bork, Assistant Attorney General Lee, and *Ronald R. Glancz.*

Thomas H. McGrail argued the cause and filed a brief for respondent.

PER CURIAM.

This case involves a suit by respondent's decedent,[1] a civilian employee of the Army and Air Force Exchange Service (AAFES), claiming wrongful discharge from his employment. He asserted jurisdiction under the Tucker Act, 28 U. S. C. § 1491, which provides for suits in the Court of Claims upon any express or implied contract with such military exchanges. The Government moved to dismiss for lack of jurisdiction. The Court of Claims concluded that it had jurisdiction because respondent's decedent's relationship with the AAFES was based upon an implied contract of employment and such a contract is covered, since 1970, by the Tucker Act. 206 Ct. Cl. 303, 513 F. 2d 1360. We granted certiorari to resolve a conflict between this decision and a contrary holding of the United States Court of Appeals for the Fifth Circuit in *Young* v. *United States,* 498 F. 2d 1211 (1974). 423 U. S. 821.

The status of claims against military post exchanges has been in some doubt since the decision of this Court in *Standard Oil Co.* v. *Johnson,* 316 U. S. 481 (1942). There the Court, in striking down a state tax on the distribution of motor fuel by Army post exchanges, held that such exchanges "are arms of the Government deemed by it essential for the performance of governmental functions. They are integral parts of the War Department . . . ." However, the Court also observed that the "Government assumes none of the financial obligations of the exchange." *Id.,* at 485.

[1] The named respondent is the widow of the original plaintiff.

The latter observation was the basis of a series of decisions by the Court of Claims to the effect that it lacked jurisdiction over claims concerning the activities of nonappropriated fund instrumentalities.[2] That court held that it could not entertain suits based on a contract for services with such an entity, because, since the Government had assumed no liability for the entity's financial obligations it could not be said to have consented to a suit designed to vindicate such obligations. Therefore, no "claim against the United States" existed under the Tucker Act which is the source of Court of Claims jurisdiction, *Borden* v. *United States,* 126 Ct. Cl. 902, 116 F. Supp. 873 (1953); *Pulaski Cab Co.* v. *United States,* 141 Ct. Cl. 160, 157 F. Supp. 955 (1958); *Kyer* v. *United States,* 177 Ct. Cl. 747, 369 F. 2d 714 (1966), cert. denied, 387 U. S. 929 (1967).

The Court of Claims, while denying jurisdiction, recognized the harsh consequences of this result since it could leave claimants against the exchanges with no forum in which to seek relief. However, the court recognized that "it is up to Congress to remedy this apparent harsh result . . . . [T]he courts should refrain from legislating by judicial fiat." *Keetz* v. *United States,* 168 Ct. Cl. 205, 207 (1964).

In 1970 Congress amended the Tucker Act and provided:

> "For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service . . . shall be considered an express or implied contract with the United States." Pub. L. 91–350, 84 Stat. 449.

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[2] A "nonappropriated fund instrumentality" is one which does not receive its monies by congressional appropriation. See 10 U. S. C. §§ 4779 (c), 9779 (c).

The purpose of this amendment, as the reports of both Houses made clear, was to afford contractors a federal forum in which to sue nonappropriated fund instrumentalities by doing away with the inequitable "loophole" in the Tucker Act. S. Rep. No. 91–268, p. 2 (1969); H. R. Rep. No. 91–933, p. 2 (1970). *Borden, supra; Pulaski, supra; Keetz, supra;* and *Kyer, supra,* were cited as examples of the "harsh result" which the amendment would correct. The purpose of the bill was clearly to provide a remedy to "contractors" with nonappropriated fund instrumentalities, *e. g.*, S. Rep. No. 91–268, pp. 4–5, and there is nothing in the legislative history to indicate, as the Government contends, that "contractors" did not include anyone who had formed a contractual employment relationship. Since the statute applies, by its terms, to "any express or implied contract" we hold that it is applicable to employment contracts as well as those for goods or other services. The fact that Congress has dealt specifically with exchange employees when it wanted to bring them within or leave them without the provisions of a law dealing with federal employees generally (*e. g.*, 5 U. S. C. § 8171 (b)) is not of controlling weight here. This statute deals with those who have a contractual relationship with military exchanges rather than with different classes of federal employees. If employees of military exchanges are within its general language, they are not removed from its effect by congressional practices in enacting other kinds of statutes.

The Government alternatively contends that AAFES employees do not have a contractual relationship with their employer, and that like orthodox federal employees they serve by "appointment" to a particular position. While there is some ambiguity in the opinion of the Court of Claims, that court apparently agreed that plain-

tiff and others like him did have a contractual employment relationship with the AAFES. We think it would be both unnecessary and unwise for us to decide the question at this stage of the case, and we think that the Court of Claims gave insufficient attention to applicable administrative regulations when it undertook to decide the question.

The exchange services are created and administered pursuant to the general authority granted the Secretary of the Army and the Secretary of the Air Force by 10 U. S. C. §§ 3012 and 8012. The nonappropriated-fund status of the exchanges places them in a position whereby the Federal Government, absent special legislation, does not assume the obligations of those exchanges in the manner that contracts entered into by appropriated fund agencies are assumed. *Standard Oil Co.* v. *Johnson,* 316 U. S., at 485. The nonappropriated-fund status of the exchanges, however, does not alter the fact that the Secretaries of the Army and the Air Force may engage employees by "appointment," in the same manner as other personnel hired by the Secretaries may be employed. See *Standard Oil Co.* v. *Johnson, supra; Crenshaw* v. *United States,* 134 U. S. 99 (1890); *Butler* v. *Pennsylvania,* 10 How. 402 (1851).

The regulations governing the AAFES, state that ordinary employees are deemed employees of an instrumentality of the United States, and hold their positions by *appointment.* AR 60–21/AFR 147–15, c. 1, § I, ¶ 1–7; c. 2, § I (Nov. 12, 1974).[3] There is congressional recogni-

[3] Except where otherwise noted, the regulations cited are those presently in effect. These differ in some respects from the regulations in effect at the time of respondent's decedent's hiring and at the time of his discharge. On remand it will be necessary for the Court of Claims to determine which regulations are applicable to this case.

tion of the power of the Secretaries to employ exchange employees by appointment. The House and Senate Reports on Pub. L. 91–350 explicitly recognized that employees of nonappropriated-fund activities, when performing their official duties, are employees of the United States. S. Rep. No. 91–268, *supra,* at 2; H. R. Rep. No. 91–933, *supra,* at 2. Further, Congress has specifically granted exchange employees certain rights afforded only appointed employees, and, more important, has specifically excluded them from the coverage of certain statutes granting rights to appointed federal employees. See statutes cited in AR 60–21/AFR 147–15, c. 1, § I, ¶ 1–8. Of particular import is their exclusion, through the operation of 5 U. S. C. § 2105 (c), from the provisions of the Back Pay Act, 5 U. S. C. § 5596. The Back Pay Act is the means by which appointed employees subjected to unjustified personnel action are given a cause of action against the United States. The Act is made necessary by the fact that, absent specific command of statute or authorized regulation, an appointed employee subjected to unwarranted personnel action does not have a cause of action against the United States. *Keim* v. *United States,* 177 U. S. 290, 293–296 (1900); *Sampson* v. *Murray,* 415 U. S. 61, 69–70 (1974); *United States* v. *Testan,* 424 U. S. 392, 405–407 (1976). Since the Act deals only with appointees, the specific exclusion of AAFES employees from the coverage of the Act would seem to indicate a congressional recognition that they may be appointed, but that appointed AAFES employees should not be allowed to sue under the Act.

This is not to say that an exchange may never employ a person pursuant to a contract of employment. The Secretaries have provided, by separate regulation, for a process under which a person may be employed by contract. AR 60–20/AFR 147–14, c. 4, §§ II and III

(Mar. 21, 1974). Such employment is subject to different procedures for negotiation, approval, and administrative remedies from those applicable to employment under AR 60–21/AFR 147–15. The regulation governing contracts defines "service contract" as including contracts both for services performed off a military installation and "direct services such as janitorial and window cleaning service." AR 60–20/AFR 147–14, App. A, ¶ A–6*e*. Under the regulation in effect at the time of plaintiff's discharge, it was specifically provided that exchanges "will not enter into [a service contract] with military personnel on active duty, civil service employees, *or exchange employees.*" AR 60–20/AFR 147–14, § XIX, ¶ 88*b* (Apr. 14, 1965) (emphasis added). The regulation thus clearly distinguished between employment pursuant to appointment and employment pursuant to contract, a distinction that existed prior to plaintiff's hiring and continues today in the use of separate regulations for "contracting" and "appointment."

When Congress enacted Pub. L. 91–350, making contracts entered into by the post exchanges cognizable in the Court of Claims, it did not change in any way the other provisions of the United States Code dealing with exchange employees, nor did it purport to require that the exchanges employ all persons pursuant to contract.

The Court of Claims, in reaching its conclusion that plaintiff held his position by virtue of an express or implied contract assumed that once it was determined he was not an appointed federal employee this result followed as a matter of course. It concluded that in such event his employment status was governed by a series of cases from the private sector of the economy holding that the typical employee-employer relationship was contractual in nature. While we do not question the relevance of these cases by way of analogy should plaintiff

be determined not to have been an appointee we hold that the Court of Claims erred in its threshold determination that AAFES employees could *never* serve by appointment. Rather, the question depends upon an analysis of the statutes and regulations previously described in light of whatever evidence is adduced on remand as to plaintiff's particular status in this case.

It is thus apparent that the question of whether plaintiff was employed by virtue of a contract or by appointment is not susceptible of determination at this time. Rather, the issue is one which must receive additional consideration from the Court of Claims after development of a fuller record.

Respondent in her brief in this Court advanced a second theory upon which the jurisdiction of the Court of Claims in this case could be sustained. She urged that plaintiff's discharge in violation of executive regulations constituted a claim enforceable under the Tucker Act, and that his discharge without due process constituted a claim founded on the Constitution and therefore enforceable under the Tucker Act. Brief for Respondent 51. At oral argument, counsel conceded that our decision in *United States* v. *Testan, supra,* which had been handed down between the time of the filing of his brief and the oral argument, foreclosed such a claim.

Plaintiff's allegation that his discharge constituted a breach of a contract of employment was sufficient, under the provisions of Pub. L. 91–350, to withstand the Government's motion to dismiss the complaint on the grounds of lack of jurisdiction in the Court of Claims, and the judgment of the court so holding is therefore affirmed. That portion of its judgment deciding that plaintiff held his employment position by virtue of an express or implied contract, rather than by appointment,

is vacated and the cause remanded for further proceedings on that question.

It is so ordered.

MR. JUSTICE POWELL dissents from the opinion of the Court substantially for the reasons stated by Judge Skelton in his dissenting opinion in the Court of Claims. 206 Ct. Cl. 303, 314, 513 F. 2d 1360, 1366 (1975).

LODGE 76, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO, ET AL. *v.* WISCONSIN EMPLOYMENT RELATIONS COMMISSION ET AL.

CERTIORARI TO THE SUPREME COURT OF WISCONSIN

No. 75–185. Argued March 22, 1976—Decided June 25, 1976

During negotiations for renewal of an expired collective-bargaining agreement with respondent employer, petitioner union and its members engaged in a concerted refusal to work overtime. The employer filed a charge with the National Labor Relations Board (NLRB), claiming that such refusal was an unfair labor practice under the National Labor Relations Act (NLRA), but the charge was dismissed on the ground that the refusal did not violate the NLRA and therefore was not conduct cognizable by the NLRB. The employer also filed an unfair labor practice complaint with respondent Wisconsin Employment Relations Commission, which held that such refusal, while neither protected nor prohibited by the NLRA, was an unfair labor practice under state law, and entered a cease-and-desist order against the union. The Wisconsin Circuit Court affirmed and entered a judgment enforcing the order, and the Wisconsin Supreme Court affirmed. *Held:* The union's concerted refusal to work overtime was peaceful conduct constituting activity that must be free of state regulation if the congressional intent in enacting the comprehensive federal law of labor relations is not to be frustrated. Congress meant that self-help economic activities, whether of employer or employee, were not to be regulable by States any more than by the NLRB, for neither States nor the NLRB is "afforded flexibility in picking and choosing which economic devices of labor and management shall be branded as unlawful," *NLRB* v. *Insurance Agents,* 361 U. S. 477, 498; rather, both are without authority to attempt to "introduce some standard of properly 'balanced' bargaining power," *id.,* at 497, or to define what "economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining." *Id.,* at 500. *Automobile Workers* v. *Wisconsin Emp. Rel. Bd.,* 336 U. S. 245 (*Briggs-Stratton* case), overruled. Pp. 136–155.

67 Wis. 2d 13, 226 N. W. 2d 203, reversed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. POWELL, J., filed a concurring opinion, in which BURGER, C. J., joined, *post,* p. 155. STEVENS, J., filed a dissenting opinion, in which STEWART and REHNQUIST, JJ., joined, *post,* p. 156.

Gerry M. Miller argued the cause for petitioners. With him on the briefs were *David Previant, Robert E. Gratz,* and *Plato E. Papps.*

James C. Mallatt argued the cause for respondents. With him on the brief for respondent Kearney & Trecker Corp. were *David J. Cannon, Jacob L. Bernheim,* and *John R. Sapp. Bronson C. La Follette,* Attorney General of Wisconsin, and *Charles D. Hoornstra,* Assistant Attorney General, filed a brief for respondent Wisconsin Employment Relations Commission.

Norton J. Come argued the cause for the National Labor Relations Board as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Bork* and *John S. Irving.**

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question to be decided in this case is whether federal labor policy pre-empts the authority of a state labor relations board to grant an employer covered by the National Labor Relations Act an order enjoining a union and its members from continuing to refuse to work overtime pursuant to a union policy to put economic pressure on the employer in negotiations for renewal of an expired collective-bargaining agreement.

A collective-bargaining agreement between petitioner Lodge 76 (Union) and respondent Kearney & Trecker

**J. Albert Woll* and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging reversal.

Corp. (employer) was terminated by the employer pursuant to the terms of the agreement on June 19, 1971. Good-faith bargaining over the terms of a renewal agreement continued for over a year thereafter, finally resulting in the signing of a new agreement effective July 23, 1972. A particularly controverted issue during negotiations was the employer's demand that the provision of the expired agreement under which, as for the prior 17 years, the basic workday was seven and one-half hours, Monday through Friday, and the basic workweek was 37½ hours, be replaced with a new provision providing a basic workday of eight hours and a basic workweek of 40 hours, and that the terms on which overtime rates of pay were payable be changed accordingly.

A few days after the old agreement was terminated the employer unilaterally began to make changes in some conditions of employment provided in the expired contract, *e. g.*, eliminating the checkoff of Union dues, eliminating the Union's office in the plant, and eliminating Union lost time. No immediate change was made in the basic workweek or workday, but in March 1972, the employer announced that it would unilaterally implement, as of March 13, 1972, its proposal for a 40-hour week and eight-hour day. The Union response was a membership meeting on March 7 at which strike action was authorized and a resolution was adopted binding Union members to refuse to work any overtime, defined as work in excess of seven and one-half hours in any day or 37½ hours in any week. Following the strike vote, the employer offered to "defer the implementation" of its workweek proposal if the Union would agree to call off the concerted refusal to work overtime. The Union, however, refused the offer and indicated its intent to continue the concerted ban on overtime. Thereafter, the employer did not make effective the proposed changes in the workday and workweek

before the new agreement became effective on July 23, 1972. Although all but a very few employees complied with the Union's resolution against acceptance of overtime work during the negotiations, the employer did not discipline, or attempt to discipline, any employee for refusing to work overtime.

Instead, while negotiations continued, the employer filed a charge with the National Labor Relations Board that the Union's resolution violated § 8 (b)(3) of the National Labor Relations Act, 49 Stat. 452, as amended, 29 U. S. C. § 158 (b)(3). The Regional Director dismissed the charge on the ground that the "policy prohibiting overtime work by its member employees . . . does not appear to be in violation of the Act" and therefore was not conduct cognizable by the Board under *NLRB* v. *Insurance Agents,* 361 U. S. 477 (1960). However, the employer also filed a complaint before the Wisconsin Employment Relations Commission charging that the refusal to work overtime constituted an unfair labor practice under state law. The Union filed a motion before the Commission to dismiss the complaint for want of "jurisdiction over the subject matter" in that jurisdiction over "the activity of the [Union] complained of [is] pre-empted by" the National Labor Relations Act. App. 11. The motion was denied and the Commission adopted the Conclusion of Law of its Examiner that "the concerted refusal to work overtime, is not an activity which is arguably protected under Section 7 or arguably prohibited under Section 8 of the National Labor Relations Act, as amended, and . . . , therefore, the . . . Commission is not pre-empted from asserting its jurisdiction to regulate said conduct." The Commission also adopted the further Conclusion of Law that the Union "by authorizing . . . the concerted refusal to work overtime . . . engaged in a concerted effort to interfere with production and . . . committed an unfair labor practice within the meaning

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of Section 111.06 (2)(h). . . ." [1] The Commission thereupon entered an order that the Union, *inter alia,* "[i]mmediately cease and desist from authorizing, encouraging or condoning any concerted refusal to accept overtime assignments . . . ." The Wisconsin Circuit Court affirmed and entered judgment enforcing the Commission's order. The Wisconsin Supreme Court affirmed the Circuit Court. 67 Wis. 2d 13, 226 N. W. 2d 203 (1975). We granted certiorari, 423 U. S. 890 (1975). We reverse.

I

"The national . . . Act . . . leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible." *Garner* v. *Teamsters Union,* 346 U. S. 485, 488 (1953). Federal labor policy as reflected in the National Labor Relations Act, as amended, has been construed not to preclude the States from regulating aspects of labor relations that involve "conduct touch[ing] interests so deeply rooted in local feeling and responsibility that . . . we could not infer that Congress had deprived the States of the power to act." *San Diego Unions* v. *Garmon,* 359 U. S. 236, 244 (1959). Policing of actual or threatened violence to persons or destruction of property has been held most clearly a matter for the States.[2]

[1] Wisconsin Stat. § 111.06 (2) (1974) provides:

"It shall be an unfair labor practice for an employe individually or in concert with others:

. . . . . .

"(h) To take unauthorized possession of property of the employer or to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike."

[2] Thus *Automobile Workers* v. *Russell,* 356 U. S. 634 (1958), upheld state-court jurisdiction of a common-law tort action against

Similarly, the federal law governing labor relations does not withdraw "from the States . . . power to regulate where the activity regulated [is] a merely peripheral concern of the Labor Management Relations Act." *Id.*, at 243.[3]

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a union to recover compensatory and punitive damages for malicious interference with the plaintiff's lawful occupation by mass picketing and threats of violence that prevented the plaintiff from entering the plant and engaging in his employment; *Youngdahl* v. *Rainfair, Inc.*, 355 U. S. 131 (1957), sustained state-court power to enjoin striking employees from threatening or provoking violence or obstructing or attempting to obstruct the free use of the streets adjacent to the struck plant, or free ingress and egress to and from the property; *Automobile Workers* v. *Wisconsin Emp. Rel. Board*, 351 U. S. 266 (1956), sustained state authority to vest jurisdiction in a state labor relations board to enjoin violent union conduct; *United Constr. Workers* v. *Laburnum Constr. Corp.*, 347 U. S. 656 (1954), held a state court not precluded from hearing and determining a common-law tort action based on conduct which, although an unfair labor practice under federal law, constituted threats of violence and intimidation that forced an employer to abandon all of its projects in the area. In short, a State still may exercise "its historic powers over such traditionally local matters as public safety and order and the use of streets and highways," *Allen-Bradley Local* v. *Wisconsin Emp. Rel. Board*, 315 U. S. 740, 749 (1942), for "[p]olicing of such conduct is left wholly to the states." *Automobile Workers* v. *Wisconsin Emp. Rel. Board*, 336 U. S. 245, 253 (1949).

[3] Thus *Machinists* v. *Gonzales*, 356 U. S. 617 (1958), held that a state court was not precluded from ordering the reinstatement by a union of a wrongfully expelled member and awarding him damages, even though the union's conduct might also involve an unfair labor practice, since there was only a remote possibility of conflict with enforcement by the National Labor Relations Board of national policy. And in *Hanna Mining Co.* v. *Marine Engineers*, 382 U. S. 181 (1965), we resolved the "troublesome question of where lies the line between permissible and federally preempted state regulation of [the] union activities" there presented, *id.*, at 183, by concluding that the Act's amendment expressly to exclude supervisory employees from the critical definition of "employees" eliminated any serious problems of pre-emption since "many provisions of the Act

Cases that have held state authority to be pre-empted by federal law tend to fall into one of two categories: (1) those that reflect the concern that "one forum would enjoin, as illegal, conduct which the other forum would find legal" and (2) those that reflect the concern "that the [application of state law by] state courts would restrict the exercise of rights guaranteed by the Federal Acts." *Automobile Workers* v. *Russell,* 356 U. S. 634, 644 (1958). "[I]n referring to decisions holding state laws pre-empted by the NLRA, care must be taken to distinguish pre-emption based on federal protection of the conduct in question . . . from that based predominantly on the primary jurisdiction of the National Labor Relations Board . . . , although the two are often not easily separable." *Railroad Trainmen* v. *Jacksonville Terminal Co.,* 394 U. S. 369, 383 n. 19 (1969). Each of these distinct aspects of labor law pre-emption has had its own history in our decisions, to which we now turn.

We consider first pre-emption based predominantly on the primary jurisdiction of the Board. This line of pre-emption analysis was developed in *San Diego Unions* v. *Garmon, supra,* and its history was recently summarized in *Motor Coach Employees* v. *Lockridge,* 403 U. S. 274, 290–291 (1971):

> "[V]arying approaches were taken by the Court in initially grappling with this pre-emption problem. Thus, for example, some early cases suggested the true distinction lay between judicial application of general common law, which was permissible, as opposed to state rules specifically designed to regulate

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employing that pivotal term would cease to operate where supervisors were the focus of concern." *Id.,* at 188. Further, in *Linn* v. *Plant Guard Workers,* 383 U. S. 53 (1966), we held that the availability of a state judicial remedy for malicious libel would not impinge upon the national labor policy.

labor relations, which were pre-empted. See, *e. g., Automobile Workers* v. *Russell,* 356 U. S. 634, 645 (1958). Others made pre-emption turn on whether the States purported to apply a remedy not provided for by the federal scheme, *e. g., Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468, 479–480 (1955), while in still others the Court undertook a thorough scrutiny of the federal Act to ascertain whether the state courts had, in fact, arrived at conclusions inconsistent with its provisions, *e. g., Automobile Workers* v. *Wisconsin Employment Relations Bd.,* 336 U. S. 245 (1949). . . . [N]one of these approaches proved satisfactory, however, and each was ultimately abandoned. It was, in short, experience—not pure logic—which initially taught that each of these methods sacrificed important federal interests in a uniform law of labor relations centrally administered by an expert agency without yielding anything in return by way of predictability or ease of judicial application.

"The failure of alternative analyses and the interplay of the foregoing policy considerations, then, led this Court to hold in *Garmon,* 359 U. S., at 244:

" 'When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.' "

See also *San Diego Unions* v. *Garmon,* 359 U. S., at 244–247; *Lockridge, supra,* at 286–290.

However, a second line of pre-emption analysis has been developed in cases focusing upon the crucial inquiry whether Congress intended that the conduct involved be unregulated because left "to be controlled by the free play of economic forces." *NLRB* v. *Nash-Finch Co.*, 404 U. S. 138, 144 (1971).[4] Concededly this inquiry was not made in 1949 in the so-called *Briggs-Stratton* case, *Automobile Workers* v. *Wisconsin Emp. Rel. Board*, 336 U. S. 245 (1949), the decision of this Court heavily relied upon by the court below in reaching its decision that state regulation of the conduct at issue is not pre-empted by national labor law. In *Briggs-Stratton*, the union, in order to bring pressure on the employer during negotia-

[4] See Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1352 (1972):

"An appreciation of the true character of the national labor policy expressed in the NLRA and the LMRA indicates that in providing a legal framework for union organization, collective bargaining, and the conduct of labor disputes, Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes that would be upset if a state could also enforce statutes or rules of decision resting upon its views concerning accommodation of the same interests."

Cf. Lesnick, Preemption Reconsidered: The Apparent Reaffirmation of *Garmon*, 72 Col. L. Rev. 469, 478, 480 (1972):

"[T]he failure of Congress to prohibit certain conduct warrant[s a] negative inference that it was deemed proper, indeed desirable—at least, desirable to be left for the free play of contending economic forces. Thus, the state is not merely filling a gap when it outlaws what federal law fails to outlaw; it is denying one party to an economic contest a weapon that Congress meant him to have available.

. . . . . .

"The premise is . . . that Congress judged whether the conduct was illicit or legitimate, and that 'legitimate' connotes, not simply that federal law is neutral, but that the conduct is to be assimilated to the large residual area in which a regime of free collective bargaining—'economic warfare,' if you prefer—is thought to be the course of regulatory wisdom."

tions, adopted a plan whereby union meetings were called at irregular times during working hours without advance notice to the employer or any notice as to whether or when the workers would return. In a proceeding under the Wisconsin Employment Peace Act, the Wisconsin Employment Relations Board issued an order forbidding the union and its members to engage in concerted efforts to interfere with production by those methods. This Court did not inquire whether Congress meant that such methods should be reserved to the union "to be controlled by the free play of economic forces." Rather, because these methods were "neither made a right under federal law nor a violation of it" the Court held that there "was no basis for denying to Wisconsin the power, in governing her internal affairs, to regulate" such conduct. *Id.*, at 265.

However, the *Briggs-Stratton* holding that state power is not pre-empted as to peaceful conduct neither protected by § 7 nor prohibited by § 8 of the federal Act, a holding premised on the statement that "[t]his conduct is governable by the State or it is entirely ungoverned," 336 U. S., at 254, was undercut by subsequent decisions of this Court. For the Court soon recognized that a particular activity might be "protected" by federal law not only when it fell within § 7, but also when it was an activity that Congress intended to be "unrestricted by *any* governmental power to regulate" because it was among the permissible "economic weapons in reserve, . . . actual exercise [of which] on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." *NLRB* v. *Insurance Agents,* 361 U. S., at 488–489 (emphasis added). "[T]he legislative purpose may . . . dictate that certain activity 'neither protected nor prohibited' be deemed privileged against state regulation." *Hanna Mining Co.* v. *Marine Engineers,* 382 U. S. 181, 187 (1965).

II

Insurance Agents, supra, involved a charge of a refusal by the union to bargain in good faith in violation of § 8 (b)(3) of the Act. The charge was based on union activities that occurred during good-faith bargaining over the terms of a collective-bargaining agreement. During the negotiations, the union directed concerted on-the-job activities by its members of a harassing nature designed to interfere with the conduct of the employer's business, for the avowed purpose of putting economic pressure on the employer to accede to the union's bargaining demands. The harassing activities, all peaceful, by the member insurance agents included refusal for a time to solicit new business, and refusal (after the writing of new business was resumed) to comply with the employer insurance company's reporting procedures; refusal to participate in a company campaign to solicit new business; reporting late at district offices the days the agents were scheduled to attend them; refusing to perform customary duties at the office, instead engaging there in "sit-in-mornings," "doing what comes naturally," and leaving at noon as a group; absenting themselves from special business conferences arranged by the company; picketing and distributing leaflets outside the various offices of the company on specified days and hours as directed by the union; distributing leaflets each day to policyholders and others and soliciting policyholders' signatures on petitions directed to the company; and presenting the signed policyholders' petitions to the company at its home office while simultaneously engaging in mass demonstrations there. 361 U. S., at 480–481. We held that such tactics would not support a finding by the NLRB that the union had failed to bargain in good faith as required by § 8 (b)(3) and rejected the *per se* rule applied by the Board that use of "economically harassing activities" alone sufficed to prove a vio-

lation of that section. The Court assumed "that the activities in question here were not 'protected' under § 7 of the Act," 361 U. S., at 483 n. 6, but held that the *per se* rule was beyond the authority of the NLRB to apply.

> "The scope of § 8(b)(3) and the limitations on Board power which were the design of § 8 (d) are exceeded, we hold, by inferring a lack of good faith not from any deficiencies of the union's performance at the bargaining table by reason of its attempted use of economic pressure, but solely and simply because tactics designed to exert economic pressure were employed during the course of the good-faith negotiations. Thus the Board in the guise of determining good or bad faith in negotiations could regulate what economic weapons a party might summon to its aid. And if the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract. As the parties' own devices became more limited, the Government might have to enter even more directly into the negotiation of collective agreements. Our labor policy is not presently erected on a foundation of government control of the results of negotiations. See S. Rep. No. 105, 80th Cong., 1st Sess., p. 2. Nor does it contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union." *Id.*, at 490.

We noted further that "Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions" and "the activities here involved have never been specifically outlawed by Congress." *Id.*, at 498. Accordingly, the Board's claim "to power . . .

to distinguish among various economic pressure tactics and brand the ones at bar inconsistent with good-faith collective bargaining," *id.*, at 492, was simply inconsistent with the design of the federal scheme in which "the use of economic pressure by the parties to a labor dispute is . . . part and parcel of the process of collective bargaining." *Id.*, at 495.

The Court had earlier recognized in pre-emption cases that Congress meant to leave some activities unregulated and to be controlled by the free play of economic forces. *Garner* v. *Teamsters Union*, in finding pre-empted state power to restrict peaceful recognitional picketing, said:

> "The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the national Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." 346 U. S., at 499–500.[5]

Moreover, *San Diego Unions* v. *Garmon* expressly recognized that "the Board may decide that an activity is neither protected nor prohibited, and thereby raise the

[5] It is true, of course, that the seeds of the *Garmon* "primary jurisdiction of the NLRB" approach to labor law pre-emption are also contained within the *Garner* opinion. See, in addition to the textual quotation, *Garner*, 346 U. S., at 490–491.

question whether such activity may be regulated by the States." 359 U. S., at 245.[6]

It is true, however, that many decisions fleshing out the concept of activities "protected" because Congress meant them to be "unrestricted by any governmental power to regulate," *Insurance Agents,* 361 U. S., at 488, involved review of *per se* NLRB rules applied in the regulation of the bargaining process. *E. g., NLRB* v. *American National Ins. Co.,* 343 U. S. 395 (1952); *NLRB* v. *Insurance Agents, supra; NLRB* v. *Drivers Local Union,* 362 U. S. 274 (1960); *NLRB* v. *Brown,* 380 U. S. 278 (1965); *American Ship Bldg. Co.* v. *NLRB,* 380 U. S. 300 (1965); cf. *NLRB* v. *Truck Drivers Union,* 353 U. S. 87 (1957); *H. K. Porter Co.* v. *NLRB,* 397 U. S. 99 (1970); *Florida Power & Light* v. *Electrical Workers,* 417 U. S. 790, 805 n. 16 (1974). But the analysis of *Garner* and *Insurance Agents* came full bloom in the pre-emption area in *Teamsters Union* v. *Morton,* 377 U. S. 252 (1964), which held pre-empted the application

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[6] Although Mr. Justice Harlan took issue with the statement in *Garmon* that States may "be powerless to act when the underlying activities are clearly 'neither protected nor prohibited' by the federal Act," 359 U. S., at 253 (concurring in result), his later opinions make plain that the point of disagreement concerned the use of the term "protected" rather than the substantive concept.

"In the context of labor relations law, this word is fraught with ambiguity. 'Protected conduct' may, for example, refer to employee conduct which the States may not prohibit, . . . or to conduct against which the employer may not retaliate." *Railroad Trainmen* v. *Jacksonville Terminal Co.,* 394 U. S. 369, 382 n. 17 (1969). Indeed, Mr. Justice Harlan thereafter expressly adopted the *Garmon* formulation. *Hanna Mining* v. *Marine Engineers,* 382 U. S., at 187.

It has been suggested that rather than "protected," '[p]ermitted activities' would be better shorthand for this category of employee conduct because it may be—indeed is—protected against state, but not employer interference." Cox, *supra,* n. 4, at 1346 (footnote omitted).

of state law to award damages for peaceful union secondary picketing. Although *Morton* involved conduct neither "protected nor prohibited" by § 7 or § 8 of the NLRA, we recognized the necessity of an inquiry whether " 'Congress occupied this field and closed it to state regulation.' " 377 U. S., at 258. Central to *Morton*'s analysis was the observation that "[i]n selecting which forms of economic pressure should be prohibited . . . , Congress struck the 'balance . . . between the uncontrolled power of management and labor to further their respective interests,' " *id.*, at 258–259,[7] and:

> "This weapon of self-help, permitted by federal law, formed an integral part of the petitioner's effort to achieve its bargaining goals during negotiations with the respondent. Allowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community. . . . If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted § 303, the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy. 'For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act

[7] "[T]he Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the . . . appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests." *Carpenters Union* v. *NLRB*, 357 U. S. 93, 99–100 (1958).

> prohibits.' *Garner* v. *Teamsters Union,* 346 U. S. 485, 500." *Id.,* at 259–260.

Although many of our past decisions concerning conduct left by Congress to the free play of economic forces address the question in the context of union and employee activities, self-help is of course also the prerogative of the employer because he, too, may properly employ economic weapons Congress meant to be unregulable. Mr. Justice Harlan concurring in *H. K. Porter Co.* v. *NLRB,* 397 U. S., at 109, stated the obvious:

> "[T]he Act as presently drawn does not contemplate that unions will always be secure and able to achieve agreement even when their economic position is weak, or that strikes and lockouts will never result from a bargaining impasse. It cannot be said that the Act forbids an employer . . . to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining."

"[R]esort to economic weapons should more peaceful measures not avail" is the right of the employer as well as the employee, *American Ship Bldg. Co.* v. *NLRB,* 380 U. S., at 317,[8] and the State may not prohibit the use of such weapons or "add to an employer's federal legal obligations in collective bargaining" any more than in the case of employees. Cox, *supra,* n. 4, at 1365. See, *e. g., Beasley* v. *Food Fair of North Carolina,* 416 U. S. 653 (1974). Whether self-help economic activities are employed by employer or union, the crucial inquiry regarding pre-emption is the same: whether "the exercise

[8] See also *NLRB* v. *Truck Drivers Union,* 353 U. S. 87, 96 (1957): "Although the Act protects the right of the employees to strike in support of their demands, this protection is not so absolute as to deny self-help by employers when legitimate interests of employees and employers collide."

of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes." *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S., at 380.

III

There is simply no question that the Act's processes would be frustrated in the instant case were the State's ruling permitted to stand. The employer in this case invoked the Wisconsin law because it was unable to overcome the Union tactic with its own economic self-help means.[9] Although it did employ economic weapons putting pressure on the Union when it terminated the pre-

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[9] "Although Kearney and Trecker could have suspended, discharged, or even locked out its employees, such steps would have only increased its already enormous production problems [and] exacerbated the already substantial strain on the bargaining process . . . ." Brief for Respondent Kearney & Trecker Corp. 24 n. 36.

"Question: . . . [I]f you make the union fish or cut bait in the two extreme alternatives, . . . they may find they have to strike instead of engaging in some lesser activity like this. Doesn't the argument—the same argument can be made on the other side of the coin, it seems to me.

"Mr. Mallatt: Well, the union has two choices: It can accept the company's last proposal or it can strike, or it can continue to negotiate with the company and not make unilateral changes in the plant. You see, the employer can't do that, why should the union be able to do it? The employer can't pressure his employees if they are working after a contract has expired. He may lock them out.

"Question: Couldn't you unilaterally adopt a new overtime program?

"Mr. Mallatt: We never put it in.

"Question: But you tried to?

"Mr. Mallatt: That was a little pressure, but it didn't work.

"Question: I see." Tr. of Oral Arg. 35.

See also *id.*, at 25–26, 30–31, 33.

vious agreement, *supra,* at 134, it apparently lacked sufficient economic strength to secure its bargaining demands under "the balance of power between labor and management expressed in our national labor policy," *Teamsters Union* v. *Morton,* 377 U. S., at 260.[10] But the economic weakness of the affected party cannot justify state aid contrary to federal law for, as we have developed, "the use of economic pressure by the parties to a labor dispute is not a grudging exception [under] . . . the [federal] Act; it is part and parcel of the process of collective bargaining." *Insurance Agents,* 361 U. S., at 495. The state action in this case is not filling "a regulatory void which Congress plainly assumed would not exist," *Hanna Mining Co.* v. *Marine Engineers,* 382 U. S., at 196 (BRENNAN, J., concurring). Rather, it is clear beyond question that Wisconsin "[entered] into the substantive aspects of the bargaining process to an extent Congress has not countenanced." *NLRB* v. *Insurance Agents, supra,* at 498.

Our decisions hold that Congress meant that these activities, whether of employer or employees, were not to be regulable by States any more than by the NLRB, for neither States nor the Board is "afforded flexibility in picking and choosing which economic devices of labor and management shall be branded as unlawful." *Ibid.* Rather, both are without authority to attempt to "intro-

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[10] Cf. Cox, *supra,* n. 4, at 1347:

"[In *Briggs-Stratton,*] the Court was beguiled by the fallacy of supposing that a Congress which allowed an employer to discharge his employees for engaging in a series of 'quickie' strikes surely would not preclude the employer's pursuing what the Court regarded as the relatively mild sanction of legal redress through state courts. In fact, most employers facing a union with the strength and discipline to call a series of 'quickie' strikes would lack the economic power to discharge union members, leaving legal redress the more efficient sanction."

duce some standard of properly 'balanced' bargaining power," *id.*, at 497 (footnote omitted), or to define "what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining." *Id.*, at 500.[11] To sanction state regulation of such economic pressure deemed by the federal Act "desirabl[y] . . . left for the free play of contending economic forces, . . . is not merely [to fill] a gap [by] outlaw[ing] what federal law fails to outlaw; it is denying one party to an economic contest a weapon that Congress meant him to have available." Lesnick, Preemption Reconsidered: The Apparent Reaffirmation of *Garmon*, 72 Col. L. Rev. 469, 478 (1972).[12] Accordingly, such regulation by

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[11] "It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one. The parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. . . . [T]he truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors—necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side. . . . Doubtless one factor influences the other; there may be less need to apply economic pressure if the areas of controversy have been defined through discussion; and at the same time, negotiation positions are apt to be weak or strong in accordance with the degree of economic power the parties possess." *Insurance Agents*, 361 U. S., at 488–489.

[12] In this case we need not and do not disturb the holding of *Briggs-Stratton*, later remarked in *Insurance Agents*, 361 U. S., at 494 n. 23, that § 13 of the NLRA, 29 U. S. C. § 163, which guarantees

the State is impermissible because it " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Hill* v. *Florida,* 325 U. S. 538, 542 (1945).

IV

There remains the question of the continuing vitality of *Briggs-Stratton. San Diego Unions* v. *Garmon,* 359 U. S., at 245 n. 4, made clear that the *Briggs-Stratton* approach to pre-emption is "no longer of general application." See also *Insurance Agents, supra,* at 493 n. 23. We hold today that the ruling of *Briggs-Stratton,* permitting state regulation of partial strike activities such as are involved in this case is likewise "no longer of general application." [13]

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a qualified right to strike, is not an independent limitation on state power apart from its context in the structure of the Act. Nor need we determine the vitality of the implication in *Briggs-Stratton,* also remarked in *Insurance Agents, supra,* at 494 n. 23, that § 501 (2) of the Taft-Hartley amendments to the NLRA, 29 U. S. C. § 142 (2), is not to be considered in connection with § 13, but rather is only an aid to construction of § 8 (b) (4), 29 U. S. C. § 158 (b) (4), of the NLRA. We do note, however, that in determining the sense of the entire structure of the federal law respecting the use of economic pressure and the economic weapons assumed by Congress to be available to the parties, it is not insignificant that § 501 (2) in defining the term "strike" refers to the use of "any concerted slow-down or other concerted interruption of operations by employees." "It is hardly conceivable that such a word as 'strike' could have been defined in these statutes without congressional realization of the obvious scope of its application." *Insurance Agents, supra,* at 511 n. 6 (opinion of Frankfurter, J.).

[13] To the extent, however, that the holding in *Briggs-Stratton,* was premised on the Court's concern in that case with "evidence of considerable injury to property and intimidation of other employees by threats," 336 U. S., at 253, that decision remains vital as an unexceptional instance of our consistent recognition of the power of the States to regulate conduct physically injuring or threatening injury to persons or property. See *supra,* at 136, and n. 2.

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Briggs-Stratton assumed "management . . . would be disabled from any kind of self-help to cope with these coercive tactics of the union" and could not "take any steps to resist or combat them without incurring the sanctions of the Act." 336 U. S., at 264. But as *Insurance Agents* held, where the union activity complained of is "protected," not because it is within § 7, but only because it is an activity Congress meant to leave unregulated, "the employer could have discharged or taken other appropriate disciplinary action against the employees participating." 361 U. S., at 493. Moreover, even were the activity presented in the instant case "protected" activity within the meaning of § 7,[14] eco-

[14] The assumption, *arguendo,* in *Insurance Agents* that the union activities involved were "unprotected" by § 7 reflected the fact that those activities included some bearing at least a resemblance to the "sit-down" strike held unprotected in *NLRB* v. *Fansteel Metallurgical Corp.,* 306 U. S. 240 (1939), and the "disloyal" activities held unprotected in *NLRB* v. *Electrical Workers,* 346 U. S. 464 (1953). See *Insurance Agents,* 361 U. S., at 492–494. The concerted refusal to work overtime presented in this case, however, is wholly free of such overtones.

It may be that case-by-case adjudication by the federal Board will ultimately result in the conclusion that some partial strike activities such as the concerted ban on overtime in the instant case, when unaccompanied by other aspects of conduct such as those present in *Insurance Agents* or those in *Briggs-Stratton* (overtones of threats and violence, 336 U. S., at 250 n. 8, and a refusal to specify bargaining demands, *id.,* at 249; see also *Insurance Agents, supra,* at 487, and n. 13), are "protected" activities within the meaning of § 7, although not so protected as to preclude the use of available countervailing economic weapons by the employer. See *Prince Lithograph Co.,* 205 N. L. R. B. 110 (1973). Compare *ibid.; Dow Chemical Co.,* 152 N. L. R. B. 1150 (1965), with *Decision, Inc.,* 166 N. L. R. B. 464, 479 (1967); *John S. Swift Co.,* 124 N. L. R. B. 394 (1959). See also *Polytech, Inc.,* 195 N. L. R. B. 695, 696 (1972). The Board in those cases placed emphasis on whether the decision to work overtime was voluntary with the individual in deciding whether a concerted refusal to work overtime is protected by

nomic weapons were available to counter the Union's refusal to work overtime, *e. g.*, a lockout, *American Ship Bldg. Co.* v. *NLRB,* 380 U. S. 300 (1965), and the hiring of permanent replacements under *NLRB* v. *Mackay Radio & Tel. Co.,* 304 U. S. 333 (1938). See *Prince Lithograph Co.,* 205 N. L. R. B. 110, 115 (1973); Cox, The Right to Engage in Concerted Activities, 26 Ind. L. J. 319, 339 (1951); Getman, The Protection of Economic Pressure by Section 7 of the National Labor Relations Act, 115 U. Pa. L. Rev. 1195, 1236 (1967).

Our decisions since *Briggs-Stratton* have made it abundantly clear that state attempts to influence the substantive terms of collective-bargaining agreements are as inconsistent with the federal regulatory scheme as are such attempts by the NLRB: "Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State." *Teamsters Union* v. *Oliver,* 358 U. S. 283, 296 (1959). And indubitably regulation, whether federal or State, of "the choice of economic weapons that may be used as part of collective bargaining [exerts] considerable influence upon the substantive terms on which the parties contract." *NLRB* v. *Insurance Agents,* 361 U. S., at 490. The availability or not of economic weapons that federal law leaves the parties free to use cannot "depend upon the forum in which the [opponent] presses its claims." *Howard Johnson Co.* v. *Hotel Employees,* 417 U. S. 249, 256 (1974).[15]

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§ 7. The parties in the instant case dispute the volitional nature of overtime prior to the concerted ban. In light of our disposition of the case we have no occasion to address the issue.

[15] "From [the decision in *Insurance Agents*] it would seem to follow a fortiori that state courts and agencies may not interject their standards of 'unjustifiable' or 'abusive' economic weapons into the context of a collective bargaining dispute." Michelman, State

Although we are not unmindful of the demands of *stare decisis* and the "important policy considerations militat[ing] in favor of continuity and predictability in the law," *Boys Markets, Inc.* v. *Retail Clerks,* 398 U. S. 235, 240 (1970), *Briggs-Stratton* "stands as a significant departure from our . . . emphasis upon the congressional policy" central to the statutory scheme it has enacted, and since our later decisions make plain that *Briggs-Stratton* "does not further but rather frustrates realization of an important goal of our national labor policy," *Boys Markets, supra,* at 241, *Briggs-Stratton* is expressly overruled. Its authority "has been 'so restricted by our later decisions' . . . that [it] must be regarded as having 'been worn away by the erosion of time' . . . and of contrary authority." *United States* v. *Raines,* 362 U. S. 17, 26 (1960).

V

This survey of the extent to which federal labor policy and the federal Act have pre-empted state regulatory authority to police the use by employees and employers of peaceful methods of putting economic pressure upon one another compels the conclusion that the judgment of the Wisconsin Supreme Court must be reversed. It is not contended, and on the record could not be contended, that the Union policy against overtime work was enforced by violence or threats of intimidation or injury to property. Workers simply left the plant at the end of their workshift and refused to volunteer for or accept overtime or Saturday work. In sustaining the order of the Wisconsin Commission, the Wisconsin Supreme Court relied on *Briggs-Stratton* as dispositive against the Union's claim of pre-emption, 67 Wis. 2d, at 19, 226

Power to Govern Concerted Employee Activities, 74 Harv. L. Rev. 641, 669 (1961).

N. W. 2d, at 206. The court held further that the refusal to work overtime was neither arguably protected under § 7 nor arguably prohibited under § 8 of the federal Act, *id.*, at 23–24, 226 N. W. 2d, at 208, an analysis which, as developed, is largely inapplicable to the circumstances of this case. *NLRB* v. *Insurance Agents* was distinguished on the ground that that case dealt only with NLRB power "to regulate . . . strike tactics" and left such "regulation . . . to the states." 67 Wis. 2d, at 22, 226 N. W. 2d, at 207. Finally, the court rejected the Union's argument relying on *Teamsters Union* v. *Morton* that the refusal to work overtime was affirmatively "permitted" under federal law, stating: "Congress has not 'focused upon' partial . . . strikes," and therefore "[p]olicing of such conduct is left wholly to the states." 67 Wis. 2d, at 26, 226 N. W. 2d, at 209.

Since *Briggs-Stratton* is today overruled, and as we hold further that the Union's refusal to work overtime is peaceful conduct constituting activity which must be free of regulation by the States if the congressional intent in enacting the comprehensive federal law of labor relations is not to be frustrated, the judgment of the Wisconsin Supreme Court is

Reversed.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE joins, concurring.

The Court correctly identifies the critical inquiry with respect to pre-emption as whether "the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes." *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S. 369, 380 (1969). See *ante*, at 147–148.

This is equally true whether the self-help activities

are those of the employer or the Union. I agree with the Court that the Wisconsin law, as applied in this case, is pre-empted since it directly curtails the self-help capability of the Union and its members, resulting in a significant shift in the balance of free economic bargaining power struck by Congress. I write to make clear my understanding that the Court's opinion does not, however, preclude the States from enforcing, in the context of a labor dispute, "neutral" state statutes or rules of decision: state laws that are not directed toward altering the bargaining positions of employers or unions but which may have an incidental effect on relative bargaining strength. Except where Congress has specifically provided otherwise, the States generally should remain free to enforce, for example, their law of torts or of contracts, and other laws reflecting neutral public policy.* See Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1355–1356 (1972).

With this understanding, I join the opinion of the Court.

MR. JUSTICE STEVENS, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, dissenting.

If the partial strike activity in this case were protected, or even arguably protected, by § 7 of the National Labor Relations Act, the Court's conclusion would be supported by *San Diego Unions* v. *Garmon,* 359 U. S. 236. But in *Automobile Workers* v. *Wisconsin Emp. Rel. Board,* 336 U. S. 245 (*Briggs-Stratton*), the Court rejected the argument that comparable activity was protected by § 7. And as I understand the Court's holding today, it as-

*State laws should not be regarded as neutral if they reflect an accommodation of the special interests of employers, unions, or the public in areas such as employee self-organization, labor disputes, or collective bargaining.

sumes that this activity remains unprotected.[1] Moreover, if such activity were prohibited, or arguably prohibited, by § 8 of the Act, the Court's conclusion would also be supported by *Garmon.* But ever since *NLRB* v. *Insurance Agents,* 361 U. S. 477, it has been clear that this activity is not even arguably prohibited.

If Congress had focused on the problems presented by partial strike activity, and had enacted special legislation dealing with this subject matter, but left the form of the activity disclosed by this record unregulated, the Court's conclusion would be supported by *Teamsters Union* v. *Morton,* 377 U. S. 252. But this is not such a case. Despite the numerous statements in the Court's opinion about Congress' intent to leave partial strike activity wholly unregulated, I have found no legislative expression of any such intent nor any evidence that Congress has scrutinized such activity.[2]

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[1] I recognize that there is some ambiguity in the Court's discussion, *ante,* at 152–153, which first implies that the employer may take any appropriate disciplinary action, including discharge, since the union activity is unprotected by § 7, and then immediately casts doubt on this assurance to the employer by indicating that some economic weapons may be used in reprisal even if the activity is protected. The ambiguity of the Court's rationale is inconsistent with its assumption that the employer is wholly free to use economic self-help without fear of committing an unfair labor practice. In all events, while I recognize that I may be misreading the Court's opinion, I assume that its holding rests on the predicate that the concerted refusal to work overtime in this case, like the partial strike activity in *Briggs-Stratton,* is unprotected by § 7.

[2] A scholar who has criticized *Briggs-Stratton* has observed: "The omission of a federal prohibition against 'quickie' strikes certainly could not have implied a desire that unions be free to embrace the tactic without restraint; congressional silence almost surely is attributable to the happy circumstance that no prohibition is urgently required because American labor unions have almost unanimously

If this Court had previously *held* that the no-man's land in which conduct is neither arguably protected nor arguably prohibited by federal law is nevertheless pre-empted by an unexpressed legislative intent, I would follow such a holding. But none of the cases reviewed in the Court's opinion so holds.[3] Ever since 1949, when *Briggs-Stratton* was decided, the rule has been that partial strike activity within that area may be regulated by the States.

If adherence to the rule of *Briggs-Stratton* would per-

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rejected such tactics." Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1347 (1972).

The Union argues that Congress focused upon partial strike activity during passage of the Taft-Hartley Act, 61 Stat. 136, relying upon a provision passed by the House, but rejected in the Conference Committee, that declared unlawful "any sit-down strike or other concerted interference with an employer's operations conducted by remaining on the employer's premises." H. R. 3020, 80th Cong., 1st Sess., § 12 (a)(3)(A) (1947). See H. R. Rep. No. 245, 80th Cong., 1st Sess., 27–28, 43–44 (1947); H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 38–39, 42–43, 58–59 (1947). The concerted refusal to work overtime in this case does not involve "concerted interference with an employer's operations conducted by remaining on the employer's premises."

[3] In *NLRB* v. *Insurance Agents,* 361 U. S. 477, the Court held that the partial strike activity in that case did not violate the union's duty to bargain in good faith; in other words, even though the activity was not protected by § 7, it was not prohibited by § 8. Contrary to the Court's implication, *ante,* at 141, the case did not hold that the States could not prohibit such activity, but only that the NLRB had not been authorized to do so. Congress' failure to grant power over such activity to the NLRB hardly amounts to withdrawal of the same power from the States.

The Court's quotation, *ibid.,* from *Hanna Mining Co.* v. *Marine Engineers,* 382 U. S. 181, 187, when read in context, is nothing more than a reference to a statement in *San Diego Unions* v. *Garmon,* 359 U. S. 236, which poses, but does not answer, the question whether pre-emption extends to activity that is neither arguably protected nor arguably prohibited.

mit the States substantially to disrupt the balance Congress has struck between union and employer, I would readily join in overruling it. But I am not persuaded that partial strike activity is so essential to the bargaining process that the States should not be free to make it illegal.[4]

Stability and predictability in the law are enhanced when the Court resists the temptation to overrule its prior decisions.[5] It is particularly inappropriate to do so when the Court is purporting to implement the intent of Congress with respect to an issue that Congress has yet to address. *Edelman* v. *Jordan,* 415 U. S. 651, 671 n. 14. Finally, I am not nearly as sanguine as the Court about the likelihood that this decision will clarify or harmonize a fairly confused area of the law. In sum, I would adhere to prior precedent which is directly in point.

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[4] See n. 2, *supra.*

[5] I cannot agree with the Court's conclusion that the holding in *Briggs-Stratton,* overruled today, numbers among those that have been eroded rather than preserved. See *ante,* at 151–154, and n. 12. The decision in *Insurance Agents, supra,* is readily distinguishable. See n. 3, *supra.* It is true that *Briggs-Stratton* has been limited to its facts insofar as it sanctions judicial determination whether conduct arguably protected by § 7 or prohibited by § 8 is actually protected or prohibited. *Motor Coach Employees* v. *Lockridge,* 403 U. S. 274, 291; *San Diego Unions* v. *Garmon, supra,* at 245 n. 4; see *Insurance Agents, supra,* at 492–494, and nn. 22, 23. But the rule established in *Garmon,* and reaffirmed in *Lockridge,* is fully consistent with the conclusion that the States may regulate conduct that is neither arguably protected nor arguably prohibited.

RUNYON ET UX., DBA BOBBE'S SCHOOL *v.* McCRARY ET AL.

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

No. 75–62. Argued April 26, 1976—Decided June 25, 1976*

Title 42 U. S. C. § 1981 provides in part that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ." After they had been denied admission to petitioner private schools in Virginia for the stated reason that the schools were not integrated, two Negro children (hereafter respondents), by their parents, brought actions against the schools, alleging that they had been prevented from attending the schools because of the schools' admitted policies of denying admission to Negroes, in violation of § 1981, and seeking declaratory and injunctive relief and damages. The District Court, finding that respondents had been denied admission on racial grounds, held that § 1981 makes illegal the schools' racially discriminatory admissions policies and accordingly enjoined the schools and the member schools of petitioner private school association (which had intervened as a party defendant) from discriminating against applicants for admission on the basis of race. The court also awarded compensatory relief to both children and to the parents of one and assessed attorneys' fees against each school, but held that the damages claim of the parents of the other child was barred by Virginia's two-year statute of limitations for "personal injury" actions, "borrowed" for § 1981 suits filed in that State. The Court of Appeals, while reversing the award of attorneys' fees, affirmed the grant of equitable and compensatory relief and the ruling as to the applicable statute of limitations, holding that § 1981 is a "limitation upon private discrimination, and its enforcement in the context of this case is not a deprivation of any right of free association or of privacy of the

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*Together with No. 75–66, *Fairfax-Brewster School, Inc.* v. *Gonzales et al.;* No. 75–278, *Southern Independent School Assn.* v. *McCrary et al.;* and No. 75–306, *McCrary et al.* v. *Runyon et ux., dba Bobbe's School, et al.,* also on certiorari to the same court.

defendants, of the intervenor, or of their pupils or patrons." *Held:*

1. Section 1981 prohibits private, commercially operated, nonsectarian schools from denying admission to prospective students because they are Negroes. Pp. 168–175.

(a) Section 1 of the Civil Rights Act of 1866, from which § 1981 is derived, prohibits racial discrimination in the making and enforcing of private contracts. See *Johnson* v. *Railway Express Agency,* 421 U. S. 454, 459–460; *Tillman* v. *Wheaton-Haven Recreation Assn.,* 410 U. S. 431, 439–440. Cf. *Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409, 441–443, n. 78. Pp. 168–172.

(b) The racial discrimination practiced by petitioner schools amounts to a classic violation of § 1981: Respondents' parents sought to enter into a contractual relationship with petitioner schools, but neither school offered services on an equal basis to white and nonwhite students. Pp. 172–173.

2. Section 1981, as applied in this case, does not violate constitutionally protected rights of free association and privacy, or a parent's right to direct the education of his children. Pp. 175–179.

(a) While under the principle that there is a First Amendment right "to engage in association for the advancement of beliefs and ideas," *NAACP* v. *Alabama,* 357 U. S. 449, 460, it may be assumed that parents have a right to send their children to schools that promote the belief that racial segregation is desirable, and that the children have a right to attend such schools, it does not follow that the *practice* of excluding racial minorities from such schools is also protected by the same principle. The Constitution places no value on discrimination, and while "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections." *Norwood* v. *Harrison,* 413 U. S. 455, 470. Pp. 175–176.

(b) The application of § 1981 in this case infringed no parental right such as was recognized in *Meyer* v. *Nebraska,* 262 U. S. 390; *Pierce* v. *Society of Sisters,* 268 U. S. 510; *Wisconsin* v. *Yoder,* 406 U. S. 205; or *Norwood* v. *Harrison, supra,* since no challenge is made to petitioner schools' right to operate, to parents' right to send their children to a particular private school rather than a public school, or to the subject matter that is taught at any private school. Pp. 176–177.

(c) While parents have a constitutional right to send their

children to private schools and to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation. Section 1981, as applied to the conduct at issue here, constitutes an exercise of federal legislative power under § 2 of the Thirteenth Amendment "to enforce [that Amendment] by appropriate legislation," fully consistent with *Meyer* v. *Nebraska, supra; Pierce* v. *Society of Sisters, supra,* and the cases that followed in their wake, such power including "the power to enact laws 'direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not.'" *Jones* v. *Alfred H. Mayer Co., supra,* at 438. Pp. 177–179.

3. Absent a federal statute of limitations for § 1981 actions or a Virginia statute of limitations specifically governing civil rights actions, the Court of Appeals applied the appropriate statute of limitations to bar the damages claim in question, particularly where it appears that the Court of Appeals, as well as the Federal District Courts in Virginia, had considered the question in previous federal civil rights litigation, and that the phrase "personal injuries" in the Virginia two-year statute of limitations can reasonably be construed to apply to the sort of injuries claimed here and not only to "physical injuries" as one respondent's parents contend. Pp. 179–182.

4. Absent any federal statute expressly providing for attorneys' fees in § 1981 cases or any bad faith on petitioner schools' part in contesting the actions, the Court of Appeals properly reversed the award of such fees. Nor is implied authority for such an award furnished by the generalized command of 42 U. S. C. § 1988 "to furnish suitable remedies" to vindicate the rights conferred by the various Civil Rights Acts. Pp. 182–186.

515 F. 2d 1082, affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. POWELL, J., *post,* p. 186, and STEVENS, J., *post,* p. 189, filed concurring opinions. WHITE, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post,* p. 192.

Louis Koutoulakos argued the cause and filed a brief for petitioners in No. 75–62. *Andrew A. Lipscomb* argued the cause and filed briefs for petitioner in No. 75–66. *Geo. S. Leonard* argued the cause for petitioner

in No. 75–278. With him on the briefs were *Sam Clammer* and *A. Gilmore Flues*. *Roderic V. O. Boggs* argued the cause for petitioners in No. 75–306. With him on the briefs were *Allison W. Brown, Jr.*, and *Robert M. Alexander*.

Mr. Brown argued the cause for respondents in Nos. 75–62, 75–66, and 75–278. With him on the briefs were *Mr. Alexander* and *Mr. Boggs*. *Mr. Lipscomb* argued the cause and filed a brief for respondent Fairfax-Brewster School, Inc., in No. 75–306. *Mr. Koutoulakos* filed a reply brief for respondents Runyon et ux. in No. 75–306.†

MR. JUSTICE STEWART delivered the opinion of the Court.

The principal issue presented by these consolidated cases is whether a federal law, namely 42 U. S. C. § 1981, prohibits private schools from excluding qualified children solely because they are Negroes.

I

The respondents in No. 75–62, Michael McCrary and Colin Gonzales, are Negro children. By their parents,

†*Lawrence R. Metsch* filed a brief for Dade Christian Schools, Inc., as *amicus curiae* urging reversal in Nos. 75–62, 75–66, and 75–278.

Briefs of *amici curiae* urging affirmance in Nos. 75–62, 75–66, and 75–278 were filed by *Solicitor General Bork, Assistant Attorney General Pottinger, Deputy Solicitor General Wallace, John P. Rupp, Brian K. Landsberg,* and *Judith E. Wolf* for the United States; by *Thomas J. Schwab* for the Council for American Private Education et al.; and by *Terrence Roche Murphy, Thomas C. Matthews, Jr.*, and *David Rubin* for the National Education Assn. *Larry M. Lavinsky, Arnold Forster, Theodore R. Mann, Paul S. Berger, Melvin L. Wulf, Samuel Rabinove,* and *Nathaniel Jones* filed a brief for the Anti-Defamation League of B'nai B'rith et al. as *amici curiae* urging affirmance in No. 75–62.

they filed a class action against the petitioners in No. 75–62, Russell and Katheryne Runyon, who are the proprietors of Bobbe's School in Arlington, Va. Their complaint alleged that they had been prevented from attending the school because of the petitioners' policy of denying admission to Negroes, in violation of 42 U. S. C. § 1981 [1] and Title II of the Civil Rights Act of 1964, 78 Stat. 243, 42 U. S. C. § 2000a *et seq.*[2] They sought declaratory and injunctive relief and damages. On the same day Colin Gonzales, the respondent in No. 75–66, filed a similar complaint by his parents against the petitioner in No. 75–66, Fairfax-Brewster School, Inc., located in Fairfax County, Va. The petitioner in No. 75–278, the Southern Independent School Association, sought and was granted permission to intervene as a party defendant in the suit against the Runyons. That organization is a nonprofit association composed of six state private school associations, and represents 395 private schools. It is stipulated that many of these schools deny admission to Negroes.

The suits were consolidated for trial. The findings of the District Court, which were left undisturbed by the Court of Appeals, were as follows. Bobbe's School opened in 1958 and grew from an initial enrollment of five students to 200 in 1972. A day camp was begun in 1967 and has averaged 100 children per year. The Fairfax-Brewster School commenced operations in 1955 and opened a summer day camp in 1956. A total of

[1] Title 42 U. S. C. § 1981 provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

[2] The respondents withdrew their Title II claim before trial.

223 students were enrolled at the school during the 1972–1973 academic year, and 236 attended the day camp in the summer of 1972. Neither school has ever accepted a Negro child for any of its programs.

In response to a mailed brochure addressed "resident" and an advertisement in the "Yellow Pages" of the telephone directory, Mr. and Mrs. Gonzales telephoned and then visited the Fairfax-Brewster School in May 1969. After the visit, they submitted an application for Colin's admission to the day camp. The school responded with a form letter, which stated that the school was "unable to accommodate [Colin's] application." Mr. Gonzales telephoned the school. Fairfax-Brewster's Chairman of the Board explained that the reason for Colin's rejection was that the school was not integrated. Mr. Gonzales then telephoned Bobbe's School, from which the family had also received in the mail a brochure addressed to "resident." In response to a question concerning that school's admissions policies, he was told that only members of the Caucasian race were accepted. In August 1972, Mrs. McCrary telephoned Bobbe's School in response to an advertisement in the telephone book. She inquired about nursery school facilities for her son, Michael. She also asked if the school was integrated. The answer was no.

Upon these facts, the District Court found that the Fairfax-Brewster School had rejected Colin Gonzales' application on account of his race and that Bobbe's School had denied both children admission on racial grounds. The court held that 42 U. S. C. § 1981 makes illegal the schools' racially discriminatory admissions policies. It therefore enjoined Fairfax-Brewster School and Bobbe's School and the member schools of the Southern Independent School Association [3] from discrim-

[3] The District Court determined that the suit could not be maintained as a class action.

inating against applicants for admission on the basis of race. The court awarded compensatory relief to Mr. and Mrs. McCrary, Michael McCrary, and Colin Gonzales.[4] In a previous ruling the court had held that the damages claim of Mr. and Mrs. Gonzales was barred by Virginia's two-year statute of limitations for personal injury actions, "borrowed" for § 1981 suits filed in that State. Finally, the court assessed attorneys' fees of $1,000 against each school. 363 F. Supp. 1200 (ED Va. 1973).

The Court of Appeals for the Fourth Circuit, sitting en banc, affirmed the District Court's grant of equitable and compensatory relief and its ruling as to the applicable statute of limitations, but reversed its award of attorneys' fees. 515 F. 2d 1082 (1975). Factually, the court held that there was sufficient evidence to support the trial court's finding that the two schools had discriminated racially against the children. On the basic issue of law, the court agreed that 42 U. S. C. § 1981 is a "limitation upon private discrimination, and its enforcement in the context of this case is not a deprivation of any right of free association or of privacy of the defendants, of the intervenor, or of their pupils or patrons." 515 F. 2d, at 1086. The relationship the parents had sought to enter into with the schools was in the court's view undeniably contractual in nature, within the meaning of § 1981, and the court rejected the schools' claim that § 1981 confers no right of action unless the contractual relationship denied to Negroes is available to all whites. 515 F. 2d, at 1087. Finally, the appellate

[4] For the embarrassment, humiliation, and mental anguish which the parents and children suffered, the Court awarded Colin Gonzales $2,000 against the Fairfax-Brewster School and $500 against Bobbe's School. Michael McCrary was awarded damages of $1,000, and Mr. and Mrs. McCrary $2,000, against Bobbe's School.

court rejected the schools' contention that their racially discriminatory policies are protected by a constitutional right of privacy. "When a school holds itself open to the public . . . or even to those applicants meeting established qualifications, there is no perceived privacy of the sort that has been given constitutional protection." *Id.*, at 1088.

We granted the petitions for certiorari filed by the Fairfax-Brewster School, No. 75–66; Bobbe's School, No. 75–62; and the Southern Independent School Association, No. 75–278, to consider whether 42 U. S. C. § 1981 prevents private schools from discriminating racially among applicants. 423 U. S. 945. We also granted the cross-petition of Michael McCrary, Colin Gonzales, and their parents, No. 75–306, to determine the attorneys' fees and statute of limitations issues. *Ibid.*

II

It is worth noting at the outset some of the questions that these cases do not present. They do not present any question of the right of a private social organization to limit its membership on racial or any other grounds.[5] They do not present any question of the right of a private school to limit its student body to boys, to girls, or to adherents of a particular religious faith, since 42 U. S. C. § 1981 is in no way addressed to such categories of selectivity. They do not even present the application of § 1981 to private sectarian schools that practice *racial* exclusion on religious grounds.[6] Rather, these cases

[5] See generally *Tillman* v. *Wheaton-Haven Recreation Assn.*, 410 U. S. 431, 439–440; *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163.

[6] Nothing in this record suggests that either the Fairfax-Brewster School or Bobbe's Private School excludes applicants on religious grounds, and the Free Exercise Clause of the First Amendment is thus in no way here involved.

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present only two basic questions: [7] whether § 1981 prohibits private, commercially operated, nonsectarian schools from denying admission to prospective students because they are Negroes, and, if so, whether that federal law is constitutional as so applied.

A. *Applicability of § 1981*

It is now well established that § 1 of the Civil Rights Act of 1866, 14 Stat. 27, 42 U. S. C. § 1981, prohibits racial discrimination in the making and enforcement of private contracts.[8] See *Johnson* v. *Railway Express*

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[7] Apart, of course, from the statute of limitations and attorneys' fees issues involved in No. 75–306, and dealt with in Part III of this opinion.

[8] The historical note appended to the portion of the Civil Rights Act of 1866, presently codified in 42 U. S. C. § 1981, indicates that § 1981 is derived solely from § 16 of the Act of May 31, 1870, 16 Stat. 144. The omission from the historical note of any reference to § 18 of the 1870 Act, which re-enacted § 1 of the 1866 Act, or to the 1866 Act itself reflects a similar omission from the historical note that was prepared in connection with the 1874 codification of federal statutory law. The earlier note was appended to the draft version of the 1874 revision prepared by three commissioners appointed by Congress.

On the basis of this omission, at least one court has concluded, in an opinion that antedated *Johnson* v. *Railway Express Agency*, 421 U. S. 454, that § 1981 is based exclusively on the Fourteenth Amendment and does not, therefore, reach private action. *Cook* v. *Advertiser Co.*, 323 F. Supp. 1212 (MD Ala.), aff'd on other grounds, 458 F. 2d 1119 (CA5). But the holding in that case ascribes an inappropriate significance to the historical note presently accompanying § 1981, and thus implicitly to the earlier revisers' note.

The commissioners who prepared the 1874 draft revision were appointed pursuant to the Act of June 27, 1866, 14 Stat. 74, re-enacted by the Act of May 4, 1870, c. 72, 16 Stat. 96. They were given authority to "revise, simplify, arrange, and consolidate all statutes of the United States," Act of June 27, 1866, § 1, 14 Stat. 74, by "bring[ing] together all statutes and parts of statutes which, from

Agency, 421 U. S. 454, 459–460; *Tillman* v. *Wheaton-Haven Recreation Assn.,* 410 U. S. 431, 439–440. Cf. *Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409, 441–443, n. 78.

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similarity of subject, ought to be brought together, *omitting redundant or obsolete enactments . . . .*" § 2, 14 Stat. 75 (emphasis added). The commissioners also had the authority under § 3 of the Act of June 27, 1866, to "designate such statutes or parts of statutes as, in their judgment, ought to be repealed, with their reasons for such repeal." 14 Stat. 75.

It is clear that the commissioners did not intend to recommend to Congress, pursuant to their authority under § 3 of the Act of June 27, 1866, that any portion of § 1 of the Civil Rights Act of 1866 be repealed upon the enactment of the 1874 revision. When the commissioners were exercising their § 3 power of recommendation, they so indicated, in accordance with the requirements of § 3. See 1 Draft Revision of the United States Statutes, Title XXVI, §§ 8, 13 (1872). No indication of a recommended change was noted with respect to the section of the draft which was to become § 1981. It is thus most plausible to assume that the revisers omitted a reference to § 1 of the 1866 Act or § 18 of the 1870 Act either inadvertently or on the assumption that the relevant language in § 1 of the 1866 Act was superfluous in light of the closely parallel language in § 16 of the 1870 Act.

We have, in past decisions, expressed the view that § 16 of the 1870 Act was merely a re-enactment, with minor changes, of certain language in § 1 of the 1866 Act. *E. g., Georgia* v. *Rachel,* 384 U. S. 780, 790–791. If this is so, then an assumption on the part of the revisers that the language of the 1866 Act was superfluous was perfectly accurate. But even assuming that the purpose behind the enactment of § 16 of the 1870 Act was narrower than that behind the enactment of relevant language in § 1 of the 1866 Act—and thus that the revisers' hypothetical assumption was wrong—there is still no basis for inferring that Congress did not understand the draft legislation which eventually became 42 U. S. C. § 1981 to be drawn from both § 16 of the 1870 Act and § 1 of the 1866 Act.

To hold otherwise would be to attribute to Congress an intent to repeal a major piece of Reconstruction legislation on the basis of an unexplained omission from the revisers' marginal notes. Such an inference would be inconsistent with Congress' delineation in § 3

In *Jones* the Court held that the portion of § 1 of the Civil Rights Act of 1866 presently codified as 42 U. S. C. § 1982 prohibits private racial discrimination in the sale or rental of real or personal property. Relying on the legislative history of § 1, from which both § 1981 and § 1982 derive, the Court concluded that Congress intended to prohibit "all racial discrimination, private and public, in the sale . . . of property," 392 U. S., at 437, and that this prohibition was within Congress' power under § 2 of the Thirteenth Amendment "rationally to determine what are the badges and the incidents of slavery, and . . . to translate that determination into effective legislation." 392 U. S., at 440.

As the Court indicated in *Jones, supra,* at 441–443, n. 78, that holding necessarily implied that the portion of § 1 of the 1866 Act presently codified as 42 U. S. C. § 1981 likewise reaches purely private acts of racial discrimination. The statutory holding in *Jones* was that the "[1866] Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein—including the right to purchase or lease property," 392 U. S., at 436. One of the "rights enumerated" in § 1 is "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ." 14 Stat. 27. Just as in *Jones* a Negro's § 1 right to purchase property on equal terms with whites was violated when a private person refused to sell to the prospective purchaser solely because he was a Negro, so also a Negro's § 1 right to "make and enforce contracts" is violated if a private offeror refuses to extend to a Negro,

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of the Act of June 27, 1866, of specific procedures to be followed in connection with the submission of substantive proposals by the revisers. It would also conflict with the square holding of this Court in *Johnson* v. *Railway Express Agency, supra,* that § 1981 reaches private conduct.

solely because he is a Negro, the same opportunity to enter into contracts as he extends to white offerees.[9]

The applicability of the holding in *Jones* to § 1981 was confirmed by this Court's decisions in *Tillman* v. *Wheaton-Haven Recreation Assn., supra,* and *Johnson* v. *Railway Express Agency, Inc., supra.* In *Tillman* the petitioners urged that a private swimming club had violated 42 U. S. C. §§ 1981, 1982, and 2000a *et seq.* by enforcing a guest policy that discriminated against Negroes. The Court noted that "[t]he operative language of both § 1981 and § 1982 is traceable to the Act of April 9, 1866, c. 31, § 1, 14 Stat. 27." 410 U. S., at 439. Referring to its earlier rejection of the respondents' contention that Wheaton-Haven was exempt from § 1982 under the private-club exception of the Civil Rights Act of 1964, the Court concluded: "In light of the historical interrelationship between § 1981 and § 1982 [there is] no reason to construe these sections differently when applied, on these facts, to the claim of Wheaton-Haven that it is a private club." 410 U. S., at 440. Accordingly the Court remanded the case to the District Court for further proceedings "free of the misconception that

[9] The petitioning schools and school association rely on a statement in *Norwood* v. *Harrison,* 413 U. S. 455, 469, that "private bias [in the admission of students to private schools] is not barred by the Constitution, *nor does it invoke any sanction of laws,* but neither can it call on the Constitution for material aid from the State." (Emphasis added.) They argue that this statement supports their contention that § 1981 does not proscribe private racial discrimination that interferes with the formation of contracts for educational services. But *Norwood* involved no issue concerning the applicability of § 1981 to such discrimination. The question there was rather whether a state statute providing free textbooks to students attending private segregated schools violated the Equal Protection Clause of the Fourteenth Amendment. Indeed, *Norwood* expressly noted that "some private discrimination is subject to special remedial legislation in certain circumstances under § 2 of the Thirteenth Amendment . . . ." 413 U. S., at 470.

Wheaton-Haven is exempt from §§ 1981, 1982, and 2000a." *Ibid.* In *Johnson* v. *Railway Express Agency, supra,* the Court noted that § 1981 "relates primarily to racial discrimination in the making and enforcement of contracts," 421 U. S., at 459, and held unequivocally "that § 1981 affords a federal remedy against discrimination in private employment on the basis of race." *Id.,* at 459–460.

It is apparent that the racial exclusion practiced by the Fairfax-Brewster School and Bobbe's Private School amounts to a classic violation of § 1981. The parents of Colin Gonzales and Michael McCrary sought to enter into contractual relationships with Bobbe's School for educational services. Colin Gonzales' parents sought to enter into a similar relationship with the Fairfax-Brewster School. Under those contractual relationships, the schools would have received payments for services rendered, and the prospective students would have received instruction in return for those payments. The educational services of Bobbe's School and the Fairfax-Brewster School were advertised and offered to members of the general public.[10] But neither school offered serv-

[10] These cases do not raise the issue of whether the "private club or other [private] establishment" exemption in § 201 (e) of the Civil Rights Act of 1964, 42 U. S. C. § 2000a (e), operates to narrow § 1 of the Civil Rights Act of 1866. As the Court of Appeals implied, that exemption, if applicable at all, comes into play only if the establishment is "not in fact open to the public . . . ." 42 U. S. C. § 2000a (e). See 515 F. 2d 1082, 1088–1089. Both Bobbe's School and the Fairfax-Brewster School advertised in the "Yellow Pages" of the telephone directory and both used mass mailings in attempting to attract students. As the Court of Appeals observed, these "schools are private only in the sense that they are managed by private persons and they are not direct recipients of public funds. Their actual and potential constituency, however, is more public than private. They appeal to the parents of all children in the area who can meet their academic and other admission requirements. This is

ices on an equal basis to white and nonwhite students. As the Court of Appeals held, "there is ample evidence in the record to support the trial judge's factual determinations . . . [that] Colin [Gonzales] and Michael [McCrary] were denied admission to the schools because of their race." 515 F. 2d, at 1086. The Court of Appeals' conclusion that § 1981 was thereby violated follows inexorably from the language of that statute, as construed in *Jones, Tillman,* and *Johnson.*

The petitioning schools and school association argue principally that § 1981 does not reach private acts of racial discrimination. That view is wholly inconsistent with *Jones'* interpretation of the legislative history of § 1 of the Civil Rights Act of 1866, an interpretation that was reaffirmed in *Sullivan* v. *Little Hunting Park, Inc.,* 396 U. S. 229, and again in *Tillman* v. *Wheaton-Haven Recreation Assn., supra.* And this consistent interpretation of the law necessarily requires the conclusion that § 1981, like § 1982, reaches private conduct. See *Till-*

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clearly demonstrated in this case by the public advertisements." *Id.,* at 1089.

The pattern of exclusion is thus directly analogous to that at issue in *Sullivan* v. *Little Hunting Park, Inc.,* 396 U. S. 229, and *Tillman* v. *Wheaton-Haven Recreation Assn.,* 410 U. S. 431, where the so-called private clubs were open to all objectively qualified whites—*i. e.,* those living within a specified geographic area.

Moreover, it is doubtful that a plausible "implied repeal" argument could be made in this context in any event. Implied repeals occur if two Acts are in irreconcilable conflict. *Radzanower* v. *Touche Ross & Co.,* 426 U. S. 148, 154–155. Title II of the Civil Rights Act of 1964, of which the "private club" exemption is a part, does not by its terms reach private schools. Since there would appear to be no potential for overlapping application of § 1981 and Title II of the 1964 Act with respect to racial discrimination practiced by private schools, there would also appear to be no potential for conflict between § 1981 and Title II's "private club" exemption in this context. See Note, The Desegregation of Private Schools: Is Section 1981 the Answer?, 48 N. Y. U. L. Rev. 1147, 1159 (1973).

man v. *Wheaton-Haven Recreation Assn.*, 410 U. S., at 439–440; *Johnson* v. *Railway Express Agency*, 421 U. S., at 459–460.

It is noteworthy that Congress in enacting the Equal Employment Opportunity Act of 1972, 86 Stat. 103, as amended, 42 U. S. C. § 2000e *et seq.* (1970 ed., Supp. IV), specifically considered and rejected an amendment that would have repealed the Civil Rights Act of 1866, as interpreted by this Court in *Jones*, insofar as it affords private-sector employees a right of action based on racial discrimination in employment. See *Johnson* v. *Railway Express Agency, supra*, at 459.[11] There could

[11] Senator Hruska proposed an amendment which would have made Title VII of the Civil Rights Act of 1964 and the Equal Pay Act the exclusive sources of federal relief for employment discrimination. 118 Cong. Rec. 3371 (1972). Senator Williams, the floor manager of the pending bill and one of its original sponsors, argued against the proposed amendment on the ground that "[i]t is not our purpose to repeal existing civil rights laws" and that to do so "would severely weaken our overall effort to combat the presence of employment discrimination." *Ibid.* Senator Williams specifically noted: "The law against employment discrimination did not begin with title VII and the EEOC, nor is it intended to end with it. The right of individuals to bring suits in Federal courts to redress individual acts of discrimination, including employment discrimination was first provided by the Civil Rights Acts of 1866 and 1871, 42 U. S. C. sections 1981, 1983. It was recently stated by the Supreme Court in the case of Jones v. Mayer, that these acts provide fundamental constitutional guarantees. In any case, the courts have specifically held that title VII and the Civil Rights Acts of 1866 and 1871 are not mutually exclusive, and must be read together to provide alternative means to redress individual grievances. Mr. President, the amendment of the Senator from Nebraska will repeal the first major piece of civil rights legislation in this Nation's history. We cannot do that." *Ibid.* The Senate was persuaded by Senator Williams' entreaty that it not "strip from [the] individual his rights that have been established, going back to the first Civil Rights Law of 1866," *id.*, at 3372, and Senator Hruska's proposed amendment was rejected. *Id.*, at 3372–3373.

hardly be a clearer indication of congressional agreement with the view that § 1981 *does* reach private acts of racial discrimination. Cf. *Flood* v. *Kuhn,* 407 U. S. 258, 269–285; *Joint Industry Board* v. *United States,* 391 U. S. 224, 228–229. In these circumstances there is no basis for deviating from the well-settled principles of *stare decisis* applicable to this Court's construction of federal statutes. See *Edelman* v. *Jordan,* 415 U. S. 651, 671 n. 14.[12]

B. *Constitutionality of § 1981 as Applied*

The question remains whether § 1981, as applied, violates constitutionally protected rights of free association and privacy, or a parent's right to direct the education of his children.[13]

1. *Freedom of Association*

In *NAACP* v. *Alabama,* 357 U. S. 449, and similar decisions, the Court has recognized a First Amendment right "to engage in association for the advancement of beliefs and ideas . . . ." *Id.,* at 460. That right is protected because it promotes and may well be essential to the "[e]ffective advocacy of both public and private points of view, particularly controversial ones" that the First Amendment is designed to foster. *Ibid.* See *Buckley* v. *Valeo,* 424 U. S. 1, 15; *NAACP* v. *Button,* 371 U. S. 415.

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[12] The Court in *Edelman* stated as follows:

"In the words of Mr. Justice Brandeis: '*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. . . .'" 415 U. S., at 671 n. 14 (citation omitted).

[13] It is clear that the schools have standing to assert these arguments on behalf of their patrons. See *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535–536.

From this principle it may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle. As the Court stated in *Norwood* v. *Harrison,* 413 U. S. 455, "the Constitution . . . places no value on discrimination," *id.,* at 469, and while "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections. And even some private discrimination is subject to special remedial legislation in certain circumstances under § 2 of the Thirteenth Amendment; Congress has made such discrimination unlawful in other significant contexts." *Id.,* at 470. In any event, as the Court of Appeals noted, "there is no showing that discontinuance of [the] discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma." 515 F. 2d, at 1087.

2. *Parental Rights*

In *Meyer* v. *Nebraska,* 262 U. S. 390, the Court held that the liberty protected by the Due Process Clause of the Fourteenth Amendment includes the right "to acquire useful knowledge, to marry, establish a home and bring up children," *id.,* at 399, and, concomitantly, the right to send one's children to a private school that offers specialized training—in that case, instruction in the German language. In *Pierce* v. *Society of Sisters,* 268 U. S. 510, the Court applied "the doctrine of *Meyer* v. *Nebraska,*" *id.,* at 534, to hold unconstitutional an Oregon law requiring the parent, guardian, or other person having custody of a child between 8 and 16 years of age

to send that child to public school on pain of criminal liability. The Court thought it "entirely plain that the [statute] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.*, at 534–535. In *Wisconsin* v. *Yoder,* 406 U. S. 205, the Court stressed the limited scope of *Pierce,* pointing out that it lent "no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society" but rather "held simply that while a State may posit [educational] standards, it may not pre-empt the educational process by requiring children to attend public schools." *Id.*, at 239 (WHITE, J., concurring). And in *Norwood* v. *Harrison,* 413 U. S. 455, the Court once again stressed the "limited scope of *Pierce,*" *id.*, at 461, which simply "affirmed the right of private schools to exist and to operate . . . ." *Id.*, at 462.

It is clear that the present application of § 1981 infringes no parental right recognized in *Meyer, Pierce, Yoder,* or *Norwood.* No challenge is made to the petitioner schools' right to operate or the right of parents to send their children to a particular private school rather than a public school. Nor do these cases involve a challenge to the subject matter which is taught at any private school. Thus, the Fairfax-Brewster School and Bobbe's School and members of the intervenor association remain presumptively free to inculcate whatever values and standards they deem desirable. *Meyer* and its progeny entitle them to no more.

3. *The Right of Privacy*

The Court has held that in some situations the Constitution confers a right of privacy. See *Roe* v. *Wade,* 410 U. S. 113, 152–153; *Eisenstadt* v. *Baird,* 405 U. S. 438, 453; *Stanley* v. *Georgia,* 394 U. S. 557, 564–565; *Griswold*

v. *Connecticut,* 381 U. S. 479, 484–485. See also *Loving* v. *Virginia,* 388 U. S. 1, 12; *Skinner* v. *Oklahoma ex rel. Williamson,* 316 U. S. 535, 541.

While the application of § 1981 to the conduct at issue here—a private school's adherence to a racially discriminatory admissions policy—does not represent governmental intrusion into the privacy of the home or a similarly intimate setting,[14] it does implicate parental interests. These interests are related to the procreative rights protected in *Roe* v. *Wade, supra,* and *Griswold* v. *Connecticut, supra.* A person's decision whether to bear a child and a parent's decision concerning the manner in which his child is to be educated may fairly be characterized as exercises of familial rights and responsibilities. But it does not follow that because government is largely or even entirely precluded from regulating the child-bearing decision, it is similarly restricted by the Constitution from regulating the implementation of parental decisions concerning a child's education.

The Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation. See *Wisconsin* v. *Yoder, supra,* at 213; *Pierce* v. *Society of Sisters, supra,* at 534; *Meyer* v. *Nebraska,* 262 U. S., at 402.[15] Indeed, the Court in *Pierce* expressly acknowledged "the power of the State

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

[15] The *Meyer-Pierce-Yoder* "parental" right and the privacy right, while dealt with separately in this opinion, may be no more than verbal variations of a single constitutional right. See *Roe* v. *Wade,* 410 U. S. 113, 152–153 (citing *Meyer* v. *Nebraska* and *Pierce* v. *Society of Sisters* for the proposition that this Court has recognized a constitutional right of privacy).

reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils . . . ." 268 U. S., at 534. See also *Prince* v. *Massachusetts,* 321 U. S. 158, 166.

Section 1981, as applied to the conduct at issue here, constitutes an exercise of federal legislative power under § 2 of the Thirteenth Amendment fully consistent with *Meyer, Pierce,* and the cases that followed in their wake. As the Court held in *Jones* v. *Alfred H. Mayer Co., supra:* "It has never been doubted . . . 'that the power vested in Congress to enforce [the Thirteenth Amendment] by appropriate legislation' . . . includes the power to enact laws 'direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not.' " 392 U. S., at 438 (citation omitted). The prohibition of racial discrimination that interferes with the making and enforcement of contracts for private educational services furthers goals closely analogous to those served by § 1981's elimination of racial discrimination in the making of private employment contracts [16] and, more generally, by § 1982's guarantee that "a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man." 392 U. S., at 443.

III

A. *Statute of Limitations*

The District Court held that the damages suit of the petitioners in No. 75–306, Mr. and Mrs. Gonzales, which was initiated 3½ years after their cause of action accrued, was barred by the statute of limitations. This

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[16] The Court has recognized in similar contexts the link between equality of opportunity to obtain an education and equality of employment opportunity. See *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637; *Sweatt* v. *Painter,* 339 U. S. 629.

ruling was affirmed by the Court of Appeals. The petitioners contend that both courts erred in "borrowing" the wrong Virginia statute of limitations.

Had Congress placed a limit upon the time for bringing an action under § 1981, that would, of course, end the matter. But Congress was silent. And "[a]s to actions at law," which a damages suit under § 1981 clearly is, "the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation." *Holmberg* v. *Armbrecht,* 327 U. S. 392, 395. See *Johnson* v. *Railway Express Agency,* 421 U. S., at 462; *Rawlings* v. *Ray,* 312 U. S. 96; *O'Sullivan* v. *Felix,* 233 U. S. 318; *Chattanooga Foundry* v. *Atlanta,* 203 U. S. 390. As the Court stated in *Holmberg, supra,* at 395: "The implied absorption of State statutes of limitation within the interstices of the federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles."

At the time of this litigation Virginia had not enacted a statute that specifically governed civil rights suits. In the absence of such a specific statute, the District Court and the Court of Appeals held that the first sentence of Va. Code Ann. § 8–24 (1957) provides the relevant limitations period for a § 1981 action: "Every action for personal injuries shall be brought within two years next after the right to bring the same shall have accrued." The petitioners assert that this provision applies only to suits predicated upon actual physical injury, and that the correct limitation period is five years, by virtue of the second sentence of § 8–24, which comprehends all other "personal" actions:

> "Every personal action, for which no limitation is otherwise prescribed, shall be brought within five

> years next after the right to bring the same shall have accrued, if it be for a matter of such nature that in case a party die it can be brought by or against his representative; and, if it be for a matter not of such nature, shall be brought within one year next after the right to bring the same shall have accrued."

The petitioners' contention is certainly a rational one, but we are not persuaded that the Court of Appeals was mistaken in applying the two-year state statute. The issue was not a new one for that court, for it had given careful consideration to the question of the appropriate Virginia statute of limitations to be applied in federal civil rights litigation on at least two previous occasions. *Allen* v. *Gifford,* 462 F. 2d 615; *Almond* v. *Kent,* 459 F. 2d 200. We are not disposed to displace the considered judgment of the Court of Appeals on an issue whose resolution is so heavily contingent upon an analysis of state law, particularly when the established rule has been relied upon and applied in numerous suits filed in the Federal District Courts in Virginia.[17] In other situations in which a federal right has depended upon the interpretation of state law, "the Court has accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion." *Bishop* v.

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[17] See, *e. g., Van Horn* v. *Lukhard,* 392 F. Supp. 384, 391 (ED Va.); *Edgerton* v. *Puckett,* 391 F. Supp. 463 (WD Va.); *Wilkinson* v. *Hamel,* 381 F. Supp. 768, 769 (WD Va.); *Cradle* v. *Superintendent, Correctional Field Unit #7,* 374 F. Supp. 435, 437 n. 3 (WD Va.); *Taliaferro* v. *State Council of Higher Education,* 372 F. Supp. 1378, 1383 (ED Va.); *Landman* v. *Brown,* 350 F. Supp. 303, 306 (ED Va.); *Sitwell* v. *Burnette,* 349 F. Supp. 83, 85–86 (WD Va).

Wood, 426 U. S. 341, 346, and n. 10, citing, *inter alia, United States* v. *Durham Lumber Co.,* 363 U. S. 522; *Propper* v. *Clark,* 337 U. S. 472; *Township of Hillsborough* v. *Cromwell,* 326 U. S. 620.

Moreover, the petitioners have not cited any Virginia court decision to the effect that the term "personal injuries" in § 8–24 means only "physical injuries." It could be argued with at least equal force that the phrase "personal injuries" was designed to distinguish those causes of action involving torts against the person from those involving damage to property. And whether the damages claim of the Gonzaleses be properly characterized as involving "injured feelings and humiliation," as the Court of Appeals held, 515 F. 2d, at 1097, or the vindication of constitutional rights, as the petitioners contend, there is no dispute that the damage was to their persons, not to their realty or personalty. Cf. *Carva Food Corp.* v. *Dawley,* 202 Va. 543, 118 S. E. 2d 664; *Travelers Ins. Co.* v. *Turner,* 211 Va. 552, 178 S. E. 2d 503.

B. *Attorneys' Fees*

The District Court, without explanation or citation of authority, awarded attorneys' fees of $1,000 against each of the two schools. The Court of Appeals reversed this part of the District Court's judgment. Anticipating our decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U. S. 240, the appellate court refused to adopt the so-called private attorney general theory under which attorneys' fees could be awarded to any litigant who vindicates an important public interest. And it could find no other ground for the award: no statute explicitly provides for attorneys' fees in § 1981 cases,[18] and neither

[18] Cf., *e. g.,* Title II of the Civil Rights Act of 1964, 42 U. S. C. § 2000a–3 (b). See *Alyeska Pipeline Serv. Co.* v. *Wilderness Society,* 421 U. S. 240, 260–262, and n. 33.

school had evinced " 'obstinate obduracy' " or bad faith in contesting the action. 515 F. 2d, at 1089–1090.

Mindful of this Court's *Alyeska* decision, the petitioners do not claim that their vindication of the right of Negro children to attend private schools alone entitles them to attorneys' fees. They make instead two other arguments.

First, the petitioners claim that the schools exhibited bad faith, not by litigating the legal merits of their racially discriminatory admissions policy, but by denying that they in fact had discriminated. To support this claim, the petitioners cite a number of conflicts in testimony between the McCrarys, the Gonzaleses, and other witnesses, on the one hand, and the officials of the schools, on the other, which the District Court resolved against the schools in finding racial discrimination. Indeed, the trial court characterized as "unbelievable" the testimony of three officials of the Fairfax-Brewster School. 363 F. Supp., at 1202. By stubbornly contesting the facts, the petitioners assert, the schools attempted to deceive the court and, in any event, needlessly prolonged the litigation.

We cannot accept this argument. To be sure, the Court has recognized the "inherent power" of the federal courts to assess attorneys' fees when the losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . . ." *F. D. Rich Co.* v. *United States ex rel. Industrial Lumber Co.*, 417 U. S. 116, 129. See *Alyeska, supra,* at 258–259; *Vaughan* v. *Atkinson,* 369 U. S. 527. But in this case the factual predicate to a finding of bad faith is absent. Simply because the facts were found against the schools does not by itself prove that threshold of irresponsible conduct for which a penalty assessment would be justified. Whenever the facts in a case are disputed, a court perforce must decide that one party's version is inaccurate. Yet it would be

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untenable to conclude *ipso facto* that that party had acted in bad faith. As the Court of Appeals stated, 515 F. 2d, at 1090: "Faults in perception or memory often account for differing trial testimony, but that has not yet been thought a sufficient ground to shift the expense of litigation." We find no warrant for disturbing the holding of the Court of Appeals that no bad faith permeated the defense by the schools of this lawsuit.

The petitioners' second argument is that while 42 U. S. C. § 1981 contains no authorization for the award of attorneys' fees, 42 U. S. C. § 1988 implicitly does. In relevant part, that section reads:

> "The jurisdiction in civil . . . matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . ."

The petitioners assert, in the words of their brief, that § 1988 "embodies a uniquely broad commission to the federal courts to search among federal and state statutes and common law for the remedial devices and procedures which best enforce the substantive provisions of

Sec. 1981 and other civil rights statutes." As part of that "broad commission" the federal courts are obligated, the petitioners say, to award attorneys' fees whenever such fees are needed to encourage private parties to seek relief against illegal discrimination.

This contention is without merit. It is true that in order to vindicate the rights conferred by the various Civil Rights Acts, § 1988 "authorize[s] federal courts, where federal law is unsuited or insufficient 'to furnish suitable remedies,' to look to principles of the common law, as altered by state law . . . ." *Moor* v. *County of Alameda,* 411 U. S. 693, 702–703. See *Sullivan* v. *Little Hunting Park, Inc.,* 396 U. S., at 239–240. But the Court has never interpreted § 1988 to warrant the award of attorneys' fees. And nothing in the legislative history of that statute suggests that such a radical departure from the long-established American rule forbidding the award of attorneys' fees was intended.

More fundamentally, the petitioners' theory would require us to overlook the penultimate clause of § 1988: "so far as the same is not inconsistent with the Constitution and laws of the United States." As the Court recounted in some detail in *Alyeska, supra,* at 247, *passim,* the law of the United States, but for a few well-recognized exceptions not present in these cases,[19] has always been that absent explicit congressional authorization, attorneys' fees are not a recoverable cost of litigation. Hence, in order to "furnish" an award of attorneys' fees, we would have to find that at least as to cases brought under statutes to which § 1988 applies, Congress intended

[19] See, *e. g., Trustees* v. *Greenough,* 105 U. S. 527 (allowance of attorneys' fees out of a common fund); *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U. S. 399 (assessment of fees as part of the fine for willful disobedience of a court order); *F. D. Rich Co.* v. *United States ex rel. Industrial Lumber Co.,* 417 U. S. 116 (assessment of attorneys' fees against party acting in bad faith).

to set aside this longstanding American rule of law. We are unable to conclude, however, from the generalized commands of § 1988, that Congress intended any such result.

For the reasons stated in this opinion, the judgment of the Court of Appeals is in all respects affirmed.

It is so ordered.

MR. JUSTICE POWELL, concurring.

If the slate were clean I might well be inclined to agree with MR. JUSTICE WHITE that § 1981 was not intended to restrict private contractual choices. Much of the review of the history and purpose of this statute set forth in his dissenting opinion is quite persuasive. It seems to me, however, that it comes too late.

The applicability of § 1981 to private contracts has been considered maturely and recently, and I do not feel free to disregard these precedents.* As they are reviewed in the Court's opinion, I merely cite them: *Johnson* v. *Railway Express Agency,* 421 U. S. 454, 459–460 (1975), an opinion in which I joined; *Tillman* v. *Wheaton-Haven Recreation Assn.,* 410 U. S. 431, 439–440 (1973), another opinion in which I joined; *Sullivan* v. *Little Hunting Park, Inc.,* 396 U. S. 229, 236–237 (1969); and particularly and primarily, *Jones* v. *Alfred H. Mayer*

*In some instances the Court has drifted almost accidentally into rather extreme interpretations of the post-Civil War Acts. The most striking example is the proposition, now often accepted uncritically, that 42 U. S. C. § 1983 does not require exhaustion of administrative remedies under any circumstances. This far-reaching conclusion was arrived at largely without the benefit of briefing and argument. See, *e. g., Wilwording* v. *Swenson,* 404 U. S. 249 (1971); *Houghton* v. *Shafer,* 392 U. S. 639 (1968); *Damico* v. *California,* 389 U. S. 416 (1967). I consider the posture of §§ 1981 and 1982 in the jurisprudence of this Court to be quite different from that of § 1983.

Co., 392 U. S. 409, 420–437 (1968). Although the latter two cases involved § 1982, rather than § 1981, I agree that their considered holdings with respect to the purpose and meaning of § 1982 necessarily apply to both statutes in view of their common derivation.

Although the range of consequences suggested by the dissenting opinion, *post*, at 212, goes far beyond what we hold today, I am concerned that our decision not be construed more broadly than would be justified.

By its terms § 1981 necessarily imposes some restrictions on those who would refuse to extend to Negroes "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." But our holding that this restriction extends to certain actions by private individuals does not imply the intrusive investigation into the motives of every refusal to contract by a private citizen that is suggested by the dissent. As the Court of Appeals suggested, some contracts are so personal "as to have a discernible rule of exclusivity which is inoffensive to § 1981." 515 F. 2d 1082, 1088 (1975).

In *Sullivan* v. *Little Hunting Park, supra,* we were faced with an association in which "[t]here was no plan or purpose of exclusiveness." Participation was "open to every white person within the geographic area, there being no selective element other than race." 396 U. S., at 236. See also *Tillman* v. *Wheaton-Haven Recreation Assn., supra,* at 438. In certain personal contractual relationships, however, such as those where the offeror selects those with whom he desires to bargain on an individualized basis, or where the contract is the foundation of a close association (such as, for example, that between an employer and a private tutor, babysitter, or housekeeper), there is reason to assume that, although the choice made by the offeror is selective, it reflects "a purpose of exclusiveness" other than the desire to bar

members of the Negro race. Such a purpose, certainly in most cases, would invoke associational rights long respected.

The case presented on the record before us does not involve this type of personal contractual relationship. As the Court of Appeals said, the petitioning "schools are private only in the sense that they are managed by private persons and they are not direct recipients of public funds. Their actual and potential constituency, however, is more public than private." 515 F. 2d, at 1089. The schools extended a public offer open, on its face, to any child meeting certain minimum qualifications who chose to accept. They advertised in the "Yellow Pages" of the telephone directories and engaged extensively in general mail solicitations to attract students. The schools are operated strictly on a commercial basis, and one fairly could construe their open-end invitations as offers that matured into binding contracts when accepted by those who met the academic, financial, and other racially neutral specified conditions as to qualifications for entrance. There is no reason to assume that the schools had any special reason for exercising an option of personal choice among those who responded to their public offers. A small kindergarten or music class, operated on the basis of personal invitations extended to a limited number of preidentified students, for example, would present a far different case.

I do not suggest that a "bright line" can be drawn that easily separates the type of contract offer within the reach of § 1981 from the type without. The case before us is clearly on one side of the line, however defined, and the kindergarten and music school examples are clearly on the other side. Close questions undoubtedly will arise in the gray area that necessarily exists in between. But some of the applicable principles and considerations, for the most part identified by the Court's opinion, are

clear: § 1981, as interpreted by our prior decisions, does reach certain acts of racial discrimination that are "private" in the sense that they involve no *state* action. But choices, including those involved in entering into a contract, that are "private" in the sense that they are not part of a commercial relationship offered generally or widely, and that reflect the selectivity exercised by an individual entering into a personal relationship, certainly were never intended to be restricted by the 19th century Civil Rights Acts. The open offer to the public generally involved in the cases before us is simply not a "private" contract in this sense. Accordingly, I join the opinion of the Court.

MR. JUSTICE STEVENS, concurring.

For me the problem in these cases is whether to follow a line of authority which I firmly believe to have been incorrectly decided.

Jones v. *Alfred H. Mayer Co.*, 392 U. S. 409, and its progeny have unequivocally held that § 1 of the Civil Rights Act of 1866 prohibits private racial discrimination. There is no doubt in my mind that that construction of the statute would have amazed the legislators who voted for it. Both its language and the historical setting in which it was enacted convince me that Congress intended only to guarantee all citizens the same legal capacity to make and enforce contracts, to obtain, own, and convey property, and to litigate and give evidence. Moreover, since the legislative history discloses an intent not to outlaw segregated public schools at that time,[1] it is quite unrealistic to assume that Congress in-

[1] The sponsor of the bill in the House, Representative Wilson of Iowa, disclaimed any effect of the bill upon segregated schools. Cong. Globe, 39th Cong., 1st Sess., 1117, 1294 (1866). Opponents of the bill raised this point as an objection to a provision in the bill that "there shall be no discrimination in civil rights or immunities among

tended the broader result of prohibiting segregated private schools. Were we writing on a clean slate, I would therefore vote to reverse.

But *Jones* has been decided and is now an important part of the fabric of our law. Although I recognize the force of MR. JUSTICE WHITE'S argument that the construction of § 1982 does not control § 1981, it would be most incongruous to give those two sections a fundamentally different construction. The net result of the enactment in 1866, the re-enactment in 1870, and the codification in 1874 produced, I believe, a statute resting on the constitutional foundations provided by both the Thirteenth and Fourteenth Amendments. An attempt to give a fundamentally different meaning to two similar provisions by ascribing one to the Thirteenth and the other to the Fourteenth Amendment cannot succeed. I am persuaded, therefore, that we must either apply the rationale of *Jones* or overrule that decision.

There are two reasons which favor overruling. First, as I have already stated, my conviction that *Jones* was wrongly decided is firm. Second, it is extremely unlikely that reliance upon *Jones* has been so extensive that this Court is foreclosed from overruling it. Cf. *Flood* v. *Kuhn*, 407 U. S. 258, 273–274, 278–279, 283. There are, however, opposing arguments of greater force.

The first is the interest in stability and orderly development of the law. As Mr. Justice Cardozo remarked, with respect to the routine work of the judiciary: "The labor of judges would be increased almost to the breaking

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the citizens of the United States in any State or Territory of the United States on account of race, color, or previous condition of slavery . . . ." *Id.*, at 1122 (remarks of Rep. Rogers); *id.*, at 1268 (remarks of Rep. Kerr); *id.*, at 1271–1272 (remarks of Rep. Bingham); see *id.*, at 500 (remarks of Sen. Cowan). The provision was deleted in part for this reason. See *id.*, at 1366 (remarks of Rep. Wilson). In that form the bill was enacted into law.

point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." [2] Turning to the exceptional case, Mr. Justice Cardozo noted: "[W]hen a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. . . . If judges have woefully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors." [3] In this case, those admonitions favor adherence to, rather than departure from, precedent. For even if *Jones* did not accurately reflect the sentiments of the Reconstruction Congress, it surely accords with the prevailing sense of justice today.

The policy of the Nation as formulated by the Congress in recent years has moved constantly in the direction of eliminating racial segregation in all sectors of society.[4] This Court has given a sympathetic and liberal construction to such legislation.[5] For the Court now to overrule *Jones* would be a significant step backwards, with effects that would not have arisen from a correct decision in the first instance. Such a step would be so

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[2] B. Cardozo, The Nature of the Judicial Process 149 (1921).

[3] *Id.*, at 150–152.

[4] See, *e. g.*, the Civil Rights Act of 1964, 78 Stat. 241, as added and as amended, 28 U. S. C. § 1447 (d), 42 U. S. C. §§ 1971, 1975a–1975d, 2000a—2000h–6 (1970 ed. and Supp. IV); the Voting Rights Act of 1965, 79 Stat. 437, as added and as amended, 42 U. S. C. §§ 1973–1973bb–4; the Civil Rights Act of 1968, Titles VIII, IX, 82 Stat. 81, 89, as amended, 42 U. S. C. §§ 3601–3631 (1970 ed. and Supp. IV).

[5] See, *e. g.*, *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U. S. 205; *Griggs* v. *Duke Power Co.*, 401 U. S. 424; *Daniel* v. *Paul*, 395 U. S. 298; *Allen* v. *State Board of Elections*, 393 U. S. 544.

clearly contrary to my understanding of the mores of today that I think the Court is entirely correct in adhering to *Jones*.

With this explanation, I join the opinion of the Court.

MR. JUSTICE WHITE, with whom MR. JUSTICE REHNQUIST joins, dissenting.

We are urged here to extend the meaning and reach of 42 U. S. C. § 1981 so as to establish a general prohibition against a private individual's or institution's refusing to enter into a contract with another person because of that person's race. Section 1981 has been on the books since 1870 and to so hold for the first time [1] would be contrary to the language of the section, to its legislative history, and to the clear dictum of this Court in the *Civil Rights Cases*, 109 U. S. 3, 16–17 (1883), almost contemporaneously with the passage of the statute, that the section reaches only discriminations imposed by state law. The majority's belated discovery of a congressional purpose which escaped this Court only a decade after the statute was passed and which escaped all other federal courts for almost 100 years is singularly unpersuasive.[2] I therefore respectfully dissent.

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[1] The majority and two concurring Justices assert that this Court has already considered the issue in this litigation and resolved it in favor of a right of action for private racially motivated refusals to contract. They are wrong. As is set forth more fully below, the only time the issue has been previously addressed by this Court it was addressed in a case in which the Court had issued a limited grant of certiorari, not including the issue involved here; in which the issue involved here was irrelevant to the decision; and in which the parties had not briefed the issue and the Court had not canvassed the relevant legislative history.

[2] I do not question at this point the power of Congress or a state legislature to ban racial discrimination in private school admissions decisions. But as I see it Congress has not yet chosen to exercise that power.

I

Title 42 U. S. C. § 1981, captioned "Equal rights under the law," [3] provides in pertinent part:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ."

On its face the statute gives "[a]ll persons" (plainly including Negroes) the *"same right* . . . to make . . . contracts . . . as is enjoyed by white citizens." (Emphasis added.) The words "right . . . enjoyed by white citizens" clearly refer to rights existing apart from this

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[3] Title 42 U. S. C. § 1981 provides in full:

"§ 1981. *Equal rights under the law.*

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

The title to § 1981 was placed there originally by the Revisers who compiled the Revised Statutes of 1874. They did so under a statute defining their responsibilities in part, as follows: to "arrange the [statutes] under titles, chapters, and sections, or other suitable divisions and subdivisions with *head-notes briefly expressive of the matter contained in such divisions.*" 14 Stat. 75. (Emphasis added.) The headnote to what is now § 1981 was before Congress when it enacted the Revised Statutes into positive law. It may properly be considered as an aid to construction, if the statutory language is deemed unclear. *E. g., Patterson* v. *Bark Eudora,* 190 U. S. 169, 172 (1903); *FTC* v. *Mandel Bros.,* 359 U. S. 385, 389 (1959); *Knowlton* v. *Moore,* 178 U. S. 41, 65 (1900); *Maguire* v. *Commissioner,* 313 U. S. 1, 9 (1941).

statute. Whites had at the time when § 1981 was first enacted, and have (with a few exceptions mentioned below), no right to make a contract with an unwilling private person, no matter what that person's motivation for refusing to contract. Indeed it is and always has been central to the very concept of a "contract" that there be "assent by the parties who form the contract to the terms thereof," Restatement of Contracts § 19 (b) (1932); see also 1 S. Williston, Law of Contracts § 18 (3) (3d ed., 1957). The right to make contracts, enjoyed by white citizens, was therefore always a right to enter into binding agreements only with willing second parties. Since the statute only gives Negroes the "same rights" to contract as is enjoyed by whites, the language of the statute confers no right on Negroes to enter into a contract with an unwilling person no matter what that person's motivation for refusing to contract. What is conferred by 42 U. S. C. § 1981 is the *right*—which was enjoyed by whites—"to make contracts" with other willing parties and to "enforce" those contracts in court. Section 1981 would thus invalidate any state statute or court-made rule of law which would have the effect of disabling Negroes or any other class of persons from making contracts or enforcing contractual obligations or otherwise giving less weight to their obligations than is given to contractual obligations running to whites.[4] The statute by its terms does not require any private individual or institution to enter into a contract or perform any other act under any circumstances; and it consequently fails to supply a cause of action by respondent students against

[4] The statute also removes any state-law-created legal disabilities enacted by the Southern States—see E. McPherson, The Political History of the United States of America During the Period of Reconstruction 29, 33, 35 (1871)—preventing Negroes or any other class of persons from suing, being parties, and giving evidence; and provides that all persons shall have full and equal benefit of all laws.

petitioner schools based on the latter's racially motivated decision not to contract with them.[5]

II

The legislative history of 42 U. S. C. § 1981 confirms that the statute means what it says and no more, *i. e.*, that it outlaws any legal rule disabling any person from making or enforcing a contract, but does not prohibit private racially motivated refusals to contract. Title 42 U. S. C. § 1981 is § 1977 of the Revised Statutes of 1874, which itself was taken verbatim from § 16 of the Voting Rights Act of May 31, 1870, 16 Stat. 144.[6] The legisla-

[5] One of the major issues in this case plainly is whether the construction in *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968), placed on similar language contained in 42 U. S. C. § 1982 granting all citizens the "same rights to . . . purchase . . . real . . . property" as is enjoyed by white citizens prevents this Court from independently construing the language in 42 U. S. C. § 1981. As will be developed more fully below, *Jones* v. *Alfred H. Mayer Co.* does not so constrict this Court. First, the legislative history of § 1981 is very different from the legislative history of § 1982 so heavily relied on by the Court in *Jones* v. *Alfred H. Mayer Co.* Second, notwithstanding the dictum in *Jones* v. *Alfred H. Mayer Co.*, quoted by the majority, *ante*, at 170, even the majority does not contend that the grant of the other rights enumerated in § 1981, *i. e.*, the rights "to sue, be parties, give evidence," and "*enforce* contracts" accomplishes anything other than the removal of *legal* disabilities to sue, be a party, testify or enforce a contract. Indeed it is impossible to give such language any other meaning. Thus, even accepting the *Jones* v. *Alfred H. Mayer Co.* dictum as applicable to § 1981, the question still would remain whether the right to "make contracts" is to be construed in the same vein as the other "right[s]" included in § 1981 or rather in the same vein as the right to "purchase . . . real property" under § 1982 involved in *Jones* v. *Alfred H. Mayer Co.*, *supra*.

[6] Section 16 of the Voting Rights Act of 1870 provided:

"And be it further enacted, That *all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce con-*

tive process culminating in the enactment of § 16 of the Voting Rights Act of 1870 was initiated by the following resolution proposed by Senator Stewart of Nevada, a

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tracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally imposed and enforced upon every person immigrating to such State from any other foreign country; and any law of any State in conflict with this provision is hereby declared null and void." (Emphasis added.)

As may be seen, the italicized portion is § 1981.

The majority mistakenly asserts that § 1977 of the Revised Statutes of 1874—the present § 1981—is taken from § 1 of the Civil Rights Act of 1866, 14 Stat. 27, which was re-enacted as § *18* of the Voting Rights Act of 1870 and which provided:

"That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and *such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence,* to inherit, purchase, lease, sell, hold, and convey real and personal property, *and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other,* any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." (Emphasis added.)

While the italicized portion of § 1 of the Civil Rights Act of 1866 is *similar* to § 1981 it is not the same statute. First, the 1866 statute, passed under the Thirteenth Amendment and before adoption of the Fourteenth Amendment, applies to "*citizens,* of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted"; whereas § 1981, like § 16 of

member of the Judiciary Committee, and eventual floor manager of the Voting Rights Act, and unanimously agreed to by the Senate on December 6, 1869.

> "*Resolved,* That the Committee on the Judiciary be requested to inquire if any States are denying to any class of persons within their jurisdiction the *equal protection of the law,* in violation of treaty obligations with foreign nations and of *section one of the fourteenth amendment to the Constitution;* and if so, *what legislation is necessary to enforce* such treaty obligations and *such amendment,* and to report by bill or otherwise." Cong. Globe, 41st Cong., 2d Sess. 3 (1869). (Emphasis added.)

This resolution bore fruit in a bill (S. 365),[7] which

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the Voting Rights Act of 1870, applies to "all persons"—including noncitizens. Second, the 1866 statute does not provide express protection against "taxes, licenses and exactions of every kind." Section 1981, like § 16 of the Voting Rights Act of 1870, does. Third, the Revisers' notes to the 1874 Revision—which notes were before Congress when it enacted the Revised Statutes into positive law—clearly designate § 16 of the Voting Rights Act of 1870 as the source for § 1977—the current 42 U. S. C. § 1981.

I deal *infra* with the majority's equally untenable position that § 1981 is in fact derived *both* from § 16 of the Voting Rights Act *and* § 1 of the Civil Rights Act of 1866.

[7] S. 365 provided in pertinent part:

"*Be it enacted, &c.,* That all persons within the jurisdiction of the United States, Indians not taxed excepted, shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person emigrating thereto from a foreign country which is not equally imposed and enforced upon every person emigrating to such State from any other

was first referred to in the Congressional Globe on January 10, 1870. On that day Senator Stewart "asked and by unanimous consent obtained, leave to introduce a bill (S. 365) to secure to *all persons the equal protection of the laws.*" (Emphasis added.) Cong. Globe, 41st Cong., 2d Sess., 323. The bill was then referred to the Judiciary Committee. The next reference to the bill in the Congressional Globe is on February 2, 1870. It states: "Mr. TRUMBULL, from the Committee on the Judiciary, to whom was referred the bill (S. No. 365) to secure to *all persons the equal protection of the laws* reported it with an amendment." *Id.*, at 964. (Emphasis added.) The next reference to the bill is on February 24, 1870. It states:

> "MR. STEWART. I move that the Senate proceed to the consideration of bill (S. No. 365) to secure to *all persons equal protection of the laws.* I do not think it will take more than a moment to pass that bill.
>
> "MR. HAMILTON. I desire that that bill be read." *Id.*, at 1536. (Emphasis added.)

The bill is next mentioned in the following colloquy later on the same day:

> "MR. POMEROY. I have not examined this bill, and I desire to ask the Senator from Nevada a question. I understood him to say that this bill gave the same civil rights to all persons in the United States which are enjoyed by citizens of the United States. Is that it?
>
> "MR. STEWART. *No; it gives all the protection of the laws.* If the Senator will examine this bill in connection with the original civil rights bill,[8] he

foreign country, and any law of any State in conflict with this provision is hereby declared null and void."

[8] This would appear to be a reference to § 1 of the Civil Rights

will see that it has no reference to inheriting or holding real estate.

"MR. POMEROY. That is what I was coming to.

"MR. STEWART. The civil rights bill had several other things applying to citizens of the United States. This simply extends to foreigners, not citizens, the protection of our laws where the *State laws* deny them the equal civil rights enumerated in the first section." *Ibid.* (Emphasis added.)

Consideration of the bill was then postponed.

The next reference to the bill was on March 4, 1870. It states:

"MR. STEWART. I move that the Senate proceed to the consideration of Senate bill No. 365, to secure to *all persons the equal protection of the laws.*" *Id.*, at 1678. (Emphasis added.)

Consideration of the bill was again postponed.

Then on May 18, 1870, Senator Stewart introduced S. 810 dealing with voting rights but including a section virtually identical to that in S. 365. *Id.*, at 3562. On May 20, 1870, Senator Stewart explained the relevant provision of S. 810, as follows:

"Then the other provision which has been added is one of great importance. It is of more importance to the honor of this nation than all the rest of this bill. We are inviting to our shores, or allowing them to come, Asiatics. We have got a treaty allowing them to come. . . . While they are here I say it is our duty to protect them. I have incorporated that provision in this bill on the advice of the Judiciary Committee, to facilitate matters and so

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Act of 1866 which was construed in *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968).

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that we shall have the whole subject before us in one discussion. It is as solemn a duty as can be devolved upon this Congress to see that those people are protected, *to see that they have the equal protection of the laws, notwithstanding that they are aliens.* They, or any other aliens, who may come here are entitled to that protection. *If the State courts do not give them the equal protection of the law,* if public sentiment is so inhuman as to rob them of their ordinary civil rights, I say I would be less than man if I did not insist, and I do here insist that that provision shall go on this bill; and that the pledge of this nation shall be redeemed, that we will protect Chinese aliens or any other aliens whom we allow to come here, and give them a hearing in our courts; *let them sue and be sued; let them be protected by all the laws and the same laws that other men are. That is all there is in that provision.*

"Why is not this bill a good place in which to put that provision? Why should we not put in this bill a measure to enforce both the *fourteenth* and fifteenth *amendments* at once? . . . *The fourteenth amendment to the Constitution says that no State shall deny to any person the equal protection of the laws.* Your treaty says that they shall have the equal protection of the laws. Justice and humanity and common decency require it. I hope that provision will not be left off this bill, for there is no time to take it up as a separate measure, discuss it, and pass it at this session." *Id.,* at 3658. (Emphasis added.)

The only other reference which research uncovers to the relevant provision of S. 810 is on May 25, 1870, and consists of a speech by Senator Stewart emphasizing the need to protect Chinese aliens. *Id.,* at 3807–3808. The

voting rights bill was enacted into law on May 31, 1870, with the section providing for equal protection of the laws included as § 16.[9]

Three things emerge unmistakably from this legislative history. First, unlike § 1 of the Civil Rights Act

[9] Section 16, 16 Stat. 144, provided, as follows:

"*And be it further enacted,* That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally imposed and enforced upon every person immigrating to such State from any other foreign country; and any law of any State in conflict with this provision is hereby declared null and void."

The Voting Rights Act also contained the following sections dealing with civil rights:

"SEC. 17. *And be it further enacted,* That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by the last preceding section of this act, or to different punishment, pains, or penalties on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

"SEC. 18. *And be it further enacted,* That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said Act." (This section re-enacted § 1 of the Civil Rights Act of 1866. See n. 4, *supra.*)

of 1866, which was passed under Congress' Thirteenth Amendment powers to remove from former slaves "'badges and incidents of slavery,'" *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 439 (1968), § 16 of the Voting Rights Act of 1870 was passed under Congress' Fourteenth Amendment powers to prevent the States from denying to "any person . . . equal protection of the laws." U. S. Const., Amdt. 14, § 1. Second, consistent with the scope of that Amendment, see, *e. g., Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 349 (1974); *Civil Rights Cases*, 109 U. S. 3 (1883), § 16 was designed to require "all persons" to be treated "the same" or "equally" under the *law* and was not designed to require equal treatment at the hands of private individuals. Third, one of the classes of persons for whose benefit the statute was intended was aliens—plainly not a class with respect to which Congress sought to remove badges and incidents of slavery—and not a class protected in any fashion by § 1 of the Civil Rights Act of 1866, since that Act applied only to "citizens."

This Court has so construed § 1977 of the Revised Statutes of 1874 on several occasions. The Court said in the *Civil Rights Cases, supra*, at 16–17:

> "That law, as re-enacted, after declaring that *all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and none other,* any law, statute, ordinance, regulation or custom to the contrary notwithstand-

ing,[10] proceeds to enact, that any person who, under color of any law, statute, ordinance, regulation or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any rights secured or protected by the preceding section (above quoted), or to different punishment, pains, or penalties, on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens, shall be deemed guilty of a misdemeanor, and subject to fine and imprisonment as specified in the act. *This law is clearly corrective in its character, intended to counteract and furnish redress against State laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified.* . . . The Civil Rights Bill here referred to is analogous in its character to what a law would have been under the original Constitution, declaring that *the validity of contracts should not be impaired, and that if any person bound by a contract should refuse to comply with it, under color or pretense that it had been rendered void or invalid by a State law,* he should be liable to an action upon it in the courts of the United States, with the addition of a penalty for setting up such an unjust and unconstitutional defence." (Emphasis added.)

Similarly in *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369 (1886), the Court said:

> "*The Fourteenth Amendment to the Constitution is not confined to the protection of citizens.* It says: 'Nor shall any State deprive *any person* of life, liberty, or property without due process of law; nor

[10] As can be seen the Court is quoting what is now 42 U. S. C. § 1981.

> deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. *It is accordingly enacted by § 1977 of the Revised Statutes, that 'all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens* and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.'" (Emphasis added.)

See also *Gibson* v. *Mississippi*, 162 U. S. 565, 580 (1896); *McLaughlin* v. *Florida*, 379 U. S. 184, 192 (1964), each of which stands for the proposition that § 1981 was enacted pursuant to Congress' power under the Fourteenth Amendment to provide for equal protection of the laws to all persons.

Indeed, it would be remarkable if Congress had intended § 1981 to require private individuals to contract with all persons the same as they contract with white citizens. To so construe § 1981 would require that private citizens treat aliens the same as they treat white citizens. However, the Federal Government has for some time discriminated against aliens in its employment policies. As we said in *Espinoza* v. *Farah Mfg. Co.*, 414 U. S. 86, 91 (1973): "Suffice it to say that we cannot conclude Congress would at once continue the practice of requiring citizenship as a condition of Federal employ-

ment, and, at the same time, prevent private employers from doing likewise."

Thus the legislative history of § 1981 unequivocally confirms that Congress' purpose in enacting that statute was solely to grant to all persons equal capacity to contract as is enjoyed by whites and included no purpose to prevent private refusals to contract, however motivated.

III

The majority seeks to avoid the construction of 42 U. S. C. § 1981 arrived at above by arguing that it (*i. e.*, § 1977 of the Revised Statutes of 1874) is a re-enactment *both* of § 16 of the Voting Rights Act of 1870—the Fourteenth Amendment statute—*and* of part of §1 of the Civil Rights Act of 1866—the Thirteenth Amendment statute.[11] The majority argues from this that § 1981 does limit *private* contractual choices because Congress may, under its Thirteenth Amendment powers, proscribe certain kinds of private conduct thought to perpetuate " 'badges and incidents of slavery,' " *Jones* v. *Alfred H. Mayer Co.*, 392 U. S., at 439; and because this Court has already construed the language "[a]ll citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to . . . *purchase* . . . *real* . . . *property*" (emphasis added), contained in the Thirteenth Amendment statute, to proscribe a refusal by a *private* individual to sell real estate to a Negro because of his race. *Id.*, at 420–437. The majority's position is untenable.

First of all, as noted above, § 1977 of the Revised Statutes was passed by Congress with the Revisers' unambiguous note before it that the section derived solely

[11] Hereinafter, I will refer to § 1 of the Civil Rights Act of 1866 as "the Thirteenth Amendment statute" and to § 16 of the Voting Rights Act of 1870 as "the Fourteenth Amendment statute."

from the Fourteenth Amendment statute, accompanied by the confirmatory sidenote "Equal rights under the law." Second and more importantly, the majority's argument is logically impossible, because it has the effect of construing the language *"the same rights to make . . . contracts . . . as is enjoyed by white citizens,"* contained in § 1977 of the Revised Statutes, to mean one thing with respect to one class of "persons" and another thing with respect to another class of "persons." If § 1981 is held to be a re-enactment of the Thirteenth Amendment statute aimed at private discrimination against "citizens" *and* the Fourteenth Amendment statute aimed at state-law-created legal disabilities for "all persons," including aliens, then one class of "persons"—Negro citizens—would, under the majority's theory, have a right not to be discriminated against by private individuals and another class—aliens—would be given *by the same language* no such right. The statute draws no such distinction among classes of persons. It logically must be construed either to give "all persons" a right not to be discriminated against by private parties in the making of contracts or to give no persons such a right. Aliens clearly never had such a right under the Fourteenth Amendment statute (or any other statute); § 1977 is concededly derived solely from the Fourteenth Amendment statute so far as coverage of aliens is concerned; and there is absolutely no indication that aliens' rights were expanded by the re-enactment of the Fourteenth Amendment statute in § 1977 of the Revised Statutes of 1874. Accordingly, the statute gives *no* class of persons the right not to be discriminated against by private parties in the making of contracts.

That part of the Thirteenth Amendment statute which gives "[a]ll citizens . . . the same rights to make . . . contracts . . . as is enjoyed by white citizens" was accordingly, not re-enacted as part of § 1977, and, since another

portion of the Thirteenth Amendment statute *was* reenacted as § 1978 of the Revised Statutes,[12] the "right to contract" part of the Thirteenth Amendment statute was repealed in 1874, by § 5596 of the Revised Statutes which provides in part as follows:

> "All acts of Congress passed prior to said first day of December one thousand eight hundred and seventy-three, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof."

The majority's final argument is that to construe the enactment of the Revised Statutes of 1874 to have repealed that part of the Thirteenth Amendment statute which gave "citizens . . . the same rights to make . . . contracts . . . as is enjoyed by white citizens" is to conclude that a substantive change in the law was wrought by the revision; and that this is contrary to normal canons of construction and contrary to the instructions given to the Revisers in the statute creating their jobs and defining their duties.

First of all, the argument is beside the point. Congress, not the Revisers, repealed part of the Thirteenth Amendment statute by enacting § 5596 quoted above. The repeal is clear and unambiguous, and the reasons for the repeal, if any, are beyond our powers to question.

As we said of the 1874 revision in *United States* v. *Bowen,* 100 U. S. 508, 513 (1880):

"The Revised Statutes must be treated as the legis-

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[12] Section 1978 of the Revised Statutes is 42 U. S. C. § 1982 and it provides as follows:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

> lative declaration of the statute law on the subjects which they embrace on the first day of December, 1873. When the meaning is plain, the courts cannot look to the statutes which have been revised to see if Congress erred in that revision . . . ."

In *Bate Refrigerating Co.* v. *Sulzberger,* 157 U. S. 1, 41 (1895), we said:

> "Now, it is true that, according to the report in the Congressional Globe of the proceedings in the House of Representatives . . . the report of the revisers had been examined by the House Committee on Revision of the Laws of the United States, and 'found to embody all the provisions of existing law, in brief, clear and precise language. . . .'
>
> "These considerations, it is supposed, should have controlling weight in our interpretation of the act as it finally passed. We cannot assent to this view. . . . [W]hatever may have been the scope of the act of 1866 [providing for compilation of a revised code] the purpose, in the act [in question] to go beyond revision and to amend the existing statutes, is manifest from the title of that act, and from the bill that came from the House Committee on Patents. . . ."

Similarly, here, we are bound by what Congress actually did regardless of its reasons, if any.

Second, the majority's argument may well rest on a false assumption that the repeal of part of the Thirteenth Amendment statute changed the law.[13] The re-

[13] I dissented in *Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409 (1968), on the ground that Congress did not ever intend any of the rights granted in the Thirteenth Amendment statute—including the right to buy real property—to accomplish more than the removal of legal disabilities. Under that view the conduct of the Revisers and of Congress in 1874 makes perfect sense—there

pealed portion [14] of the Thirteenth Amendment statute may well never have had any effect other than that of removing certain legal disabilities. First, as noted above, some of the rights granted under the Thirteenth Amendment statute—the rights to sue, be parties, give evidence, enforce contracts—could not possibly accomplish anything other than the removal of *legal* disabilities. Thus, the question is whether the right to "make contracts" in the repealed part of the Thirteenth Amendment statute would have been construed in the same vein as these other rights (later included in the Fourteenth Amendment statute) or rather in the same vein as the right to "purchase, etc., real and personal property." The fact that one of the leaders of the efforts to pass the Thirteenth Amendment statute—Senator Stewart—included the right to "make contracts" but not the right to "purchase, etc., real and personal prop-

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were two statutes accomplishing the same thing, one with respect to "all persons," and the other with respect to the included category of "citizens." Under this view which I still believe was shared by Congress and the Revisers, the statute applicable to the included category "citizens" was redundant and was quite sensibly repealed. I am bound by the holding in *Jones* v. *Alfred H. Mayer Co., supra,* that—with respect to the right to "purchase . . . real . . . property"—the Thirteenth Amendment statute accomplishes more than the removal of legal disabilities. However, for the reasons set forth below, it does not follow that the right to "make . . . contracts" in the Thirteenth Amendment statute ever granted anything more than the right to be free from legal disabilities to contract. Accordingly, the Revisers and Congress may well, by repealing part of the Thirteenth Amendment statute, have simply eliminated redundant legislation.

[14] The repealed portion is set forth below:

"[C]itizens . . . shall have the same right, in every State and Territory in the United States, *to make and enforce contracts, to sue, be parties, and give evidence . . . and to full and equal benefit of all laws and proceedings* for the security of person and property, as is enjoyed by white citizens . . . ." (Emphasis added.)

erty" in the Fourteenth Amendment statute providing for equal rights under the laws which he sponsored four years later is strong evidence of the fact that Congress always viewed the right to "make contracts" as simply granting equal legal capacity to contract. Plainly that is the only effect of such language in the Fourteenth Amendment statute. It is reasonable to suppose Congress intended the identical language to accomplish the same result when included in a different statute four years earlier. Indeed Senator Stewart specifically drew a distinction between the rights enumerated in the Fourteenth Amendment statute including the right to "make contracts" and the real and personal property rights not so included. In connection with the Fourteenth Amendment statute, he was asked:

> "MR. POMEROY. I have not examined this bill, and I desire to ask the Senator from Nevada a question. I understood him to say that this bill gave the same civil rights to all persons in the United States which are enjoyed by citizens of the United States. Is that it?"

He replied:

> "MR. STEWART. *No; it gives all the protection of the laws.* If the Senator will examine this bill in connection with the original civil rights bill, he will see that it has no reference to inheriting or holding real estate."

Similarly, President Johnson in vetoing the Thirteenth Amendment statute differentiated between real property rights and contract rights granted by that statute. He said: "If Congress can declare by law who shall hold lands, who shall testify, who shall have *capacity* to make a contract in a State, then Congress can by law also declare who, without regard to color or race, shall have

the right to sit as juror or as a judge, to hold any office, and, finally, to vote, 'in every State and Territory of the United States.' " Cong. Globe, 39th Cong., 1st Sess., 1680 (1866). (Emphasis added.) Moreover, the legislative history of the Thirteenth Amendment statute is laced with statements that it does not require Negroes and whites to be sent to the same schools—statements which are inconsistent with a provision banning all racially motivated contractual decisions.[15]

Finally, as a matter of common sense, it would seem extremely unlikely that Congress would have intended—without a word in the legislative history addressed to the precise issue—to pass a statute prohibiting every racially motivated refusal to contract by a private individual. It is doubtful that all such refusals could be considered badges or incidents of slavery within Congress' proscriptive power under the Thirteenth Amendment. A racially motivated refusal to hire a Negro or a white babysitter or to admit a Negro or a white to a private association cannot be called a badge of slavery—and yet the construction given by the majority to the Thirteenth Amendment statute attributes to Congress an intent to proscribe them.

The Court holds in *McDonald* v. *Santa Fe Trail Transp. Co.*, *post*, p. 273, that § 1981 gives to whites the same cause of action it gives to blacks. Thus under the majority's construction of § 1981 in this case a former slaveowner was given a cause of action against his former slave if the former slave refused to work for him on the ground that he was a white man. It is inconceivable that Congress ever intended such a result.

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[15] See remarks of Senator Cowan, Cong. Globe, 39th Cong., 1st Sess., 500 (1866); remarks of Representative Wilson, *id.*, at 1117; remarks of Representative Rogers, *id.*, at 1120–1123.

IV

The majority's holding that 42 U. S. C. § 1981 prohibits all racially motivated contractual decisions—particularly coupled with the Court's decision in *McDonald, supra,* that whites have a cause of action against others including blacks for racially motivated refusals to contract—threatens to embark the Judiciary on a treacherous course. Whether such conduct should be condoned or not, whites and blacks will undoubtedly choose to form a variety of associational relationships pursuant to contracts which exclude members of the other race. Social clubs, black and white, and associations designed to further the interests of blacks or whites are but two examples. Lawsuits by members of the other race attempting to gain admittance to such an association are not pleasant to contemplate. As the associational or contractual relationships become more private, the pressures to hold § 1981 inapplicable to them will increase. Imaginative judicial construction of the word "contract" is foreseeable; Thirteenth Amendment limitations on Congress' power to ban "badges and incidents of slavery" may be discovered; the doctrine of the right to association may be bent to cover a given situation. In any event, courts will be called upon to balance sensitive policy considerations against each other—considerations which have never been addressed by any Congress—all under the guise of "construing" a statute. This is a task appropriate for the Legislature, not for the Judiciary.

Such balancing of considerations as has been done by Congress in the area of racially motivated decisions not to contract with a member of the other race has led it to ban private racial discrimination in most of the job market and most of the housing market and to go no further. The Judiciary should not undertake the political task of trying to decide what other areas are appropriate ones for a similar rule.

V

There remains only the question whether any prior pronouncements of this Court preclude me from construing 42 U. S. C. § 1981 in the manner indicated above. What has already been said demonstrates that this Court's construction of § 1982 in *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968), does not require me to construe § 1981 in a similar manner. The former is a Thirteenth Amendment statute under which the Congress may and did seek to reach private conduct, at least with respect to sales of real estate. The latter is a Fourteenth Amendment statute under which the Congress may and did reach only state action.

However, the majority points to language in *Johnson* v. *Railway Express Agency,* 421 U. S. 454 (1975), stating with no discussion whatever that § 1981 supplies a cause of action for a private racially motivated refusal to contract. In *Johnson,* the respondent had been sued for firing the petitioner on account of his race. The Court of Appeals held the petitioner's action under § 1981 to have been barred by the applicable statute of limitations. We granted petitioner's petition for a writ of certiorari limited to the question

> " '[w]hether the timely filing of a charge of employment discrimination with the Equal Employment Opportunity Commission pursuant to Section 706 of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e–5, tolls the running of the period of limitation applicable to an action based on the same facts brought under the Civil Rights Act of 1866, 42 U. S. C. § 1981?' " 417 U. S. 929 (1974).

Respondent could have argued in support of the judgment of the Court of Appeals that § 1981 supplied no cause of action quite apart from the statute of limitations, see *United States* v. *American Railway Express*

Co., 265 U. S. 425, 435–436 (1924), but it did not do so. It argued only that the action was barred by the statute of limitations. The Court ruled for respondent, in any event, holding the action barred by the statute of limitations. Thus the statement in *Johnson* v. *Railway Express Agency* that § 1981 supplies a cause of action for a private racially motivated refusal to contract was dictum, made without benefit of briefs by the parties and without reference to the legislative history of § 1981 set forth above—as is demonstrated by the erroneous reference to the Thirteenth Amendment statute in the question on which certiorari was granted. The Court simply cited several Courts of Appeals' decisions each of which had erroneously assumed the legislative history of § 1981 to be identical to that of § 1982 and thus assumed the construction of § 1981 to be governed by this Court's decision in *Jones* v. *Alfred H. Mayer Co., supra.*[16] Moreover, the dictum in *Johnson* v. *Railway Express Agency* is squarely contrary to the dictum in the *Civil Rights Cases,* 109 U. S. 3 (1883). The issue presented in this litigation is too important for this Court to let the more recent of two contradictory dicta stand in the way of an objective analysis of legislative history and a correct construction of a statute passed by Congress. Cf. *Jones* v. *Alfred H. Mayer Co., supra,* at 420 n. 25.

Accordingly, I would reverse.

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[16] *Tillman* v. *Wheaton-Haven Recreation Assn.*, 410 U. S. 431, 439–440 (1973), cited by the majority, contains no language, either dictum or holding, relevant to the issue in this case. The Court carefully held in that case solely that the respondent swimming club was not a private club under Title II of the Civil Rights Act of 1964, 42 U. S. C. § 2000a (e), and was not exempt as a private club from any cause of action based either on § 1981 or § 1982. No attempt is made in the opinion to state whether any cause of action existed under § 1981.

Syllabus

MEACHUM, CORRECTIONAL SUPERINTENDENT, ET AL. *v.* FANO ET AL.

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

No. 75–252. Argued April 21, 1976—Decided June 25, 1976

The Due Process Clause of the Fourteenth Amendment *held* not to entitle a duly convicted state prisoner to a factfinding hearing when he is transferred to a prison the conditions of which are substantially less favorable to him, absent a state law or practice conditioning such transfers on proof of serious misconduct or the occurrence of other specified events. Such a transfer does not infringe or implicate a "liberty" interest of the prisoner within the meaning of the Due Process Clause. Pp. 223–229.

(a) Given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution. P. 224.

(b) The Due Process Clause does not in and of itself protect a duly convicted prisoner against transfer from one institution to another, and that life in one prison is much more disagreeable than in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated when a prisoner is transferred to the institution with the more severe rules. P. 225.

(c) To hold that *any* substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts. *Wolff* v. *McDonnell,* 418 U. S. 539, distinguished. Pp. 225–227.

(d) Whatever expectation the prisoner may have in remaining at a particular prison so long as he behaves himself, it is too ephemeral and insubstantial to trigger procedural due process protections as long as prison officials have discretion to transfer him for any reason whatsoever or for no reason at all. P. 228.

520 F. 2d 374, reversed.

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WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 229.

Michael C. Donahue, Assistant Attorney General of Massachusetts, argued the cause for petitioners. With him on the brief were *Francis X. Bellotti,* Attorney General, and *John J. Irwin, Jr.,* and *David A. Mills,* Assistant Attorneys General.

Richard Shapiro argued the cause and filed a brief for respondents.

Deputy Solicitor General Jones argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Bork, Assistant Attorney General Thornburgh,* and *Jerome M. Feit.*

MR. JUSTICE WHITE delivered the opinion of the Court.

The question here is whether the Due Process Clause of the Fourteenth Amendment entitles a state prisoner to a hearing when he is transferred to a prison the conditions of which are substantially less favorable to the prisoner, absent a state law or practice conditioning such transfers on proof of serious misconduct or the occurrence of other events. We hold that it does not.

I

During a 2½-month period in 1974, there were nine serious fires at the Massachusetts Correctional Institution at Norfolk—a medium-security institution. Based primarily on reports from informants, the six respondent inmates were removed from the general prison population and placed in the Receiving Building, an administrative detention area used to process new inmates. Proceedings were then had before the Norfolk prison

Classification Board with respect to whether respondents were to be transferred to another institution—possibly a maximum-security institution, the living conditions at which are substantially less favorable than those at Norfolk. Each respondent was notified of the classification hearing and was informed that the authorities had information indicating that he had engaged in criminal conduct.[1]

Individual classification hearings were held, each respondent being represented by counsel. Each hearing began by the reading of a prepared statement by the Classification Board. The Board then heard, *in camera* and out of the respondents' presence, the testimony of petitioner Meachum, the Norfolk prison superintendent,

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[1] Respondents Fano, DeBrosky, and Dussault received the following notice:

"The department has received information through a reliable source that you were in possession of instruments that might be used as weapons and/or ammunition and that you had joined in plans to use these contraband items.

"These items and plans occurred during the period of serious unrest at MCI, Norfolk which included many fires that posed a significant threat to lives of persons at MCI, Norfolk as well as serious property damage."

Respondents Hathaway and McPhearson received the following notice:

"The department has received information through reliable sources that you were significantly involved in the planning and execution of one or more of the serious fires occurring within MCI, Norfolk in the past few weeks. These fires caused considerable property damage and posed a very real threat to personal safety."

Respondent Royce received the following notice:

"The department has received information through a reliable source that you were involved in the trafficking of contraband in MCI, Norfolk (narcotics, barbiturates and/or amphetamines).

"This occurred during a period of serious unrest at MCI, Norfolk which included many fires, that posed a significant threat to the lives of persons at MCI, Norfolk as well as serious property damage."

who repeated the information that had been received from informants. Each respondent was then told that the evidence supported the allegations contained in the notice but was not then—or ever—given transcripts or summaries of Meachum's testimony before the Board. Each respondent was allowed to present evidence in his own behalf; and each denied involvement in the particular infraction being investigated. Some respondents submitted supportive testimony or written statements from correction officers. A social worker also testified in the presence of each respondent, furnishing the respondent's criminal and custodial record, including prior rule infractions, if any, and other aspects of his performance and "general adjustment" at Norfolk.

The Board recommended that Royce be placed in administrative segregation for 30 days; that Fano, Dussault, and McPhearson be transferred to Walpole, a maximum-security institution where the living conditions are substantially less favorable to the prisoners than those at Norfolk, and that DeBrosky and Hathaway be transferred to Bridgewater which has both maximum- and medium-security facilities. The reasons for its actions were stated in the Board's reports,[2] which, however,

[2] With respect to Dussault, the Board recorded:

"*Reasons for decision:*

"1. The 'reliable sources' were deemed acceptable as reliable because they had produced truthful and verifiable information prior to incidents, which were then avoided and serious harm prevented.

"2. Mr. Dussault has not made significant use of program facilities at MCI Norfolk. He has, in effect only been doing time.

"*To Mr. Dussault & Attorney:*

"There is sufficient & significant information that has been made available to the committee that indicates to us that you have placed yourself in a situation at MCI Norfolk so that adequate programming cannot be provided at this time."

[*Footnote 2 is continued on p. 219*]

were not then available to respondents. Although respondents were aware of the general import of the informants' allegations and were told that the recommen-

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The Board's statement of reasons for its decision with respect to Fano was:

"1. The inclosed summary of informant information was considered. The sources are considered quite reliable in this case and tend to corroborate each other. In addition, the number of times the subject was named in conjunction with the unrest at Norfolk adds weight in the judgment of this board to the reliability of this information.

"2. The seriousness of his involvements were considered extreme. The danger posed by weapons and materials used for violence weighs very heavily against remaining in this population. In addition, the type of involvement of this man as an organizer, leader and [e]nforcer was considered detrimental to the institution, and prohibitive to rehabilitative programming at MCI Norfolk at this time."

Similarly, with respect to McPhearson:

"*Basis for Recommendation:*

"1. Informant Information was judged sufficient in detail and reliability to be weighed seriously in the board[']s decision making. The information regarding the subject's attitude and motivation seemed adequately supported by the man's record and his attitude before the board. (He stated he had never received fair treatment at classification.) The reliability of the information was judged as quite reliable in that it came from three sources. When asked, Mr. Meachum provided details of the course of events on the night of Oct. 13th which substantiated in general terms the informant information presented (see attached letter).

"2. The sources themselves were considered reliable, especially in cases of sources C and D. (See attached statement concerning reliability of sources.)"

With respect to Hathaway, the Board stated:

"*Basis for Decision:*

"1. When Mr. Hathaway was questioned during interview re: the charges expressed on notice of Classification hearing 'serious fires occurring with MCI Norfolk . . . ,' he immediately went into long discussion of two specific fires denying his [guilt]—Although he was not privy to informant information, and could not have known

dations drew upon informant sources, the details of this information were not revealed to respondents and are not included in the Board's reports which are part of the record before us.

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specifics that these were the two mentioned in the charges. The more he talked, the more he appeared involved.

"2. The 'reliable sources' were deemed acceptable as reliable because they had produced truthful information prior to incidents that were then avoided and serious harm prevented.

"3. Mr. Hathaway, other than avocation has not made sufficiently of available programs at MCI Norfolk that might benefit him.

"*Decision as Presented to Mr. Hathaway:*

"This committee feels that you should be removed from this environment and associates and the current situation at MCI Norfolk. Because of this, the recommendation will be to MCI Bridgewater. There are programs, such as AA which will be available to you. There is also a new avocational center in which you can become active. It is a Medium Security institution, and this committee has tried to listen when you've said 'Trust me'—Give me a chance. . . .'

"Mr. Stolzberger requested that his client be allowed to return to population to empty room and sell Avo equipment. Denied.

"A counter suggestion was made that he work with Mr. Jackson, social worker to accomplish these ends. Mr. Hathaway accepted."

The explanation as to Royce was:

"*Basis for Recommendation:*

"1. Informant information was presented by Mr. Larry Meachum, Supt of MCI Norfolk, prior to the hearing. Although several sources contributed to the presenting information, the committee felt that the sources had not been proved reliable enough to become a decisive factor, indicating transfer. Both Mr. Meachum's report & Source reliability report to follow elsewhere in this report.

"2. Although Mr. Royce had an additional disciplinary report (see D reports 2–3). It was felt by the committee to be of serious emotional instability rather than resorting to earlier behavior of absolute violence.

"3. Mr. Royce appears to be making an effort to get himself together with help. His good relationship with Mrs. Lowenstein and Mr. Jackson has been supportive of these efforts. His indi-

The Board's recommendations were reviewed by the Acting Deputy Commissioner for Classification and Treatment and by the Commissioner of Corrections on the basis of the written report prepared by the Board. They accepted the recommendations of the Board with respect to Fano, Dussault, Hathaway, and McPhearson. DeBrosky and Royce were ordered transferred to Walpole.[3] The transfers were carried out, with two exceptions.[4] No respondent was subjected to disciplinary

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cated interest in poetry, avocation, and school would also reaffirm his intent for self improvement."

As to DeBrosky, the record shows only:

"Basis for Recommendation:

"Summary of Informant Information and Conclusions:

"Informant Information Excised."

[3] The Commissioner's action was reported to DeBrosky's attorney as follows:

"As you are aware, the recommendation of the Board was for placement at MCI-Bridgewater. However, after a thorough review of the facts, with considerable concern being given to the intelligence information that connected Mr. DeBrosky with involvement with a weapon, the Commissioner has decided to place Mr. DeBrosky at MCI-Walpole. The intelligence information referred to above was judged to be reliable. Your request that the subject be placed back into the population at MCI-Norfolk is being denied."

The Commissioner also explained his action with respect to Royce:

"Upon careful examination of all related materials and information, I have reached the following decision:

"Placement: MCI, Walpole.

"Reasons: I disagree with the recommendation of the Board and I am assigning you to MCI, Walpole because I feel that you have demonstrated that you are unwilling and/or unable to accept the responsibility that is commensurate with assignment to MCI, Norfolk, a medium security facility. Your actions of Nov. 1, 1974 whereby you destroyed state property and displayed disrespect to a Correctional Officer have played a part in this decision."

[4] At the time of the District Court hearing, DeBrosky was hospitalized at Norfolk, and Hathaway had not yet been transferred.

punishment upon arrival at the transfer prison. None of the transfers ordered entailed loss of good time or disciplinary confinement.[5]

Meanwhile respondents had brought this action under 42 U. S. C. § 1983 against petitioners Meachum, the prison superintendent; Hall, the State Commissioner of Corrections; and Dawber, the Acting Deputy for Classification and Treatment, alleging that respondents were being deprived of liberty without due process of law in that petitioners had ordered them transferred to a less favorable institution without an adequate factfinding hearing. They sought an injunction setting aside the ordered transfer, declaratory relief, and damages.

The District Court understood *Wolff* v. *McDonnell*, 418 U. S. 539 (1974), to entitle respondents to notice and hearing and held both constitutionally inadequate in this case. Respondents were ordered returned to the general prison population at Norfolk until transferred after proper notice and hearing. Petitioners were also ordered to promulgate regulations to establish procedures governing future transfer hearings involving informant testimony. A divided panel of the Court of Appeals affirmed, 520 F. 2d 374, holding that the transfers from Norfolk to maximum-security institutions involved "a significant modification of the overall conditions of confinement" and that this change in circumstances was "serious enough to trigger the application of due process protections." *Id.*, at 377–378.[6]

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[5] In addition to notice of the classification hearing, each respondent had been furnished with a copy of a disciplinary report specifying the instances of alleged misconduct. Under the applicable regulation, however, disciplinary proceedings were not held because the alleged misconduct had been referred to the local district attorney for investigation and action.

[6] The Court of Appeals did not distinguish between disciplinary and administrative transfers:

"We attach no significance for present purposes to the fact that

We granted the prison officials' petition for writ of certiorari, 423 U. S. 1013 (1975), in order to determine whether the Constitution required petitioners to conduct a factfinding hearing in connection with the transfers in this case where state law does not condition the authority to transfer on the occurrence of specific acts of misconduct or other events and, if so, whether the hearings granted in this case were adequate. In light of our resolution of the first issue, we do not reach the second.

II

The Fourteenth Amendment prohibits any State from depriving a person of life, liberty, or property without due process of law. The initial inquiry is whether the transfer of respondents from Norfolk to Walpole and Bridgewater infringed or implicated a "liberty" interest

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these proceedings were for 'classification' rather than 'discipline.' Defendants assert that 'there are in the instant case as many administrative overtones as disciplinary ones,' but we have already indicated that in our view the motive of prison officials, as such, is not properly a part of the due process calculus. *Gomes* v. *Travisono,* 510 F. 2d 537, 541 (1st Cir. 1974). Whether the transfer is thought of as punishment or as a way of preserving institutional order, the effects on the inmate are the same and the appropriateness of the action depends upon the accuracy of the official allegation of misconduct." 520 F. 2d, at 376 n. 2.

See also *Gomes* v. *Travisono,* 510 F. 2d 537 (CA1 1974), modifying and affirming 490 F. 2d 1209 (1973).

Other Courts of Appeals, including the Court of Appeals for the Second Circuit, see *Montanye* v. *Haymes, post,* p. 236, have held that minimum procedures must accompany only disciplinary transfers. *Aikens* v. *Lash,* 514 F. 2d 55 (CA7 1975); *Carroll* v. *Sielaff,* 514 F. 2d 415 (CA7 1975); *Ault* v. *Holmes,* 506 F. 2d 288 (CA6 1974); *Stone* v. *Egeler,* 506 F. 2d 287 (CA6 1974). See also *Bryant* v. *Hardy,* 488 F. 2d 72 (CA4 1973). Still others have indicated that transfers of inmates do not call for due process hearings. *Gray* v. *Creamer,* 465 F. 2d 179, 187 (CA3 1972); *Hillen* v. *Director,* 455 F. 2d 510 (CA9 1972); cf. *Fajeriak* v. *McGinnis,* 493 F. 2d 468 (CA9 1974).

of respondents within the meaning of the Due Process Clause. Contrary to the Court of Appeals, we hold that it did not. We reject at the outset the notion that *any* grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause. In *Board of Regents* v. *Roth,* 408 U. S. 564 (1972), a university professor was deprived of his job, a loss which was surely a matter of great substance, but because the professor had no property interest in his position, due process procedures were not required in connection with his dismissal. We there held that the determining factor is the nature of the interest involved rather than its weight. *Id.,* at 570–571.

Similarly, we cannot agree that *any* change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protections of the Due Process Clause. The Due Process Clause by its own force forbids the State from convicting any person of crime and depriving him of his liberty without complying fully with the requirements of the Clause. But given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution. The Constitution does not require that the State have more than one prison for convicted felons; nor does it guarantee that the convicted prisoner will be placed in any particular prison if, as is likely, the State has more than one correctional institution. The initial decision to assign the convict to a particular institution is not subject to audit under the Due Process Clause, although the degree of confinement in one prison may be quite different from that in another. The conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in *any* of its prisons.

Neither, in our view, does the Due Process Clause in and of itself protect a duly convicted prisoner against transfer from one institution to another within the state prison system. Confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose. That life in one prison is much more disagreeable than in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated when a prisoner is transferred to the institution with the more severe rules.

Our cases hold that the convicted felon does not forfeit all constitutional protections by reason of his conviction and confinement in prison. He retains a variety of important rights that the courts must be alert to protect. See *Wolff* v. *McDonnell,* 418 U. S., at 556, and cases there cited. But none of these cases reaches this one; and to hold as we are urged to do that *any* substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts.

Transfers between institutions, for example, are made for a variety of reasons and often involve no more than informed predictions as to what would best serve institutional security or the safety and welfare of the inmate. Yet under the approach urged here, any transfer, for whatever reason, would require a hearing as long as it could be said that the transfer would place the prisoner in substantially more burdensome conditions that he had been experiencing. We are unwilling to go so far.

Wolff v. *McDonnell,* on which the Court of Appeals heavily relied, is not to the contrary. Under that case, the Due Process Clause entitles a state prisoner to cer-

tain procedural protections when he is deprived of good-time credits because of serious misconduct. But the liberty interest there identified did not originate in the Constitution, which "itself does not guarantee good-time credit for satisfactory behavior while in prison." *Id.*, at 557. The State itself, not the Constitution, had "not only provided a statutory right to good time but also specifies that it is to be forfeited only for serious misbehavior." *Ibid.* We concluded:

> "[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." *Id.,* at 558.

The liberty interest protected in *Wolff* had its roots in state law, and the minimum procedures appropriate under the circumstances were held required by the Due Process Clause "to insure that the state-created right is not arbitrarily abrogated." *Id.,* at 557. This is consistent with our approach in other due process cases such as *Goss* v. *Lopez,* 419 U. S. 565 (1975); *Board of Regents* v. *Roth, supra; Perry* v. *Sindermann,* 408 U. S. 593 (1972); *Goldberg* v. *Kelly,* 397 U. S. 254 (1970).

Here, Massachusetts law conferred no right on the prisoner to remain in the prison to which he was initially assigned, defeasible only upon proof of specific acts of misconduct. Insofar as we are advised, transfers between Massachusetts prisons are not conditioned upon

the occurrence of specified events.[7] On the contrary, transfer in a wide variety of circumstances is vested in prison officials. The predicate for invoking the protection of the Fourteenth Amendment as construed and applied in *Wolff* v. *McDonnell* is totally nonexistent in this case.

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[7] At the time the transfers in this case occurred, Massachusetts General Laws Annotated, c. 127, §§ 20 and 97 (1974) provided as follows:

"§ 20. Classification of prisoners; approval

"There shall be established by the commissioner, with the approval of the governor and council, a reception center for all male prisoners, except those sentenced to the Massachusetts Correctional Institution, Bridgewater. Any male convict who is sentenced to any correctional institution of the commonwealth, except the Massachusetts Correctional Institution, Bridgewater, shall be delivered by the sheriff or other officer authorized to execute sentence to said center for the purpose of proper classification of the prisoner. Classification of female prisoners shall be made at the Massachusetts Correctional Institution, Framingham, under the supervision of the deputy commissioner for classification and treatment.

"The deputy commissioner for classification and treatment, under the general supervision of the commissioner, shall direct the professional staff assigned to said reception center, and shall be responsible for grading and classifying all prisoners sentenced to any of the correctional institutions of the commonwealth, and shall in addition have general charge of the reception center."

"§ 97. Transfers from and to correctional institutions; approval

"The commissioner may transfer any sentenced prisoner from one correctional institution of the commonwealth to another, and with the approval of the sheriff of the county from any such institution except a prisoner serving a life sentence to any jail or house of correction, or a sentenced prisoner from any jail or house of correction to any such institution except the state prison, or from any jail or house of correction to any other jail or house of correction. Prisoners so removed shall be subject to the terms of their original sentences and to the provisions of law governing parole from the correctional institutions of the commonwealth."

Even if Massachusetts has not represented that transfers will occur only on the occurrence of certain events, it is argued that charges of serious misbehavior, as in this case, often initiate and heavily influence the transfer decision and that because allegations of misconduct may be erroneous, hearings should be held before transfer to a more confining institution is to be suffered by the prisoner. That an inmate's conduct, in general or in specific instances, may often be a major factor in the decision of prison officials to transfer him is to be expected unless it be assumed that transfers are mindless events. A prisoner's past and anticipated future behavior will very likely be taken into account in selecting a prison in which he will be initially incarcerated or to which he will be transferred to best serve the State's penological goals.

A prisoner's behavior may precipitate a transfer; and absent such behavior, perhaps transfer would not take place at all. But, as we have said, Massachusetts prison officials have the discretion to transfer prisoners for any number of reasons. Their discretion is not limited to instances of serious misconduct. As we understand it no legal interest or right of these respondents under Massachusetts law would have been violated by their transfer whether or not their misconduct had been proved in accordance with procedures that might be required by the Due Process Clause in other circumstances. Whatever expectation the prisoner may have in remaining at a particular prison so long as he behaves himself, it is too ephemeral and insubstantial to trigger procedural due process protections as long as prison officials have discretion to transfer him for whatever reason or for no reason at all.

Holding that arrangements like this are within reach of the procedural protections of the Due Process Clause would place the Clause astride the day-to-day functioning of state prisons and involve the judiciary in issues

and discretionary decisions that are not the business of federal judges. We decline to so interpret and apply the Due Process Clause. The federal courts do not sit to supervise state prisons, the administration of which is of acute interest to the States. *Preiser* v. *Rodriguez,* 411 U. S. 475, 491–492 (1973); *Cruz* v. *Beto,* 405 U. S. 319, 321 (1972); *Johnson* v. *Avery,* 393 U. S. 483, 486 (1969). The individual States, of course, are free to follow another course, whether by statute, by rule or regulation, or by interpretation of their own constitutions. They may thus decide that prudent prison administration requires pretransfer hearings. Our holding is that the Due Process Clause does not impose a nationwide rule mandating transfer hearings.[8]

The judgment of the Court of Appeals accordingly is

Reversed.

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

The Court's rationale is more disturbing than its narrow holding. If the Court had merely held that the transfer of a prisoner from one penal institution to another does not cause a sufficiently grievous loss to amount to a deprivation of liberty within the meaning of the Due Process Clause of the Fourteenth Amendment,[1]

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[8] Nor do we think the situation is substantially different because a record will be made of the transfer and the reasons which underlay it, thus perhaps affecting the future conditions of confinement, including the possibilities of parole. The granting of parole has itself not yet been deemed a function to which due process requirements are applicable. See *Scott* v. *Kentucky Parole Board,* No. 74–6438, cert. granted, 423 U. S. 1031 (1975). If such holding eventuates, it will be time enough to consider respondents' contentions that there is unfounded information contained in their files.

[1] "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U. S. Const., Amdt. 14, § 1.

I would disagree with the conclusion but not with the constitutional analysis. The Court's holding today, however, appears to rest on a conception of "liberty" which I consider fundamentally incorrect.

The Court indicates that a "liberty interest" may have either of two sources. According to the Court, a liberty interest may "originate in the Constitution," *ante,* at 226, or it may have "its roots in state law." *Ibid.* Apart from those two possible origins, the Court is unable to find that a person has a constitutionally protected interest in liberty.

If man were a creature of the State, the analysis would be correct. But neither the Bill of Rights nor the laws of sovereign States create the liberty which the Due Process Clause protects. The relevant constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen. The relevant state laws either create property rights, or they curtail the freedom of the citizen who must live in an ordered society. Of course, law is essential to the exercise and enjoyment of individual liberty in a complex society. But it is not the source of liberty, and surely not the exclusive source.

I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects, rather than the particular rights or privileges conferred by specific laws or regulations.

A correct description of the source of the liberty protected by the Constitution does not, of course, decide this case. For, by hypothesis, we are dealing with persons who may be deprived of their liberty because they have been convicted of criminal conduct after a fair trial. We should therefore first ask whether the deprivation of liberty which follows conviction is total or partial.

At one time the prevailing view was that the deprivation was essentially total. The penitentiary inmate was considered "the slave of the State." See *Ruffin* v. *Commonwealth,* 62 Va. 790, 796 (1871). Although the wording of the Thirteenth Amendment provided some support for that point of view,[2] "courts in recent years have moderated the harsh implications of the Thirteenth Amendment." [3]

The moderating trend culminated in this Court's landmark holding that notwithstanding the continuation of legal custody pursuant to a criminal conviction, a parolee has a measure of liberty that is entitled to constitutional protection.

> "We see, therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.' By whatever name, the 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.

Although the Court's opinion was narrowly written with careful emphasis on the permission given to the parolee to live outside the prison walls, the Court neces-

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[2] Section 1 provides: "Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted,* shall exist within the United States, or any place subject to their jurisdiction," U. S. Const., Amdt. 13, § 1 (emphasis added).

[3] *Morales* v. *Schmidt,* 489 F. 2d 1335, 1338 (CA7 1973), modified on rehearing en banc, 494 F. 2d 85 (1974).

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sarily held that the individual possesses a residuum of constitutionally protected liberty while in legal custody pursuant to a valid conviction. For release on parole is merely conditional, and it does not interrupt the State's legal custody. I remain convinced that the Court of Appeals for the Seventh Circuit correctly analyzed the true significance of the *Morrissey* holding, when I wrote for that court in 1973:

> "In view of the fact that physical confinement is merely one species of legal custody, we are persuaded that *Morrissey* actually portends a more basic conceptual holding: liberty protected by the due process clause may—indeed must to some extent—coexist with legal custody pursuant to conviction. The deprivation of liberty following an adjudication of guilt is partial, not total. A residuum of constitutionally protected rights remains.
>
> "As we noted in Morales v. Schmidt, the view once held that an inmate is a mere slave is now totally rejected. The restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual.[4] 'Liberty' and 'custody' are not mutually exclusive concepts.

"[4] In his dissenting opinion in Morrissey v. Brewer, Circuit Judge Lay quoted the following excerpt from the President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 83 (1967) (hereinafter cited as Task Force Report):

'A first tenet of our governmental, religious, and ethical tradition is the intrinsic worth of every individual, no matter how degenerate. It is a radical departure from that tradition to subject a defined class of persons, even criminals, to a regime in which their right to liberty is determined by officials wholly unaccountable in the exercise of their power. . . .' 443 F. 2d [942], at 952 n. 1." 479 F. 2d, at 712–713, n. 21.

> "If the *Morrissey* decision is not narrowly limited by the distinction between physical confinement and conditional liberty to live at large in society,[5] it requires that due process precede any substantial deprivation of the liberty of persons in custody. We believe a due regard for the interests of the individual inmate, as well as the interests of that substantial segment of our total society represented by inmates,[6] requires that *Morrissey* be so read." *United States ex rel. Miller* v. *Twomey,* 479 F. 2d 701, 712–713.

It demeans the holding in *Morrissey*—more importantly it demeans the concept of liberty itself—to ascribe to that holding nothing more than a protection of an interest that the State has created through its own prison regulations. For if the inmate's protected liberty interests are no greater than the State chooses to allow, he is really little more than the slave described in the 19th century cases. I think it clear that even the inmate retains an unalienable interest in liberty—at the very minimum the right to be treated with dignity—which the Constitution may never ignore.

"[5] See Task Force Report, at 6–12. See especially the discussion of 'Blurring Lines Between Institution and Community' at 10–11." *Id.*, at 713 n. 22.

"[6] 'A substantial portion of our population is affected by the law in this area. Approximately 1.3 million people are at any one time subject to correctional authority; untold millions have criminal records. There is increasing doubt as to the propriety of treating this large group of persons as, in varying degrees, outcasts from society. And there is increasing recognition that such treatment is not in the ultimate interests of society. Denying offenders any chance to challenge arbitrary assertions of power by correctional officials, and barring them from legitimate opportunities such as employment, are inconsistent with the correctional goal of rehabilitation, which emphasizes the need to instill respect for and willingness to cooperate with society and to help the offender assume the role of a normal citizen.' Task Force Report at 82." *Id.*, at 713 n. 23.

This basic premise is not inconsistent with recognition of the obvious fact that the State must have wide latitude in determining the conditions of confinement that will be imposed following conviction of crime. To supervise and control its prison population, the State must retain the power to change the conditions for individuals, or for groups of prisoners, quickly and without judicial review. In many respects the State's problems in governing its inmate population are comparable to those encountered in governing a military force. Prompt and unquestioning obedience by the individual, even to commands he does not understand, may be essential to the preservation of order and discipline. Nevertheless, within the limits imposed by the basic restraints governing the controlled population, each individual retains his dignity and, in time, acquires a status that is entitled to respect.

Imprisonment is intended to accomplish more than the temporary removal of the offender from society in order to prevent him from committing like offenses during the period of his incarceration. While custody denies the inmate the opportunity to offend, it also gives him an opportunity to improve himself and to acquire skills and habits that will help him to participate in an open society after his release. Within the prison community, if my basic hypothesis is correct, he has a protected right to pursue his limited rehabilitative goals, or at the minimum, to maintain whatever attributes of dignity are associated with his status in a tightly controlled society. It is unquestionably within the power of the State to change that status, abruptly and adversely; but if the change is sufficiently grievous, it may not be imposed arbitrarily. In such case due process must be afforded.

That does not mean, of course, that every adversity amounts to a deprivation within the meaning of the

Fourteenth Amendment.[7] There must be grievous loss, and that term itself is somewhat flexible. I would certainly not consider every transfer within a prison system, even to more onerous conditions of confinement, such a loss. On the other hand, I am unable to identify a principled basis for differentiating between a transfer from the general prison population to solitary confinement and a transfer involving equally disparate conditions between one physical facility and another.

In view of the Court's basic holding, I merely note that I agree with the Court of Appeals that the transfer involved in this case was sufficiently serious to invoke the protection of the Constitution.[8]

I respectfully dissent.

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[7] "This does not mean, however, that every decision by prison officials should be subject to judicial review or that the courts rather than experienced administrators should write prison regulations. *Morrissey* reminds us that due process is a flexible concept which takes account of the importance of the interests at stake; thus, it is abundantly clear that a myriad of problems of prison administration must remain beyond the scope of proper judicial concern. Only significant deprivations of liberty raise constitutional issues under *Morrissey*. Moreover, in determining whether to require due process, we need not choose between the 'full panoply' of rights accorded a defendant in a criminal prosecution, on the one hand, and no safeguards whatsoever, on the other. Rather, as *Morrissey* aptly illustrates, the requirements of due process may be shaped to fit the needs of a particular situation." *United States ex rel. Miller* v. *Twomey*, 479 F. 2d, at 713.

[8] There is no question that respondents in this case suffered loss because of the transfer. Hathaway lost his laundry business—a source of income—which he had been running at Norfolk; Dussault lost his job as a plumber, in which he had been performing "a difficult job especially well"; Royce was separated from counselors with whom he had a "good relationship" which had helped him in his effort "to get himself together." These losses were in addition to the generally more restrictive conditions inherent in a maximum-security institution as compared to a medium-security institution.

MONTANYE, CORRECTIONAL SUPERINTENDENT, ET AL. *v.* HAYMES

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

No. 74–520. Argued April 21, 1976—Decided June 25, 1976

The Due Process Clause of the Fourteenth Amendment *held* not to require a hearing in connection with the transfer of a state prisoner to another institution in the State whether or not such transfer resulted from the prisoner's misbehavior or was disciplinary or punitive, where under state law the prisoner had no right to remain at any particular prison and no justifiable expectation that he would not be transferred unless found guilty of misconduct, and the transfer of prisoners is not conditional upon or limited to the occurrence of misconduct. *Meachum* v. *Fano*, *ante*, p. 215. Pp. 242–243.

505 F. 2d 977, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 244.

Joel Lewittes, Assistant Attorney General of New York, argued the cause for petitioners. With him on the briefs were *Louis J. Lefkowitz*, Attorney General, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Margery Evans Reifler* and *Judith A. Gordon*, Assistant Attorneys General.

Alvin J. Bronstein argued the cause for respondent. With him on the brief was *Melvin L. Wulf*.*

**Solicitor General Bork*, *Assistant Attorney General Thornburgh*, *Deputy Solicitor General Jones*, and *Peter M. Shannon, Jr.*, filed a brief for the United States as *amicus curiae* urging reversal.

Evelle J. Younger, Attorney General, *Jack R. Winkler*, Chief Assistant Attorney General, *Edward P. O'Brien*, Assistant Attorney

MR. JUSTICE WHITE delivered the opinion of the Court.

On June 7, 1972, respondent Haymes was removed from his assignment as inmate clerk in the law library at the Attica Correctional Facility in the State of New York. That afternoon Haymes was observed circulating among other inmates a document prepared by him and at the time signed by 82 other prisoners. Among other things, each signatory complained that he had been deprived of legal assistance as the result of the removal of Haymes and another inmate from the prison law library.[1]

General, and *John T. Murphy, Karl S. Mayer,* and *Jean M. Bordon,* Deputy Attorneys General, filed a brief for the State of California as *amicus curiae.*

[1] The document read verbatim:

"Hon. Judge John T. Curtin:

"I am writing to complain that I am now being deprived of legal assistance as a result of inmate Rodney R. Haymes and John Washington being removed from the prison law library.

"Since the removal of the above two from the law library, I cannot any longer obtain any legal assistance either in the nature of obtaining the proper applicable case law corresponding with the particular issue contained in my case, as well as assistance in preparing my post-conviction application to the courts.

"The major problem and reason for my not being able to obtain legal assistance is a direct result of the attitude displayed by the law library officer whom goes out of his way to circumvent inmates legal assistance.

"I feel that this was obviously the same reason why this officer has had Rodney Haymes and John Washington removed from the law library whereby they no longer have proper access to either the law books or myself and the other inmates whom they are legally assisting.

"Wherefore, I feel that my constitutional rights to adequate access to the courts for judicial review and redress is being violated as a direct result of the circumstances and conditions herein set forth.

"[Signed by 82 inmates.]"

The document, which was addressed to a federal judge but sought no relief, was seized and held by prison authorities. On June 8, Haymes was advised that he would be transferred to Clinton Correctional Facility, which, like Attica, was a maximum-security institution. The transfer was effected the next day. No loss of good time, segregated confinement, loss of privileges, or any other disciplinary measures accompanied the transfer. On August 3, Haymes filed a petition with the United States District Court which was construed by the judge to be an application under 42 U. S. C. § 1983 and 28 U. S. C. § 1343 seeking relief against petitioner Montanye, the then Superintendent at Attica. The petition complained that the seizure and retention of the document, despite requests for its return, not only violated Administrative Bulletin No. 20, which allegedly made any communication to a court privileged and confidential, but also infringed Haymes' federally guaranteed right to petition the court for redress of grievances. It further asserted that Haymes' removal to Clinton was to prevent him from pursuing his remedies and also was in reprisal for his having rendered legal assistance to various prisoners as well as having, along with others, sought to petition the court for redress.

In response to a show-cause order issued by the court, petitioner Brady, the correctional officer at Attica in charge of the law library, stated in an affidavit that Haymes had been relieved from his assignment as an inmate clerk in the law library "because of his continual disregard for the rules governing inmates and the use of the law library" and that only one of the inmates who had signed the petition being circulated by Haymes had ever made an official request for legal assistance. The affidavit of Harold Smith, Deputy Superintendent of Attica, furnished the court with Paragraph 21 of the

Inmate's Rule Book,[2] which prohibited an inmate from furnishing legal assistance to another inmate without official permission and with a copy of a bulletin board notice directing inmates with legal problems to present them to Officer Brady—inmates were in no circumstances to set themselves up as legal counselors and receive pay for their services.[3] The affidavit asserted that the petition taken from Haymes was being circulated "in direct disregard of the above rule forbidding legal assistance except with the approval of the Superintendent" and that Haymes had been cautioned on several occasions about assisting other inmates without the required approval.

Haymes responded by a motion to join Brady as a defendant, which was granted, and with a counteraffidavit denying that there was a rulebook at Attica, reasserting that the document seized was merely a letter to the court not within the scope of the claimed rule and alleging that his removal from the law library, the seizure of his petition, and his transfer to Clinton were acts of reprisal for his having attempted to furnish legal assistance to the other prisoners rather than merely hand out library books to them.

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[2] Inmates are forbidden, except upon approval of the warden, to assist other inmates in the preparation of legal papers.

[3] The notice read as follows:

"Office of Superintendent
"April 25, 1972

"To ALL CONCERNED:

"In all instances where inmates desire assistance in the use of the Law Library, they are to present their problems to Correction Officer Brady, who will assist them to the extent necessary or will assign inmates on the Law Library staff to particular cases.

"Under no circumstances are inmates to set themselves up as 'legal counselors' and receive pay for their services.

"ERNEST L. MONTANYE
"Superintendent"

After retained counsel had submitted a memorandum on behalf of Haymes, the District Court dismissed the action. It held that the rule against giving legal assistance without consent was reasonable and that the seizure of Haymes' document was not in violation of the Constitution. The court also ruled that the transfer to Clinton did not violate Haymes' rights: "Although a general allegation is made that punishment was the motive for the transfer, there is no allegation that the facilities at [Clinton] are harsher or substantially different from those afforded to petitioner at Attica. . . . Petitioner's transfer was consistent with the discretion given to prison officials in exercising proper custody of inmates." App. 26a.

The Court of Appeals for the Second Circuit reversed. 505 F. 2d 977 (1974). Because the District Court had considered affidavits outside the pleadings, the dismissal was deemed to have been a summary judgment under Fed. Rule Civ. Proc. 56. The judgment was ruled erroneous because there were two unresolved issues of material fact: whether Haymes' removal to Clinton was punishment for a disobedience of prison rules and if so whether the effects of the transfer were sufficiently burdensome to require a hearing under the Due Process Clause of the Fourteenth Amendment.

The court's legal theory was that Haymes should no more be punished by a transfer having harsh consequences than he should suffer other deprivations which under prison rules could not be imposed without following specified procedures. Disciplinary transfers, the Court of Appeals thought, were in a different category from "administrative" transfers. "When harsh treatment is meted out to reprimand, deter, or reform an individual, elementary fairness demands that the one punished be given a satisfactory opportunity to establish

that he is not deserving of such handling. . . . [T]he specific facts upon which a decision to punish are predicated can most suitably be ascertained at an impartial hearing to review the evidence of the alleged misbehavior, and to assess the effect which transfer will have on the inmate's future incarceration." 505 F. 2d, at 980. The Court of Appeals found it difficult "to look upon the circumstances of the transfer as a mere coincidence," *id.*, at 979; it was also convinced that Haymes might be able to demonstrate sufficiently burdensome consequences attending the transfer to trigger the protections of the Due Process Clause, even though Attica and Clinton were both maximum-security prisons.[4] The case was therefore remanded for further proceedings to the Dis-

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[4] The Court of Appeals found "that the hardship involved in the mere fact of dislocation may be sufficient to render Haymes's summary transfer—if a trial establishes that it was punitive—a denial of due process." 505 F. 2d, at 981. The court said:

"The facts of this case may provide a good illustration of the real hardship in being shuttled from one institution to another. After being sent to Clinton, Haymes found himself several hundred miles away from his home and family in Buffalo, New York. Not only was he effectively separated by the transfer from his only contact with the world outside the prison, but he also was removed from the friends he had made among the inmates at Attica and forced to adjust to a new environment where he may well have been regarded as a troublemaker. Contacts with counsel would necessarily have been more difficult. A transferee suffers other consequences as well: the inmate is frequently put in administrative segregation upon arrival at the new facility, 7 N. Y. C. R. R. Part 260; personal belongings are often lost; he may be deprived of facilities and medications for psychiatric and medical treatment, *see* Hoitt v. Vitek, 361 F. Supp. 1238, 1249 (D. N. H. 1973); and educational and rehabilitative programs can be interrupted. Moreover, the fact of transfer, and perhaps the reasons alleged therefor, will be put on the record reviewed by the parole board, and the prisoner may have difficulty rebutting, long after the fact, the adverse inference to be drawn therefrom." *Id.*, at 981–982.

trict Court. We granted certiorari, 422 U. S. 1055 (1975), and heard the case with *Meachum* v. *Fano*, *ante*, p. 215. We reverse the judgment of the Court of Appeals.

The Court of Appeals did not hold, as did the Court of Appeals in *Meachum* v. *Fano*, that every disadvantageous transfer must be accompanied by appropriate hearings. Administrative transfers, although perhaps having very similar consequences for the prisoner, were exempt from the Court of Appeals ruling. Only disciplinary transfers having substantial adverse impact on the prisoner were to call for procedural formalities. Even so, our decision in *Meachum* requires a reversal in this case. We held in *Meachum* v. *Fano*, that no Due Process Clause liberty interest of a duly convicted prison inmate is infringed when he is transferred from one prison to another within the State, whether with or without a hearing, absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events. We therefore disagree with the Court of Appeals' general proposition that the Due Process Clause by its own force requires hearings whenever prison authorities transfer a prisoner to another institution because of his breach of prison rules, at least where the transfer may be said to involve substantially burdensome consequences. As long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight. The Clause does not require hearings in connection with transfers whether or not they are the result of the inmate's misbehavior or may be labeled as disciplinary or punitive.

We also agree with the State of New York that under the law of that State Haymes had no right to remain at any particular prison facility and no justifiable expectation that he would not be transferred unless found guilty of misconduct. Under New York law, adult persons sentenced to imprisonment are not sentenced to particular institutions, but are committed to the custody of the Commissioner of Corrections. He receives adult, male felons at a maximum-security reception center for initial evaluation and then transfers them to specified institutions. N. Y. Correc. Law § 71 (1) (McKinney Supp. 1975–1976); 7 N. Y. C. R. R. § 103.10. Thereafter, the Commissioner is empowered by statute to "transfer inmates from one correctional facility to another." N. Y. Correc. Law § 23 (1) (McKinney Supp. 1975–1976). The Court of Appeals reasoned that because under the applicable state statutes and regulations, various specified punishments were reserved as sanctions for breach of prison rules and could not therefore be imposed without appropriate hearings, neither could the harsh consequences of a transfer be imposed as punishment for misconduct absent appropriate due process procedures. But under the New York law, the transfer of inmates is not conditional upon or limited to the occurrence of misconduct. The statute imposes no conditions on the discretionary power to transfer, and we are advised by the State that no such requirements have been promulgated. Transfers are not among the punishments which may be imposed only after a prison disciplinary hearing. 7 N. Y. C. R. R. § 253.5. Whatever part an inmate's behavior may play in a decision to transfer, there is no more basis in New York law for invoking the protections of the Due Process Clause than we found to be the case under the Massachusetts law in the *Meachum* case.

The judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

So ordered.

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

Respondent's complaint, fairly read, alleges two quite different theories of recovery: First, that he was entitled to a hearing before he could be transferred from one facility to another because the transfer deprived him of an interest in liberty; second, that the transfer was a form of punishment for circulating a petition, for communicating with a court, and for rendering legal assistance to other inmates.

Since respondent has not alleged a material difference between the two facilities, I agree with the Court that the transfer did not cause him a grievous loss entitling him to a hearing. In my opinion this conclusion is unaffected by the motivation for the transfer, because I think it is the seriousness of its impact on the inmate's residuum of protected liberty that determines whether a deprivation has occurred.

I am persuaded, however, that the allegations of his complaint are sufficient to require a trial of his claim that the transfer was made in retribution for his exercise of protected rights. On this claim, the reason for the defendants' action is critical and the procedure followed is almost irrelevant. I do not understand the Court to disagree with this analysis, and assume that the Court of Appeals, consistently with this Court's mandate, may direct the District Court to conduct a trial.*

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*Respondent alleged in his complaint that his transfer violated his First Amendment rights because it had the purpose of suppressing his attempt to petition the courts, and that any rule which forbade

The reason for my dissent is that the same result would follow from a simple affirmance. Thus, although the Court has explained why it believes the *opinion* of the Court of Appeals should be "reversed," it has not explained why that court's *judgment* was not correct. I would affirm that judgment.

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him to do that was unconstitutional. It was also disputed whether respondent had actually broken any rule against giving legal advice to other prisoners. It was improper for the District Court either to dismiss the complaint or to grant summary judgment for the defendants without a trial of the facts. *Haines* v. *Kerner*, 404 U. S. 519; *Conley* v. *Gibson*, 355 U. S. 41.

UNION ELECTRIC CO. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL.

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

No. 74–1542. Argued January 21, 1976—Decided June 25, 1976

Section 110 (a)(1) of the Clean Air Act, as added by the 1970 Amendments to the Act, requires that each State formulate, subject to approval by the Administrator of the Environmental Protection Agency (EPA), an implementation plan providing for attainment of national ambient air quality standards, both primary standards (those necessary to protect the public health) and secondary standards (those necessary to protect the public welfare). Section 110 (a)(2) provides that the Administrator "shall approve" the proposed plan if it has been adopted after public notice and hearing and meets eight specified criteria, including provisions for attaining the primary standards "as expeditiously as practicable but . . . in no case later than three years from the date of approval of such plan," and of the secondary standards within a "reasonable time," and provisions for such control measures "as may be necessary" to attain both the primary and secondary standards. Section 307 (b)(1) of the Act provides that a petition for review of the Administrator's "action in approving . . . [the] implementation plan" may be filed in the appropriate United States court of appeals, and must be filed within 30 days from the date of such approval, or after such date if the petition is based on grounds arising after the 30th day. Petitioner electric utility company, whose coal-fired generating plants are subject to the sulfur dioxide restrictions in the Missouri implementation plan, did not seek review of the Administrator's approval of that plan within the required 30 days but rather applied to the state and county agencies for, and received, one-year variances. At a time when petitioner was seeking extension of these variances, the Administrator notified it that sulfur dioxide emissions from its plants were violating the Missouri plan. Thereupon petitioner filed a petition for review of the Administrator's approval of the plan, claiming that various economic and technological difficulties had arisen more than 30 days after the approval, making compliance with the emission limitations impossible. The Court of Appeals dismissed the petition for lack of jurisdiction, holding that only

matters which, if known to the Administrator at the time he approved the state plan, would justify setting aside the approval are properly reviewable after the 30-day period, and that since claims of economic and technological infeasibility, such as petitioner was asserting here, could not properly justify the Administrator's rejection of a plan, such claims could not serve at any time as the basis for a court's overturning a plan. *Held:*

1. Since, regardless of when a petition for review is filed under § 307 (b) (1), the court is limited to reviewing "the Administrator's action in approving . . . [the] implementation plan," if new "grounds" are alleged, they must be such that, had they been known at the time the plan was presented to the Administrator for approval, it would have been an abuse of discretion for him to approve the plan. A contrary holding would shift a substantial responsibility in administering the Act from the Administrator and the state agencies to the federal courts. Pp. 255–256.

2. Since both the language of the relevant provisions of the Clean Air Amendments of 1970, especially § 110 (a) (2), and their legislative history make it clear that Congress intended that grounds of economic and technological infeasibility be deemed wholly foreign to the Administrator's consideration of a state implementation plan, a court of appeals reviewing an approved plan under § 307 (b) (1) cannot set it aside on such grounds, no matter when they are raised. Pp. 256–269.

(a) The mandatory "shall" in the provision of § 110 (a) (2) that the Administrator "shall approve" an implementation plan if it satisfies the eight specified criteria, clearly indicates that the Administrator is not to be concerned with factors other than those specified, none of which appears to permit consideration of economic or technological infeasibility. P. 257.

(b) The criterion of § 110 (a) (2) that the primary air quality standards be met "as expeditiously as practicable but . . . in no case later than three years," does not require consideration of claims of economic and technological infeasibility, but, as both the language and legislative history of that criterion make clear, it was intended that the Administrator must approve a plan that provides for attainment of the primary standards in three years even if attainment does not appear possible, the three-year deadline being central to the regulatory scheme of technology forcing. Pp. 257–260.

(c) The criterion of § 110 (a) (2) that the state implementation plan contain such control measures "as may be necessary" to achieve the primary and secondary standards does not preclude

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a State from submitting a plan more stringent than federal law demands, but such requirement demands only that the proposed plan meet the minimum requirements of § 110 (a) (2) and provides no basis for the Administrator ever to reject a state implementation plan on the ground that it is economically or technologically infeasible. Pp. 260–265.

(d) Since the 1970 Amendments to the Act afford ample opportunity for considering claims of economic and technological infeasibility as long as there will not be substantial interference with the primary goal of promptly attaining the national standards, to allow such claims to be raised by appealing the Administrator's approval of an implementation plan would frustrate congressional intent; would permit a proposed plan to be struck down as infeasible before it is given a chance to work, even though Congress clearly contemplated that some plans would be infeasible when proposed; and would also permit the Administrator or a federal court to reject a State's legislative choices in regulating air pollution, even though Congress plainly left with the States, so long as national standards were met, the power to determine which sources would be burdened by regulation and to what extent. Pp. 266–269.

515 F. 2d 206, affirmed.

MARSHALL, J., delivered the opinion for a unanimous Court. POWELL, J., filed a concurring opinion, in which BURGER, C. J., joined, *post*, p. 269.

William H. Ferrell argued the cause and filed briefs for petitioner.

Assistant Attorney General Taft argued the cause for respondent Environmental Protection Agency. With him on the brief were *Solicitor General Bork, Deputy Solicitor General Randolph,* and *Edmund B. Clark. John C. Danforth,* Attorney General of Missouri, *pro se,* and *Walter W. Nowotny, Jr.,* and *Dan Summers,* Assistant Attorneys General, filed briefs for respondents Danforth et al.*

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*Briefs of *amici curiae* urging reversal were filed by *H. Edward Dunkelberger, Jr., Theodore L. Garrett,* and *A. Joseph Dowd* for the Appalachian Power Co. et al.; by *Cameron F. MacRae,*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

After the Administrator of the Environmental Protection Agency (EPA) approves a state implementation plan under the Clean Air Act, the plan may be challenged in a court of appeals within 30 days, or after 30 days have run if newly discovered or available information justifies subsequent review. We must decide whether the operator of a regulated emission source, in a petition for review of an EPA-approved state plan filed after the original 30-day appeal period, can raise the claim that it is economically or technologically infeasible to comply with the plan.

I

We have addressed the history and provisions of the Clean Air Amendments of 1970, Pub. L. 91–604, 84 Stat. 1676, in detail in *Train* v. *Natural Resources Defense Council* (*NRDC*), 421 U. S. 60 (1975), and will not repeat that discussion here. Suffice it to say that the Amendments reflect congressional dissatisfaction with the progress of existing air pollution programs and a determination to "tak[e] a stick to the States," *id.*, at 64, in order to guarantee the prompt attainment and maintenance of specified air quality standards. The heart of the Amendments is the requirement that each State formulate, subject to EPA approval, an implementation plan designed to achieve national primary ambient air quality standards—those necessary to protect the public health—"as expeditiously as practicable but . . . in no case later than three years from the date of ap-

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Harry H. Voigt, and *Henry V. Nickel* for the Edison Electric Institute; and by *Ronald A. Zumbrun* and *Raymond M. Momboisse* for the Pacific Legal Foundation.

Lewis C. Green filed a brief for Coalition for the Environment, St. Louis Region, as *amicus curiae* urging affirmance.

proval of such plan." § 110 (a)(2)(A) of the Clean Air Act, as added, 84 Stat. 1680, 42 U. S. C. § 1857c–5 (a)(2)(A). The plan must also provide for the attainment of national secondary ambient air quality standards—those necessary to protect the public welfare—within a "reasonable time." *Ibid.* Each State is given wide discretion in formulating its plan, and the Act provides that the Administrator "shall approve" the proposed plan if it has been adopted after public notice and hearing and if it meets eight specified criteria. § 110 (a)(2).[1]

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[1] Section 110 (a)(2), 42 U. S. C. § 1857c–5 (a)(2), provides in full:

"The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

"(A)(i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

"(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

"(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

"(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

"(E) it contains adequate provisions for intergovernmental co-

On April 30, 1971, the Administrator promulgated national primary and secondary standards for six air pollutants he found to have an adverse effect on the public health and welfare. 40 CFR pt. 50 (1975). See § 108 (a) of the Act, as added, 84 Stat. 1678, 42 U. S. C. § 1857c–3 (a). Included among them was sulfur dioxide, at issue here. 40 CFR §§ 50.4–50.5 (1975). After the promulgation of the national standards, the State of Missouri formulated its implementation plan and submitted it for approval. Since sulfur dioxide levels exceeded national primary standards in only one of the

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operation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

"(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this Act, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 303, and adequate contingency plans to implement such authority;

"(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

"(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements."

State's five air quality regions—the Metropolitan St. Louis Interstate region, 40 CFR § 52.1321 (1975)—the Missouri plan concentrated on a control strategy and regulations to lower emissions in that area. The plan's emission limitations were effective at once, but the State retained authority to grant variances to particular sources that could not immediately comply.[2] Mo. Rev. Stat. § 203.110 (1972). The Administrator approved the plan on May 31, 1972. See 40 CFR § 52.1320 *et seq.* (1975).

Petitioner is an electric utility company servicing the St. Louis metropolitan area, large portions of Missouri, and parts of Illinois and Iowa. Its three coal-fired generating plants in the metropolitan St. Louis area are subject to the sulfur dioxide restrictions in the Missouri implementation plan. Petitioner did not seek review of the Administrator's approval of the plan within 30 days, as it was entitled to do under § 307 (b)(1) of the Act, as added, 84 Stat. 1708, 42 U. S. C. § 1857h–5 (b)(1), but rather applied to the appropriate state and county agencies for variances from the emission limitations affecting its three plants. Petitioner received one-year variances, which could be extended upon reapplication. The variances on two of petitioner's three plants had expired and petitioner was applying for extensions when, on May 31, 1974, the Administrator notified petitioner that sulfur dioxide emissions from its plants violated the emission limitations contained in the Missouri plan.[3] See 40 Fed. Reg. 3566 (1975). Shortly there-

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[2] The plan was designed to attain primary and secondary air quality standards in the Metropolitan St. Louis Interstate region by July 1975. See 40 CFR § 52.1332 (1975).

[3] The notice included all three plants, even though the variance on one of them had not yet expired, because the one variance still in effect had not been submitted to the EPA as a plan revision

after petitioner filed a petition in the Court of Appeals for the Eighth Circuit for review of the Administrator's 1972 approval of the Missouri implementation plan.

Section 307 (b)(1) allows petitions for review to be filed in an appropriate court of appeals more than 30 days after the Administrator's approval of an implementation plan only if the petition is "based solely on grounds arising after such 30th day." Petitioner claimed to meet this requirement by asserting, *inter alia,* that various economic and technological difficulties had arisen more than 30 days after the Administrator's approval and that these difficulties made compliance with the emission limitations impossible.[4] The Court of Ap-

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under § 110 (a)(3)(A), as amended, 88 Stat. 256, 42 U. S. C. § 1857c–5 (a)(3)(A) (1970 ed., Supp. IV), and therefore was not part of the applicable implementation plan. See n. 15, *infra,*

[4] Petitioner also claimed that the presence of sulfur dioxide in the ambient air should no longer be regarded as a health hazard and that compliance with the Missouri implementation plan was not necessary for attainment of national primary or secondary air quality standards. The Court of Appeals found that these claims were not sufficient to establish jurisdiction under § 307 (b)(1).

The court held that the challenge to the validity of regulating sulfur dioxide was not properly before it because the alleged new information had not previously been presented to the Administrator for action, a procedure the court held was necessary for the exercise of its jurisdiction. 515 F. 2d 206, 220 (1975). See also *Oljato Chapter of Navajo Tribe* v. *Train,* 169 U. S. App. D. C. 195, 515 F. 2d 654 (1975). In any case, the court held, the challenge was to a national air quality standard and as such could be brought only in the Court of Appeals for the District of Columbia Circuit under § 307 (b)(1). 515 F. 2d, at 220. While petitioner sought certiorari on this ruling, our grant of the writ was limited to the question whether claims of economic or technical infeasibility could be raised in a challenge to a state implementation plan. 423 U. S. 821 (1975).

The Court of Appeals also found that no claim was stated by petitioner's assertion that the Missouri standards exceeded those necessary for compliance with the national standards because, the

peals ordered briefing on the question of its subject-matter jurisdiction to hear the case and, after argument, granted the motions of the EPA and intervenor-respondents, the Attorney General of Missouri and the Missouri Air Conservation Commission, to dismiss the petition for review for lack of jurisdiction.

The court held that "only matters which, if known to the Administrator at the time of his action [in approving a state implementation plan], would justify setting aside that action are properly reviewable after the initial 30 day review period." 515 F. 2d 206, 216 (1975). Since, in the court's view, claims of economic and technological infeasibility could not properly provide a basis for the Administrator's rejecting a plan, such claims could not serve—at any time—as the basis for a court's overturning an approved plan. Accordingly, insofar as petitioner's claim of newly discovered or available information was grounded on an assertion of economic and technological infeasibility, the court held itself to be without jurisdiction to consider the petition for review, and so dismissed the petition. In so holding the Court of Appeals considered and rejected the contrary or partially contrary holdings of three other Circuits. *Buckeye Power, Inc.* v. *EPA*, 481 F. 2d 162, 168–169 (CA6 1973) (but see *id.*, at 173); *Appalachian Power Co.* v. *EPA*, 477 F. 2d 495, 505–507 (CA4 1973); *Duquesne Light Co.* v. *EPA*, 481 F. 2d 1 (CA3 1973); *Getty Oil Co.* v. *Ruckelshaus*, 467 F. 2d 349 (CA3 1972), cert. denied, 409 U. S. 1125 (1973). See also *St. Joe Minerals Corp.* v. *EPA*, 508 F. 2d 743, 746–749 (CA3 1975), vacated and remanded,

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court held, the States are free to adopt stricter standards than the national standards under § 116 of the Clean Air Act, as amended, 84 Stat. 1689 and 88 Stat. 259, 42 U. S. C. § 1857d–1 (1970 ed., Supp. IV). 515 F. 2d, at 220. While certiorari was not sought on this question, it has been briefed for us and we find it necessary to resolve it in deciding this case. See *infra*, at 261–266.

425 U. S. 987 (1976); *Duquesne Light Co.* v. *EPA,* 522 F. 2d 1186 (CA3 1975), cert. pending, No. 75–736. On the other hand, the Eighth Circuit found support for its position in the decisions of several other Circuits. *South Terminal Corp.* v. *EPA,* 504 F. 2d 646, 675–676 (CA1 1974); *Texas* v. *EPA,* 499 F. 2d 289, 317 (CA5 1974); *Natural Resources Defense Council* v. *EPA,* 507 F. 2d 905, 914 (CA9 1974). See also *Indiana & Michigan Electric Co.* v. *EPA,* 509 F. 2d 839, 843–845 (CA7 1975). Cf. *Buckeye Power, Inc.* v. *EPA,* 525 F. 2d 80 (CA6 1975). We granted certiorari to resolve the conflict among the Circuits, 423 U. S. 821 (1975), and we now affirm.

II

A

We reject at the outset petitioner's suggestion that a claim of economic or technological infeasibility may be considered upon a petition for review based on new information and filed more than 30 days after approval of an implementation plan even if such a claim could not be considered by the Administrator in approving a plan or by a court in reviewing a plan challenged within the original 30-day appeal period. In pertinent part § 307 (b)(1) provides:

> "A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 . . . may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day."

Regardless of when a petition for review is filed under § 307 (b)(1), the court is limited to reviewing "the Ad-

ministrator's action in approving . . . [the] implementation plan . . . ." Accordingly, if new "grounds" are alleged, they must be such that, had they been known at the time the plan was presented to the Administrator for approval, it would have been an abuse of discretion for the Administrator to approve the plan. To hold otherwise would be to transfer a substantial responsibility in administering the Clean Air Act from the Administrator and the state agencies to the federal courts.

B

Since a reviewing court—regardless of when the petition for review is filed—may consider claims of economic and technological infeasibility only if the Administrator may consider such claims in approving or rejecting a state implementation plan, we must address ourselves to the scope of the Administrator's responsibility. The Administrator's position is that he has no power whatsoever to reject a state implementation plan on the ground that it is economically or technologically infeasible, and we have previously accorded great deference to the Administrator's construction of the Clean Air Act. See *Train* v. *NRDC,* 421 U. S., at 75. After surveying the relevant provisions of the Clean Air Amendments of 1970 and their legislative history, we agree that Congress intended claims of economic and technological infeasibility to be wholly foreign to the Administrator's consideration of a state implementation plan.

As we have previously recognized, the 1970 Amendments to the Clean Air Act were a drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution. The Amendments place the primary responsibility for formulating pollution control strategies on the States, but nonetheless subject

the States to strict minimum compliance requirements. These requirements are of a "technology-forcing character," *Train* v. *NRDC, supra,* at 91, and are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible.

This approach is apparent on the face of § 110 (a)(2). The provision sets out eight criteria that an implementation plan must satisfy, and provides that if these criteria are met and if the plan was adopted after reasonable notice and hearing, the Administrator "shall approve" the proposed state plan. The mandatory "shall" makes it quite clear that the Administrator is not to be concerned with factors other than those specified, *Train* v. *NRDC, supra,* at 71 n. 11, 79, and none of the eight factors appears to permit consideration of technological or economic infeasibility.[5] Nonetheless, if a basis is to be found for allowing the Administrator to consider such claims, it must be among the eight criteria, and so it is here that the argument is focused.

It is suggested that consideration of claims of technological and economic infeasibility is required by the first criterion—that the primary air quality standards be met "as expeditiously as practicable but . . . in no case later than three years . . ." and that the secondary air

[5] See n. 1, *supra.* Comparison of the eight criteria of § 110 (a)(2) with other provisions of the Amendments bolsters this conclusion. Where Congress intended the Administrator to be concerned about economic and technological infeasibility, it expressly so provided. Thus, §§ 110 (e), 110 (f), 111 (a)(1), 202 (a), 211 (c)(2)(A), and 231 (b) of the Amendments all expressly permit consideration, *e. g.,* "of the requisite technology, giving appropriate consideration to the cost of compliance." § 231 (b), as added, 84 Stat. 1704, 42 U. S. C. § 1857f–9 (b). See also 42 U. S. C. §§ 1857c–5 (e), 1857c–5 (f), 1857c–6 (a)(1), 1857f–1 (a), 1857f–6c (c)(2)(A). Section 110 (a)(2) contains no such language.

quality standards be met within a "reasonable time." § 110 (a)(2)(A). The argument is that what is "practicable" or "reasonable" cannot be determined without assessing whether what is proposed is possible. This argument does not survive analysis.

Section 110 (a)(2)(A)'s three-year deadline for achieving primary air quality standards is central to the Amendments' regulatory scheme and, as both the language and the legislative history of the requirement make clear, it leaves no room for claims of technological or economic infeasibility. The 1970 congressional debate on the Amendments centered on whether technology forcing was necessary and desirable in framing and attaining air quality standards sufficient to protect the public health, standards later termed primary standards. The House version of the Amendments was quite moderate in approach, requiring only that health-related standards be met "within a reasonable time." H. R. 17255, 91st Cong., 2d Sess., § 108 (c)(1)(C)(i) (1970). The Senate bill, on the other hand, flatly required that, possible or not, health-related standards be met "within three years." S. 4358, 91st Cong., 2d Sess., § 111 (a)(2)(A) (1970).

The Senate's stiff requirement was intended to foreclose the claims of emission sources that it would be economically or technologically infeasible for them to achieve emission limitations sufficient to protect the public health within the specified time. As Senator Muskie, manager of the Senate bill, explained to his chamber:

> " 'The first responsibility of Congress is not the making of technological or economic judgments—or even to be limited by what is or appears to be technologically or economically feasible. Our responsibility is to establish what the public interest requires to protect the health of persons. This may

> mean that people and industries will be asked to do what seems to be impossible at the present time.' " 116 Cong. Rec. 32901–32902 (1970).

See also *id.*, at 32919 (remarks of Sen. Cooper); 33115 (remarks of Sen. Prouty). This position reflected that of the Senate committee:

> "In the Committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility as the basis of ambient air standards. The Committee determined that 1) the health of people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible; and 2) the growth of pollution load in many areas, even with application of available technology, would still be deleterious to public health.
>
> "Therefore, the Committee determined that existing sources of pollutants either should meet the standard of the law or be closed down . . . ." S. Rep. No. 91–1196, pp. 2–3 (1970).

The Conference Committee and, ultimately, the entire Congress accepted the Senate's three-year mandate for the achievement of primary air quality standards, and the clear import of that decision is that the Administrator must approve a plan that provides for attainment of the primary standards in three years even if attainment does not appear feasible. In rejecting the House's version of reasonableness, however, the conferees strengthened the Senate version. The Conference Committee made clear that the States could not procrastinate until the deadline approached. Rather, the primary standards had to be met in less than three years if possible; they had to be met "as expeditiously as practica-

ble." § 110 (a)(2)(A). Whatever room there is for considering claims of infeasibility in the attainment of primary standards must lie in this phrase, which is, of course, relevant only in evaluating those implementation plans that attempt to achieve the primary standard in less than three years.

It is argued that when such a state plan calls for proceeding more rapidly than economics and the available technology appear to allow, the plan must be rejected as not "practicable." Whether this is a correct reading of § 110 (a)(2)(A) depends on how that section's "as expeditiously as practicable" phrase is characterized. The Administrator's position is that § 110 (a)(2)(A) sets only a minimum standard that the States may exceed in their discretion, so that he has no power to reject an infeasible state plan that surpasses the minimum federal requirements—a plan that reflects a state decision to engage in technology forcing on its own and to proceed more expeditiously than is practicable. On the other hand, petitioner and *amici* supporting its position argue that § 110 (a)(2)(A) sets a mandatory standard that the States must meet precisely, and conclude that the Administrator may reject a plan for being too strict as well as for being too lax. Since the arguments supporting this theory are also made to show that the Administrator must reject a state plan that provides for achieving more than the secondary air quality standards require, we defer consideration of this question in order to outline the development and content of the secondary standards provision of § 110 (a)(2)(A).

Secondary air quality standards, those necessary to protect the public welfare, were subject to far less legislative debate than the primary standards. The House version of the Amendments treated welfare-related standards together with health-related standards, and

required both to be met "within a reasonable time." H. R. 17255, 91st Cong., 2d Sess., §§ 107 (e)(1), 108 (c)(1)(C)(i) (1970). The Senate bill, on the other hand, treated health- and welfare-related standards separately and did not require that welfare-related standards be met in any particular time at all, S. 4358, 91st Cong., 2d Sess., §§ 110 (a)(3), 110 (b), 111 (a)(2)(A) (1970), although the Committee Report expressed the desire that they be met "as rapidly as possible." S. Rep. No. 91–1196, p. 11 (1970). The final Amendments also separated welfare-related standards from health-related standards, labeled them secondary air quality standards, and adopted the House's requirement that they be met within a "reasonable time." §§ 109 (b), 110 (a)(2)(A). Thus, technology forcing is not expressly required in achieving standards to protect the public welfare.[6]

It does not necessarily follow, however, that the Administrator may consider claims of impossibility in assessing a state plan for achieving secondary standards. As with plans designed to achieve primary standards in less than three years, the scope of the Administrator's power to reject a plan depends on whether the State itself may decide to engage in technology forcing and adopt a plan more stringent than federal law demands.[7]

Amici Appalachian Power Co. et al. argue that the Amendments do not give such broad power to the States.

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[6] The Administrator appears to take this position in his guidelines for attaining secondary standards. See 40 CFR § 51.13 (b) (1975).

[7] A different question would be presented if the Administrator drafted the plan himself pursuant to § 110 (c). Cf. *District of Columbia* v. *Train,* 172 U. S. App. D. C. 311, 521 F. 2d 971 (1975); *South Terminal Corp.* v. *EPA,* 504 F. 2d 646 (CA1 1974). Whether claims of economic or technical infeasibility must be considered by the Administrator in drafting an implementation plan is a question we do not reach.

They claim that the States are precluded from submitting implementation plans more stringent than federal law demands by § 110 (a)(2)'s second criterion—that the plan contain such control devices "as may be necessary" to achieve the primary and secondary air quality standards. § 110 (a)(2)(B).[8] The contention is that an overly restrictive plan is not "necessary" for attainment of the national standards and so must be rejected by the Administrator.[9]

The principal support for this theory of *amici* lies in the fact that while the House and Senate versions of § 110 (a)(2) both expressly provided that the States could submit for the Administrator's approval plans that were stricter than the national standards required, see H. R. 17255, 91st Cong., 2d Sess., § 108 (c) (1970); S. 4358, 91st Cong., 2d Sess., § 111 (a)(1) (1970), the section as enacted contains no such express language. *Amici* argue that the Conference Committee must have decided to require state implementation plans simply—and precisely—to meet the national standards. The argument of *amici* proves too much. A Conference Committee lacks power to make substantive changes on matters about

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[8] See n. 1, *supra*.

[9] *Amici* not only argue that the Administrator must reject state plans that attempt to attain the primary standards more rapidly than "practicable" or the secondary standards in less than a "reasonable time," but also that he must reject state implementation plans that call for more quantitative emission controls than those necessary to meet the national primary and secondary standards. This argument adds nothing to deciding whether claims of economic or technological infeasibility can be raised. If quantitatively stiffer standards are barred, all plans containing them must be rejected, whether infeasible or not. In any case, as we make clear below, the States may adopt such more rigorous emission standards, and the Administrator must approve plans containing them if the minimum federal requirements are satisfied.

which both Houses agree. 2 U. S. C. § 190c (a) (Senate Conference Reports); Rule XXVIII (3), Rules of the House of Representatives, and § 546, Jefferson's Manual, H. R. Doc. No. 384, 92d Cong., 2d Sess., 526, 270–271 (1972); *National Coal Operators' Assn.* v. *Kleppe,* 423 U. S. 388, 401 n. 10 (1976). Here the Conference Report expressly notes that both the Senate and House bills would allow States to submit plans more stringent than the national standards demand, and offers no suggestion that the Conference bill intended to change that result, even if it could. H. R. Conf. Rep. No. 91–1783, p. 45 (1970). And while the final language of § 110 (a)(2)(B) may be less explicit than the versions originally approved by the House and the Senate, the most natural reading of the "as may be necessary" phrase in context is simply that the Administrator must assure that the minimal, or "necessary," requirements are met, not that he detect and reject any state plan more demanding than federal law requires.[10]

This reading is further supported by practical considerations. Section 116 of the Clean Air Act, as added, 84 Stat. 1689, 42 U. S. C. § 1857d–1 (1970 ed., Supp. IV), provides that the States may adopt emission standards

[10] Subsequent legislation confirms that this was Congress' original intent. In response to the fuel shortages of late 1973, Congress enacted the Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93–319, 88 Stat. 246. The Act allows the Administrator to review state implementation plans and notify the States if their restrictions on fuel-burning stationary sources may be relaxed without interfering with timely attainment and maintenance of national air quality standards. 42 U. S. C. § 1857c–5 (3)(B) (1970 ed., Supp. IV). The decision whether to relax restrictions, however, is left to the States. The Act shows congressional awareness and approval of the fact that federally approved implementation plans may be stricter than necessary for attainment of national standards.

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stricter than the national standards.[11] *Amici* argue that such standards must be adopted and enforced independently of the EPA-approved state implementation plan. This construction of §§ 110 and 116, however, would not only require the Administrator to expend considerable time and energy determining whether a state plan was precisely tailored to meet the federal standards,[12] but would simultaneously require States desiring stricter standards to enact and enforce two sets of emission standards, one federally approved plan and one stricter state plan. We find no basis in the Amendments for visiting such wasteful burdens upon the States and the Administrator, and so we reject the argument of *amici*.

We read the "as may be necessary" requirement of § 110 (a)(2)(B) to demand only that the implementation plan submitted by the State meet the "minimum conditions" of the Amendments.[13] *Train* v. *NRDC*, 421

[11] Section 116, 42 U. S. C. § 1857d–1 (1970 ed., Supp. IV), provides:

"Except as otherwise provided in sections 119 (c), (e), and (f), 209, 211 (c)(4), and 233 (preempting certain State regulation of moving sources) nothing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 111 or 112, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section."

[12] This burden would be particularly onerous in view of the facts that Congress gave the Administrator only four months in which to evaluate each plan submitted, § 110 (a)(2), and that all state plans are submitted at approximately the same time. § 110 (a)(1).

[13] Economic and technological factors may be relevant in determining whether the minimum conditions are met. Thus, the Administrator may consider whether it is economically or technologically

U. S., at 71 n. 11. Beyond that, if a State makes the legislative determination that it desires a particular air quality by a certain date and that it is willing to force technology to attain it—or lose a certain industry if attainment is not possible—such a determination is fully consistent with the structure and purpose of the Amendments, and § 110 (a)(2)(B) provides no basis for the EPA Administrator to object to the determination on the ground of infeasibility.[14] See *Train* v. *NRDC, supra,* at 79.

In sum, we have concluded that claims of economic or technological infeasibility may not be considered by the Administrator in evaluating a state requirement that primary ambient air quality standards be met in the mandatory three years. And, since we further conclude that the States may submit implementation plans more stringent than federal law requires and that the Administrator must approve such plans if they meet the minimum requirements of § 110 (a)(2), it follows that the language of § 110 (a)(2)(B) provides no basis for the Administrator ever to reject a state implementation plan on the ground that it is economically or technologically infeasible. Accordingly, a court of appeals reviewing an

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possible for the state plan to require more rapid progress than it does. If he determines that it is, he may reject the plan as not meeting the requirement that primary standards be achieved "as expeditiously as practicable" or as failing to provide for attaining secondary standards within "a reasonable time."

[14] In a literal sense, of course, no plan is infeasible since offending sources always have the option of shutting down if they cannot otherwise comply with the standard of the law. Thus, there is no need for the Administrator to reject an economically or technologically "infeasible" state plan on the ground that anticipated noncompliance will cause the State to fall short of the national standards. Sources objecting to such a state scheme must seek their relief from the State.

approved plan under § 307 (b)(1) cannot set it aside on those grounds, no matter when they are raised.

III

Our conclusion is bolstered by recognition that the Amendments do allow claims of technological and economic infeasibility to be raised in situations where consideration of such claims will not substantially interfere with the primary congressional purpose of prompt attainment of the national air quality standards. Thus, we do not hold that claims of infeasibility are never of relevance in the formulation of an implementation plan or that sources unable to comply with emission limitations must inevitably be shut down.

Perhaps the most important forum for consideration of claims of economic and technological infeasibility is before the state agency formulating the implementation plan. So long as the national standards are met, the State may select whatever mix of control devices it desires, *Train* v. *NRDC, supra,* at 79, and industries with particular economic or technological problems may seek special treatment in the plan itself. Cf. 40 CFR §§ 51.2 (b), (d) (1975); S. Rep. No. 91–1196, p. 36 (1970). Moreover, if the industry is not exempted from, or accommodated by, the original plan, it may obtain a variance, as petitioner did in this case; and the variance, if granted after notice and a hearing, may be submitted to the EPA as a revision of the plan.[15] § 110 (a)(3)(A), as amended, 88 Stat. 256, 42 U. S. C. § 1857c–5 (a)(3)(A) (1970 ed., Supp. IV). Lastly, an industry denied an exemption from the implementation plan, or denied a subsequent variance, may be able to take its claims of

[15] A variance approved as a revision of a plan under § 110 (a)(3)(A) will be honored by the EPA as part of an applicable implementation plan, § 110 (d), a matter of no little import to those granted variances. See n. 3, *supra.*

economic or technological infeasibility to the state courts. See, *e. g.*, Mo. Rev. Stat. § 203.130 (1972); Cal. Health & Safety Code § 39506 (West 1973); Pa. Stat. Ann., Tit. 71, § 1710.41 (1962).[16]

While the State has virtually absolute power in allocating emission limitations so long as the national standards are met, if the state plan cannot meet the national standards, the EPA is implicated in any postponement procedure. There are two ways that a State can secure relief from the EPA for individual emission sources, or classes of sources, that cannot meet the national standards. First, if the Governor of the State so requests at the time the original implementation plan is submitted, and if the State provides reasonable interim controls, the Administrator may allow a two-year extension of the three-year deadline for attainment of primary air quality standards if he finds, *inter alia,* that it is technologically infeasible for the source to comply. § 110 (e).[17] Second, again upon application of the Governor of the State, the Administrator may allow a one-year postponement of any compliance date in an implementation plan if he finds, *inter alia,* that compliance is technologically

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[16] Of course, the Amendments do not *require* the States to formulate their implementation plans with deference to claims of technological or economic infeasibility, to grant variances on those or any other grounds, or to provide judicial review of such actions. Consistent with Congress' recognition of the primary role of the States in controlling air pollution, the Amendments leave all such decisions to the States, which have typically responded in the manner described in the text. Cf. 40 CFR §§ 51.2 (b), (d) (1975).

[17] Section 110 (e) itself convincingly demonstrates that the statutory scheme did not contemplate the Administrator's rejecting state implementation plans as infeasible. There would be little purpose in providing noncomplying sources with § 110 (e)'s limited mechanism for postponing infeasible plans—dependent upon the cooperation of the State—if the sources had the option of going to court instead and freeing themselves entirely of the plan by having it struck down as infeasible.

infeasible and that "the continued operation of [the emission source] is essential to national security or to the public health or welfare . . . ." § 110 (f). See *Train* v. *NRDC*, 421 U. S., at 81.

Even if the State does not intervene on behalf of an emission source, technological and economic factors may be considered in at least one other circumstance. When a source is found to be in violation of the state implementation plan, the Administrator may, after a conference with the operator, issue a compliance order rather than seek civil or criminal enforcement. Such an order must specify a "reasonable" time for compliance with the relevant standard, taking into account the seriousness of the violation and "any good faith efforts to comply with applicable requirements." § 113 (a)(4) of the Clean Air Act, as added, 84 Stat. 1686, 42 U. S. C. § 1857c–8 (a)(4). Claims of technological or economic infeasibility, the Administrator agrees, are relevant to fashioning an appropriate compliance order under § 113 (a)(4). Brief for Respondent EPA 36 n. 34.[18]

In short, the Amendments offer ample opportunity for consideration of claims of technological and economic infeasibility. Always, however, care is taken that consideration of such claims will not interfere substantially with the primary goal of prompt attainment of the national standards. Allowing such claims to be raised by

[18] If he chooses not to seek a compliance order, or if an order is issued and violated, the Administrator may institute a civil enforcement proceeding. § 113 (b). Additionally, violators of an implementation plan are subject to criminal penalties under § 113 (c) and citizen enforcement suits under § 304, as added, 84 Stat. 1706, 42 U. S. C. § 1857h–2. Some courts have suggested that in criminal or civil enforcement proceedings the violator may in certain circumstances raise a defense of economic or technological infeasibility. See *Buckeye Power, Inc.* v. *EPA*, 481 F. 2d 162, 173 (CA6 1973); *Indiana & Michigan Electric Co.* v. *EPA*, 509 F. 2d 839, 847 (CA7 1975). We do not address this question here.

appealing the Administrator's approval of an implementation plan, as petitioner suggests, would frustrate congressional intent. It would permit a proposed plan to be struck down as infeasible before it is given a chance to work, even though Congress clearly contemplated that some plans would be infeasible when proposed. And it would permit the Administrator or a federal court to reject a State's legislative choices in regulating air pollution, even though Congress plainly left with the States, so long as the national standards were met, the power to determine which sources would be burdened by regulation and to what extent. Technology forcing is a concept somewhat new to our national experience and it necessarily entails certain risks. But Congress considered those risks in passing the 1970 Amendments and decided that the dangers posed by uncontrolled air pollution made them worth taking. Petitioner's theory would render that considered legislative judgment a nullity, and that is a result we refuse to reach.[19]

Affirmed.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE joins, concurring.

I join the opinion of the Court because the statutory scheme and the legislative history, thoroughly described in the Court's opinion, demonstrate irrefutably that Congress did not intend to permit the Administrator of

[19] Petitioner has briefed its contention that the Due Process Clause of the Fifth Amendment demands that at some time it be afforded the opportunity to raise before a court claims of economic and technological impossibility. This claim was neither presented to, nor considered by, the Court of Appeals, and we declined to grant certiorari on the question. 423 U. S. 821 (1975). In any case, we could not resolve petitioner's claim here, for there has been no showing that a § 307 (b)(1) appeal would be the only opportunity for petitioner to raise before a court its claims of economic and technological impossibility.

the Environmental Protection Agency to reject a proposed state implementation plan on the grounds of economic or technological infeasibility. Congress adopted this position despite its apparent awareness that in some cases existing sources that cannot meet the standard of the law must be closed down.[1]

The desire to impose strong incentives on industry to encourage the rapid development and adoption of pollution control devices is understandable. But it is difficult to believe that Congress would adhere to its absolute position if faced with the potentially devastating consequences to the public that this case vividly demonstrates.

Petitioner is an electric utility supplying power demands in the St. Louis metropolitan area, a large part of Missouri, and parts of Illinois and Iowa. It alleges that it cannot continue to operate if forced to comply with the sulfur dioxide restrictions contained in the

[1] The record is clear beyond question that at least the sponsors and floor leaders of the Clean Air Act intended that industries unable to comply with approved state implementation plans, whether because of economic or technological infeasibility, would be "closed down." This is explicit in the Senate Report. S. Rep. No. 91–1196, p. 3 (1970). It is repeated quite candidly in the statements of various members of the Senate and is described in detail in the EPA's brief in this case. Brief for Respondent EPA 20–32. Indeed, remarkable as it may seem, it is clear from the legislative history that even total technological infeasibility is "irrelevant." See *id.*, at 16, 18–23.

What this means in this case, if the allegations of Union Electric Co. prove to be correct, is that—in the interest of public health—the utility will be ordered to discontinue electric service to the public. As one cannot believe this would be allowed, I suppose that the State or Federal Government would find some basis for continuing to operate the company's facilities to serve the public despite noncompliance. But no such contingency program or authority therefor is found in the statute, and we must decide the case on the record before us.

Missouri implementation plan approved by the Administrator. Specifically, petitioner alleges that since the Administrator's approval of the plan, low-sulfur coal has become too scarce and expensive to obtain; reliable and satisfactory sulfur dioxide removal equipment that would enable it to comply with the plan's requirements simply has not been devised; the installation of the unsatisfactory equipment that is available would cost over $500 million, a sum impossible to obtain by bonds that are contingent on approval by regulatory bodies and public acceptance; and, even if the financing could be obtained, the carrying, operating, and maintenance costs of over $120 million a year would be prohibitive.[2] Petitioner further alleges that recent evidence has disclosed that sulfur dioxide in the ambient air is not the hazard to public health that it was once thought to be, and that compliance with the sulfur regulation in the Missouri plan is not necessary to the attainment of national primary and secondary ambient air standards in the St. Louis area.

At the risk of civil and criminal penalties enforceable by both the State and Federal Governments, as well as possible citizens' suits, 42 U. S. C. §§ 1857c–8, 1857h–2, petitioner is being required either to embark upon the task of installing allegedly unreliable and prohibitively expensive equipment or to shut down. Yet the present Act permits neither the Administrator, in approving the state plan, nor the courts, in reviewing that approval under § 307 of the Act, 42 U. S. C. § 1857h–5, even to consider petitioner's allegations of infeasibility.

Environmental concerns, long neglected, merit high priority, and Congress properly has made protection of

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[2] The burden of these extraordinary capital and operating costs, even if the technological infeasibility problems could be solved, would fall necessarily on the consumers of electric power.

the public health its paramount consideration. See S. Rep. No. 91–1196, pp. 2–3 (1970). But the shutdown of an urban area's electrical service could have an even more serious impact on the health of the public than that created by a decline in ambient air quality. The result apparently required by this legislation in its present form could sacrifice the well-being of a large metropolitan area through the imposition of inflexible demands that may be technologically impossible to meet and indeed may no longer even be necessary to the attainment of the goal of clean air.

I believe that Congress, if fully aware of this Draconian possibility, would strike a different balance.

Syllabus

McDONALD ET AL. *v.* SANTA FE TRAIL TRANSPORTATION CO. ET AL.

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

No. 75–260. Argued April 20, 1976—Decided June 25, 1976

Petitioners, both white employees of respondent transportation company, were discharged for misappropriating cargo from one of the company's shipments, but a Negro employee, who was also charged with the same offense, was not discharged. After subsequent grievance proceedings pursuant to a collective-bargaining agreement between the company and respondent union and complaints filed with the Equal Employment Opportunity Commission (EEOC) secured no relief, petitioners brought an action against respondents, alleging that in discharging petitioners, while retaining the Negro employee, respondent company had discriminated against petitioners on the basis of race, and that respondent union had acquiesced in this discrimination by failing properly to represent one of the petitioners in the grievance proceeding, all in violation of Title VII of the Civil Rights Act of 1964, which prohibits the discharge of "any individual" because of "such individual's race," and of 42 U. S. C. § 1981, which provides that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ." The District Court dismissed the complaint on the pleadings, holding, *inter alia,* that § 1981 is inapplicable to racial discrimination against whites, and that the facts alleged by petitioners failed to state a claim under Title VII. The Court of Appeals affirmed. *Held:*

1. Title VII, whose terms are not limited to discrimination against members of any particular race, prohibits racial discrimination in private employment against white persons upon the same standards as racial discrimination against nonwhites. Pp. 278–285.

(a) Title VII has been so interpreted by the EEOC, whose interpretations are entitled to great deference, and its conclusion accords with uncontradicted legislative history. Pp. 279–280.

(b) That petitioners' dismissal was based upon the commission of a criminal offense does not preclude them from seeking relief under Title VII. *McDonnell Douglas Corp.* v.

Green, 411 U. S. 792. While respondent employer may decide that participation in a theft of cargo may warrant not retaining a person in its employment, this criterion must be "applied alike to members of all races," or Title VII is violated. Crime or other misconduct may be a legitimate basis for discharge, but it is not a basis for racial discrimination. Pp. 281–284.

(c) Respondent union, as well as respondent company, is subject to liability under Title VII, since the same reasons that prohibit an employer from discriminating on the basis of race among culpable employees apply equally to the union, regardless of whether the union, under the circumstances, may find it necessary to compromise in securing retention of some of the affected employees. Whatever factors such a compromise may legitimately take into account in mitigating discipline of some employees, under Title VII race may not be included. Pp. 284–285.

2. Section 1981 prohibits racial discrimination in private employment against white persons as well as nonwhites, and this conclusion is supported both by the statute's language, which explicitly applies to "*all* persons," and by its legislative history. While the phrase "as is enjoyed by white persons" would seem to lend some support to the argument that the statute is limited to the protection of nonwhite persons against racial discrimination, the legislative history is clear that the addition of the phrase to the statute as finally enacted was not intended to eliminate the prohibition of racial discrimination against whites. Pp. 285–296.

513 F. 2d 90, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, BLACKMUN, POWELL, and STEVENS, JJ., joined, and in Parts I and II of which WHITE and REHNQUIST, JJ., joined. WHITE and REHNQUIST, JJ., filed a separate statement, *post*, p. 296.

Henry M. Rosenblum argued the cause and filed a brief for petitioners.

C. George Niebank, Jr., argued the cause for respondent Santa Fe Trail Transportation Co. With him on the brief was *Benjamin R. Powel*. *Chris Dixie* argued the cause and filed a brief for respondent Local No. 988 of

the Teamsters Freight, Tank Line & Automobile Industry Employees.

Assistant Attorney General Pottinger argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Bork* and *Walter W. Barnett.**

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Petitioners, L. N. McDonald and Raymond L. Laird, brought this action in the United States District Court for the Southern District of Texas seeking relief against Santa Fe Trail Transportation Co. (Santa Fe) and International Brotherhood of Teamsters Local 988 (Local 988), which represented Santa Fe's Houston employees, for alleged violations of the Civil Rights Act of 1866, 42 U. S. C. § 1981, and of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, in connection with their discharge from Santa Fe's employment. The District Court dismissed the complaint on the pleadings. The Court of Appeals for the Fifth Circuit affirmed. In determining whether the decisions of these courts were correct, we must decide, first, whether a complaint alleging that white employees charged with misappropriating property from their employer were dismissed from employment, while a black employee similarly charged was

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*Briefs of *amici curiae* urging reversal were filed by *Samuel Rabinove* for the American Jewish Committee; and by *Gerard C. Smetana, Jerry Kronenberg, Lawrence B. Kraus,* and *Richard B. Berman* for the Chamber of Commerce of the United States.

Briefs of *amici curiae* were filed by *Larry M. Lavinsky, Arnold Forster, Amos Alter,* and *Donald A. Derfner* for the Anti-Defamation League of B'nai B'rith; and by *Jack Greenberg, Barry L. Goldstein,* and *Eric Schnapper* for the N. A. A. C. P. Legal Defense and Educational Fund, Inc.

not dismissed, states a claim under Title VII. Second, we must decide whether § 1981, which provides that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . ." affords protection from racial discrimination in private employment to white persons as well as nonwhites.

I

Because the District Court dismissed this case on the pleadings, we take as true the material facts alleged in petitioners' complaint. *Hospital Bldg. Co.* v. *Trustees of Rex Hospital,* 425 U. S. 738, 740 (1976). On September 26, 1970, petitioners, both white, and Charles Jackson, a Negro employee of Santa Fe, were jointly and severally charged with misappropriating 60 one-gallon cans of antifreeze which was part of a shipment Santa Fe was carrying for one of its customers. Six days later, petitioners were fired by Santa Fe, while Jackson was retained. A grievance was promptly filed with Local 988, pursuant to the collective-bargaining agreement between the two respondents, but grievance proceedings secured no relief. The following April, complaints were filed with the Equal Employment Opportunity Commission (EEOC) charging that Santa Fe had discriminated against both petitioners on the basis of their race in firing them, and that Local 988 had discriminated against McDonald on the basis of his race in failing properly to represent his interests in the grievance proceedings, all in violation of Title VII of the Civil Rights Act of 1964. Agency process proved equally unavailing for petitioners, however, and the EEOC notified them in July 1971 of their right under the Act to initiate a civil action in district court within 30 days. This suit followed, petitioners joining their § 1981 claim to their Title VII allegations.

Respondents moved to dismiss the complaint, and in June 1974 the District Court issued a final modified opinion and order dismissing petitioners' claims under both Title VII and § 1981. Turning first to the § 1981 claim, the District Court determined that § 1981 is wholly inapplicable to racial discrimination against white persons, and dismissed the claim for want of jurisdiction. Turning then to petitioners' claims under Title VII, the District Court concluded it had no jurisdiction over Laird's Title VII claim against Local 988, because Laird had not filed any charge against Local 988 with the EEOC.[1] Respondent Santa Fe additionally contended that petitioners' EEOC charges against it, filed more than 90 days after their discharge, were untimely.[2] Apparently relying upon Fifth Circuit authority for the proposition that the 90-day period for filing with the EEOC was tolled during the pendency of grievance pro-

[1] See § 706 (e) of the Act, 42 U. S. C. § 2000e–5 (e), as amended, 42 U. S. C. § 2000e–5 (f)(1) (1970 ed., Supp. IV). This issue is not presented for review on certiorari here.

[2] Sections 706 (a) and (d) of the 1964 Act provided in pertinent part:

"(a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, . . . that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization . . . with a copy of such charge and shall make an investigation of such charge . . . . If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. . . .

. . . . . .

"(d) A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred . . . ." Amendments to § 706 by § 4 (a) of the Equal Employment Opportunity Act of 1972, 86 Stat. 104, 42 U. S. C. § 2000e–5 (1970 ed., Supp. IV), are not pertinent to this case.

ceedings, however,[3] the District Court concluded that the question of timely filing with the EEOC could not be determined without a hearing on petitioners' allegations that they had not been notified until April 3, 1971, of the termination of the grievance proceedings.[4] But the District Court found it unnecessary to hold such a hearing, since it concluded, quite apart from any timeliness problem, that "the dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged Negro employee does not raise a claim upon which Title VII relief may be granted." App. 117.

The Court of Appeals affirmed the dismissal, *per curiam*, 513 F. 2d 90 (1975), noting in regard to the Title VII claim asserted: "There is no allegation that the plaintiffs were falsely charged. Disciplinary action for offenses not constituting crimes is not involved in this case." *Id.*, at 90–91. We granted certiorari. 423 U. S. 923 (1975). We reverse.

II

Title VII of the Civil Rights Act of 1964 prohibits the discharge of "any individual" because of "such individual's race," § 703 (a)(1), 42 U. S. C. § 2000e–2 (a)(1).[5] Its terms are not limited to discrimination

[3] See *Hutchings* v. *United States Industries, Inc.*, 428 F. 2d 303 (1970); *Culpepper* v. *Reynolds Metals Co.*, 421 F. 2d 888 (1970).

[4] Respondents also alleged that the grievance proceedings under the collective-bargaining agreement were concluded in October 1970, so that even asuming the 90-day period for filing with the EEOC was tolled until that time, the April 1971 charges were untimely.

[5] Section 703 of the Act, 42 U. S. C. § 2000e–2, provides in pertinent part:

"(a) *Employer practices.* It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges

against members of any particular race. Thus, although we were not there confronted with racial discrimination against whites, we described the Act in *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 431 (1971), as prohibiting "[d]iscriminatory preference for *any* [racial] group, *minority* or *majority*" (emphasis added).[6] Similarly the EEOC, whose interpretations are entitled to great deference, *id.*, at 433–434, has consistently interpreted Title VII to proscribe racial discrimination in private employment against whites on the same terms as racial discrimination against nonwhites, holding that to proceed otherwise would

"constitute a derogation of the Commission's Con-

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of employment, because of such individual's race, color, religion, sex, or national origin.

. . . . . .

"(c) *Labor organization practices.* It shall be an unlawful employment practice for a labor organization . . . to cause or attempt to cause an employer to discriminate against an individual in violation of this section."

[6] Our discussion in *McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792, 802 (1973), of the means by which a Title VII litigant might make out a prima facie case of racial discrimination is not contrary. There we said that a complainant could establish a prima facie case by showing:

"(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." (Footnote omitted.)

As we particularly noted, however, this "specification . . . of the prima facie proof required . . . is not necessarily applicable in every respect to differing factual situations." *Id.*, at 802 n. 13. Requirement (i) of this sample pattern of proof was set out only to demonstrate how the racial character of the discrimination could be established in the most common sort of case, and not as an indication of any substantive limitation of Title VII's prohibition of racial discrimination.

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gressional mandate to eliminate all practices which operate to disadvantage the employment opportunities of any group protected by Title VII, including Caucasians." EEOC Decision No. 74–31, 7 FEP 1326, 1328, CCH EEOC Decisions ¶ 6404, p. 4084 (1973).[7]

This conclusion is in accord with uncontradicted legislative history to the effect that Title VII was intended to "cover white men and white women and all Americans," 110 Cong. Rec. 2578 (1964) (remarks of Rep. Celler), and create an "obligation not to discriminate against whites," *id.*, at 7218 (memorandum of Sen. Clark). See also *id.*, at 7213 (memorandum of Sens. Clark and Case); *id.*, at 8912 (remarks of Sen. Williams). We therefore hold today that Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes and Jackson white.[8]

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[7] See, *e. g.*, EEOC Decision No. 75–268, 10 FEP 1502, CCH EEOC Decisions ¶ 6452 (1975); EEOC Decision No. 74–106, 10 FEP 269, CCH EEOC Decisions ¶ 6427 (1974); EEOC Decision No. 74–95, 8 FEP 701, CCH EEOC Decisions ¶ 6432 (1974). None of the Courts of Appeals appears directly to have confronted the question. But compare, *Parks* v. *Brennan*, 389 F. Supp. 790 (ND Ga. 1974), rev'd on other grounds *sub nom. Parks* v. *Dunlop*, 517 F. 2d 785 (CA5 1975), with *Haber* v. *Klassen*, 10 FEP 1446 (ND Ohio 1975); *Mele* v. *United States Dept. of Justice*, 395 F. Supp. 592 (1975). Neither of the opinions below articulated a clear stance on the issue. Since his decision below, the District Judge in this case has held that Title VII is applicable to white persons. *Spiess* v. *C. Itoh & Co. (America), Inc.*, 408 F. Supp. 916, 918 n. 3, 929 n. 19 (SD Tex. 1976).

[8] Local 988 explicitly concedes that it makes no difference that petitioners are white and Jackson Negro, rather than the other way around. Brief for Respondent Local 988, p. 7. Santa Fe, while conceding that "across-the-board discrimination in favor of minorities could never be condoned consistent with Title VII," contends nevertheless that "such discrimination . . . in isolated cases which cannot reasonably be said to burden whites as a class unduly," such as is

Respondents contend that, even though generally applicable to white persons, Title VII affords petitioners no protection in this case, because their dismissal was based upon their commission of a serious criminal offense against their employer. We think this argument is foreclosed by our decision in *McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792 (1973).[9]

In *McDonnell Douglas,* a laid-off employee took part in an illegal "stall-in" designed to block traffic into his former employer's plant, and was arrested, convicted, and fined for obstructing traffic. At a later date, the former employee applied for an open position with the company, for which he was apparently otherwise qualified, but the employer turned down the application, assertedly because of the former employee's illegal activities against it. Charging that he was denied re-employment because he was a Negro, a claim the company denied, the former employee sued under Title VII. Reviewing the case on certiorari, we concluded that the rejected employee had adequately stated a claim under

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alleged here, "may be acceptable." Brief for Respondent Santa Fe 20 (emphasis omitted). We cannot agree. There is no exception in the terms of the Act for isolated cases; on the contrary, "Title VII tolerates *no* racial discrimination, subtle or otherwise." *McDonnell Douglas Corp.* v. *Green, supra,* at 801 (emphasis added).

Santa Fe disclaims that the actions challenged here were any part of an affirmative action program, see Brief for Respondent Santa Fe 19 n. 5, and we emphasize that we do not consider here the permissibility of such a program, whether judicially required or otherwise prompted. Cf. Brief for United States as *Amicus Curiae* 7 n. 5.

[9] Both the District Court, App. 117, and the Court of Appeals, 513 F. 2d, at 90, specifically relied upon petitioners' failure to allege that the charge of misappropriating the antifreeze was false. Petitioners assert here that their complaint should be construed to deny culpability, Brief for Petitioners 18–19, n. 37, but for the reasons discussed in the text, we need not consider whether the complaint can so be read.

Title VII. See *id.*, at 801. Although agreeing with the employer that "[n]othing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it," *id.*, at 803, we also recognized:

> "[T]he inquiry must not end here. While Title VII does not, without more, compel rehiring of [the former employee], neither does it permit [the employer] to use [the former employee's] conduct as a pretext for the sort of discrimination prohibited by [the Act]. On remand, [the former employee] must . . . be afforded a fair opportunity to show that [the employer's] stated reason for [the former employee's] rejection was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts against [the employer] of comparable seriousness to the 'stall-in' were nevertheless retained or rehired. [The employer] may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races." *Id.*, at 804.[10]

We find this case indistinguishable from *McDonnell Douglas.* Fairly read, the complaint asserted that petitioners were discharged for their alleged participation in a misappropriation of cargo entrusted to Santa Fe, but that a fellow employee, likewise implicated, was not so disciplined, and that the reason for the discrepancy in

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[10] The use of the term "pretext" in this context does not mean, of course, that the Title VII plaintiff must show that he would have in any event been rejected or discharged solely on the basis of his race, without regard to the alleged deficiencies; as the closing sentence to the quoted passage makes clear, no more is required to be shown than that race was a "but for" cause. See also *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405, 425 (1975).

discipline was that the favored employee is Negro while petitioners are white. See *Conley* v. *Gibson,* 355 U. S. 41, 45–46 (1957)[11] While Santa Fe may decide that participation in a theft of cargo may render an employee unqualified for employment, this criterion must be "applied, alike to members of all races," and Title VII is violated if, as petitioners alleged, it was not.

We cannot accept respondents' argument that the principles of *McDonnell Douglas* are inapplicable where the discharge was based, as petitioners' complaint admitted, on participation in serious misconduct or crime [12] directed against the employer. The Act prohibits *all* racial discrimination in employment, without exception for any group of particular employees, and while crime or other misconduct may be a legitimate basis for discharge, it is hardly one for racial discrimination. Indeed,

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[11] Santa Fe contends that petitioners were required to plead with "particularity" the degree of similarity between their culpability in the alleged theft and the involvement of the favored coemployee, Jackson. This assertion, apparently not made below, too narrowly constricts the role of the pleadings. Significantly, respondents themselves declined to plead any dissimilarities in the alleged misconduct of Jackson and petitioners, and did not amend their pleadings even after an interim order of the District Court indicated it regarded petitioners' allegations of racial discrimination as sufficient to raise the legal problem of dissimilar employment discipline of "equally guilty" employees of different races. App. 94. Of course, precise equivalence in culpability between employees is not the ultimate question: as we indicated in *McDonnell Douglas,* an allegation that other "employees involved in acts against [the employer] of *comparable seriousness* . . . were nevertheless retained . . ." is adequate to plead an inferential case that the employer's reliance on his discharged employee's misconduct as grounds for terminating him was merely a pretext. 411 U. S., at 804 (emphasis added).

[12] Local 988 asserts petitioners' alleged misappropriations would amount to a felony under Texas law, Tex. Penal Code Ann. § 31.03 (1974), and federal law, 18 U. S. C. § 659. We assume this assertion to be true.

the Title VII plaintiff in *McDonnell Douglas* had been convicted for a nontrivial [13] offense against his former employer. It may be that theft of property entrusted to an employer for carriage is a more compelling basis for discharge than obstruction of an employer's traffic arteries, but this does not diminish the illogic in retaining guilty employees of one color while discharging those of another color.[14]

At this stage of the litigation the claim against Local 988 must go with the claim against Santa Fe, for in substance the complaint alleges that the union shirked its duty properly to represent McDonald, and instead "acquiesced and/or joined in" Santa Fe's alleged racial discrimination against him. Local 988 argues that as a matter of law it should not be subject to liability under Title VII in a situation, such as this, where some but not all culpable employees are ultimately discharged on account of joint misconduct, because in representing all the affected employees in their relations with the em-

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[13] As we observed in *McDonnell Douglas:*

"The trial judge noted that no personal injury or property damage resulted from the 'stall-in' due 'solely to the fact that law enforcement officials had obtained notice in advance of plaintiff's . . . demonstration and were at the scene to remove plaintiff's car from the highway.' 318 F. Supp. 846, 851." 411 U. S., at 803 n. 16.

[14] Local 988's reliance on *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240 (1939), is misplaced. In that case we held only that it did not violate the National Labor Relations Act for an employer, after lawfully discharging a number of employees for their participation in an illegal sit-down strike, to extend re-employment to some, but not all, of those discharged employees. We held there that the employer "was simply exercising its normal right to select its employees." *Id.*, at 259. There was no suggestion of racial discrimination, or any discrimination based upon legally protected labor activities, in *Fansteel,* however. See also *American Ship Bldg.* v. *NLRB,* 380 U. S. 300, 312 (1965).

ployer, the union may necessarily have to compromise by securing retention of only some. We reject the argument. The same reasons which prohibit an employer from discriminating on the basis of race among the culpable employees apply equally to the union; and whatever factors the mechanisms of compromise may legitimately take into account in mitigating discipline of some employees, under Title VII race may not be among them.

Thus, we conclude that the District Court erred in dismissing both petitioners' Title VII claims against Santa Fe, and petitioner McDonald's Title VII claim against Local 988.

III

Title 42 U. S. C. § 1981 provides in pertinent part: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ." [15] We have previously held, where discrimination against Negroes was in question, that § 1981 affords a federal remedy against discrimination in private employment on the basis of race, and respondents do not contend otherwise. *Johnson* v. *Railway Express Agency*, 421 U. S. 454, 459–460 (1975). See also *Runyon* v. *McCrary, ante*, at 168; *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968). The question here is

[15] The statute provides in full:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

whether § 1981 prohibits racial discrimination in private employment against whites as well as nonwhites.[16]

While neither of the courts below elaborated its reasons for not applying § 1981 to racial discrimination against white persons, respondents suggest two lines of argument to support that judgment. First, they argue that by operation of the phrase "as is enjoyed by white citizens," § 1981 unambiguously limits itself to the protection of nonwhite persons against racial discrimination. Second, they contend that such a reading is consistent with the legislative history of the provision, which derives its operative language from § 1 of the Civil Rights Act of 1866, Act of Apr. 9, 1866, c. 31, § 1, 14 Stat. 27. See *Runyon* v. *McCrary, ante,* at 168–170, n. 8; *Tillman* v. *Wheaton-Haven Recreation Assn.,* 410 U. S. 431, 439 (1973). The 1866 statute, they assert, was concerned predominantly with assuring specified civil rights to the former Negro slaves freed by virtue of the Thirteenth Amendment, and not at all with protecting the corresponding civil rights of white persons.

We find neither argument persuasive. Rather, our examination of the language and history of § 1981 con-

[16] The lower federal courts have divided on the applicability of § 1981 to racial discrimination against white persons. Decisions in accord with the holdings below include *Balc* v. *United Steelworkers,* 6 EPD ¶ 8948 (WD Pa. 1973); *Ripp* v. *Dobbs Houses, Inc.,* 366 F. Supp. 205 (ND Ala. 1973); *Perkins* v. *Banster,* 190 F. Supp. 98 (Md. 1960). Decisions in conflict include *Carter* v. *Gallagher,* 452 F. 2d 315, 325 (CA8 1971); *Hollander* v. *Sears, Roebuck & Co.,* 392 F. Supp. 90 (Conn. 1975); *WRMA Broadcasting Co., Inc.* v. *Hawthorne,* 365 F. Supp. 577 (MD Ala. 1973); *Gannon* v. *Action,* 303 F. Supp. 1240, 1244–1245 (ED Mo. 1969), aff'd on other grounds, 450 F. 2d 1227 (CA8 1971); *Central Presbyterian Church* v. *Black Liberation Front,* 303 F. Supp. 894, 901 (ED Mo. 1969). We note that the District Judge in this case has changed his view since the decision below, and held that § 1981 is applicable to white persons. *Spiess* v. *C. Itoh & Co. (America), Inc.* 408 F. Supp. 916 (SD Tex. 1976).

vinces us that § 1981 is applicable to racial discrimination in private employment against white persons.

First, we cannot accept the view that the terms of § 1981 exclude its application to racial discrimination against white persons. On the contrary, the statute explicitly applies to "*all* persons" (emphasis added), including white persons. See, *e. g., United States* v. *Wong Kim Ark,* 169 U. S. 649, 675–676 (1898). While a mechanical reading of the phrase "as is enjoyed by white citizens" would seem to lend support to respondents' reading of the statute, we have previously described this phrase simply as emphasizing "the racial character of the rights being protected," *Georgia* v. *Rachel,* 384 U. S. 780, 791 (1966). In any event, whatever ambiguity there may be in the language of § 1981, see cases cited, *supra,* at 286 n. 16, is clarified by an examination of the legislative history of § 1981's language as it was originally forged in the Civil Rights Act of 1866. *Tidewater Oil Co.* v. *United States,* 409 U. S. 151, 157 (1972); *Immigration Service* v. *Errico,* 385 U. S. 214, 218 (1966). It is to this subject that we now turn.

The bill ultimately enacted as the Civil Rights Act of 1866 was introduced by Senator Trumbull of Illinois as a "bill . . . to protect *all* persons in the United States in their civil rights . . ." (emphasis added), and was initially described by him as applying to "every race and color." Cong. Globe, 39th Cong., 1st Sess., 211 (1866) (hereinafter Cong. Globe). Consistent with the views of its draftsman,[17] and the prevailing view in the Congress as to the reach of its powers under the enforcement section

[17] Cf. Cong. Globe 474:

"I take it that any statute which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude which, by the Constitution, is prohibited." (Emphasis added.)

of the Thirteenth Amendment,[18] the terms of the bill prohibited any racial discrimination in the making and enforcement of contracts against whites as well as nonwhites. Its first section provided:

> "[T]here shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." *Id.*, at 211.[19]

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[18] See generally, *e. g.*, Buchanan, The Quest for Freedom: A Legal History of the Thirteenth Amendment, 12 Hous. L. Rev. 1 (1974); Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1, 11–29 (1955). The Court has previously ratified the view that Congress is authorized under the Enforcement Clause of the Thirteenth Amendment to legislate in regard to "every race and individual." *Hodges* v. *United States*, 203 U. S. 1, 16–17 (1906); see *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 441 n. 78 (1968).

[19] The bill's concern with equal protection of civil rights for whites as well as nonwhites is also expressed in its § 4, which referred, as introduced, Cong. Globe 211, and enacted, 14 Stat. 28, to "protection to all persons in their constitutional rights of equality before the law, without distinction of race or color." The same concern is reflected in the evolution of an amendment offered by Senator Trumbull to provide, at the beginning of § 1: "That all persons of African descent born in the United States are

While it is, of course, true that the immediate impetus for the bill was the necessity for further relief of the constitutionally emancipated former Negro slaves, the general discussion of the scope of the bill did not circumscribe its broad language to that limited goal. On the contrary, the bill was routinely viewed, by its opponents and supporters alike, as applying to the civil rights of whites as well as nonwhites.[20] The point was most directly focused on in the closing debate in the Senate.

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hereby declared to be citizens of the United States . . . ." Cong. Globe 474. The amendment, accepted in principle, was itself amended to replace "all persons of African descent born in the United States" with "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed," 14 Stat. 27. This provision was ultimately superseded by § 1 of the Fourteenth Amendment.

The congressional design to protect individuals of all races is further emphasized by re-enactment of the 1866 Act as part of the Enforcement Act of 1870, following ratification of the Fourteenth Amendment. See *Jones* v. *Alfred H. Mayer Co., supra,* at 436.

[20] See, *e. g.,* Cong. Globe 504 (remarks of Sen. Howard, a supporter: "[The bill] simply gives to persons who are of different races or colors the same civil rights"); *id.,* at 505 (remarks of Sen. Johnson, an opponent: "[T]he white as well as the black is included in this first section . . ."); *id.,* at 601 (remarks of Sen. Hendricks, an opponent: "[The bill] provides, in the first place, that the civil rights of *all* men, without regard to color, shall be equal)." (Emphasis added.)

Respondents reasonably assert that references to the bill's placing Negroes' and whites' civil rights "upon precisely the same footing," *id.,* at 604 (remarks of Sen. Cowan, an opponent), and similar remarks might be read consistently either with the position that the measure was solely for relief of nonwhites, or with the position that it applies to protect whites as well. Respondents are unable, however, to summon any congressional debate from any stage in the bill's consideration to *contradict* the plain language of the bill as introduced and the explicit statements of Senator Trumbull, and others, that the bill, as introduced, did comprehend the prohibition of antiwhite discrimination.

During that debate, in response to the argument of Senator Davis of Kentucky that by providing for the punishment of racial discrimination in its enforcement section, § 2, the bill extended to Negroes a protection never afforded whites, Senator Trumbull said:

> "Sir, *this bill applies to white men as well as black men.* It declares that all persons in the United States shall be entitled to the same civil rights, the right to the fruit of their own labor, the right to make contracts, the right to buy and sell, and enjoy liberty and happiness; and that is abominable and iniquitous and unconstitutional! Could anything be more monstrous or more abominable than for a member of the Senate to rise in his place and denounce with such epithets as these a bill, the only object of which is to secure equal rights to all the citizens of the country, *a bill that protects a white man just as much as a black man?* With what consistency and with what face can a Senator in his place here say to the Senate and the country that this is a bill for the benefit of black men exclusively when there is no such distinction in it, and when *the very object of the bill is to break down all discrimination between black men and white men?*" *Id.*, at 599 (emphasis supplied).

So advised, the Senate passed the bill shortly thereafter. *Id.*, at 606–607.

It is clear, thus, that the bill, as it passed the Senate, was not limited in scope to discrimination against nonwhites. Accordingly, respondents pitch their legislative history argument largely upon the House's amendment of the Senate bill to add the "as is enjoyed by white citizens" phrase. But the statutory history is equally clear that that phrase was not intended to have the

effect of eliminating from the bill the prohibition of racial discrimination against whites.

Representative Wilson of Iowa, Chairman of the Judiciary Committee and the bill's floor manager in the House, proposed the addition of the quoted phrase immediately upon the introduction of the bill. The change was offered explicitly to technically "perfect" the bill, and was accepted as such without objection or debate. *Id.*, at 1115.

That Wilson's amendment was viewed simply as a technical adjustment without substantive effect is corroborated by the structure of the bill as it then stood. Even as amended the bill still provided that "there shall be no discrimination in civil rights or immunities among citizens of the United States in any State or Territory of the United States on account of race, color, or previous condition of slavery." [21] To read Wilson's amendment as excluding white persons from the particularly enumer-

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[21] After Representative Wilson's "perfecting" amendments, § 1 of the bill provided:

"[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States, without distinction of color, and there shall be no discrimination in civil rights or immunities among citizens of the United States in any State or Territory of the United States on account of race, color, or previous condition of slavery; and such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." S. 61, 39th Cong., 1st Sess., House Print, Mar. 2, 1866.

ated civil rights guarantees of the Act would contradict this more general language; and we would be unwilling to conclude, without further evidence, that in adopting the amendment without debate or discussion, the House so regarded it.[22]

Moreover, Representative Wilson's initial elaboration on the meaning of Senator Trumbull's bill, which immediately followed his securing passage of the foregoing amendment, fortifies our view that the amended bill was intended to protect whites as well as nonwhites. As Wilson described it, the purpose of the measure was to provide "for the equality of citizens . . . in the enjoyment of 'civil rights and immunities.'" *Id.,* at 1117. Then, speaking in particular of "immunities" as "'freedom or exemption from obligation,'" he made clear that the bill "secures to citizens of the United States equality in the exemptions of the law. . . . Whatever exemptions there may be shall apply to all citizens alike. One race shall not be more favored in this respect than

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[22] The provision generally forbidding "discrimination in civil rights or immunities . . . on account of race, color, or previous condition of slavery" was ultimately struck from the statute in the House. Cong. Globe 1366. This does not affect the analysis here, however, for two reasons. First, the debates make clear that the ground for objection to that provision, and the reason for its ultimate omission, was the breadth of the terms "civil rights and immunities," beyond those specifically enumerated in the second half of § 1, rather than an antagonism to the principle of protection for every race. See generally *Georgia* v. *Rachel,* 384 U. S. 780, 791–792 (1966); Bickel, *supra,* n. 18, at 11–29. Second, the point here is only that acceptance of respondents' interpretation of Congressman Wilson's amendment is inconsistent with the fact that the general provision against racial discrimination regarding civil rights remained in the bill *at the time of the amendment,* and was not removed until debate had focused on its particular ambiguities more than a week later.

another," *ibid.*[23] Finally, in later dialogue Wilson made quite clear that the purpose of his amendment was not to affect the Act's protection of white persons. Rather, he stated, "the reason for offering [the amendment] was this: it was thought by some persons that unless these qualifying words were incorporated in the bill, those rights might be extended to all citizens, whether male or female, majors or minors." Cong. Globe, App. 157. Thus, the purpose of the amendment was simply "to emphasize the racial character of the rights being protected," *Georgia* v. *Rachel,* 384 U. S., at 791, not to limit its application to nonwhite persons.[24]

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[23] Wilson also urged that the bill should pass

"to protect our citizens, from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men." Cong. Globe 1118.

Wilson's view that the Act applied equally to protect all races was echoed by other supporters of the bill in the House, as it had been in the Senate. See, *e. g.,* the remarks of Representative Shallabarger:

"Its whole effect is to require that whatever rights as to each of those enumerated civil . . . matters the States may confer upon one race or color of the citizens shall be held by all races in equality. Your State may deprive women of the right to sue or contract or testify, and children from doing the same. But if you do so, or do not so as to one race, you shall treat the other likewise. . . . It secures—not to all citizens, but to all races as races who are citizens—equality of protection in those enumerated civil rights which the States may deem proper to confer upon any races." *Id.,* at 1293.

See also *id.,* at 1159 (remarks of Rep. Windom); cf. *id.,* at 1118 (remarks of Rep. Wilson).

[24] Local 988 suggests that the pattern for Wilson's "as enjoyed by white citizens" amendment was similar language in § 2 of the civil rights bill which, as introduced by Senator Trumbull, Cong. Globe 211, and enacted, 14 Stat. 27, provided in pertinent part:

"Any person who . . . shall subject . . . any inhabitant of any State or Territory . . . to different punishment, pains, or penalties . . . by

The Senate debate on the House version of the bill [25] likewise emphasizes that Representative Wilson's amendment was not viewed as limiting the bill's prohibition of racial discrimination against white persons. Senator Trumbull, still managing the bill on the floor of the Senate, was asked whether there was not an inconsistency between the application of the bill to all "citizens of every race and color" and the statement that they shall have "the same right to make and enforce contracts . . . *as is enjoyed by white persons,*" (emphasis supplied) and it was suggested that the emphasized words were super-

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reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by a fine . . . or imprisonment . . . ." That this may have been the source of the language of the amendment hardly explains its meaning. As recited above, the prescriptive portion of the bill, § 1, provided, as introduced, see *supra,* at 288, and enacted, see n. 25, *infra,* and provides as currently codified, that punishments shall be equal for members of all races. Section 2 of the bill is no different, as it criminalizes the application of "*different* punishment, pains, or penalties" (emphasis supplied) whether greater or lesser than what white persons would be subject to. Even were we to read § 2 of the Act as protecting only nonwhites, however, the significance of such a conclusion to the interpretation of § 1 would be slight; for we have previously explained that the 39th Congress apparently intended to apply criminal sanctions only to some, but not all, violations of the Act. See *Jones* v. *Alfred H. Mayer Co.,* 392 U. S., at 424–425.

[25] Cong. Globe 1367. Section 1 of the bill, as it then stood, and as it was ultimately enacted, provided in relevant part:

"[A]ll persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts . . . as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." 14 Stat. 27.

fluous. Cong. Globe 1413. Senator Trumbull responded in agreement with the view that the words were merely "superfluous. I do not think they alter the bill. . . . [A]nd as in the opinion of the [Senate Judiciary] [C]ommittee which examined this matter they did not alter the meaning of the bill, the committee thought proper to recommend a concurrence . . . ." *Ibid.*

Finally, after the Senate's acquiescence in the House version of the bill, *id.,* at 1413–1416, and the subsequent veto by President Johnson,[26] the debate in both the Senate and the House again reflected the proponents' views that the bill did not favor nonwhites. Senator Trumbull once more rejected the view that the bill "discriminates in favor of colored persons," *id.,* at 1758, and in a similar vein, Representative Lawrence observed in the House that its "broad and comprehensive philanthropy which regards all men in their civil rights as equal before the law, is not made for any . . . race or color . . . but . . . will, if it become[s] a law, protect every citizen . . . ." *Id.,* at 1833. On these notes, both Houses passed the bill by the prescribed margins, and the veto was overridden. *Id.,* at 1802, 1861.

This cumulative evidence of congressional intent makes clear, we think, that the 1866 statute, designed to protect the "same right . . . to make and enforce contracts" of "citizens of every race and color" was not understood or intended to be reduced by Representative Wilson's amendment, or any other provision, to the protection solely of nonwhites. Rather, the Act was meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race. Unlikely as it might have appeared in 1866

[26] In his veto message, President Johnson recognized that the bill attempted to fix "a perfect equality of the white and black races." Cong. Globe 1679.

that white citizens would encounter substantial racial discrimination of the sort proscribed under the Act, the statutory structure and legislative history persuade us that the 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves. And while the statutory language has been somewhat streamlined in re-enactment and codification, there is no indication that § 1981 is intended to provide any less than the Congress enacted in 1866 regarding racial discrimination against white persons. *Runyon* v. *McCrary, ante,* at 168, and n. 8. Thus, we conclude that the District Court erred in dismissing petitioners' claims under § 1981 on the ground that the protections of that provision are unavailable to white persons.

The judgment of the Court of Appeals for the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST join Parts I and II of the Court's opinion, but for the reasons stated in MR. JUSTICE WHITE's dissenting opinion in *Runyon* v. *McCrary, ante,* p. 192, cannot join Part III since they do not agree that § 1981 is applicable in this case. To that extent they dissent.

Syllabus

CITY OF NEW ORLEANS ET AL. *v.* DUKES, DBA LOUISIANA CONCESSIONS

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 74–775. Argued November 11, 1975—Decided June 25, 1976

A New Orleans ordinance prohibits pushcart food sales in the Vieux Carre, or French Quarter, but by a "grandfather provision" exempts pushcart vendors who had operated in the Quarter for eight years. Appellee, who had conducted a pushcart business there for less than that time, brought suit in the District Court challenging the application of the grandfather provision as a denial of equal protection. The District Court granted appellant city's motion for summary judgment. The Court of Appeals, finding the grandfather provision a totally arbitrary and irrational method of achieving the city's conceded authority to regulate street business in the Vieux Carre to preserve the Quarter's values as a tourist attraction, and relying mainly on *Morey* v. *Doud*, 354 U. S. 457, reversed, and remanded the case for a determination as to the severability of the grandfather provision. *Held:*

1. This Court has jurisdiction of the appeal under 28 U. S. C. § 1254 (2), which authorizes this Court's review of an appeal by a party relying on a state statute (including a municipal ordinance) held unconstitutional by a court of appeals. Notwithstanding whether the ordinance as a whole or only its grandfather clause will be invalidated, its unconstitutionality has been definitely and finally adjudicated by the Court of Appeals, leaving no federal issue to be resolved below.

2. The grandfather provision does not violate the Equal Protection Clause of the Fourteenth Amendment. *Morey* v. *Doud, supra,* overruled.

(a) States have wide latitude in regulating their local economies, and when a local economic regulation like the ordinance here, which is aimed solely at enhancing the Vieux Carre's tourist appeal as part of the economy of New Orleans, is challenged as violating equal protection this Court defers to the legislative determination as to the desirability of particular statutory discriminations, and only such regulations as amount

to an invidious discrimination will be held to violate the Equal Protection Clause.

(b) The city could rationally choose initially to eliminate more recent pushcart vendors than absolutely to bar all pushcart vendors, on the ground that the newer businesses were less likely to have built up substantial reliance interests in the Vieux Carre and that the two vendors that qualified under the grandfather clause themselves have become part of the distinctive charm of the Quarter.

501 F. 2d 706, reversed and remanded.

Joel P. Loeffelholz argued the cause for appellants. With him on the brief was *Blake G. Arata.*

Joseph Neves Marcal III argued the cause and filed a brief for appellee.

PER CURIAM.

The question presented by this case is whether the provision of a New Orleans ordinance, as amended in 1972, that excepts from the ordinance's prohibition against vendors' selling of foodstuffs from pushcarts in the Vieux Carre, or French Quarter, "vendors who have continuously operated the same business within the Vieux Carre . . . for eight or more years prior to January 1, 1972 . . ." denied appellee vendor equal protection of the laws in violation of the Fourteenth Amendment.[1]

Appellee operates a vending business from pushcarts throughout New Orleans but had carried on that business in the Vieux Carre for only two years when the ordinance was amended in 1972 and barred her from

[1] The pertinent provision of the New Orleans ordinance, c. 46, §§ 1 and 1.1 of the Code of the City of New Orleans, as amended August 31, 1972, provides:

"Vendors who have continuously operated the same business within the Vieux Carre under the authority of this Chapter for eight or more years prior to January 1, 1972 may obtain a valid permit to operate such business within the Vieux Carre."

continuing operations there.[2] She had previously filed an action in the District Court for the Eastern District of Louisiana attacking the validity of the former version of the ordinance,[3] and amended her complaint to challenge the application of the ordinance's "grandfather clause"—the eight-years-or-more provision—as a denial of equal protection. She prayed for an injunction and declaratory judgment. On cross-motions for summary judgment, the District Court, without opinion, granted appellant city's motion. The Court of Appeals for the Fifth Circuit reversed. 501 F. 2d 706 (1974). We postponed the question of this Court's jurisdiction to a hearing on the merits, 421 U. S. 908 (1975). We hold that we have jurisdiction of appellant's appeal, and on the merits reverse the judgment of the Court of Appeals.

The Vieux Carre of the city of New Orleans is the heart of that city's considerable tourist industry and an integral component of the city's economy.[4] The sector plays a special role in the city's life, and pursuant to the Louisiana State Constitution, c. 8 of Art. V of the city's Home Rule Charter grants the New Orleans City Council power to enact ordinances designed to preserve its distinctive charm, character, and economic vitality.

Chapter 46 of the Code of the City of New Orleans sets up a comprehensive scheme of permits for the conduct of various businesses in the city. In 1972, the Code was amended to restrict the validity of many of these per-

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[2] Most of appellee's sales, particularly during the summer months, were made in the Vieux Carre.

[3] Jurisdiction was invoked pursuant to 28 U. S. C. §§ 1331, 1343 (3), (4), and 2201–2202. The equal protection violation was alleged to constitute a violation of 42 U. S. C. §§ 1983, 1985.

[4] See generally 2 App. 31–63 (Excerpts from Comprehensive Study Plan and Program for the Vieux Carre Under a Demonstration Grant from Department of Housing and Urban Development).

mits to points outside the Vieux Carre. However, even as to those occupations—including all pushcart food vendors—which were to be banned from the Vieux Carre during seasons other than Mardi Gras, the City Council made the "grandfather provision" exception. Two pushcart food vendors—one engaged in the sale of hot dogs and the other an ice cream vendor—had operated in the Vieux Carre for 20 or more years and therefore qualified under the "grandfather clause" and continued to operate there. The Court of Appeals recognized the "City Council's legitimate authority generally to regulate business conducted on the public streets and sidewalks of the Vieux Carre in order to preserve the appearance and custom valued by the Quarter's residents and attractive to tourists," 501 F. 2d, at 709, but nevertheless found that the Council's justification for the "grandfather" exception was "insufficient to support the discrimination imposed" and thus deprived appellee of equal protection. *Id.*, at 711. Stating expressly that this Court's decision in *Morey* v. *Doud*, 354 U. S. 457 (1957), was "our chief guide in resolving this case," 501 F. 2d, at 710, the Court of Appeals focused on the "exclusionary character" of the ordinance and its concomitant "creation of a protected monopoly for the favored class member." *Id.*, at 712–713. The "pivotal defect" in the statutory scheme was perceived to be the fact that the favored class members need not "continue to operate in a manner more consistent with the traditions of the Quarter than would any other operator," *id.*, at 711, and the fact that there was no reason to believe that length of operation "instills in the [favored] licensed vendors (or their likely transient operators) the kind of appreciation for the conservation of the Quarter's tradition" that would cause their operations to become or remain consistent with that tradition. *Id.*, at 712. Because these factors demonstrated the "insubstantiality of the relation between the

nature of the discrimination and the legitimate governmental interest in conserving the traditional assets of the Vieux Carre," *id.*, at 713, the ordinance was declared violative of equal protection as applied and the case was remanded for a determination of the severability of the "grandfather clause" from the remainder of the ordinance.

I

The question of this Court's jurisdiction to hear the appeal need detain us only briefly. Title 28 U. S. C. § 1254 (2) grants jurisdiction to review decisions of the courts of appeals

> "[b]y appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States . . . ."

A municipal ordinance is a "State statute" for purposes of this provision. See *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 927 n. 2 (1975); *United Gas Co.* v. *Ideal Cement Co.*, 369 U. S. 134 (1962). See also, *e. g.*, *Dusch* v. *Davis*, 387 U. S. 112 (1967); *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U. S. 77 (1958); *City of Detroit* v. *Murray Corp.*, 355 U. S. 489 (1958).

However, it is argued that the Court of Appeals' decision is not "final" under the doctrine enunciated in *Slaker* v. *O'Connor*, 278 U. S. 188 (1929) (involving predecessor statute to § 1254 (2)), and *South Carolina Electric & Gas Co.* v. *Flemming*, 351 U. S. 901 (1956) (*per curiam*), since the Court of Appeals, although finding the statute unconstitutional as applied, remanded the case to the District Court for a determination as to the severability of the "grandfather provision." There may be some question as to the continuing vitality of the "finality" requirement in the context of § 1254 (2), which unlike such jurisdictional statutes as 28 U. S. C. §§ 1257

and 1291 has no "finality" provision in the statute itself. See, *e. g., Doran* v. *Salem Inn, Inc., supra,* at 927; *Chicago* v. *Atchison, T. & S. F. R. Co., supra,* at 82–83. But without resolving that question, we believe that any "finality" test is met under the facts of this case.

The unconstitutionality of the ordinance, in its application to appellee, has been definitely and finally adjudicated by the Court of Appeals, and only a state-law question remains to be decided on remand—whether the statute will be totally invalidated or whether only its "grandfather provision" will be struck down. There is no federal, much less constitutional, question which is yet to be resolved below, and the policy underlying § 1254 (2)—ensuring that state laws are not erroneously invalidated—will in no way be served by further delay in adjudicating the constitutional issue presented. Moreover, since the outcome of the severability question will not moot a difficult constitutional issue in this case, the policy of avoiding needless constitutional decisions would not be furthered by staying our hand. Furthermore, to the extent any "finality" requirement in the context of § 1254 (2) might be premised on the policies of avoiding piecemeal appeals or the rendering of advisory opinions, neither difficulty is likely to eventuate in this case; even if we were to uphold the Court of Appeals' remand for a determination of the severability of the "grandfather provision" under state law, the ruling on remand is not one which would be subject to further review in this Court. On the other hand, a decision by this Court rejecting the constitutional challenge to the statute will obviate the need for further proceedings and bring to a halt the continued disruption of the city's internal economic affairs. Cf. generally, *e. g., Cox Broadcasting Corp.* v. *Cohn,* 420 U. S. 469, 476–478, 480, 485–486 (1975). We accordingly hold that this appeal is prop-

erly before us under 28 U. S. C. § 1254 (2). We therefore turn to the merits.

II

The record makes abundantly clear that the amended ordinance, including the "grandfather provision," is solely an economic regulation aimed at enhancing the vital role of the French Quarter's tourist-oriented charm in the economy of New Orleans.

When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. See, *e. g., Lehnhausen* v. *Lake Shore Auto Parts Co.,* 410 U. S. 356 (1973). Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step by step, *Katzenbach* v. *Morgan,* 384 U. S. 641 (1966), in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. See, *e. g., Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 488–489 (1955). In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines, see, *e. g., Day-Brite Lighting, Inc.* v. *Missouri,* 342 U. S. 421, 423 (1952); in the local economic sphere, it is only the in-

vidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment. See, *e. g., Ferguson* v. *Skrupa,* 372 U. S. 726, 732 (1963).[5]

The Court of Appeals held in this case, however, that the "grandfather provision" failed even the rationality test. We disagree. The city's classification rationally furthers the purpose which the Court of Appeals recognized the city had identified as its objective in enacting the provision, that is, as a means "to preserve the appearance and custom valued by the Quarter's residents and attractive to tourists." 501 F. 2d, at 709. The legitimacy of that objective is obvious. The City Council plainly could further that objective by making the reasoned judgment that street peddlers and hawkers tend to interfere with the charm and beauty of a historic area and disturb tourists and disrupt their enjoyment of that charm and beauty, and that such vendors in the Vieux Carre, the heart of the city's tourist industry,

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[5] *Ferguson* presented an analogous situation. There, a Kansas statute excepted lawyers from the prohibition of a statute making it a misdemeanor for any person to engage in the business of debt adjusting. We held that the exception of lawyers was not a denial of equal protection, stating, 372 U. S., at 732:

"Nor is the statute's exception of lawyers a denial of equal protection of the laws to nonlawyers. Statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution. . . . If the State of Kansas wants to limit debt adjusting to lawyers, the Equal Protection Clause does not forbid it" (footnote omitted).

We emphasize again that these principles, of course, govern only when no constitutional provision other than the Equal Protection Clause itself is apposite. Very different principles govern even economic regulation when constitutional provisions such as the Commerce Clause are implicated, or when local regulation is challenged under the Supremacy Clause as inconsistent with relevant federal laws or treaties.

might thus have a deleterious effect on the economy of the city. They therefore determined that to ensure the economic vitality of that area, such businesses should be substantially curtailed in the Vieux Carre, if not totally banned.

It is suggested that the "grandfather provision," allowing the continued operation of some vendors was a totally arbitrary and irrational method of achieving the city's purpose. But rather than proceeding by the immediate and absolute abolition of all pushcart food vendors, the city could rationally choose initially to eliminate vendors of more recent vintage. This gradual approach to the problem is not constitutionally impermissible. The governing constitutional principle was stated in *Katzenbach* v. *Morgan, supra,* at 657:

> "[W]e are guided by the familiar principles that a 'statute is not invalid under the Constitution because it might have gone farther than it did,' *Roschen* v. *Ward,* 279 U. S. 337, 339, that a legislature need not 'strike at all evils at the same time,' *Semler* v. *Dental Examiners,* 294 U. S. 608, 610, and that 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 489."

The city could reasonably decide that newer businesses were less likely to have built up substantial reliance interests in continued operation in the Vieux Carre and that the two vendors who qualified under the "grandfather clause"—both of whom had operated in the area for over 20 years rather than only eight—had themselves become part of the distinctive character and charm that distinguishes the Vieux Carre. We cannot say that these judgments so lack rationality that they constitute a constitutionally impermissible denial of equal protection.

Nevertheless, relying on *Morey* v. *Doud,* 354 U. S. 457 (1957), as its "chief guide," the Court of Appeals held that even though the exemption of the two vendors was rationally related to legitimate city interests on the basis of facts extant when the ordinance was amended, the "grandfather clause" still could not stand because "the hypothesis that a present eight year veteran of the push-cart hot dog market in the Vieux Carre will continue to operate in a manner more consistent with the traditions of the Quarter than would any other operator is without foundation." 501 F. 2d, at 711. Actually, the reliance on the statute's potential irrationality in *Morey* v. *Doud,* as the dissenters in that case correctly pointed out, see 354 U. S., at 474–475 (Frankfurter, J., joined by Harlan, J., dissenting), was a needlessly intrusive judicial infringement on the State's legislative powers, and we have concluded that the equal protection analysis employed in that opinion should no longer be followed. *Morey* was the only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds, and we are now satisfied that the decision was erroneous. *Morey* is, as appellee and the Court of Appeals properly recognized, essentially indistinguishable from this case, but the decision so far departs from proper equal protection analysis in cases of exclusively economic regulation that it should be, and it is, overruled.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Mr. Justice Marshall concurs in the judgment.

Mr. Justice Stevens took no part in the consideration or decision of this case.

MASSACHUSETTS BOARD OF RETIREMENT ET AL. *v.* MURGIA

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

No. 74–1044. Argued December 10, 1975—Decided June 25, 1976

A Massachusetts statute making it mandatory for a uniformed state police officer to retire at age 50 *held* not to deny equal protection of the laws in violation of the Fourteenth Amendment.

(a) Rationality, rather than strict scrutiny, is the proper standard for determining whether the statute violates equal protection. Equal protection analysis requires strict scrutiny of a legislative classification only when it impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. Here mandatory retirement at 50 does not implicate any fundamental right of a uniformed state police officer over that age, since a right of governmental employment *per se* is not fundamental, and the class of such officers over 50 does not constitute a suspect class, since classifications based on age are not considered suspect.

(b) Since physical ability generally declines with age, mandatory retirement at 50 serves to remove from police service those whose fitness for uniformed police work has presumptively diminished with age and is, therefore, rationally related to the State's announced legitimate objective of protecting the public by assuring the physical preparedness of its uniformed police. There is no indication that the statute has the effect of excluding from service so few officers who are in fact unqualified as to render age 50 a criterion wholly unrelated to such objective. While the State perhaps has not chosen the best means to accomplish its purpose, where rationality is the test, a statute "does not violate the Equal Protection Clause merely because the classifications made by [it] are imperfect." *Dandridge* v. *Williams,* 397 U. S. 471, 485.

376 F. Supp. 753 and 386 F. Supp. 179, reversed.

Terence P. O'Malley, Assistant Attorney General of Massachusetts, argued the cause for appellants. With

him on the brief were *Francis X. Bellotti,* Attorney General, and *S. Stephen Rosenfeld* and *Margot Botsford,* Assistant Attorneys General.

Robert D. City argued the cause and filed a brief for appellee.*

PER CURIAM.

This case presents the question whether the provision of Mass. Gen. Laws Ann. c. 32, § 26 (3)(a) (1966), that a uniformed state police officer "shall be retired . . . upon his attaining age fifty," denies appellee police officer equal protection of the laws in violation of the Fourteenth Amendment.[1]

**Henry Friedman* filed a brief for the State Police Association of Massachusetts as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *James A. Lanigan, Alfred Miller,* and *Stephen L. Solomon* for the American Association of Retired Persons et al.; by *Howard Eglit, Jonathan A. Weiss,* and *Melvin Wulf* for Legal Services for the Elderly Poor et al.; by *Thomas K. Gilhool* and *Edwin D. Wolf* for the Older and Middle Age Worker Ombudsman Pilot Project of United Communities of Southeastern Philadelphia et al.; by *James J. McNamara* for the American Medical Association; and by *Melvin S. Louison* for Lieutenant Lawrence Carter et al.

[1] Uniformed state police officers are appointed under Mass. Gen. Laws Ann. c. 22, § 9A (Supp. 1976–1977), which provides:

"Whenever the governor shall deem it necessary to provide more effectively for the protection of persons and property and for the maintenance of law and order in the commonwealth, he may authorize the commissioner to make additional appointments to the division of state police, together with such other employees as the governor may deem necessary for the proper administration thereof. . . . Said additional officers shall have and exercise within the commonwealth all the powers of constables, except the service of civil process, and of police officers and watchmen. . . . No person who has not reached his nineteenth birthday nor any person who has passed his thirtieth birthday shall be enlisted for the first time as an officer of the division of state police, except that said maximum age qualifica-

Appellee Robert Murgia was an officer in the Uniformed Branch of the Massachusetts State Police. The Massachusetts Board of Retirement retired him upon his 50th birthday. Appellee brought this civil action in the United States District Court for the District of Massachusetts, alleging that the operation of § 26 (3)(a) denied him equal protection of the laws and requesting the convening of a three-judge court under

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tion shall not apply in the case of the enlistment of any woman as such an officer."

In pertinent part c. 32, § 26 (3), provides:

"(*a*) . . . Any . . . officer appointed under section nine A of chapter twenty-two . . . who has performed service in the division of state police in the department of public safety for not less than twenty years, shall be retired by the state board of retirement upon his attaining age fifty or upon the expiration of such twenty years, whichever last occurs."

"(*b*) Any . . . officer . . . who has performed service . . . for not less than twenty years and who has not attained . . . age fifty in the case of an officer appointed under the said section nine A, shall be retired by the state board of retirement in case the rating board, after an examination of such officer or inspector by a registered physician appointed by it, shall report in writing to the state board of retirement that he is physically or mentally incapacitated for the performance of duty and that such incapacity is likely to be permanent."

Since § 9A requires that new enlistees in the Uniformed Branch be no more than 30 years of age, few retirements are delayed past 50 until the expiration of 20 years' service.

The question presented in this case was summarily treated in *Cannon* v. *Guste,* 423 U. S. 918 (1975), aff'g No. 74–3211 (May 6, 1975, ED La.); *Weisbrod* v. *Lynn,* 420 U. S. 940 (1975), aff'g 383 F. Supp. 933 (DC 1974); *McIlvaine* v. *Pennsylvania,* 415 U. S. 986 (1974), dismissing appeal from 454 Pa. 129, 309 A. 2d 801 (1973). Our cursory consideration in those cases does not, of course, foreclose this opportunity to consider more fully that question. See, *e. g., Edelman* v. *Jordan,* 415 U. S. 651, 670–671 (1974).

28 U. S. C. §§ 2281, 2284.[2] The District Judge dismissed appellee's complaint on the ground that the complaint did not allege a substantial constitutional question. 345 F. Supp. 1140 (1972). On appeal, the United States Court of Appeals for the First Circuit, in an unreported memorandum, set aside the District Court judgment and remanded the case with direction to convene a three-judge court. Upon a record consisting of depositions, affidavits, and other documentary material submitted by the parties, the three-judge court filed an opinion that declared § 26 (3)(a) unconstitutional on the ground that "a classification based on age 50 alone lacks a rational basis in furthering any substantial state interest," and enjoined enforcement of the statute. 376 F. Supp. 753, 754 (1974). We noted probable jurisdiction, 421 U. S. 974 (1975), and now reverse.

The primary function of the Uniformed Branch of the Massachusetts State Police is to protect persons and property and maintain law and order. Specifically, uniformed officers participate in controlling prison and civil disorders, respond to emergencies and natural disasters, patrol highways in marked cruisers, investigate crime, apprehend criminal suspects, and provide backup support for local law enforcement personnel. As the District Court observed, "service in this branch is, or can be, arduous." 376 F. Supp., at 754. "[H]igh versatility is required, with few, if any, backwaters available for the partially superannuated." *Ibid.* Thus, "even [appellee's] experts concede that there is a general relationship be-

[2] Jurisdiction was invoked pursuant to 28 U. S. C. § 1343, and declaratory and injunctive relief was sought under 28 U. S. C. §§ 2201, 2202. The equal protection denial was alleged to constitute a violation of 42 U. S. C. § 1983. Appellee made no claim under the Federal Age Discrimination in Employment Act of 1967, 81 Stat. 602, 29 U. S. C. § 621 *et seq.*

tween advancing age and decreasing physical ability to respond to the demands of the job." *Id.*, at 755.

These considerations prompt the requirement that uniformed state officers pass a comprehensive physical examination biennially until age 40. After that, until mandatory retirement at age 50, uniformed officers must pass annually a more rigorous examination, including an electrocardiogram and tests for gastro-intestinal bleeding. Appellee Murgia had passed such an examination four months before he was retired, and there is no dispute that, when he retired, his excellent physical and mental health still rendered him capable of performing the duties of a uniformed officer.

The record includes the testimony of three physicians: that of the State Police Surgeon, who testified to the physiological and psychological demands involved in the performance of uniformed police functions; that of an associate professor of medicine, who testified generally to the relationship between aging and the ability to perform under stress; and that of a surgeon, who also testified to aging and the ability safely to perform police functions. The testimony clearly established that the risk of physical failure, particularly in the cardiovascular system, increases with age, and that the number of individuals in a given age group incapable of performing stress functions increases with the age of the group. App. 77–78, 174–176. The testimony also recognized that particular individuals over 50 could be capable of safely performing the functions of uniformed officers. The associate professor of medicine, who was a witness for the appellee, further testified that evaluating the risk of cardiovascular failure in a given individual would require a number of detailed studies. *Id.*, at 77–78.

In assessing appellee's equal protection claim, the District Court found it unnecessary to apply a strict-scrutiny test, see *Shapiro* v. *Thompson*, 394 U. S. 618 (1969), for

it determined that the age classification established by the Massachusetts statutory scheme could not in any event withstand a test of rationality, see *Dandridge* v. *Williams,* 397 U. S. 471 (1970). Since there had been no showing that reaching age 50 forecasts even "imminent change" in an officer's physical condition, the District Court held that compulsory retirement at age 50 was irrational under a scheme that assessed the capabilities of officers individually by means of comprehensive annual physical examinations. We agree that rationality is the proper standard by which to test whether compulsory retirement at age 50 violates equal protection. We disagree, however, with the District Court's determination that the age 50 classification is not rationally related to furthering a legitimate state interest.

I

We need state only briefly our reasons for agreeing that strict scrutiny is not the proper test for determining whether the mandatory retirement provision denies appellee equal protection. *San Antonio School District* v. *Rodriguez,* 411 U. S. 1, 16 (1973), reaffirmed that equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right [3] or operates to the peculiar disadvantage of a suspect class.[4] Mandatory retirement at age 50

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[3] *E. g., Roe* v. *Wade,* 410 U. S. 113 (1973) (right of a uniquely private nature); *Bullock* v. *Carter,* 405 U. S. 134 (1972) (right to vote); *Shapiro* v. *Thompson,* 394 U. S. 618 (1969) (right of interstate travel); *Williams* v. *Rhodes,* 393 U. S. 23 (1968) (rights guaranteed by the First Amendment); *Skinner* v. *Oklahoma ex rel. Williamson,* 316 U. S. 535 (1942) (right to procreate).

[4] *E. g., Graham* v. *Richardson,* 403 U. S. 365 (1971) (alienage); *McLaughlin* v. *Florida,* 379 U. S. 184 (1964) (race); *Oyama* v. *California,* 332 U. S. 633 (1948) (ancestry).

under the Massachusetts statute involves neither situation.

This Court's decisions give no support to the proposition that a right of governmental employment *per se* is fundamental. See *San Antonio School District* v. *Rodriguez, supra; Lindsey* v. *Normet,* 405 U. S. 56, 73 (1972); *Dandridge* v. *Williams, supra,* at 485. Accordingly, we have expressly stated that a standard less than strict scrutiny "has consistently been applied to state legislation restricting the availability of employment opportunities." *Ibid.*

Nor does the class of uniformed state police officers over 50 constitute a suspect class for purposes of equal protection analysis. *Rodriguez, supra,* at 28, observed that a suspect class is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. The class subject to the compulsory retirement feature of the Massachusetts statute consists of uniformed state police officers over the age of 50. It cannot be said to discriminate only against the elderly. Rather, it draws the line at a certain age in middle life. But even old age does not define a "discrete and insular" group, *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152–153, n. 4 (1938), in need of "extraordinary protection from the majoritarian political process." Instead, it marks a stage that each of us will reach if we live out

our normal span. Even if the statute could be said to impose a penalty upon a class defined as the aged, it would not impose a distinction sufficiently akin to those classifications that we have found suspect to call for strict judicial scrutiny.

Under the circumstances, it is unnecessary to subject the State's resolution of competing interests in this case to the degree of critical examination that our cases under the Equal Protection Clause recently have characterized as "strict judicial scrutiny."

II

We turn then to examine this state classification under the rational-basis standard. This inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary. *Dandridge* v. *Williams, supra,* at 485. Such action by a legislature is presumed to be valid.[5]

In this case, the Massachusetts statute clearly meets the requirements of the Equal Protection Clause, for the State's classification rationally furthers the purpose identified by the State: [6] Through mandatory retirement at age 50, the legislature seeks to protect the public by assuring physical preparedness of its uniformed police.[7]

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[5] See, *e. g., San Antonio School District* v. *Rodriguez,* 411 U. S. 1, 40–41 (1973); *Madden* v. *Kentucky,* 309 U. S. 83, 88 (1940); *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78–79 (1911).

[6] See *San Antonio School District* v. *Rodriguez, supra,* at 17.

[7] A special legislative commission's report preceding the enactment of the age-50 maximum for uniformed police stated: "The Division of State Police, by virtue of the nature of the work demanded of its members, undoubtedly requires comparatively young men of vigorous physique. The nature of the duties to be performed in all weathers is arduous in the extreme . . . . No argument is

Since physical ability generally declines with age, mandatory retirement at 50 serves to remove from police service those whose fitness for uniformed work presumptively has diminished with age. This clearly is rationally related to the State's objective.[8] There is no indication

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needed to demonstrate that men above middle life are not usually physically able to perform such duties." Mass. H. Doc. No. 1582, p. 8 (1938). With these considerations in mind, the State's Commissioner of Public Safety argued before the commission for provisions permitting retirement of state police at 45. The commission observed in response that it was "not prepared to say that the contention of the Commissioner of Public Safety, that [state police] over age forty-five should be eligible [for] retirement, is unsound as a matter of public policy." *Ibid.* The commission, however, deferred the problem of setting retirement ages for the state police to special study, their sole reason for not recommending age 45 being the anticipated pension costs to the State, not the reasonableness of the age with respect to job qualification. *Id.*, at 7–9. Though the age-50 limitation was not specifically proposed by the commission, but was ultimately enacted by the legislature after further study, Act of Aug. 12, 1939, c. 503, § 3 (1939), Mass. Acts & Resolves 737–738 (1939), it is apparent that the purpose of the limitation was to protect the public by assuring the ability of state police to respond to the demands of their jobs. See also Mass. H. Doc. No. 5316, pp. 16–17 (1967); Mass. H. Doc. No. 2500, pp. 21, 23–25 (1955). This purpose is also clearly implied by the State's maximum-age scheme, which sets higher mandatory retirement ages for less demanding jobs. See Mass. Gen. Laws Ann. c. 32, §§ 1, 3 (2)(g), 26 (3)(a) (1966 and Supp. 1975).

[8] Appellee seems to have suggested in oral argument that Mass. Gen. Laws Ann. c. 32, §§ 1, 3 (2)(g), 26 (3)(a), also deny equal protection through the job classification established by them. Tr. of Oral Arg. 14, 17–18. Any such argument, however, is unpersuasive. The sections do set a maximum retirement age for uniformed state officers which is less than that set for other law enforcement personnel. It has never been seriously disputed, if at all, however, that the work of uniformed state officers is more demanding than that of other state, or even municipal, law enforcement personnel. It is this difference in work demands that underlies the job classification. Mass. H. Doc. No. 2500, pp. 21–22 (1955).

that § 26 (3)(a) has the effect of excluding from service so few officers who are in fact unqualified as to render age 50 a criterion wholly unrelated to the objective of the statute.[9]

That the State chooses not to determine fitness more precisely through individualized testing after age 50 is not to say that the objective of assuring physical fitness is not rationally furthered by a maximum-age limitation. It is only to say that with regard to the interest of all concerned, the State perhaps has not chosen the best means to accomplish this purpose.[10] But where rationality is the test, a State "does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Dandridge* v. *Williams*, 397 U. S., at 485.

We do not make light of the substantial economic and psychological effects premature and compulsory retirement can have on an individual; nor do we denigrate the ability of elderly citizens to continue to contribute to society. The problems of retirement have been well doc-

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[9] Review of Massachusetts' maximum-age limitations by state legislative commissions has proceeded on the principle that "maximum retirement age for any group of employees should be that age at which the efficiency of a large majority of the employees in the group is such that it is in the public interest that they retire." *Id.*, at 7.

[10] Indeed, were it not for the existing annual individual examinations through age 50, appellee would concede the rationality of mandatory retirement at 50. Tr. of Oral Arg. 22–23. The introduction of individual examinations, however, hardly defeats the rationality of the State's scheme. In fact, it augments rationality since the legislative judgment to avoid the risk posed by even the healthiest 50-year-old officers would be implemented by annual individual examinations between ages 40 and 50 which serve to eliminate those younger officers who are not at least as healthy as the best 50-year-old officers.

umented and are beyond serious dispute.[11] But "[w]e do not decide today that the [Massachusetts statute] is wise, that it best fulfills the relevant social and economic objectives that [Massachusetts] might ideally espouse, or that a more just and humane system could not be devised." *Id.*, at 487. We decide only that the system enacted by the Massachusetts Legislature does not deny appellee equal protection of the laws.

The judgment is reversed.

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

MR. JUSTICE MARSHALL, dissenting.

Today the Court holds that it is permissible for the Commonwealth of Massachusetts to declare that members of its state police force who have been proved medically fit for service are nonetheless legislatively unfit to be policemen and must be terminated—involuntarily "retired"—because they have reached the age of 50. Although we have called the right to work "of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure," *Truax* v. *Raich*, 239 U. S. 33, 41 (1915), the Court finds that the right to work is not a fundamental right. And, while agreeing that "the treatment of the aged in this Nation has not been wholly free of discrimination," *ante*, at 313, the Court holds that the elderly are not a

[11] *E. g.*, M. Barron, The Aging American (1961); Cameron, Neuroses of Later Maturity, in Mental Disorders in Later Life 201 (O. Kaplan, 2d ed. 1956); Senate Special Committee on Aging, Developments in Aging: 1971 and January-March 1972, S. Rep. No. 92–784, pp. 48–53 (1972); Hearings before the Subcommittee on Retirement and the Individual of the Senate Special Committee on Aging, 90th Cong., 1st Sess., pts. 1 and 2, pp. 36–46, 87–100, 121–127, 212–217, 464–471 (1967).

suspect class. Accordingly, the Court undertakes the scrutiny mandated by the bottom tier of its two-tier equal protection framework, finds the challenged legislation not to be "wholly unrelated" to its objective, and holds, therefore, that it survives equal protection attack. I respectfully dissent.

I

Although there are signs that its grasp on the law is weakening, the rigid two-tier model still holds sway as the Court's articulated description of the equal protection test. Again, I must object to its perpetuation. The model's two fixed modes of analysis, strict scrutiny and mere rationality, simply do not describe the inquiry the Court has undertaken—or should undertake—in equal protection cases. Rather, the inquiry has been much more sophisticated and the Court should admit as much. It has focused upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the state interests asserted in support of the classification. *Marshall* v. *United States,* 414 U. S. 417, 432–433 (1974) (MARSHALL, J., dissenting); *San Antonio School District* v. *Rodriguez,* 411 U. S. 1, 98–110 (1973) (MARSHALL, J., dissenting); *Richardson* v. *Belcher,* 404 U. S. 78, 90–91 (1971) (MARSHALL, J., dissenting); *Dandridge* v. *Williams,* 397 U. S. 471, 519–530 (1970) (MARSHALL, J., dissenting). See also *City of Charlotte* v. *Firefighters,* 426 U. S. 283, 286 (1976); *Memorial Hospital* v. *Maricopa County,* 415 U. S. 250, 253–254 (1974); *Dunn* v. *Blumstein,* 405 U. S. 330, 335 (1972); *Kramer* v. *Union School Dist.,* 395 U. S. 621, 626 (1969); *Williams* v. *Rhodes,* 393 U. S. 23, 30 (1968).

Although the Court outwardly adheres to the two-tier model, it has apparently lost interest in recognizing fur-

ther "fundamental" rights and "suspect" classes. See *San Antonio School District* v. *Rodriguez, supra* (rejecting education as a fundamental right); *Frontiero* v. *Richardson,* 411 U. S. 677 (1973) (declining to treat women as a suspect class). In my view, this result is the natural consequence of the limitations of the Court's traditional equal protection analysis. If a statute invades a "fundamental" right or discriminates against a "suspect" class, it is subject to strict scrutiny. If a statute is subject to strict scrutiny, the statute always, or nearly always, see *Korematsu* v. *United States,* 323 U. S. 214 (1944), is struck down. Quite obviously, the only critical decision is whether strict scrutiny should be invoked at all. It should be no surprise, then, that the Court is hesitant to expand the number of categories of rights and classes subject to strict scrutiny, when each expansion involves the invalidation of virtually every classification bearing upon a newly covered category.[1]

But however understandable the Court's hesitancy to invoke strict scrutiny, all remaining legislation should not drop into the bottom tier, and be measured by the mere rationality test. For that test, too, when applied as articulated, leaves little doubt about the outcome; the challenged legislation is always upheld. See *New*

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[1] Some classifications are so invidious that they should be struck down automatically absent the most compelling state interest, and by suggesting the limitations of strict-scrutiny analysis I do not mean to imply otherwise. The analysis should be accomplished, however, not by stratified notions of "suspect" classes and "fundamental" rights, but by individualized assessments of the particular classes and rights involved in each case. Of course, the traditional suspect classes and fundamental rights would still rank at the top of the list of protected categories, so that in cases involving those categories analysis would be functionally equivalent to strict scrutiny. Thus, the advantages of the approach I favor do not appear in such cases, but rather emerge in those dealing with traditionally less protected classes and rights. See *infra,* at 321–327.

Orleans v. *Dukes, ante,* p. 297 (overruling *Morey* v. *Doud,* 354 U. S. 457 (1957), the only modern case in which this Court has struck down an economic classification as irrational). It cannot be gainsaid that there remain rights, not now classified as "fundamental," that remain vital to the flourishing of a free society, and classes, not now classified as "suspect," that are unfairly burdened by invidious discrimination unrelated to the individual worth of their members. Whatever we call these rights and classes, we simply cannot forgo all judicial protection against discriminatory legislation bearing upon them, but for the rare instances when the legislative choice can be termed "wholly irrelevant" to the legislative goal. *McGowan* v. *Maryland,* 366 U. S. 420, 425 (1961).

While the Court's traditional articulation of the rational-basis test does suggest just such an abdication, happily the Court's deeds have not matched its words. Time and again, met with cases touching upon the prized rights and burdened classes of our society, the Court has acted only after a reasonably probing look at the legislative goals and means, and at the significance of the personal rights and interests invaded. *Stanton* v. *Stanton,* 421 U. S. 7 (1975); *Weinberger* v. *Wiesenfeld,* 420 U. S. 636 (1975); *United States Dept. of Agriculture* v. *Moreno,* 413 U. S. 528 (1973); *Frontiero* v. *Richardson,* 411 U. S., at 691 (POWELL, J., concurring in judgment); *James* v. *Strange,* 407 U. S. 128 (1972); *Weber* v. *Aetna Casualty & Surety Co.,* 406 U. S. 164 (1972); *Eisenstadt* v. *Baird,* 405 U. S. 438 (1972); *Reed* v. *Reed,* 404 U. S. 71 (1971). See *San Antonio School District* v. *Rodriguez, supra,* at 98–110 (MARSHALL, J., dissenting).[2]

[2] See also Gunther, The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972).

These cases make clear that the Court has rejected, albeit *sub silentio,* its most deferential statements of the rationality standard in assessing the validity under the Equal Protection Clause of much noneconomic legislation.

But there are problems with deciding cases based on factors not encompassed by the applicable standards. First, the approach is rudderless, affording no notice to interested parties of the standards governing particular cases and giving no firm guidance to judges who, as a consequence, must assess the constitutionality of legislation before them on an *ad hoc* basis. Second, and not unrelatedly, the approach is unpredictable and requires holding this Court to standards it has never publicly adopted. Thus, the approach presents the danger that, as I suggest has happened here, relevant factors will be misapplied or ignored. All interests not "fundamental" and all classes not "suspect" are not the same; and it is time for the Court to drop the pretense that, for purposes of the Equal Protection Clause, they are.

II

The danger of the Court's verbal adherence to the rigid two-tier test, despite its effective repudiation of that test in the cases, is demonstrated by its efforts here. There is simply no reason why a statute that tells able-bodied police officers, ready and willing to work, that they no longer have the right to earn a living in their chosen profession merely because they are 50 years old should be judged by the same minimal standards of rationality that we use to test economic legislation that discriminates against business interests. See *New Orleans* v. *Dukes, supra; Williamson* v. *Lee Optical Co.,* 348 U. S. 483 (1955). Yet, the Court today not only invokes the minimal level of scrutiny, it wrongly adheres to it. Anal-

ysis of the three factors I have identified above—the importance of the governmental benefits denied, the character of the class, and the asserted state interests—demonstrates the Court's error.

Whether "fundamental" or not, " 'the right of the individual . . . to engage in any of the common occupations of life' " has been repeatedly recognized by this Court as falling within the concept of liberty guaranteed by the Fourteenth Amendment. *Board of Regents* v. *Roth,* 408 U. S. 564, 572 (1972), quoting *Meyer* v. *Nebraska,* 262 U. S. 390, 399 (1923). As long ago as *Butchers' Union Co.* v. *Crescent City Co.,* 111 U. S. 746 (1884), Mr. Justice Bradley wrote that this right "is an inalienable right; it was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence . . . . This right is a large ingredient in the civil liberty of the citizen." *Id.,* at 762 (concurring opinion). And in *Smith* v. *Texas,* 233 U. S. 630 (1914), in invalidating a law that criminally penalized anyone who served as a freight train conductor without having previously served as a brakeman, and that thereby excluded numerous equally qualified employees from that position, the Court recognized that "all men are entitled to the equal protection of the law in their right to work for the support of themselves and families." *Id.,* at 641.

> "In so far as a man is deprived of the right to labor his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling." *Id.,* at 636.

See also *Arnett* v. *Kennedy,* 416 U. S. 134 (1974); *Perry* v. *Sindermann,* 408 U. S. 593 (1972); *Bell* v. *Burson,* 402

U. S. 535 (1971); *Keyishian* v. *Board of Regents,* 385 U. S. 589, 605–606 (1967); *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 238–239 (1957); *Slochower* v. *Board of Higher Education,* 350 U. S. 551 (1956); *Wieman* v. *Updegraff,* 344 U. S. 183 (1952); *Truax* v. *Raich,* 239 U. S., at 41. Even if the right to earn a living does not include the right to work for the government,[3] it is settled that because of the importance of the interest involved, we have always carefully looked at the reasons asserted for depriving a government employee of his job.

While depriving any government employee of his job is a significant deprivation, it is particularly burdensome when the person deprived is an older citizen. Once terminated, the elderly cannot readily find alternative employment. The lack of work is not only economically damaging, but emotionally and physically draining. Deprived of his status in the community and of the opportunity for meaningful activity, fearful of becoming dependent on others for his support, and lonely in his new-found isolation, the involuntarily retired person is susceptible to physical and emotional ailments as a direct consequence of his enforced idleness. Ample clinical evidence supports the conclusion that mandatory retirement poses a direct threat to the health and life expectancy of the retired person,[4] and these consequences of termination for age are not disputed by appellants.

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[3] See *Board of Regents* v. *Roth,* 408 U. S. 564, 587 (1972) (MARSHALL, J., dissenting). Appellee makes no such claim; nor does he allege that procedural due process requires that he be afforded a hearing prior to termination.

[4] See American Medical Association, Committee on Aging, Retirement, A Medical Philosophy and Approach; M. Barron, The Aging American 76–86, and sources cited (1961). Because, as one former AMA president bluntly put it, "[d]eath comes at retirement," quoted in M. Barron, *id.,* at 76, the AMA has formally taken a position against involuntary retirement and has submitted an *amicus* brief in this case to inform us of the medical consequences of the practice.

Thus, an older person deprived of his job by the government loses not only his right to earn a living, but, too often, his health as well, in sad contradiction of Browning's promise: "The best is yet to be,/The last of life, for which the first was made." [5]

Not only are the elderly denied important benefits when they are terminated on the basis of age, but the classification of older workers is itself one that merits judicial attention. Whether older workers constitute a "suspect" class or not, it cannot be disputed that they constitute a class subject to repeated and arbitrary discrimination in employment. See United States Department of Labor, The Older American Worker: Age Discrimination in Employment (1965); M. Barron, The Aging American 55–68 (1961). As Congress found in passing the Age Discrimination in Employment Act of 1967:

> "[I]n the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs[.]
>
> "[T]he setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons[.]
>
> "[T]he incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave[.]" 81 Stat. 602, 29 U. S. C. § 621 (a) (subsection numbers omitted).

See also *ante*, at 317 n. 11.

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[5] R. Browning, Rabbi Ben Ezra, stanza 1.

Of course, the Court is quite right in suggesting that distinctions exist between the elderly and traditional suspect classes such as Negroes, and between the elderly and "quasi-suspect" classes such as women or illegitimates. The elderly are protected not only by certain anti-discrimination legislation, but by legislation that provides them with positive benefits not enjoyed by the public at large. Moreover, the elderly are not isolated in society, and discrimination against them is not pervasive but is centered primarily in employment. The advantage of a flexible equal protection standard, however, is that it can readily accommodate such variables. The elderly are undoubtedly discriminated against, and when legislation denies them an important benefit—employment—I conclude that to sustain the legislation appellants must show a reasonably substantial interest and a scheme reasonably closely tailored to achieving that interest. Cf. *San Antonio School District* v. *Rodriguez,* 411 U. S., at 124–126 (MARSHALL, J., dissenting). This inquiry, ultimately, is not markedly different from that undertaken by the Court in *Reed* v. *Reed,* 404 U. S. 71 (1971).

Turning, then, to appellants' arguments, I agree that the purpose of the mandatory retirement law is legitimate, and indeed compelling. The Commonwealth has every reason to assure that its state police officers are of sufficient physical strength and health to perform their jobs. In my view, however, the means chosen, the forced retirement of officers at age 50, is so overinclusive that it must fall.

All potential officers must pass a rigorous physical examination. Until age 40, this same examination must be passed every two years—when the officer re-enlists—and, after age 40, every year. Appellants have conceded that "[w]hen a member passes his re-enlistment or annual physical, he is found to be qualified to perform all of

the duties of the Uniformed Branch of the Massachusetts State Police." App. 43. See *id.*, at 52. If a member fails the examination, he is immediately terminated or refused re-enlistment. Thus, the only members of the state police still on the force at age 50 are those who have been determined—repeatedly—by the Commonwealth to be physically fit for the job. Yet, all of these physically fit officers are automatically terminated at age 50. Appellants do not seriously assert that their testing is no longer effective at age 50,[6] nor do they claim that continued testing would serve no purpose because officers over 50 are no longer physically able to perform their

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[6] There may be an age at which passing a physical examination provides no substantial guarantee that the officer is fit for service for the coming year. In that case, the test has lost its predictive ability. There is no showing that age 50 marks such a line—although appellants ask us to hypothesize that it does—and indeed the evidence seems contrary to that supposition. First, among officers aged 40–49, who undergo yearly examinations, there is no general trend of increasing rejections with age nor any suggestion that those who passed the examination served in less than a satisfactory manner. 376 F. Supp. 753, 756 (Mass. 1974).

This evidence presents no reason to assume that testing suddenly loses its predictive ability after age 50. The only relevant studies presented are contrary to appellants' assumption. These studies support the conclusion that airline pilots should be terminated at age 60 because after *that* age medical examinations lose their predictive ability. See *Air Line Pilots Assn., Int'l* v. *Quesada,* 276 F. 2d 892 (CA2 1960).

The suggestion that age 50 is not the critical point for predictive ability is also supported by the national experience. Appellee has produced a study of the laws of the 50 States that shows that Massachusetts' age-50 retirement law prescribes the earliest retirement age in the Nation, and that no other State requires its state police to retire before age 55. Brief for Appellee 37 n. 14.

In short, I refuse to hypothesize that testing after age 50 loses its predictive ability when the appellants have introduced absolutely nothing that supports this position.

jobs.[7] Thus the Commonwealth is in the position of already individually testing its police officers for physical fitness, conceding that such testing is adequate to determine the physical ability of an officer to continue on the job, and conceding that that ability may continue after age 50. In these circumstances, I see no reason at all for automatically terminating those officers who reach the age of 50; indeed, that action seems the height of irrationality.

Accordingly, I conclude that the Commonwealth's mandatory retirement law cannot stand when measured against the significant deprivation the Commonwealth's action works upon the terminated employees. I would affirm the judgment of the District Court.[8]

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[7] Indeed, the appellants have conceded that "[a]ny individual member of the Uniformed Branch . . . whose age is fifty years or more may be capable of performing the physical activity required of the Uniformed Branch . . . depending upon his individual physical condition." App. 44. See *id.*, at 52.

[8] The Court's conclusion today does not imply that all mandatory retirement laws are constitutionally valid. Here the primary state interest is in maintaining a physically fit police force, not a mentally alert or manually dexterous work force. That the Court concludes it is rational to legislate on the assumption that physical strength and well-being decrease significantly with age does not imply that it will reach the same conclusion with respect to legislation based on assumptions about mental or manual ability. Accordingly, a mandatory retirement law for all government employees would stand in a posture different from the law before us today.

NORTH *v.* RUSSELL ET AL.

APPEAL FROM COURT OF APPEALS OF KENTUCKY

No. 74–1409. Argued December 9, 1975—Decided June 28, 1976

Under Kentucky's two-tier court system, police courts (the first tier) have jurisdiction of misdemeanor cases, but an accused has an appeal of right from a police judge's decision to the circuit court (the second tier), where there is a trial *de novo*. The State Constitution requires cities in Kentucky to be classified according to population size. By statute judges of police courts in cities of less than a certain population need not be lawyers, but in larger cities they must be, and all circuit court judges are lawyers. In this challenge to the constitutionality of the statutory scheme *held:*

1. An accused, who is charged with a misdemeanor for which he is subject to possible imprisonment, is not denied due process when tried before a nonlawyer police court judge in one of the smaller cities, when a later trial *de novo* is available in the circuit court. *Ward* v. *Village of Monroeville,* 409 U. S. 57; *Tumey* v. *Ohio,* 273 U. S. 510, distinguished. Pp. 333–339.

2. Nor does the State deny such an accused equal protection of the laws by providing law-trained judges for some police courts and lay judges for others, depending upon the State Constitution's classification of cities according to population, since as long as all people within each classified area are treated equally, the different classifications within the court system are justified. *Missouri* v. *Lewis,* 101 U. S. 22. Pp. 338–339.

Affirmed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., concurred in the result. STEWART, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post,* p. 339. STEVENS, J., took no part in the consideration or decision of the case.

Charles E. Goss argued the cause and filed briefs for appellant.

Robert L. Chenoweth, Assistant Attorney General of

Kentucky, argued the cause for appellees. With him on the briefs was *Ed W. Hancock,* Attorney General.*

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

The question presented in this case is whether an accused, subject to possible imprisonment, is denied due process when tried before a nonlawyer police court judge with a later trial *de novo* available under a State's two-tier court system; and whether a State denies equal protection by providing law-trained judges for some police courts and lay judges for others, depending upon the State Constitution's classification of cities according to population.

(1)

Appellant Lonnie North was arrested in Lynch, Ky., on July 10, 1974, and charged with driving while intoxicated in violation of Ky. Rev. Stat. Ann. § 189.520 (2) (1971). If a first offense, a penalty of a fine of from $100 to $500 is provided; if a subsequent offense, the same fine, and imprisonment for not more than six months.[1] Ky. Rev. Stat. Ann. § 189.990 (10)(a) (1971).

*Briefs of *amici curiae* urging reversal were filed by *Allan Ashman* for the American Judicature Society; by *Rene H. Reixach, Jr.,* for the Petitioners and Classes of Petitioners in *Wyse* v. *Hopkins* and in *Sanchez* v. *Tonkin;* and by *Laughlin McDonald, Ray McClain, Neil Bradley,* and *Melvin L. Wulf* for the American Civil Liberties Union Foundation, Inc.; by *Leslie G. Whitmer* for the Kentucky Bar Assn.; by *Marshall J. Hartman, Joseph T. Garlovsky,* and *James F. Flug* for the National Legal Aid and Defender Assn.; and by *Jimi Mitsunaga* for the Salt Lake Legal Defenders Assn.

Eugene W. Salisbury, Duncan S. MacAffer, and *Lawrence A. Schulz* filed a brief for the New York State Association of Magistrates as *amicus curiae* urging affirmance.

[1] The offense now carries the same monetary fine schedule, but a second offense now requires imprisonment for not less than three

Appellant's trial was scheduled for July 18, 1974, at 7 p. m., before the Lynch City Police Court. Appellee C. B. Russell, who is not a lawyer, was the presiding judge. Appellant's request for a jury was denied although under Kentucky law he was entitled to a jury trial. Ky. Const. § 11; Ky. Rev. Stat. Ann. §§ 25.014, 26.400 (1971). Appellant pleaded not guilty. Appellant was found guilty and sentenced to 30 days in jail, a fine of $150, and revocation of his driver's license.

Section 156 of the Kentucky Constitution requires cities to be classified according to population size. There are six classes of cities: fifth-class cities have a population of between 1,000 and 3,000; sixth-class cities have a population of less than 1,000. Lynch is a fifth-class city. Ky. Rev. Stat. Ann. § 81.010 (5) (1971). A police judge in fifth- and sixth-class cities must by statute be a voter and resident of the city for at least one year and be bonded, Ky. Rev. Stat. Ann. § 26.200 (1971); the police judge in such cities need not be a lawyer. Police judges in first-class cities, which have populations of over 100,000, must have the same qualifications as a circuit judge, who must be at least 35 years of age, a citizen of Kentucky, a two-year resident of the district, and a practicing attorney for eight years.[2] Ky. Const. § 130; Ky. Rev. Stat. Ann. § 26.140 (1971). Police court judges have terms of four years.

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days and not more than six months; any subsequent offense requires imprisonment for not less than 30 days and not more than 12 months. Ky. Rev. Stat. Ann. § 189.990 (9) (a) (Supp. 1974).

[2] A second-class city (population 20,000–100,000) police judge must be at least 25, a resident of the city for four years, and an attorney at law. Ky. Rev. Stat. Ann. § 26.150 (Supp. 1974). A third-class city (population 8,000-20,000) and a fourth-class city (population 3,000–8,000) police judge must be at least 24 and a city resident. Ky. Rev. Stat. Ann. § 26.190 (1971).

In fourth-, fifth-, or sixth-class cities police judges may be either appointed or elected.[3] Ky. Const. § 160.

Police courts have jurisdiction, concurrent with circuit courts, of penal and misdemeanor cases punishable by a fine of not more than $500 and/or imprisonment of not more than 12 months. Ky. Rev. Stat. Ann. § 26.010 (1971). Kentucky has a two-tier misdemeanor court system. An appeal of right is provided from the decision of a police judge to the circuit court where all judges are lawyers, and in that court a jury trial *de novo* may be had. Ky. Rev. Stat. Ann. § 23.032 (1971); Ky. Rule Crim. Proc. 12.06.

Appellant did not appeal to the Kentucky circuit court for a trial *de novo* to which he was entitled. After being sentenced by appellee judge, appellant challenged the statutory scheme described above by a writ of habeas corpus in the Harlan County Circuit Court, where he was

[3] The General Assembly of the Commonwealth of Kentucky at its 1974 session, by Senate Bill 183, enacted an Act proposing an amendment to the Kentucky Constitution relating to the judicial branch of government. On November 4, 1975, the Kentucky voters ratified the judicial amendment to the Kentucky Constitution, effective January 1, 1976. It provides, in part, that by January 1, 1978, all the county, quarterly, justice of the peace, and police courts will be combined into one district court in each of the 120 counties. These counties are to be allocated among 55 districts and each district is to elect at least one district judge who must be an attorney licensed in Kentucky. A district judge in multicounty districts must appoint a trial commissioner for each county in which no district judge resides. The commissioner must be an attorney if one is qualified and available. The commissioner will have the power to perform such duties of the district court as may be prescribed by the Kentucky Supreme Court.

The case is not mooted by this judicial amendment since the police courts will continue to function as challenged until January 1, 1978, and since the new amendment still permits nonlawyer judges to sit. These judges may have power to impose prison sentences if the Kentucky Supreme Court so provides.

represented by an attorney. Appellant contended that his federal due process and equal protection rights had been abridged because he had been tried and convicted in a court presided over by a judge without legal training and thus without legal competence. The State Circuit Court issued the writ, granted bail, and held an evidentiary hearing.

The Circuit Court noted that appellant was not challenging the adequacy of the proceedings before appellee Russell, and hence rested on the appellant's pleadings, which the court found were purposefully limited to the issue whether appellant could be tried before a judge who was not legally trained when persons similarly situated but residing in larger cities would be tried by a judge trained in the law. The Circuit Court denied relief on the basis of the Kentucky Court of Appeals holding in *Ditty* v. *Hampton,* 490 S. W. 2d 772 (1972), appeal dismissed, 414 U. S. 885 (1973). The Kentucky Court of Appeals in turn affirmed the denial of relief on the basis of *Ditty* v. *Hampton, supra,* noting that appellant could apply for bail in the event of an appeal from the Lynch Police Court judgment. 516 S. W. 2d 103 (1974).

When this case first came here on appeal we vacated the judgment and remanded it "for further consideration in light of the position presently asserted by the Commonwealth." 419 U. S. 1085 (1974). The Attorney General of Kentucky in his motion to dismiss or affirm had requested that this Court remand the case to the Kentucky Court of Appeals for consideration of violations of state law based on the suggestion that appellee judge had "mistakenly imposed a sentence of imprisonment upon appellant for a first offense of driving while intoxicated, whereas imprisonment is not an authorized punishment for first offenders . . . ." The

Kentucky Attorney General conceded that the writ of habeas corpus should have been granted and requested an opportunity to correct the error.

On remand, however, the Kentucky Court of Appeals declined to decide the case on the state grounds presented by the Attorney General, noting that the federal constitutional issue "was and is the only issue before us." That court noted that appellant sought only to "test the constitutional status of lay judges in criminal cases." No. 74–723 (Mar. 21, 1975).

On the second appeal to this Court we noted probable jurisdiction. 422 U. S. 1040 (1975).

(2)

Appellant's first claim is that when confinement is a possible penalty, a law-trained judge is required by the Due Process Clause of the Fourteenth Amendment whether or not a trial *de novo* before a lawyer-judge is available.[4]

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[4] Article III of the United States Constitution, of course, unlike provisions of some state constitutions, see, *e. g.*, N. Y. Const., Art. 6, § 20 (a); S. D. Const., Art. 5, §§ 10, 25, is silent as to any requirement that judges of the United States' courts, including Justices of the Supreme Court, be lawyers or "learned in the law." We note that in excess of 95% of all criminal cases in England are tried before lay judicial officers. See D. Karlen, Judicial Administration: The American Experience 32 (1970); H. Abraham, The Judicial Process 246–247, and n. 4 (2d ed. 1968). We also note that many of the States in the United States which utilize nonlawyer judges provide mandatory or voluntary training programs, see, *e. g.*, Iowa Code Ann. § 602.50 (6) (1975); La. Rev. Stat. Ann. § 49:251.1 (Supp. 1976); Miss. Code Ann. §§ 7–5–59, 9–11–3 (1972); Mont. Rev. Codes Ann. § 93–401 (Supp. 1975); Nev. Rev. Stat. § 5.026 (1973); N. Y. Uniform Justice Court Act § 105 (Supp. 1975–1976); N. C. Sess. Laws, c. 956, § 11 (1975); N. D. Cent. Code § 27–18–08 (Interim Supp. 1975); Pa. Stat. Ann., Tit. 42, § 1214 (Supp. 1976–1977); Utah Code Ann. § 78–5–27 (Supp. 1975); and training

It must be recognized that there is a wide gap between the functions of a judge of a court of general jurisdiction, dealing with complex litigation, and the functions of a local police court judge trying a typical "drunk" driver case or other traffic violations. However, once it appears that confinement is an available penalty, the process commands scrutiny. See *Argersinger* v. *Hamlin,* 407 U. S. 25 (1972).

Appellant argues that the right to counsel articulated in *Argersinger* v. *Hamlin, supra,* and *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), is meaningless without a lawyer-judge to understand the arguments of counsel. Appellant also argues that the increased complexity of substantive and procedural criminal law requires that all judges now be lawyers in order to be able to rule correctly on the intricate issues lurking even in some simple misdemeanor cases. In the context of the Kentucky procedures, however, it is unnecessary to reach the question whether a defendant could be convicted and imprisoned after a proceeding in which the only trial afforded is conducted by a lay judge. In all instances, a defendant in Kentucky facing a criminal sentence is afforded an opportunity to be tried *de novo* in a court presided over by a lawyer-judge since an appeal automatically vacates the conviction in police court. Ky. Rev. Stat. Ann. § 23.032 (1971); Ky. Rule Crim. Proc.

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manuals, see, *e. g.,* G. Brownlee, The Montana Justice of the Peace and Police Judge (1970). The brief of *amicus curiae* New York State Association of Magistrates informs us that, of the States that have nonlawyer judges, Delaware, Florida, Idaho, Iowa, Mississippi, Montana, New Mexico, New York, North Carolina, North Dakota, Pennsylvania, Texas, Utah, Washington, West Virginia, and Wyoming have mandatory training programs, and Alaska, Georgia, Kansas, Louisiana, Missouri, Nevada, New Hamsphire, Oregon, South Carolina, Tennessee, Vermont, and Wisconsin have voluntary training programs.

12.06. The trial *de novo* is available after either a trial or a plea of guilty in the police court; a defendant is entitled to bail while awaiting the trial *de novo.* 516 S. W. 2d 103 (1974).

It is obvious that many defendants charged with a traffic violation or other misdemeanor may be uncounseled when they appear before the police court. They may be unaware of their right to a *de novo* trial after a judgment is entered since the decision is likely to be prompt. We assume that police court judges recognize their obligation under *Argersinger* v. *Hamlin, supra,* to inform defendants of their right to a lawyer if a sentence of confinement is to be imposed. The appellee judge testified that informing defendants of a right to counsel was "the standard procedure." App. 32. We also assume that police court judges in Kentucky recognize their obligation to inform all convicted defendants, including those who waived counsel or for whom imprisonment was not imposed, of their unconditional right to a trial *de novo* and of the necessity that an "appeal" be filed within 30 days in order to implement that right. Ky. Rule Crim. Proc. 12.04.

In *Colten* v. *Kentucky,* 407 U. S. 104 (1972), we considered Kentucky's two-tier system there challenged on other grounds. We noted:

> "The right to a new trial is absolute. A defendant need not allege error in the inferior court proceeding. If he seeks a new trial, the Kentucky statutory scheme contemplates that the slate be wiped clean. Ky. Rule Crim. Proc. 12.06. Prosecution and defense begin anew. . . . The case is to be regarded exactly as if it had been brought there in the first instance." *Id.,* at 113.

We went on to note that the justifications urged by

States for continuing such tribunals [5] are the "increasing burdens on state judiciaries" and the "interest of both the defendant and the State, to provide speedier and less costly adjudications" than those provided in courts "where the full range of constitutional guarantees is available . . . ." *Id.*, at 114. Moreover, state policy takes into account that it is a convenience to those charged to be tried in or near their own community, rather than travel to a distant court where a law-trained judge is provided, and to have the option, as here, of a trial after regular business hours. We took note of these practical considerations in *Colten:*

> "We are not persuaded, however, that the Kentucky arrangement for dealing with the less serious offenses disadvantages defendants any more or any less than trials conducted in a court of general jurisdiction in the first instance, as long as the latter are always available. Proceedings in the inferior courts are simple and speedy, and, if the results in Colten's case are any evidence, the penalty is not characteristically severe. Such proceedings offer a defendant the opportunity to learn about the prosecution's case and, if he chooses, he need not reveal his own. He may also plead guilty without a trial and promptly secure a *de novo* trial in a court of general criminal jurisdiction." *Id.*, at 118–119.

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[5] We observed in *Colten* v. *Kentucky* that in the first-tier tribunals, "[s]ome [States], including Kentucky, do not record proceedings and the judges may not be trained for their positions either by experience or schooling." 407 U. S., at 114. We took note of the Kentucky Court of Appeals' comment that " 'the inferior courts are not designed or equipped to conduct error-free trials, or to insure full recognition of constitutional freedoms. They are courts of convenience, to provide speedy and inexpensive means of disposition of charges of minor offenses.' *Colten* v. *Commonwealth,* 467 S. W. 2d, at 379." *Id.*, at 117.

Under *Ward* v. *Village of Monroeville,* 409 U. S. 57, 61–62 (1972), appellant argues that he is entitled to a lawyer-judge in the first instance. There the judge was also mayor and the village received a substantial portion of its income from fines imposed by him as judge. Similarly in *Tumey* v. *Ohio,* 273 U. S. 510 (1927), the challenge was directed not at the training or education of the judge but at his possible bias due to interest in the outcome of the case, because as in *Monroeville* he was both mayor and judge and received a portion of his compensation directly from the fines. Financial interest in the fines was thought to risk a possible bias in finding guilt and fixing the amount of fines, and the Court found that potential for bias impermissible.

Under the Kentucky system, as we noted in *Colten,* a defendant can have an initial trial before a lawyer-judge by pleading guilty in the police court, thus bypassing that court and seeking the *de novo* trial, "erasing . . . any consequence that would otherwise follow from tendering the [guilty] plea." 407 U. S., at 119–120.

Our concern in prior cases with judicial functions being performed by nonjudicial officers has also been directed at the need for independent, neutral, and detached judgment, not at legal training. See *Coolidge* v. *New Hampshire,* 403 U. S. 443, 449–453 (1971). See also, *e. g., Whiteley* v. *Warden,* 401 U. S. 560, 564 (1971); *Katz* v. *United States,* 389 U. S. 347, 356 (1967); *Wong Sun* v. *United States,* 371 U. S. 471, 481–482 (1963). Yet cases such as *Shadwick* v. *City of Tampa,* 407 U. S. 345 (1972), are relevant; lay magistrates and other judicial officers empowered to issue warrants must deal with evaluation of such legal concepts as probable cause and the sufficiency of warrant affidavits. Indeed,

in *Shadwick* the probable-cause evaluation made by the lay magistrate related to a charge of "impaired driving." [6]

(3)

Appellant's second claim is that Kentucky's constitutional provisions classifying cities by population and its statutory provisions permitting lay judges to preside in some cities while requiring law-trained judges in others denies him the equal protection guaranteed by the Fourteenth Amendment. However, all people within a given city and within cities of the same size are treated equally.

The Kentucky Court of Appeals in *Ditty* v. *Hampton, supra,* articulated reasons for the differing qualifications of police court judges in cities of different size:

> "1. The greater volume of court business in the larger cities requires that judges be attorneys to enable the courts to operate efficiently and expeditiously (not necessarily with more fairness and impartiality).
>
> "2. Lawyers with whom to staff the courts are more available in the larger cities.
>
> "3. The larger cities have greater financial resources with which to provide better qualified personnel and better facilities for the courts." 490 S. W. 2d, at 776.

That court then noted: "That population and area factors may justify classifications within a court system has long been recognized." *Id.,* at 776–777. The Court of Appeals relied upon *Missouri* v. *Lewis,* 101

[6] In *Shadwick* we cautioned:

"[O]ur federal system warns of converting desirable practice into constitutional commandment. It recognizes in plural and diverse state activities one key to national innovation and vitality. States are entitled to some flexibility and leeway . . . ." 407 U. S., at 353–354.

U. S. 22 (1880), which held that as long as all people within the classified area are treated equally:

> "Each State . . . may establish one system of courts for cities and another for rural districts, one system for one portion of its territory and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a State to regulate its internal affairs to deny to it this right." *Id.*, at 30–31.

See generally *Salsburg* v. *Maryland,* 346 U. S. 545 (1954); *Fay* v. *New York,* 332 U. S. 261 (1947); *Manes* v. *Goldin,* 400 F. Supp. 23 (EDNY 1975) (three-judge court), summarily aff'd, 423 U. S. 1068 (1976).

We conclude that the Kentucky two-tier trial court system with lay judicial officers in the first tier in smaller cities and an appeal of right with a *de novo* trial before a traditionally law-trained judge in the second does not violate either the due process or equal protection guarantees of the Constitution of the United States; accordingly the judgment before us is

Affirmed.

MR. JUSTICE BRENNAN concurs in the result.

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

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

Lonnie North was haled into a Kentucky criminal court and there tried, convicted, and sentenced to a term of imprisonment by Judge C. B. Russell. Judge Russell is a coal miner without any legal training or education

whatever.[1] I believe that a trial before such a judge that results in the imprisonment of the defendant is constitutionally intolerable. It deprives the accused of his right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments, and deprives him as well of due process of law.[2]

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[1] The judge at North's state habeas corpus hearing concluded: "I think the fact has been established that [Judge Russell is] not a lawyer, he doesn't know any law, he hasn't studied any law." Judge Russell testified that he had only a high school education. He had never received any training concerning his duties as a lay judge. This is not a case, therefore, involving a lay judge who has received the kind of special training that several States apparently provide. See *ante,* at 333–334, n. 4.

A study of California's lay judges made in 1972 showed that 37% had no education beyond high school while 13% had even less formal education. *Gordon* v. *Justice Court,* 12 Cal. 3d 323, 330 n. 7, 525 P. 2d 72, 76 n. 7. A 1966 survey revealed that only 5% of Virginia's justices of the peace were college graduates, Note, 52 Va. L. Rev. 151, 177, while in 1958 one-half of West Virginia's justices had not completed high school, Note, 69 W. Va. L. Rev. 314, 323. In 1969, the Assistant Attorney General of Mississippi told the State's Judiciary Commission that "33% of the justices of the peace are limited in educational background to the extent that they are not capable of learning the necessary elements of law." Hearings on Justice of the Peace Courts and Judges before the Mississippi Judiciary Commission (testimony of R. Hugo Newcomb, Sr.), quoted in Comment, 44 Miss. L. J. 996, 1000 n. 31 (1973).

[2] At least two state courts have held that such a trial violates the United States Constitution. *Gordon* v. *Justice Court, supra; Shelmidine* v. *Jones,* No. 224948 (Utah 3d Jud. Dist., June 3, 1975).

Contemporary studies of American court systems have been unanimous in calling for the elimination of nonlawyer judges. See ABA Commission on Standards of Judicial Administration, Court Organization § 1.21 (1974); National Advisory Commission on Criminal Justice Standards & Goals, Task Force Report: Courts, Standard 8.1 (1973); The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 36

I

A

The reasons why a defendant in a criminal trial needs a lawyer to assist in his defense have nowhere been better put than in the oft-quoted words of Mr. Justice Sutherland's opinion for the Court in *Powell* v. *Alabama,* 287 U. S. 45:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Id.,* at 68–69.

So it was that, beginning with the capital case of *Powell* v. *Alabama, supra,* extending through the felony case of *Gideon* v. *Wainwright,* 372 U. S. 335, and culminating in the misdemeanor case of *Argersinger* v. *Ham-*

(1967); Advisory Commission on Intergovernmental Relations, State-Local Relations in the Criminal Justice System, Recommendation 21 (1971); Consensus Statement of the National Conference on the Judiciary, 55 J. Am. Jud. Soc. 29, 30 (1971).

lin, 407 U. S. 25, the Court's decisions firmly established that a person who has not been accorded the constitutional right to the assistance of counsel cannot be sentenced to even one day of imprisonment.

But the essential presupposition of this basic constitutional right is that the judge conducting the trial will be able to understand what the defendant's lawyer is talking about. For if the judge himself is ignorant of the law, then he, too, will be incapable of determining whether the charge "is good or bad." He, too, will be "unfamiliar with the rules of evidence." [3] And a lawyer for the

[3] Judge Russell testified that he had not received any training concerning rules of evidence and that he was not familiar with the Kentucky statutes relating to jury trials, with the Kentucky rules of criminal procedure, or with the rights guaranteed to a defendant in a criminal case under the Fourteenth Amendment.

The deposition of a lay magistrate in a South Carolina case provides another illustration of the inadequate legal background of nonlawyer judges:

"Q. What books do you have . . . that deal with the duties of Magistrate?"

Magistrate McLendon: "I got a stack of volume books from the courthouse when I got the job, little red books.

"Q. What books are those sir, do you know the names of them?"

Magistrate McLendon: "No, sir.

. . . . . .

"Q. Tell me what your understanding of the Code of Laws is, what is contained in the Code of Laws, as you understand?"

Magistrate McLendon: "Well I never have done any reading in it.

"Q. You never have had occasion to refer to it?"

Magistrate McLendon: "No, sir." Deposition of Magistrate Robert McLendon, Oct. 15, 1974, p. 110, *Frierson* v. *West,* Civ. No. 74–1074 (SC May 15, 1975).

See generally Note, 61 Va. L. Rev. 1454, 1456 (1975); Note, 10 Harv. Civ. Rights—Civ. Lib. L. Rev. 739, 746–755 (1975); Note, 69 W. Va. L. Rev. 314, 323–326 (1967); Comment, 44 Miss. L. J. 996, 1004–1008 (1973); Note, 53 Ore. L. Rev. 411, 428–430, 437 n. 187 (1974).

defendant will be able to do little or nothing to prevent an unjust conviction. In a trial before such a judge, the constitutional right to the assistance of counsel thus becomes a hollow mockery—"a teasing illusion like a munificent bequest in a pauper's will." *Edwards* v. *California,* 314 U. S. 160, 186 (Jackson, J., concurring).

B

In this case Judge Russell denied a motion for trial by jury, although under Kentucky law North was clearly entitled to a jury trial upon request. Ky. Const. § 11; Ky. Rev. Stat. Ann. §§ 25.014, 26.400 (1971). And after finding North guilty, Judge Russell proceeded to impose a sentence of imprisonment, although such a sentence was clearly unauthorized by Kentucky law. Ky. Rev. Stat. Ann. §§ 189.520 (2), 189.990 (10) (a) (1971).

But even if it were not possible to demonstrate in a particular case that the lay judge had been incompetent or the trial egregiously unfair, I think that *any* trial before a lay judge that results in the defendant's imprisonment violates the Due Process Clause of the Fourteenth Amendment. The Court has never required a showing of specific or individualized prejudice when it was the procedure itself that violated due process of law. "[A]t times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." *Estes* v. *Texas,* 381 U. S. 532, 542–543. See *Rideau* v. *Louisiana,* 373 U. S. 723; *Hamilton* v. *Alabama,* 368 U. S. 52.

A trial judge is "charged with the duty of insuring that justice, in the broadest sense of that term, is achieved in every criminal trial." *Faretta* v. *California,* 422 U. S. 806, 839 (BURGER, C. J., dissenting). See *Geders* v.

United States, 425 U. S. 80, 86–87. Among the critical functions that a trial judge must frequently perform are the acceptance of a guilty plea, *Henderson* v. *Morgan,* 426 U. S. 637; the determination of the voluntariness of a confession, *Jackson* v. *Denno,* 378 U. S. 368; the advising of the defendant of his trial rights, *Boykin* v. *Alabama,* 395 U. S. 238; and the instruction of a jury, *Bollenbach* v. *United States,* 326 U. S. 607, 612. A judge ignorant of the law is simply incapable of performing these functions. If he is aware of his incompetence, such a judge will perhaps instinctively turn to the prosecutor for advice and direction.[4] But such a practice no more than compounds the due process violation. See *In re Murchison,* 349 U. S. 133, 136.[5]

The Kentucky Court of Appeals characterized the kind of trial that took place here as an "absurdity." The trial,

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[4] Judge Russell conceded that he relied on the city attorney for legal advice:

"Q. Prior to your appointment as City Judge . . . had you had any previous legal experience of any kind?"

Judge Russell: "No, sir.

"Q. Have you had any legal training of any kind since your appointment?"

Judge Russell: "Well, the only thing I can say, if I have any doubt, I just consult with the city lawyer . . . .

. . . . . .

"Q. And when you receive advice from the city attorney, do you follow that advice?"

Judge Russell: "Yes, sir."

See also Deposition of Magistrate Robert McLendon, Oct. 15, 1974, p. 116 in *Frierson* v. *West,* Civ. No. 74–1074, (SC May 15, 1975) (stating that in event of request for jury trial he "would come to Mr. George Stuckey [the county attorney] and find out what I had to do").

[5] See Note, 53 Ore. L. Rev. 411, 430 (1974); Note, 61 Va. L. Rev. 1454, 1469–1470, n. 74 (1975); Note, 10 Harv. Civ. Rights—Civ. Lib. L. Rev. 739, 755 (1975).

in my view, was such an absurdity as to constitute a gross denial of due process of law.[6]

II

The Court seems to say that these constitutional deficiencies can all be swept under the rug and forgotten because the convicted defendant may have a trial *de novo* before a qualified judge. I cannot agree.

In *Ward* v. *Village of Monroeville,* 409 U. S. 57, the Court made clear that "the State's trial court procedure [cannot] be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance." *Id.,* at 61–62. See also *Callan* v. *Wilson,* 127 U. S. 540 (right to trial by jury is right to a jury in first instance).

The Court would distinguish the *Ward* case as "directed at the need for independent, neutral, and detached judgment, not at legal training." *Ante,* at 337. But surely there can be no meaningful constitutional difference between a trial that is fundamentally unfair because of the judge's possible bias, and one that is fundamentally unfair because of the judge's ignorance of the law.[7]

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[6] The scarcity of lawyers or legally trained persons in rural areas cannot serve to justify trials such as this. Utah, to cite one example, has managed to devise a constitutionally adequate trial system even though large portions of the State are sparsely populated and 13 of its 29 counties have two or fewer lawyers. See Utah House Bill No. 1, 1975 First Special Session, amending Utah Code Ann. § 78–5–4. See generally Note, 10 Harv. Civ. Rights—Civ. Lib. L. Rev. 739, 763–767 (1975).

[7] The Court's reliance on *Colten* v. *Kentucky,* 407 U. S. 104, is misplaced. The question in *Colten* was not whether a trial of the kind challenged here is constitutionally valid, but the quite different question whether a greater sentence can be imposed on a defendant following a trial *de novo* without violating *North Carolina* v. *Pearce,* 395 U. S. 711.

And the Court's suggestion that a defendant haled before a lay judge can protect his constitutional rights by simply pleading guilty and immediately seeking a trial *de novo* is wholly unpersuasive. First, this argument assumes without any factual support that the defendant will be informed of his right to a trial *de novo*.[8] Second, the procedure would still necessitate multiple court appearances, at the cost of both delay and an increased financial burden for attorneys' fees and court costs. Third, such a practice would turn what should be a solemn court proceeding, see *Boykin* v. *Alabama,* 395 U. S. 238, into nothing more than a sham. In short, I cannot accept the suggestion that, as a prerequisite to a constitutionally fair trial, a defendant must stand up in open court and inform a judge that he is guilty when in fact he believes that he is not.

At Runnymede in 1215 King John pledged to his barons that he would "not make any Justiciaries, Constables, Sheriffs, or Bailiffs, excepting of such as know the laws of the land . . . ." Magna Carta 45. Today, more than 750 years later, the Court leaves that promise unkept.

I respectfully dissent.

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[8] The record indicates that North was taken to jail immediately after sentencing and obtained his freedom only when the state habeas corpus court on the following day signed a writ ordering his release. It is hardly likely that North would have spent the night in jail if he had been told that he could avoid jail simply by asking for a trial *de novo*.

The Court also states its assumption that Kentucky police court judges will advise defendants of their right to counsel and that counsel will advise their clients of their right to a trial *de novo*. See *ante,* at 335. This assumption is also devoid of support in the present record. Although Judge Russell stated that it was "the standard procedure" to advise defendants of their right to counsel, he was unwilling to state that he advised North of this right, and North unreservedly testified that he was not so advised.

Syllabus

ELROD, SHERIFF, ET AL. *v.* BURNS ET AL.

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

No. 74–1520. Argued April 19, 1976—Decided June 28, 1976

Respondents, Republicans who are non-civil-service employees of the Cook County, Ill., Sheriff's Office, brought this suit as a class action for declaratory, injunctive, and other relief against petitioners, including the newly elected Sheriff, a Democrat, and county Democratic organizations, alleging that in violation of the First and Fourteenth Amendments and various statutes, including the Civil Rights Act of 1871, respondents were discharged or (in the case of one respondent) threatened with discharge for the sole reason that they were not affiliated with or sponsored by the Democratic Party. Finding that respondents had failed to show irreparable injury, the District Court denied their motion for a preliminary injunction and ultimately dismissed their complaint for failure to state a claim upon which relief could be granted. The Court of Appeals reversed and remanded with instructions to enter appropriate preliminary injunctive relief. *Held:* The judgment is affirmed. Pp. 351–374; 374–375.

509 F. 2d 1133, affirmed.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE WHITE and MR. JUSTICE MARSHALL, concluded that:

1. Neither the political-question doctrine nor the separation-of-powers doctrine makes this case inappropriate for judicial resolution, since, *inter alia,* neither doctrine applies to the federal judiciary's relationship to the States. Pp. 351–353.

2. The practice of patronage dismissals violates the First and Fourteenth Amendments, and respondents thus stated a valid claim for relief. Pp. 355–373.

(a) Patronage dismissals severely restrict political belief and association, which constitute the core of those activities protected by the First Amendment, and government may not, without seriously inhibiting First Amendment rights, force a public employee to relinquish his right to political association as the price of holding a public job, *Perry* v. *Sindermann,* 408 U. S. 593; *Keyishian* v. *Board of Regents,* 385 U. S. 589. Pp. 355–360.

(b) Though First Amendment rights are not absolute, they may be curtailed only by interests of vital importance, the burden of proving the existence of which rests upon the government, *Buckley* v. *Valeo,* 424 U. S. 1, 94. If conditioning the retention of public employment on the employee's support of the in-party is to survive constitutional challenge, it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of the constitutionally protected rights. Pp. 360–363.

(c) The inefficiency resulting from wholesale replacement of public employees on a change of administration belies the argument that employees not of the same political persuasion as the controlling party will not be motivated to work effectively; nor is it clear that patronage appointees are more qualified than those they replace. Since unproductive employees may always be discharged and merit systems are available, it is clear that less drastic means than patronage dismissals are available to insure the vital need for government efficiency and effectiveness. Pp. 364–367.

(d) The need to insure that policies that the electorate has sanctioned are effectively implemented can be fully satisfied by limiting patronage dismissals to policymaking positions. Pp. 367–368.

(e) Patronage dismissals cannot be justified by their contribution to the proper functioning of our democratic process through their assistance to partisan politics, since political parties are nurtured by other methods that are less intrusive. More fundamentally, any contribution of patronage dismissals to the democratic process does not suffice to override their severe encroachment on First Amendment freedoms. Pp. 368–373.

3. Since at the time the preliminary injunction was sought one of the named respondents was threatened with job loss, as were many of the class that respondents were seeking to have certified (if they had not already been coerced into supporting the Democratic Party to avoid discharge), First Amendment interests were either threatened or being impaired. Thus, irreparable injury was shown, and since respondents demonstrated a probability of success on the merits, the issuance of the injunction was properly directed by the Court of Appeals. Pp. 373–374.

MR. JUSTICE STEWART, joined by MR. JUSTICE BLACKMUN, concluded that a nonpolicymaking, nonconfidential government employee may not be discharged from a job that he is satisfactorily performing, upon the sole ground of his political beliefs, and that no other issue is involved in this case. Pp. 374–375.

BRENNAN, J., announced the judgment of the Court and delivered an opinion, in which WHITE and MARSHALL, JJ., joined. STEWART, J., filed an opinion concurring in the judgment, in which BLACKMUN, J., joined, *post,* p. 374. BURGER, C. J., filed a dissenting opinion, *post,* p. 375. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post,* p. 376. STEVENS, J., took no part in the consideration or decision of the case.

Thomas A. Foran argued the cause for petitioners. With him on the briefs were *Bernard Carey, Paul P. Biebel, Jr., Raymond F. Simon,* and *Robert E. Wiss.*

John C. Tucker argued the cause for respondents. With him on the brief was *David Goldberger.**

MR. JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion in which MR. JUSTICE WHITE and MR. JUSTICE MARSHALL joined.

This case presents the question whether public employees who allege that they were discharged or threatened with discharge solely because of their partisan political affiliation or nonaffiliation state a claim for deprivation of constitutional rights secured by the First and Fourteenth Amendments.

I

Respondents brought this suit in the United States District Court for the Northern District of Illinois

*Briefs of *amici curiae* urging affirmance were filed by *C. Richard Johnson* for the Independent Voters of Illinois et al.; and by *Joseph L. Rauh, Jr., John Silard,* and *Alan B. Morrison* for Public Citizen.

against petitioners, Richard J. Elrod, Richard J. Daley, the Democratic Organization of Cook County, and the Democratic County Central Committee of Cook County. Their complaint alleged that they were discharged or threatened with discharge solely for the reason that they were not affiliated with or sponsored by the Democratic Party. They sought declaratory, injunctive, and other relief for violations of the First and Fourteenth Amendments and 42 U. S. C. §§ 1983, 1985, 1986, 1988. Finding that the respondents failed to make an adequate showing of irreparable injury, the District Court denied their motion for a preliminary injunction and ultimately dismissed their complaint for failure to state a claim upon which relief could be granted. The United States Court of Appeals for the Seventh Circuit, relying on *Illinois State Employees Union* v. *Lewis,* 473 F. 2d 561 (CA7 1972), reversed and remanded, holding that respondents' complaint stated a legally cognizable claim. The Court of Appeals instructed the District Court to enter appropriate preliminary injunctive relief. 509 F. 2d 1133 (1975). We granted certiorari. 423 U. S. 821. We affirm.[1]

II

In December 1970, the Sheriff of Cook County, a Republican, was replaced by Richard Elrod, a Democrat. At that time, respondents, all Republicans, were employees of the Cook County Sheriff's Office. They were non-civil-service employees and, therefore, not covered by any statute, ordinance, or regulation protecting them from arbitrary discharge. One respondent, John Burns, was Chief Deputy of the Process Division and supervised all departments of the Sheriff's Office working on the

[1] For purposes of our review, all of the well-pleaded allegations of respondents' complaint and uncontroverted affidavits filed in support of the motion for a preliminary injunction are taken as true.

seventh floor of the building housing that office. Frank Vargas was a bailiff and security guard at the Juvenile Court of Cook County. Fred L. Buckley was employed as a process server in the office. Joseph Dennard was an employee in the office.

It has been the practice of the Sheriff of Cook County, when he assumes office from a Sheriff of a different political party, to replace non-civil-service employees of the Sheriff's Office with members of his own party when the existing employees lack or fail to obtain requisite support from, or fail to affiliate with, that party. Consequently, subsequent to Sheriff Elrod's assumption of office, respondents, with the exception of Buckley, were discharged from their employment solely because they did not support and were not members of the Democratic Party and had failed to obtain the sponsorship of one of its leaders. Buckley is in imminent danger of being discharged solely for the same reasons. Respondents allege that the discharges were ordered by Sheriff Elrod under the direction of the codefendants in this suit.

III

At the outset, we are met with objections to our consideration of this case based on the political-question doctrine and the principle of separation of powers. These objections need not long detain us.

A question presented to this Court for decision is properly deemed political when its resolution is committed by the Constitution to a branch of the Federal Government other than this Court. *Baker* v. *Carr,* 369 U. S. 186, 217 (1962). Thus, "it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.' " *Id.,* at 210. That matters related to a State's, or even the Federal Government's, elective process are implicated by

this Court's resolution of a question is not sufficient to justify our withholding decision of the question. In particular, in this case, we are asked only to determine whether the politically motivated discharge of employees of the Cook County Sheriff's Office comports with the limitations of the First and Fourteenth Amendments. This involves solely a question of constitutional interpretation, a function ultimately the responsibility of this Court. *Id.*, at 211. See *Powell* v. *McCormack,* 395 U. S. 486, 518–549 (1969). Petitioners do not, and could not, argue that a decision as to the constitutionality of the Sheriff's practices should be left to Congress or the President. The political-question doctrine, therefore, is no obstacle to judicial review in this case. See *Williams* v. *Rhodes,* 393 U. S. 23, 28 (1968).

Petitioners also object that our review of this case will offend the principle of separation of powers, for the executive's responsibility to insure that the laws be faithfully executed requires the power of appointment or removal at will, unimpaired by any judicial oversight. They cite *Myers* v. *United States,* 272 U. S. 52 (1926), in support of their argument. The short answer to this argument is that the separation-of-powers principle, like the political-question doctrine, has no applicability to the federal judiciary's relationship to the States. The matter in *Myers* itself was limited to the permissibility of restraints imposed by Congress on the President concerning the removal of the executive officers. More fundamentally, however, the answer to petitioners' objection is that there can be no impairment of executive power, whether on the state or federal level, where actions pursuant to that power are impermissible under the Constitution. Where there is no power, there can be no impairment of power. And our determination of the limits on state executive power contained in the Constitution

is in proper keeping with our primary responsibility of interpreting that document. It is to such a determination that we now turn.

IV

The Cook County Sheriff's practice of dismissing employees on a partisan basis is but one form of the general practice of political patronage.[2] The practice also includes placing loyal supporters in government jobs that may or may not have been made available by political discharges. Nonofficeholders may be the beneficiaries of lucrative government contracts for highway construction, buildings, and supplies. Favored wards may receive improved public services. Members of the judiciary may even engage in the practice through the appointment of receiverships, trusteeships, and refereeships. Although political patronage comprises a broad range of activities, we are here concerned only with the constitutionality of dismissing public employees for partisan reasons.

Patronage practice is not new to American politics. It has existed at the federal level at least since the Presidency of Thomas Jefferson,[3] although its popularization and legitimation primarily occurred later, in the Presidency of Andrew Jackson.[4] The practice is not unique to American politics. It has been used in many European countries,[5] and in darker times, it played a significant role in the Nazi rise to power in Germany and other totalitarian states.[6] More recent times have wit-

[2] M. Tolchin & S. Tolchin, To the Victor 5–6 (1971).

[3] *Id.*, at 323.

[4] *Id.*, at 323–326.

[5] See C. Fish, The Civil Service and the Patronage 87, 209–210 (1904); D. Rosenbloom, Federal Service and the Constitution 238–240 (1971).

[6] C. Friedrich & Z. Brzezinski, Totalitarian Dictatorship and Autocracy 183–188 (rev. ed. 1965).

nessed a strong decline in its use, particularly with respect to public employment. Indeed, only a few decades after Andrew Jackson's administration, strong discontent with the corruption and inefficiency of the patronage system of public employment eventuated in the Pendleton Act,[7] the foundation of modern civil service. And on the state and local levels, merit systems have increasingly displaced the practice.[8] This trend led the Court to observe in *CSC* v. *Letter Carriers,* 413 U. S. 548, 564 (1973), that "the judgment of Congress, the Executive, and the country appears to have been that partisan political activities by federal employees must be limited if the Government is to operate effectively and fairly, elections are to play their proper part in representative government, and employees themselves are to be sufficiently free from improper influences."

The decline of patronage employment is not, of course, relevant to the question of its constitutionality. It is the practice itself, not the magnitude of its occurrence, the constitutionality of which must be determined. Nor for that matter does any unacceptability of the practice signified by its decline indicate its unconstitutionality. Our inquiry does not begin with the judgment of history, though the actual operation of a practice viewed in retrospect may help to assess its workings with respect to constitutional limitations. Compare *Brown* v. *Board of Education,* 347 U. S. 483 (1954), with

[7] Act of Jan. 16, 1883, c. 27, § 2 (2) Fifth, Sixth, 22 Stat. 404.

[8] See *Broadrick* v. *Oklahoma,* 413 U. S. 601, 604–605, n. 2 (1973). Factors contributing to the declining use of patronage have not been limited to the proliferation of merit systems. New methods of political financing, the greater necessity of job expertise in public employment, growing issue orientation in the elective process, and new incentives for political campaigners have also contributed. Sorauf, The Silent Revolution In Patronage, 20 Pub. Admin. Rev. 28, 34 (1960).

Plessy v. *Ferguson,* 163 U. S. 537 (1896). Rather, inquiry must commence with identification of the constitutional limitations implicated by a challenged governmental practice.[9]

V

The cost of the practice of patronage is the restraint it places on freedoms of belief and association. In order to maintain their jobs, respondents were required to pledge their political allegiance to the Democratic Party, work for the election of other candidates of the Democratic Party, contribute a portion of their wages to the Party, or obtain the sponsorship of a member of the Party, usually at the price of one of the first three alternatives. Regardless of the incumbent party's identity, Democratic or otherwise, the consequences for association and belief are the same. An individual who is a member of the out-party maintains affiliation with his own party at the risk of losing his job. He works for the election of his party's candidates and espouses its policies at the same risk. The financial and campaign assistance that he is induced to provide to another party furthers the advancement of that party's policies to the detriment of his party's views and ultimately his own beliefs, and any assessment of his salary is tantamount to coerced belief. See *Buckley* v. *Valeo,* 424 U. S. 1, 19 (1976). Even a pledge of allegiance to another party, however ostensible, only serves to compromise the individual's true beliefs. Since the average public employee is hardly in the financial position to support his party and another, or to lend his time to two parties, the

[9] For comprehensive commentary on the constitutionality of the practice of patronage dismissals, see Schoen, Politics, Patronage, and the Constitution, 3 Ind. Legal Forum 35 (1969); Comment, Patronage Dismissals: Constitutional Limits and Political Justification, 41 U. Chi. L. Rev. 297 (1974).

individual's ability to act according to his beliefs and to associate with others of his political persuasion is constrained, and support for his party is diminished.

It is not only belief and association which are restricted where political patronage is the practice. The free functioning of the electoral process also suffers. Conditioning public employment on partisan support prevents support of competing political interests. Existing employees are deterred from such support, as well as the multitude seeking jobs. As government employment, state or federal, becomes more pervasive, the greater the dependence on it becomes, and therefore the greater becomes the power to starve political opposition by commanding partisan support, financial and otherwise. Patronage thus tips the electoral process in favor of the incumbent party, and where the practice's scope is substantial relative to the size of the electorate, the impact on the process can be significant.

Our concern with the impact of patronage on political belief and association does not occur in the abstract, for political belief and association constitute the core of those activities protected by the First Amendment.[10] Regardless of the nature of the inducement, whether it be by the denial of public employment or, as in *Board of Education* v. *Barnette,* 319 U. S. 624 (1943), by the influence of a teacher over students, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.,* at 642. And, though

[10] "It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case." *Board of Education* v. *Barnette,* 319 U. S. 624, 639 (1943).

freedom of belief is central, "[t]he First Amendment protects political association as well as political expression." *Buckley* v. *Valeo, supra,* at 15. "There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. *NAACP* v. *Button,* 371 U. S. 415, 430; *Bates* v. *Little Rock,* 361 U. S. 516, 522–523; *NAACP* v. *Alabama,* 357 U. S. 449, 460–461. The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Kusper* v. *Pontikes,* 414 U. S. 51, 56–57 (1973).

These protections reflect our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 270 (1964), a principle itself reflective of the fundamental understanding that "[c]ompetition in ideas and governmental policies is at the core of our electoral process . . . ." *Williams* v. *Rhodes,* 393 U. S., at 32. Patronage, therefore, to the extent it compels or restrains belief and association, is inimical to the process which undergirds our system of government and is "at war with the deeper traditions of democracy embodied in the First Amendment." *Illinois State Employees Union* v. *Lewis,* 473 F. 2d, at 576. As such, the practice unavoidably confronts decisions by this Court either invalidating or recognizing as invalid government action that inhibits belief and association through the conditioning of public employment on political faith.

The Court recognized in *United Public Workers* v. *Mitchell,* 330 U. S. 75, 100 (1947), that "Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office . . . .' " This

principle was reaffirmed in *Wieman* v. *Updegraff,* 344 U. S. 183 (1952), which held that a State could not require its employees to establish their loyalty by extracting an oath denying past affiliation with Communists. And in *Cafeteria Workers* v. *McElroy,* 367 U. S. 886, 898 (1961), the Court recognized again that the government could not deny employment because of previous membership in a particular party.[11]

Particularly pertinent to the constitutionality of the practice of patronage dismissals are *Keyishian* v. *Board of Regents,* 385 U. S. 589 (1967), and *Perry* v. *Sindermann,* 408 U. S. 593 (1972). In *Keyishian,* the Court invalidated New York statutes barring employment merely on the basis of membership in "subversive" organizations. *Keyishian* squarely held that political association alone could not, consistently with the First Amendment, consti-

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[11] Protection of First Amendment interests has not been limited to invalidation of conditions on government employment requiring allegiance to a particular political party. This Court's decisions have prohibited conditions on public benefits, in the form of jobs or otherwise, which dampen the exercise generally of First Amendment rights, however slight the inducement to the individual to forsake those rights.

In *Torcaso* v. *Watkins,* 367 U. S. 488 (1961), decided the same day as *Cafeteria Workers,* the Court squarely held that a citizen could not be refused a public office for failure to declare his belief in God. More broadly, the Court has held impermissible under the First Amendment the dismissal of a high school teacher for openly criticizing the Board of Education on its allocation of school funds. *Pickering* v. *Board of Education,* 391 U. S. 563 (1968). And in *Sherbert* v. *Verner,* 374 U. S. 398 (1963), unemployment compensation, rather than public employment, was the government benefit which could not be withheld on the condition that a person accept Saturday employment where such employment was contrary to religious faith. Similarly, the First Amendment prohibits limiting the grant of a tax exemption to only those who affirm their loyalty to the State granting the exemption. *Speiser* v. *Randall,* 357 U. S. 513 (1958).

tute an adequate ground for denying public employment.[12] In *Perry,* the Court broadly rejected the validity of limitations on First Amendment rights as a condition to the receipt of a governmental benefit, stating that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' *Speiser* v. *Randall,* 357 U. S. 513, 526. Such interference with constitutional rights is impermissible." 408 U. S., at 597.

Patronage practice falls squarely within the prohibitions of *Keyishian* and *Perry.* Under that practice, public employees hold their jobs on the condition that they provide, in some acceptable manner, support for the favored political party. The threat of dismissal for failure to provide that support unquestionably inhibits protected belief and association, and dismissal for failure to provide support only penalizes its exercise. The belief and association which government may not ordain directly are achieved by indirection.[13] And

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[12] Thereafter, *United States* v. *Robel,* 389 U. S. 258 (1967), similarly held that mere membership in the Communist Party could not bar a person from employment in private defense establishments important to national security.

[13] The increasingly pervasive nature of public employment provides officials with substantial power through conditioning jobs on partisan support, particularly in this time of high unemployment. Since the government, however, may not seek to achieve an unlawful end either directly or indirectly, the inducement afforded by placing conditions on a benefit need not be particularly great in order to find that rights have been violated. Rights are infringed

regardless of how evenhandedly these restraints may operate in the long run, after political office has changed hands several times, protected interests are still infringed and thus the violation remains.

VI

Although the practice of patronage dismissals clearly infringes First Amendment interests, our inquiry is not at an end, for the prohibition on encroachment of First Amendment protections is not an absolute. Restraints are permitted for appropriate reasons. *Keyishian* and *Perry,* however, not only serve to establish a presumptive prohibition on infringement, but also serve to dispose of one suggested by petitioners' reference to this Court's affirmance by an equally divided court in *Bailey* v. *Richardson,* 341 U. S. 918 (1951), aff'g 86 U. S. App. D. C. 248, 182 F. 2d 46 (1950).[14] That is the notion that because there is no right to a government benefit, such as public employment, the benefit may be denied for any reason. *Perry,* however, emphasized that "[f]or at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may

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both where the government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason.

Petitioners contend that even though the government may not provide that public employees may retain their jobs only if they become affiliated with or provide support for the in-party, respondents here have waived any objection to such requirements. The difficulty with this argument is that it completely swallows the rule. Since the qualification may not be constitutionally imposed absent an appropriate justification, to accept the waiver argument is to say that the government may do what it may not do. A finding of waiver in this case, therefore, would be contrary to our view that a partisan job qualification abridges the First Amendment.

[14] Brief for Petitioners 12–13.

deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely." 408 U. S., at 597. *Perry* and *Keyishian* properly recognize one such impermissible reason: The denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly. "'[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.'" *Keyishian* v. *Board of Regents,* 385 U. S., at 605–606. "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert* v. *Verner,* 374 U. S. 398, 404 (1963). "'[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or as a "privilege."'" *Sugarman* v. *Dougall,* 413 U. S. 634, 644 (1973) (quoting *Graham* v. *Richardson,* 403 U. S. 365, 374 (1971)).[15]

[15] See also *Board of Regents* v. *Roth,* 408 U. S. 564, 571 n. 9 (1972):

"In a leading case decided many years ago, the Court of Appeals for the District of Columbia Circuit held that public employment in general was a 'privilege,' not a 'right,' and that procedural due process guarantees therefore were inapplicable. *Bailey* v. *Richardson,* 86 U. S. App. D. C. 248, 182 F. 2d 46, aff'd by an equally divided Court, 341 U. S. 918. The basis of this holding has been thoroughly undermined in the ensuing years. For, as MR. JUSTICE BLACKMUN wrote for the Court only last year, 'this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or as a "privilege."' *Graham* v. *Richardson,* 403 U. S. 365, 374. See, *e. g., Morrissey* v. *Brewer, ante,* at 482; *Bell* v. *Burson,* [402 U. S. 535,] 539; *Goldberg* v. *Kelly,* [397 U. S. 254,] 262; *Shapiro* v. *Thompson,* 394 U. S. 618, 627 n. 6; *Pickering* v. *Board of Education,* 391 U. S. 563, 568; *Sherbert* v. *Verner,* 374 U. S. 398, 404."

While the right-privilege distinction furnishes no ground on which to justify patronage, petitioners raise several other justifications requiring consideration. Before examining those justifications, however, it is necessary to have in mind the standards according to which their sufficiency is to be measured. It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny. *Buckley* v. *Valeo,* 424 U. S., at 64–65; *NAACP* v. *Alabama,* 357 U. S. 449, 460–461 (1958). "This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct . . . ." *Buckley* v. *Valeo, supra,* at 65. Thus encroachment "cannot be justified upon a mere showing of a legitimate state interest." *Kusper* v. *Pontikes,* 414 U. S., at 58. The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest. *Buckley* v. *Valeo, supra,* at 94; *Williams* v. *Rhodes,* 393 U. S., at 31–33; *NAACP* v. *Button,* 371 U. S. 415, 438, 444 (1963); *Bates* v. *Little Rock,* 361 U. S. 516, 524 (1960); *NAACP* v. *Alabama, supra,* at 464–466; *Thomas* v. *Collins,* 323 U. S. 516, 530 (1945). In the instant case, care must be taken not to confuse the interest of partisan organizations with governmental interests. Only the latter will suffice. Moreover, it is not enough that the means chosen in furtherance of the interest be rationally related to that end. *Sherbert* v. *Verner, supra,* at 406. The gain to the subordinating interest provided by the means must outweigh the incurred loss of protected rights, see *United Public Workers* v. *Mitchell,* 330 U. S., at 96,[16] and the government must "emplo[y] means

[16] "[T]his Court must balance the extent of the guarantees of

closely drawn to avoid unnecessary abridgment . . . ." *Buckley* v. *Valeo, supra,* at 25. "[A] State may not choose means that unnecessarily restrict constitutionally protected liberty. 'Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Kusper* v. *Pontikes, supra,* at 59 (citations omitted). See *United States* v. *Robel,* 389 U. S. 258 (1967); *Shelton* v. *Tucker,* 364 U. S. 479 (1960). In short, if conditioning the retention of public employment on the employee's support of the in-party is to survive constitutional challenge, it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights.[17]

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freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government." *United Public Workers* v. *Mitchell,* 330 U. S., at 96.

[17] The Court's decision in *United States* v. *O'Brien,* 391 U. S. 367 (1968), does not support petitioners. *O'Brien* dealt with the constitutionality of laws regulating the "nonspeech" elements of expressive conduct. No such regulation is involved here, for it is association and belief *per se,* not any particular form of conduct, which patronage seeks to control. Moreover, while partisanship may involve activities such as registering with a political organization, wearing a campaign button, or contributing to a campaign fund, we cannot say these activities can be equated with such conduct as destruction of a draft card which was involved in *O'Brien.* See *Buckley* v. *Valeo,* 424 U. S. 1, 17 (1976). Finally, to paraphrase the Court's observations in *Buckley:* "Even if the categorization of [partisan activity] as conduct were accepted, the limitations challenged here would not meet the *O'Brien* test because the gov-

One interest which has been offered in justification of patronage is the need to insure effective government and the efficiency of public employees. It is argued that employees of political persuasions not the same as that of the party in control of public office will not have the incentive to work effectively and may even be motivated to subvert the incumbent administration's efforts to govern effectively. We are not persuaded. The inefficiency resulting from the wholesale replacement of large numbers of public employees every time political office changes hands belies this justification. And the prospect of dismissal after an election in which the incumbent party has lost is only a disincentive to good work.[18] Further, it is not clear that dismissal in order to make room for a patronage appointment will result in replacement

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ernmental interests advanced in support of the [practice of patronage] involve 'suppressing communication.'" *Id.*, at 17. For the end to be furthered by the practice involves the compulsion of support for the incumbent political party. Indeed, unlike the legislation tested in *Buckley*, the practice of patronage does "focus on the ideas expressed by persons or groups subjected to [it] . . . ." *Ibid.* And, contrary to *O'Brien*'s proscription, under patronage "the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." 391 U. S., at 382.

[18] It does not appear that efficiency and effective government were the concerns of elected officials in this case. Employees originally dismissed were reinstated after obtaining sponsorship letters, a practice hardly promotive of efficiency if the employee's work had been less than par or if the employee had previously behaved in an insubordinate manner. App. 14. Complaints by one supervisor that too many people were being discharged too fast, without adequately trained replacements, were met with the response that the number of dismissals was to be maintained because the job openings were needed for partisan appointments. *Id.*, at 15. One Republican employee of the Sheriff's Office was told that his dismissal had nothing to do with the quality of his work, but that his position was needed for a Democratic replacement. *Id.*, at 22.

by a person more qualified to do the job since appointment often occurs in exchange for the delivery of votes, or other party service, not job capability. More fundamentally, however, the argument does not succeed because it is doubtful that the mere difference of political persuasion motivates poor performance; nor do we think it legitimately may be used as a basis for imputing such behavior. The Court has consistently recognized that mere political association is an inadequate basis for imputing disposition to ill-willed conduct. See *Keyishian* v. *Board of Regents,* 385 U. S., at 606–608; *Elfbrandt* v. *Russell,* 384 U. S. 11, 19 (1966); *Wieman* v. *Updegraff,* 344 U. S., at 190–191.[19] Though those cases involved affiliation with the Communist Party, we do not "con-

[19] In this regard, petitioners' reliance on *American Communications Assn.* v. *Douds,* 339 U. S. 382 (1950), is misplaced. To be sure, that decision upheld a section of the National Labor Relations Act denying certain benefits of the Act to labor organizations which had not filed with the National Labor Relations Board affidavits that their leaders were not members of the Communist Party. The Court there deferred to a legislative determination that, with respect to labor relations, the Communist Party was unlike other parties in its use of union leadership to bring about strikes and other obstructions to commerce. The Court was careful to note in *Douds,* however, that the precise holding in that case would not serve as a departure point for inferences of ill conduct grounded merely on political association. *Id.,* at 410. Indeed, the Court in *Douds* also carefully observed that political affiliations and beliefs "are circumstances ordinarily irrelevant to permissible subjects of government action." *Id.,* at 391.

Those caveats were well stated. With but three exceptions shortly after *Douds, Adler* v. *Board of Education,* 342 U. S. 485 (1952); *Garner* v. *Los Angeles Board,* 341 U. S. 716 (1951); and *Gerende* v. *Board of Supervisors,* 341 U. S. 56 (1951), the Court's decisions have consistently rejected all inferences based merely on belief and association, and we do so today. See, *e. g., Keyishian* v. *Board of Regents,* 385 U. S., at 606–608; *Wieman* v. *Updegraff,* 344 U. S., at 188–190.

sider these [respondents'] interest in freely associating with members of the [Republican] Party less worthy of protection than [other] employees' interest in associating with Communists or former Communists." *Illinois State Employees Union* v. *Lewis,* 473 F. 2d, at 570. At all events, less drastic means for insuring government effectiveness and employee efficiency are available to the State. Specifically, employees may always be discharged for good cause, such as insubordination or poor job performance, when those bases in fact exist.

Even if the first argument that patronage serves effectiveness and efficiency be rejected, it still may be argued that patronage serves those interests by giving the employees of an incumbent party the incentive to perform well in order to insure their party's incumbency and thereby their jobs. Patronage, according to the argument, thus makes employees highly accountable to the public. But the ability of officials more directly accountable to the electorate to discharge employees for cause and the availability of merit systems, growth in the use of which has been quite significant, convince us that means less intrusive than patronage still exist for achieving accountability in the public work force and, thereby, effective and efficient government. The greater effectiveness of patronage over these less drastic means, if any, is at best marginal, a gain outweighed by the absence of intrusion on protected interests under the alternatives.

The lack of any justification for patronage dismissals as a means of furthering government effectiveness and efficiency distinguishes this case from *CSC* v. *Letter Carriers,* 413 U. S. 548 (1973), and *United Public Workers* v. *Mitchell,* 330 U. S. 75 (1949). In both of those cases, legislative restraints on political management and campaigning by public employees were upheld despite their encroachment on First Amendment rights

because, *inter alia,* they did serve in a necessary manner to foster and protect efficient and effective government.[20] Interestingly, the activities that were restrained by the legislation involved in those cases are characteristic of patronage practices. As the Court observed in *Mitchell:* "The conviction that an actively partisan governmental personnel threatens good administration has deepened since [1882]. Congress recognizes danger to the service in that political rather than official effort may earn advancement and to the public in that governmental favor may be channeled through political connections." 330 U. S., at 97–98.

A second interest advanced in support of patronage is the need for political loyalty of employees, not to the end that effectiveness and efficiency be insured, but to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate. The justification is not without force, but is nevertheless inadequate to validate patronage wholesale. Limiting patronage dismissals to policymaking positions is sufficient to achieve this governmental end. Nonpolicymaking individuals usually have only limited responsibility and are therefore not in a position to thwart the goals of the in-party.

No clear line can be drawn between policymaking and nonpolicymaking positions. While nonpolicymaking individuals usually have limited responsibility, that is not to say that one with a number of responsibilities is necessarily in a policymaking position. The nature of the responsibilities is critical. Employee supervisors, for

[20] Legislative restraints on political management and campaigning were also upheld in *Letter Carriers* and *Mitchell* because they served to protect individual belief and association and, thereby, the political process. The distinction between this case and those cases in that respect is treated *infra,* this page and at 368–371.

example, may have many responsibilities, but those responsibilities may have only limited and well-defined objectives. An employee with responsibilities that are not well defined or are of broad scope more likely functions in a policymaking position. In determining whether an employee occupies a policymaking position, consideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals. Thus, the political loyalty "justification is a matter of proof, or at least argument, directed at particular kinds of jobs." *Illinois State Employees Union* v. *Lewis,* 473 F. 2d, at 574. Since, as we have noted, it is the government's burden to demonstrate an overriding interest in order to validate an encroachment on protected interests, the burden of establishing this justification as to any particular respondent will rest on the petitioners on remand, cases of doubt being resolved in favor of the particular respondent.

It is argued that a third interest supporting patronage dismissals is the preservation of the democratic process. According to petitioners, " 'we have contrived no system for the support of party that does not place considerable reliance on patronage. The party organization makes a democratic government work and charges a price for its services.' " [21] The argument is thus premised on the centrality of partisan politics to the democratic process.

Preservation of the democratic process is certainly an interest protection of which may in some instances justify limitations on First Amendment freedoms. See *Buckley* v. *Valeo,* 424 U. S. 1 (1976); *CSC* v. *Letter Carriers, supra; Williams* v. *Rhodes,* 393 U. S. 23 (1968); *United Public Workers* v. *Mitchell, supra.* But however im-

[21] Brief for Petitioners 43, quoting V. Key, Politics, Parties and Pressure Groups 369 (5th ed. 1964).

portant preservation of the two-party system or any system involving a fixed number of parties may or may not be,[22] *Williams* v. *Rhodes, supra,* at 32, we are not persuaded that the elimination of patronage practice or, as is specifically involved here, the interdiction of patronage dismissals, will bring about the demise of party politics. Political parties existed in the absence of active patronage practice prior to the administration of Andrew Jackson, and they have survived substantial reduction in their patronage power through the establishment of merit systems.[23]

Patronage dismissals thus are not the least restrictive alternative to achieving the contribution they may make to the democratic process.[24] The process functions as well without the practice, perhaps even better, for patronage dismissals clearly also retard that process. Patronage can result in the entrenchment of one or a few parties to the exclusion of others. And most indisputably, as we recognized at the outset, patronage is a very effective impediment to the associational and speech freedoms which

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[22] Partisan politics bears the imprimatur only of tradition, not the Constitution.

"It may be correct that the patronage system has been followed for 'almost two hundred years' and therefore was in existence when the Constitution was adopted. However, the notoriety of the practice in the administration of Andrew Jackson in 1828 implies that it was not prevalent theretofore; we are not aware of any discussion of the practice during the drafting of the Constitution or the First Amendment. In any event, if the age of a pernicious practice were a sufficient reason for its continued acceptance, the constitutional attack on racial discrimination would, of course, have been doomed to failure." *Illinois State Employees Union* v. *Lewis,* 473 F. 2d 561, 568 n. 14 (CA7 1972).

[23] Sorauf, The Silent Revolution in Patronage, 20 Pub. Admin. Rev. 28, 32–33 (1960); Sorauf, Patronage and Party, 3 Midwest J. Pol. Sci. 115, 118–120 (1959).

[24] See n. 8, *supra.*

are essential to a meaningful system of democratic government. Thus, if patronage contributes at all to the elective process, that contribution is diminished by the practice's impairment of the same. Indeed, unlike the gain to representative government provided by the Hatch Act in *CSC* v. *Letter Carriers, supra,* and *United Public Workers* v. *Mitchell, supra,* the gain to representative government provided by the practice of patronage, if any, would be insufficient to justify its sacrifice of First Amendment rights.[25]

To be sure, *Letter Carriers* and *Mitchell* upheld Hatch Act restraints sacrificing political campaigning and man-

[25] The Court's decision earlier this term in *Buckley* v. *Valeo,* 424 U. S. 1 (1976), is not contrary. It is true that in *Buckley,* as here, the interest to be served was the democratic system, and accordingly in *Buckley,* the infringement of some First Amendment rights was held to be tolerable. In *Buckley,* however, unlike here, the disclosure and contribution limitations on campaign financing, which were upheld, were essential to eliminating the grave evil of improper influence in the political process. The Court found that those provisions "constitute the Act's primary weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions." *Id.,* at 58. The Court further found that "[t]he contribution ceilings . . . serve the basic governmental interest in safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion." *Ibid.* With respect to expenditure limitations, however, which were not upheld, the Court found: "These provisions place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate." *Id.,* at 58–59. The restrictions imposed by patronage dismissals, limiting wholesale an individual's political beliefs, expression, and association, while perhaps less direct, are equally, if not more, substantial, and therefore also intolerable to the First Amendment. Moreover, patronage dismissals involve the evil of influence, whose very need for elimination justified the contribution and disclosure provisions in *Buckley.*

agement, activities themselves protected by the First Amendment. But in those cases it was the Court's judgment that congressional subordination of those activities was permissible to safeguard the core interests of individual belief and association.[26] Subordination of some First Amendment activity was permissible to protect other such activity. Today, we hold that subordination of other First Amendment activity, that is, patronage dismissals, not only is permissible, but also is mandated by the First Amendment. And since patronage dismissals fall within the category of political campaigning and management, this conclusion irresistibly flows from *Mitchell* and *Letter Carriers.* For if the First Amendment did not place individual belief and association above political campaigning and management, at least in the setting of public employment, the restraints on those latter activities could not have been judged permissible in *Mitchell* and *Letter Carriers.*[27]

It is apparent that at bottom we are required to engage in the resolution of conflicting interests under the First Amendment. The constitutional adjudication called for

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[26] "To declare that the present supposed evils of political activity are beyond the power of Congress to redress would leave the nation impotent to deal with what many sincere men believe is a material threat to the democratic system." *United Public Workers* v. *Mitchell,* 330 U. S., at 99. "Congress may reasonably desire to limit party activity of federal employees so as to avoid a tendency toward a one-party system." *Id.,* at 100.

[27] The judgment that the First Amendment interests in political campaigning and management must, in the setting of public employment, give way to the First Amendment interests in individual belief and association does not necessarily extend to other contexts. Restraining political campaigning and management in the area of public employment leaves it free to continue in other settings. The consequence of no such restraint, however, is the complete restriction of individual belief and association for each public employee affected.

by this task is well within our province.[28] The illuminating source to which we turn in performing the task is the system of government the First Amendment was intended to protect, a democratic system whose proper functioning is indispensably dependent on the unfettered judgment of each citizen on matters of political concern. Our decision in obedience to the guidance of that source does not outlaw political parties or political campaigning and management. Parties are free to exist and their concomitant activities are free to continue. We require only that the rights of every citizen to believe as he will and to act and associate according to his beliefs be free to continue as well.

In summary, patronage dismissals severely restrict political belief and association. Though there is a vital need for government efficiency and effectiveness, such dismissals are on balance not the least restrictive means for fostering that end. There is also a need to insure that policies which the electorate has sanctioned are effectively implemented. That interest can be fully satisfied by limiting patronage dismissals to policymaking positions. Finally, patronage dismissals cannot be justified by their contribution to the proper functioning of our democratic process through their assistance to partisan politics since political parties are nurtured by other, less intrusive and

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[28] *Letter Carriers* did observe: "Although Congress is free to strike a different balance than it has, if it so chooses, we think the balance it has so far struck is sustainable by the obviously important interests sought to be served by the limitations on partisan political activities now contained in the Hatch Act." 413 U. S., at 564. Though Congress may be free not to impose restraints on political campaigning and management in the public employment sector, we are not similarly free to do so where those practices, protected as they may be in other contexts, are found impermissibly to pre-empt equally, if not more, fundamental constitutional rights.

equally effective methods. More fundamentally, however, any contribution of patronage dismissals to the democratic process does not suffice to override their severe encroachment on First Amendment freedoms. We hold, therefore, that the practice of patronage dismissals is unconstitutional under the First and Fourteenth Amendments, and that respondents thus stated a valid claim for relief.

VII

There remains the question whether the issuance of a preliminary injunction was properly directed by the Court of Appeals. The District Court predicated its denial of respondents' motion for a preliminary injunction on its finding that the allegations in their complaints and affidavits did not constitute a sufficient showing of irreparable injury and that respondents had an adequate remedy at law. The Court of Appeals held, however: "Inasmuch as this case involves First Amendment rights of association which must be carefully guarded against infringement by public office holders, we judge that injunctive relief is clearly appropriate in these cases." 509 F. 2d, at 1136. We agree.

At the time a preliminary injunction was sought in the District Court, one of the respondents was only threatened with discharge. In addition, many of the members of the class respondents were seeking to have certified prior to the dismissal of their complaint were threatened with discharge or had agreed to provide support for the Democratic Party in order to avoid discharge. It is clear therefore that First Amendment interests were either threatened or in fact being impaired at the time relief was sought. The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. See *New York Times Co.*

v. *United States,* 403 U. S. 713 (1971).[29] Since such injury was both threatened and occurring at the time of respondents' motion and since respondents sufficiently demonstrated a probability of success on the merits, the Court of Appeals might properly have held that the District Court abused its discretion in denying preliminary injunctive relief. See *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58, 67 (1963).

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE STEVENS did not participate in the consideration or decision of this case.

MR. JUSTICE STEWART, with whom MR. JUSTICE BLACKMUN joins, concurring in the judgment.

Although I cannot join the plurality's wide-ranging opinion, I can and do concur in its judgment.

This case does not require us to consider the broad contours of the so-called patronage system, with all its variations and permutations. In particular, it does not require us to consider the constitutional validity of a system that confines the hiring of some governmental employees to those of a particular political party, and I would intimate no views whatever on that question.

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[29] The timeliness of political speech is particularly important. See *Carroll* v. *Princess Anne,* 393 U. S. 175, 182 (1968); *Wood* v. *Georgia,* 370 U. S. 375, 391–392 (1962).

"[T]he purpose of the First Amendment includes the need . . . 'to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them.'" *Id.,* at 392 (quoting 2 T. Cooley, Constitutional Limitations 885 (8th ed. 1927)).

The single substantive question involved in this case is whether a nonpolicymaking, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs. I agree with the plurality that he cannot. See *Perry* v. *Sindermann,* 408 U. S. 593, 597–598.

MR. CHIEF JUSTICE BURGER, dissenting.

The Court's decision today represents a significant intrusion into the area of legislative and policy concerns—the sort of intrusion MR. JUSTICE BRENNAN has recently protested in other contexts. I therefore join MR. JUSTICE POWELL's dissenting opinion, and add a few words simply to emphasize an aspect that seems particularly important to me.

The Illinois Legislature has pointedly decided that roughly half of the Sheriff's staff shall be made up of tenured career personnel and the balance left exclusively to the choice of the elected head of the department. The Court strains the rational bounds of First Amendment doctrine and runs counter to longstanding practices that are part of the fabric of our democratic system to hold that the Constitution *commands* something it has not been thought to require for 185 years. For all that time our system has wisely left these matters to the States and, on the federal level, to the Congress. The Court's action is a classic example of trivializing constitutional adjudication—a function of the highest importance in our system.

Only last week, in *National League of Cities* v. *Usery,* 426 U. S. 833 (1976), we took steps to arrest the downgrading of States to a role comparable to the departments of France, governed entirely out of the national capital. Constant inroads on the powers of the States

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to manage their own affairs cannot fail to complicate our system and centralize more power in Washington. For the reasons MR. JUSTICE POWELL persuasively adduces, the First Amendment neither requires nor justifies such inroads in this case. In my view, the issue is not so much whether the patronage system is "good" or "bad," as the plurality characterizes the problem, but whether the choice of its use in the management of the very government of each State was not, in the words of the Tenth Amendment, "reserved to the States . . . or to the people."

Congress long ago, as a matter of policy, opted for a federal career service with a small number of purely political appointments in the Executive Branch, and many governmental departments have a limited number of positions in which the persons appointed have no tenure but serve at the pleasure of the cabinet officer or agency chief, who in turn serves at the pleasure of the President. See, *e. g., Leonard* v. *Douglas,* 116 U. S. App. D. C. 136, 321 F. 2d 749 (1963). The considerations leading to these legislative conclusions are—for me—not open to judicial scrutiny under the guise of a First Amendment claim, any more than is the right of a newly elected Representative or Senator, for example, to have a staff made up of persons who share his political philosophy and affiliation and are loyal to him. It seems to me that the Illinois Legislature's choice is entitled to no less deference.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

The Court holds unconstitutional a practice as old as the Republic, a practice which has contributed significantly to the democratization of American politics. This decision is urged on us in the name of First Amendment rights, but in my view the judgment neither is constitu-

tionally required nor serves the interest of a representative democracy. It also may well disserve—rather than promote—core values of the First Amendment. I therefore dissent.

I

The Cook County Sheriff's Office employs approximately 3,000 people. Roughly half of these employees are "merit" employees given various protections from discharge. The other half of the employees have no such protection. Customary Illinois political practice has allowed such "nonmerit" positions to be awarded on "patronage" grounds. This tradition has entitled newly elected officeholders to replace incumbent nonmerit employees with patronage appointments.

Petitioner Richard Elrod, a Democrat, was elected Sheriff of Cook County in 1970, succeeding a Republican. Consistently with Illinois practice, he dismissed a number of incumbent employees because they lacked Democratic affiliation and were unable to secure Democratic sponsorship. The named respondents, several discharged employees and another employee threatened with discharge, are all Republicans who concededly were hired by Elrod's predecessor because of their political affiliations.

II

As the plurality opinion recognizes, patronage practices of the sort under consideration here have a long history in America.[1] Although an extensive recounting of that history is not necessary, I think it important to

[1] Substantially for the reasons stated in the plurality opinion, I agree that the question presented here is a justiciable one. I note, however, that the ability to formulate judicial standards is another factor to be considered in evaluating justiciability. *Baker* v. *Carr*, 369 U. S. 186 (1962). The difficulty of formulating standards might pose a bar to judicial review of some patronage practices not before us.

survey it more fully than does the plurality opinion.[2] The observation that patronage in employment received its primary popularization and legitimation during Jackson's Presidency, *ante,* at 353, understates the historical antecedents of the practice, which stretch back to Washington's Presidency.

Partisan politics, as we now know them, did not assume a prominent role in national politics immediately after the adoption of the Constitution. Nonetheless, Washington tended to confine appointments even of customs officials and postmasters to Federalists, as opposed to anti-Federalists. As the role of parties expanded, partisan considerations quickly influenced employment decisions. John Adams removed some Republicans from minor posts, and Jefferson, the first President to succeed a President of an opposing party, made significant patronage use of the appointment and removal powers. The administrations of Madison, Monroe, and John Quincy Adams provided no occasion for conspicuous patronage practice in employment, as each succeeded a copartisan. Jackson, of course, used patronage extensively when he became the first President since Jefferson to succeed an antagonistic administration.

It thus appears that patronage employment practices emerged on the national level at an early date, and that they were conspicuous during Jackson's Presidency largely because of their necessary dormancy during the long succession of Republican Presidents. During that period, however, patronage in hiring was practiced widely in the States, especially in New York and Pennsylvania. This afforded a theoretical and popular legitimacy to patronage, helping to lay the groundwork for acceptance of Jackson's actions on the national level.

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[2] The sources primarily relied upon for the statements in text are C. Fish, The Civil Service and the Patronage (1905), and D. Rosenbloom, Federal Service and the Constitution (1971).

It is recognized that patronage in employment played a significant role in democratizing American politics. See, *e. g.,* C. Fish, The Civil Service and the Patronage 156–157 (1905); Sorauf, Patronage and Party, 3 Midwest J. Pol. Sci. 115–116 (1959). Before patronage practices developed fully, an "aristocratic" class dominated political affairs, a tendency that persisted in areas where patronage did not become prevalent. C. Fish, *supra,* at 157. Patronage practices broadened the base of political participation by providing incentives to take part in the process, thereby increasing the volume of political discourse in society. Patronage also strengthened parties, and hence encouraged the development of institutional responsibility to the electorate on a permanent basis. Parties became "instrument[s] through which discipline and responsibility may be achieved within the Leviathan." Sorauf, *supra,* at 115.

In many situations patronage employment practices also entailed costs to government efficiency. These costs led eventually to reforms placing most federal and state civil service employment on a nonpatronage basis. But the course of such reform is of limited relevance to the task of constitutional adjudication in this case. It is pertinent to note, however, that a perceived impingement on employees' political beliefs by the patronage system was not a significant impetus to such reform. Most advocates of reform were concerned primarily with the corruption and inefficiency that patronage was thought to induce in civil service and the power that patronage practices were thought to give the "professional" politicians who relied on them. D. Rosenbloom, Federal Service and the Constitution 70–74 (1971). Moreover, it generally was thought that elimination of these evils required the imposition both of a merit system and of restrictions on First Amendment activities

by government employees. *Id.,* at 76–77, 82–86; see, *e. g., CSC* v. *Letter Carriers,* 413 U. S. 548 (1973).

III

It might well be possible to dispose of this case on the ground that it implicates no First Amendment right of the respondents, and therefore that they have failed to state a cause of action. They are employees seeking to avoid discharge—not citizens desiring an opportunity to be hired by the county without regard to their political affiliation or loyalty. Respondents' complaint acknowledges the longstanding existence of the patronage system they now challenge:

> "For many years past and continuing to this time it has been the practice of the elected Sheriff of Cook County, when he assumes office from a Sheriff of a different political party, to replace all or substantially all of the non-civil service employees of the Sheriff's office who did not (a) Pledge their political allegiance to the political party of the incoming Sheriff; [and/or meet other specified political requirements] . . . ." App. 3.

We thus have complaining employees who apparently accepted patronage jobs knowingly and willingly, while fully familiar with the "tenure" practices long prevailing in the Sheriff's Office. Such employees have *benefited* from their political beliefs and activities; they have not been penalized for them. In these circumstances, I am inclined to agree with the holding of the Supreme Court of Pennsylvania in *American Federation of State Employees* v. *Shapp,* 443 Pa. 527, 280 A. 2d 375 (1971), that beneficiaries of a patronage system may not be heard to challenge it when it comes their turn to be replaced. See also *Nunnery* v. *Barber,* 503 F. 2d 1349 (CA4 1974).

The plurality opinion virtually ignores this issue in

an apparent rush to constitutional adjudication. It also may be that the pleadings present an inadequate record on which to decide this matter.[3] In any event, I am forced to turn to the question addressed by the plurality, even though a full development of the evidence or more carefully drawn pleadings may have justified a disposition on the ground that these respondents cannot challenge the patronage hiring practices.[4]

IV

The question is whether it is consistent with the First and Fourteenth Amendments for a State to offer some employment conditioned, explicitly or implicitly, on partisan political affiliation and on the political fortunes of the incumbent officeholder. This is to be determined, as the plurality opinion agrees, by whether patronage hiring practices sufficiently advance important state interests to justify the consequent burdening of First Amendment interests. *Buckley* v. *Valeo,* 424 U. S. 1, 25 (1976); *ante,* at 360–363. It is difficult to disagree with the view, as an abstract proposition, that government employment ordinarily should not be conditioned upon one's political beliefs or activities. But we deal

[3] On petitioners' motion to dismiss, the District Court had before it only the complaint and the petitioners' conclusory motions to dismiss. Although one reasonably may be confident that these employees willingly accepted this employment as political patronage, with full knowledge that their continued employment depended on the outcome of the next election, this may not be entirely clear from the pleadings as viewed upon a motion to dismiss. The District Court made no finding of fact in this respect, and its brief opinion does not rely on this ground.

[4] One may agree readily that different plaintiffs legitimately could assert First Amendment interests. These would be individuals who desired to be hired for state or local employment and who possessed all requisite qualifications except the "right" political posture or sponsorship.

here with a highly practical and rather fundamental element of our political system, not the theoretical abstractions of a political science seminar. In concluding that patronage hiring practices are unconstitutional, the plurality seriously underestimates the strength of the government interest—especially at the local level—in allowing some patronage hiring practices, and it exaggerates the perceived burden on First Amendment rights.[5]

A

As indicated above, patronage hiring practices have contributed to American democracy by stimulating political activity and by strengthening parties, thereby helping to make government accountable.[6] It cannot be questioned seriously that these contributions promote important state interests. Earlier this Term we said of the government interest in encouraging political debate:

> "[Public financing of Presidential campaigns] is . . . [an effort] to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Buckley* v. *Valeo supra,* at 92–93 (footnote omitted).

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[5] This case involves only employees. We thus face no allegations that patronage practices exclude any voters or candidates from effective participation in the political process by impermissibly disadvantaging them. Cf. *Shakman* v. *Democratic Organization of Cook County,* 435 F. 2d 267 (CA7 1970). Elrod informs us that since 1955 two Democrats, two Republicans, and an Independent have served as Sheriff. Reply Brief for Petitioners 11 n. 20a.

[6] Some commentators have believed that patronage hiring practices promote other social interests as well:

"Patronage is peculiarly important for minority groups, involving much more than the mere spoils of office. Each first appointment given a member of any underdog element is a boost in that element's struggle for social acceptance. It means that another barrier to their advance has been lifted, another shut door has swung open." S. Lubell, The Future of American Politics 76–77 (1952).

> "Legislation to enhance these First Amendment values is the rule, not the exception. Our statute books are replete with laws providing financial assistance to the exercise of free speech . . . ." *Id.*, at 93 n. 127.

We also have recognized the strong government interests in encouraging stable political parties and avoiding excessive political fragmentation. Through the medium of established parties the "people . . . are presented with understandable choices and the winner in the general election with sufficient support to govern effectively," *Storer* v. *Brown,* 415 U. S. 724, 735 (1974), while "splintered parties and unrestrained factionalism [might] do significant damage to the fabric of government." *Id.,* at 736. See *Buckley* v. *Valeo, supra,* at 98, 101.

Without analysis, however, the plurality opinion disparages the contribution of patronage hiring practices in advancing these state interests. It merely asserts that such practices cause the "free functioning of the electoral process [to suffer]," *ante,* at 356, and that "we are not persuaded that the elimination of . . . patronage dismissals, will bring about the demise of party politics." *Ante,* at 369. One cannot avoid the impression, however, that even a threatened demise of parties would not trouble the plurality. In my view, this thinking reflects a disturbing insensitivity to the political realities relevant to the disposition of this case.[7]

The complaining parties are or were employees of the Sheriff. In many communities, the sheriff's duties are as routine as process serving, and his election attracts little or no general public interest. In the States, and

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[7] As this case presents only the question whether a State constitutionally may pursue patronage hiring practices, we do not consider whether such practices would be justified if pursued by the Federal Government.

especially in the thousands of local communities, there are large numbers of elective offices, and many are as relatively obscure as that of the local sheriff or constable. Despite the importance of elective offices to the ongoing work of local governments, election campaigns for lesser offices in particular usually attract little attention from the media, with consequent disinterest and absence of intelligent participation on the part of the public. Unless the candidates for these offices are able to dispense the traditional patronage that has accrued to the offices, they also are unlikely to attract donations of time or money from voluntary groups. In short, the resource pools that fuel the intensity of political interest and debate in "important" elections frequently "could care less" about who fills the offices deemed to be relatively unimportant. Long experience teaches that at this local level traditional patronage practices contribute significantly to the democratic process. The candidates for these offices derive their support at the precinct level, and their modest funding for publicity, from cadres of friends and political associates who hope to benefit if their "man" is elected.[8] The activities of the latter are

[8] Former Senator Paul H. Douglas (D. Ill.) said of patronage hiring practices:

"In short, I am for civil service but not for having civil service dominate public employment 100 percent. That would give us the bureaucracy of Germany and France which I do not regard as ideal.

. . . . . .

"But I would like to have you consider just how long most liberals would be able to last in Congress if you stripped us of all patronage, as you desire. We who try to defend the interests of the people, the consumers and the taxpayers commonly face the powerful opposition of the special-interest groups which will spend enormous sums of money to defeat us. . . . If we are to survive we need some support rooted in gratitude for material favors which at the same time do not injure the general public." Letter to New Republic, July 14, 1952, p. 2.

often the principal source of political information for the voting public. The "robust" political discourse that the plurality opinion properly emphasizes is furthered—not restricted—by the time-honored system.

Patronage hiring practices also enable party organizations to persist and function at the local level. Such organizations become visible to the electorate at large only at election time, but the dull periods between elections require ongoing activities: precinct organizations must be maintained; new voters registered; and minor political "chores" performed for citizens who otherwise may have no practical means of access to officeholders. In some communities, party organizations and clubs also render helpful social services.

It is naive to think that these types of political activities are motivated at these levels by some academic interest in "democracy" or other public service impulse. For the most part, as every politician knows, the hope of some reward generates a major portion of the local political activity supporting parties. It is difficult to overestimate the contributions to our system by the major political parties, fortunately limited in number compared to the fractionalization that has made the continued existence of democratic government doubtful in some other countries. Parties generally are stable, high-profile, and permanent institutions. When the names on a long ballot are meaningless to the average voter, party affiliation affords a guidepost by which voters may rationalize a myriad of political choices. Cf. *Buckley* v. *Valeo,* 424 U. S., at 66–68. Voters can and do hold parties to long-term accountability, and it is not too much to say that, in their absence, responsive and responsible performance in low-profile offices, particularly, is difficult to maintain.

It is against decades of experience to the contrary, then, that the plurality opinion concludes that patronage

hiring practices interfere with the "free functioning of the electoral process." *Ante,* at 356. This *ad hoc* judicial judgment runs counter to the judgments of the representatives of the people in state and local governments, representatives who have chosen, in most instances, to retain some patronage practices in combination with a merit-oriented civil service. One would think that elected representatives of the people are better equipped than we to weigh the need for some continuation of patronage practices in light of the interests above identified,[9] and particularly in view of local conditions.[10] See *CSC* v.

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[9] The plurality might be taken to concede some promotion of the democratic process by patronage hiring practices but to conclude that in net effect such practices will reduce political debate impermissibly by affecting some employees or potential employees and thereby depriving society of the "unfettered judgment of each citizen on matters of political concern." *Ante,* at 372. In the past the Court has upheld congressional actions designed to increase the overall level of political discourse but affecting adversely the First Amendment interests of some individuals. *Buckley* v. *Valeo,* 424 U. S. 1, 64–68 (1976) (disclosure requirements); *CSC* v. *Letter Carriers,* 413 U. S. 548, 564–566 (1973); *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 392–395 (1969). In *Letter Carriers* we indicated specifically that the First Amendment freedoms of federal employees could be limited in an effort to further the functioning of the democratic process. I do not believe that local legislative judgments as to what will further the democratic process in light of local conditions should receive less weight than these congressional judgments. Surely that should be the case until we have a record, if one could be created, showing the fears of the plurality to be justified.

[10] The judgment today is limited to nonpolicymaking positions. *Ante,* at 367–368. A "policymaking" exception, however, will not allow substantial advancement of the state interests undercut by the Court's holding, as it is doubtful that any significant number of employees can be identified as policymakers in a sheriff's office. States have chosen to provide for the election of many local officials who have little or no genuine policymaking functions, see *supra,* at 383–384, and the subordinates of such officials are even less likely to

Letter Carriers, 413 U. S., at 564; *United Public Workers* v. *Mitchell,* 330 U. S. 75, 99 (1947). Against this background, the assertion in the plurality opinion that "[p]atronage dismissals . . . are not the least restrictive alternative to achieving [any] contribution they may make to the democratic process" is unconvincing, especially since no alternative to some continuation of patronage practices is suggested. *Ante,* at 369 (footnote omitted).

B

I thus conclude that patronage hiring practices sufficiently serve important state interests, including some interests sought to be advanced by the First Amendment, to justify a tolerable intrusion on the First Amendment interests of employees or potential employees.

The plurality opinion asserts that patronage hiring practices contravene the fundamental principle that " 'no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . .' " *Ante,* at 356, quoting *Board of Education* v. *Barnette,* 319 U. S. 624, 642 (1943). But such practices simply cannot be so construed. This case differs materially from previous cases involving the imposition of political conditions on employment, see, *e. g., Garner* v. *Los Angeles Board,* 341 U. S. 716 (1951), cases where there was an attempt to exclude "a minority group . . . odious to the majority." *Id.,* at 725 (Frankfurter, J., concurring in part and dissenting in part). In that context there was a danger that governmental action was directed toward the elimination of political beliefs

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have such functions. It thus is predictable that the holding today will terminate almost completely the contributions of patronage hiring practices to the democratic process. The probability of this result is increased to the extent that the needs of efficiency in local government require that policymaking positions be included in a merit-oriented, nonpolitical civil service.

by penalizing adherents to them. But patronage hiring practices have been consistent historically with vigorous ideological competition in the political "marketplace." And even after one becomes a beneficiary, the system leaves significant room for individual political expression. Employees, regardless of affiliation, may vote freely [11] and express themselves on some political issues. See *Perry* v. *Sindermann,* 408 U. S. 593 (1972); *Pickering* v. *Board of Education,* 391 U. S. 563 (1968). The principal intrusion of patronage hiring practices on First Amendment interests thus arises from the coercion on associational choices that may be created by one's desire initially to obtain employment. This intrusion, while not insignificant, must be measured in light of the limited role of patronage hiring in most government employment. The pressure to abandon one's beliefs and associations to obtain government employment—especially employment of such uncertain duration—does not seem to me to assume impermissible proportions in light of the interests to be served.

V

On the assumption that we must reach the constitutional issue at the behest of respondents, I would hold that a state or local government may elect to condition employment on the political affiliation of a prospective employee and on the political fortunes of the hiring incumbent. History and long-prevailing practice across the country support the view that patronage hiring practices make a sufficiently substantial contribution to the practical functioning of our democratic system to sup-

[11] It appears that before the adoption of the Australian ballot, one's access to or retention of a government job sometimes could depend on voting "correctly." D. Rosenbloom, *supra,* n. 2, at 61. Today this ultimate core of political expression is beyond the reach of any coercive effects of the patronage system.

port their relatively modest intrusion on First Amendment interests. The judgment today unnecessarily constitutionalizes another element of American life—an element certainly not without its faults but one which generations have accepted on balance as having merit.[12] We should have heeded, instead, the admonition of Mr. Justice Holmes that "[i]f a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it . . . ." *Jackman* v. *Rosenbaum Co.*, 260 U. S. 22, 31 (1922); see *Walz* v. *Tax Comm'n*, 397 U. S. 664, 678 (1970).

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[12] In concluding that the Constitution does not require the invalidation of state and local patronage systems, I wish to make clear that approval of any particular type of system or of the practice in any particular State, city, or community is not implied. I believe that the prevailing practice is to establish a broad base of merit-oriented civil service, but to leave some room for the operation of traditional patronage. I must say that the "mix" in Cook County (where only about half of the employees in the Sheriff's Office are within the merit system) seems disproportionate. On the other hand, there are smaller communities—*e. g.*, where nonpartisan, council-manager forms of government exist—in which the merit system embraces the vast majority of public employees. Political scientists and students of government differ, and their views also have varied from time to time, as to the best means of structuring state and local government employment in the public interest. Nor is the answer necessarily the same for every community without regard to its size, form of government, or other local conditions. My conviction, as indicated in the opinion above, is that we should not foreclose local options in the name of a constitutional right perceived to be applicable for the first time after nearly two centuries.

KLEPPE, SECRETARY OF THE INTERIOR, ET AL. *v.* SIERRA CLUB ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75–552. Argued April 28, 1976—Decided June 28, 1976*

Section 102 (2)(C) of the National Environmental Policy Act of 1969 (NEPA) requires that all federal agencies include an environmental impact statement (EIS) "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." Respondent environmental organizations, alleging a widespread interest in the rich coal reserves of the "Northern Great Plains region" (embracing parts of Wyoming, Montana, North Dakota, and South Dakota) and a threat from coal-related operations to their members' enjoyment of the region's environment, brought suit against petitioner officials of the Department of the Interior and other federal agencies responsible for issuing coal leases, approving mining plans, and taking other actions to enable private companies and public utilities to develop coal reserves on federally owned or controlled land. Respondents claimed that petitioners could not allow further development of coal reserves in the region without preparing a comprehensive EIS under § 102 (2)(C) on the entire region, and sought declaratory and injunctive relief. The District Court, on the basis of extensive findings of fact and conclusions of law, held that the complaint stated no claim for relief, and granted petitioners' motion for summary judgment. While accepting the District Court's findings of fact, the Court of Appeals held, on the basis of the soon-forthcoming interim report of the Northern Great Plains Resources Program (NGPRP) (a study of the potential environmental impact from resource development in Montana, Wyoming, North Dakota, South Dakota, and Nebraska) as well as other such studies of areas either inclusive of or included within the Northern Great Plains region, that petitioners "contemplated" a regional plan or program, and reversed and remanded with instructions to petitioners to inform the

*Together with No. 75–561, *American Electric Power System et al.* v. *Sierra Club et al.*, also on certiorari to the same court.

District Court of their role in the further development of the region within 30 days after the NGPRP interim report issued, and that if they decided to control that development, an EIS would be required. The Court of Appeals also enjoined the Department of the Interior's approval of mining plans in one section of the region for which an EIS already had been prepared. *Held:*

1. The NEPA does not require petitioners to prepare an EIS on the entire Northern Great Plains region. Petitioners have proposed no legislation on the region, and there is no evidence in the record of any proposal for major federal action with respect to the region, but rather it appears that all proposals have been for actions of either local or national scope. Unless there is a proposal for a regional plan of development, it is not practical to prepare a regional EIS, since, absent such a plan, it is impossible to predict the level of coal-related activity that will occur in the region, and thus to analyze the environmental consequences and the resource commitments involved, and alternatives to, such activity. Pp. 398–402.

2. The Court of Appeals erred in both its factual assumptions that the several studies undertaken by petitioners represented attempts to control development on a regional scale, and in its interpretation of the NEPA. There is nothing in the record to indicate that the NGPRP was aimed toward a regional plan or program, but even if the record justified such a finding the Court of Appeals' legal conclusion cannot be squared with the NEPA, which in § 102 (2) (C) clearly states that an EIS is not required until an agency makes a recommendation or report on a *proposal* for major federal action. The Court of Appeals had no authority to depart from the statutory language and, by a balancing of court-devised factors, determine a point at which an EIS *should be prepared*. Pp. 403–406.

3. Assuming that the Court of Appeals' theory about "contemplation" of regional action would permit a court to require preproposal preparation of an EIS, that court's injunction against approval of the mining plans in one part of the region nevertheless would have been error, since on the court's own terms there was in fact no harm and thus no ground for the injunction. Pp. 407–408.

4. Respondents' contention as to the relationships of all proposed coal-related projects in the Northern Great Plains region does not require that petitioners prepare one comprehensive EIS

covering such projects before proceeding to approve specific pending applications. Absent a showing that petitioners acted arbitrarily in refusing to prepare one comprehensive EIS on the entire region, it must be assumed that the responsible federal agencies have exercised appropriately their discretion to resolve the technical issues involved in determining the region, if any, with respect to which a comprehensive EIS covering several proposals is necessary. Pp. 408–414.

169 U. S. App. D. C. 20, 514 F. 2d 856, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. MARSHALL, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN, J., joined, *post*, p. 415.

Deputy Solicitor General Randolph argued the cause for petitioners in No. 75–552. With him on the briefs were *Solicitor General Bork, Assistant Attorney General Taft, Raymond N. Zagone, Herbert Pittle,* and *Jacques B. Gelin. Francis M. Shea* argued the cause for petitioners in both cases. With him on the briefs were *Peter J. Nickles, Richard M. Merriman, Peyton G. Bowman III, James K. Mitchell, Henry B. Weaver, John E. Nolan, Jr., Richard H. Porter, Frank B. Friedman, Dale A. Wright, Harold L. Talisman, Richard T. Conway, David Booth Beers, Charles A. Case, Jr., David B. Ward, Robert L. Ackerly, Joseph S. Wager, Patrick J. McDonough, Max N. Edwards, James W. McDade,* and *George J. Miller.*

Bruce J. Terris argued the cause for respondents in both cases. With him on the briefs were *Suellen T. Keiner* and *Nathalie V. Black. John L. Warden* and *Jerome H. Simonds* filed a brief for Amax, Inc., respondent under this Court's Rule 21 (4).

V. Frank Mendocino, Attorney General, argued the cause for the State of Wyoming as *amicus curiae* by special leave of the Court. With him on the brief were

the Attorneys General and other officials for their respective States as follows: *William J. Baxley,* Attorney General of Alabama, and *Henry H. Caddell,* Assistant Attorney General, *Evelle J. Younger,* Attorney General of California, and *Nicholas C. Yost,* Deputy Attorney General, *J. D. MacFarlane,* Attorney General of Colorado, *Carl R. Ajello,* Attorney General of Connecticut, *Wayne L. Kidwell,* Attorney General of Idaho, *Richard C. Turner,* Attorney General of Iowa, *Francis B. Burch,* Attorney General of Maryland, *Henry R. Lord,* Deputy Attorney General, and *Warren K. Rich,* Associate Attorney General, *Francis X. Bellotti,* Attorney General of Massachusetts, *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *Stewart H. Freeman,* Assistant Attorney General, *A. F. Summer,* Attorney General of Mississippi, *John C. Danforth,* Attorney General of Missouri, and *Robert M. Lindholm,* Assistant Attorney General, *Paul L. Douglas,* Attorney General of Nebraska, and *Harold Mosher,* Assistant Attorney General, *Tony Anaya,* Attorney General of New Mexico, and *Douglas W. Fraser,* Assistant Attorney General, *Louis J. Lefkowitz,* Attorney General of New York, *Rufus L. Edmisten,* Attorney General of North Carolina, *Allen I. Olson,* Attorney General of North Dakota, *James R. Barnett,* Assistant Attorney General of Oklahoma, *R. A. Ashley, Jr.,* Attorney General of Tennessee, and *William B. Hubbard,* Assistant Attorney General, *M. Jerome Diamond,* Attorney General of Vermont, and *Benson D. Scotch,* Deputy Attorney General, *Slade Gorton,* Attorney General of Washington, and *Charles B. Roe, Jr.,* Senior Assistant Attorney General, and *Bronson C. LaFollette,* Attorney General of Wisconsin.†

†Briefs of *amici curiae* urging reversal in both cases were filed by *Vernon B. Romney,* Attorney General, and *William C.*

MR. JUSTICE POWELL delivered the opinion of the Court.

Section 102 (2)(C) of the National Environmental Policy Act of 1969 [1] (NEPA) requires that all federal agencies include a detailed statement of environmental consequences—known as an environmental impact statement—"in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U. S. C. § 4332 (2)(C). The United States Court of Appeals for the District of Columbia Circuit held that officials of the Department of the Interior (Department) and certain other federal agencies must take additional steps under this section, beyond those already taken, before allowing further development of federal coal reserves in a specific area of the country. For the reasons set forth, we reverse.

I

Respondents, several organizations concerned with the environment, brought this suit in July 1973 in the United States District Court for the District of Columbia.[2] The defendants in the suit, petitioners here, were the offi-

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Quigley, Assistant Attorney General, for the State of Utah; by *William C. Wise* and *Robert Weinberg* for the American Public Power Assn. et al.; by *Roberts B. Owen, James R. Atwood,* and *Robert M. Perry* for the Carter Oil Co.; by *Ronald A. Zumbrun* and *Raymond M. Momboisse* for the Pacific Legal Foundation; by *Gerry Levenberg, Sidney G. Baucom,* and *Verl R. Topham* for the Utah Power & Light Co.; and by *Edward Weinberg* and *John Schwab* for the Western Fuels Assn., Inc., et al.

George W. Pring filed a brief for the Environmental Defense Fund, Inc., et al. as *amici curiae* urging affirmance in both cases.

[1] 83 Stat. 852, 42 U. S. C. § 4321 *et seq.*

[2] Respondents asserted jurisdiction under 5 U. S. C. §§ 701–706, 28 U. S. C. § 1331 (a), and 28 U. S. C. § 1361.

cials of the Department and other federal agencies responsible for issuing coal leases, approving mining plans, granting rights-of-way, and taking the other actions necessary to enable private companies and public utilities to develop coal reserves on land owned or controlled by the Federal Government. Citing widespread interest in the reserves of a region identified as the "Northern Great Plains region," and an alleged threat from coal-related operations to their members' enjoyment of the region's environment, respondents claimed that the federal officials could not allow further development without preparing a "comprehensive environmental impact statement" under § 102 (2)(C) on the entire region. They sought declaratory and injunctive relief.

The District Court, on the basis of extensive findings of fact and conclusions of law, held that the complaint stated no claim for relief and granted the petitioners' motions for summary judgment.[3] Respondents appealed. Shortly after oral argument but before issuing an opinion on the merits, the Court of Appeals in January 1975 issued an injunction—over a dissent—against the Department's approval of four mining plans in the Powder River Coal Basin, which is one small but coal-rich section of the region that concerns respondents. 166 U. S. App. D. C. 200, 509 F. 2d 533. An impact statement had been prepared on these plans, but it had not been before the District Court and was not before the Court of Appeals. In June 1975 the Court of Appeals ruled on the merits and, for reasons discussed below, reversed the District Court and remanded for further proceedings.

[3] Prior to ruling on motions for summary judgment, the District Court permitted intervention as defendants by several public utilities, coal mining companies, and natural gas companies, by an Indian tribe, and by an individual rancher. Most of these intervenors have joined in a separate petition for certiorari in No. 75–561, which is decided together with this case.

169 U. S. App. D. C. 20, 514 F. 2d 856. The court continued its injunction in force.

The federal officials petitioned for writ of certiorari on October 9, 1975. On November 7, the Court of Appeals refused to dissolve its injunction,[4] and a week later petitioners moved this Court for a stay. On January 12, 1976, we stayed the injunction and granted the petitions for certiorari. 423 U. S. 1047. We have been informed that shortly thereafter the Secretary of the Interior (Secretary) approved the four mining plans in the Powder River Coal Basin that had been stayed by the injunction.

II

The record and the opinions of the courts below contain extensive facts about coal development and the geographic area involved in this suit. The facts that we consider essential, however, can be stated briefly.

The Northern Great Plains region identified in respondents' complaint encompasses portions of four States—northeastern Wyoming, eastern Montana, western North Dakota, and western South Dakota. There is no dispute about its richness in coal, nor about the waxing interest in developing that coal, nor about the crucial role the federal petitioners will play due to the significant percentage of the coal to which they control access. The Department has initiated, in this decade, three studies in areas either inclusive of or included within this

[4] On the same date the Court of Appeals remanded to the District Court respondents' motion for modification of the injunction to prohibit the Secretary from approving a new mining plan submitted by a coal company, not then a party to the suit, that had been mining coal on leased federal land since 1972. The new mining plan was covered by an impact statement. The Secretary of the Interior approved the plan on November 11. On November 14, the District Court partially enjoined the company from mining under the approved plan.

region. The North Central Power Study was addressed to the potential for coordinated development of electric power in an area encompassing all or part of 15 States in the North Central United States. It aborted in 1972 for lack of interest on the part of electric utilities. The Montana-Wyoming Aqueducts Study, intended to recommend the best use of water resources for coal development in southeastern Montana and northeastern Wyoming, was suspended in 1972 with the initiation of the third study, the Northern Great Plains Resources Program (NGPRP).

While the record does not reveal the degree of concern with environmental matters in the first two studies, it is clear that the NGPRP was devoted entirely to the environment. It was carried out by an interagency, federal-state task force with public participation, and was designed "to assess the potential social, economic and environmental impacts" from resource development in five States—Montana, Wyoming, South Dakota, North Dakota, and Nebraska.[5] Its primary objective was "to provide an analytical and informational framework for policy and planning decisions at all levels of government" [6] by formulating several "scenarios" showing the probable consequences for the area's environment and culture from the various possible techniques and levels of resource development. The final interim report of the NGPRP was issued August 1, 1975, shortly after the decision of the Court of Appeals in this case.

In addition, since 1973 the Department has engaged in a complete review of its coal-leasing program for the entire Nation. On February 17 of that year the Secretary announced the review and announced also that during study a "short-term leasing policy" would prevail,

[5] Department of Interior News Release (Oct. 3, 1972), App. 132.
[6] NGPRP outline, App. 136.

under which new leasing would be restricted to narrowly defined circumstances and even then allowed only when an environmental impact statement had been prepared if required under NEPA.[7] The purpose of the program review was to study the environmental impact of the Department's entire range of coal-related activities and to develop a planning system to guide the national leasing program. The impact statement, known as the "Coal Programmatic EIS," went through several drafts before issuing in final form on September 19, 1975—shortly before the petitions for certiorari were filed in this case. The Coal Programmatic EIS proposed a new leasing program based on a complex planning system called the Energy Minerals Activity Recommendation System (EMARS), and assessed the prospective environmental impact of the new program as well as the alternatives to it. We have been informed by the parties to this litigation that the Secretary is in the process of implementing the new program.[8]

Against this factual background, we turn now to consider the issues raised by this case in the status in which it reached this Court.

III

The major issue remains the one with which the suit began: whether NEPA requires petitioners to prepare an environmental impact statement on the entire Northern Great Plains region.[9] Petitioners, arguing the negative,

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[7] Department of Interior News Release (Feb. 17, 1973), App. 125–127.

[8] The petitioners in No. 75–561 have included in their brief a press release by the Secretary announcing the new program, and a detailed description of the program. Pending full operation thereof, the short-term leasing policy remains in effect.

[9] In the District Court respondents also contended that petitioners had failed to comply with §§ 102 (2)(A) and (D), 42 U. S. C. §§ 4332 (2)(A) and (D), which require an agency to use a specified

rely squarely upon the facts of the case and the language of § 102 (2)(C) of NEPA. We find their reliance well placed.

As noted in the first sentence of this opinion, § 102 (2)(C) requires an impact statement "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." Since no one has suggested that petitioners have proposed legislation on respondents' region, the controlling phrase in this section of the Act, for this case, is "major Federal actions." Respondents can prevail only if there has been a report or recommendation on a proposal for major federal action with respect to the Northern Great Plains region. Our statement of the relevant facts shows there has been none; instead, all proposals are for actions of either local or national scope.

The local actions are the decisions by the various petioners to issue a lease, approve a mining plan, issue a right-of-way permit, or take other action to allow private activity at some point within the region identified by respondents. Several Courts of Appeals have held that an impact statement must be included in the report or recommendation on a proposal for such action if the private activity to be permitted is one "significantly affecting the quality of the human environment" within the meaning of § 102 (2)(C). See, *e. g., Scientists' Institute for Public Information, Inc.* v. *AEC,* 156 U. S. App. D. C. 395, 404–405, 481 F. 2d 1079, 1088–1089 (1973); *Davis* v. *Morton,* 469 F. 2d 593 (CA10 1972).

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approach to decisionmaking and to describe alternatives when a proposal involves unresolved conflicts concerning uses of resources. (Subparagraph (D) was redesignated subparagraph (E) by Pub. L. 94–83, 89 Stat. 424.) The District Court ruled against respondents on the count based on these subparagraphs, and it has dropped out of the case.

The petitioners do not dispute this requirement in this case, and indeed have prepared impact statements on several proposed actions of this type in the Northern Great Plains during the course of this litigation.[10] Similarly, the federal petitioners agreed at oral argument that § 102 (2)(C) required the Coal Programmatic EIS that was prepared in tandem with the new national coal-leasing program and included as part of the final report on the proposal for adoption of that program. Tr. of Oral Arg. 9. Their admission is well made, for the new leasing program is a coherent plan of national scope, and its adoption surely has significant environmental consequences.

But there is no evidence in the record of an action or a proposal for an action of regional scope. The District Court, in fact, expressly found that there was no existing or proposed plan or program on the part of the Federal Government for the regional development of the area described in respondents' complaint. It found also that the three studies initiated by the Department in areas either included within or inclusive of respondents' region—that is, the Montana-Wyoming Aqueducts Study, the North Central Power Study, and the

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[10] In an affidavit submitted in support of the application for a stay of the Court of Appeals' injunction, the Secretary described four impact statements completed by the petitioners on coal-related activity in Montana and Wyoming. One was the multiproject statement on the Powder River Coal Basin that was the subject of that injunction. See *supra*, at 395–396. Another was on the single mining plan subsequently brought under the injunction as modified by the District Court. See n. 4, *supra*. A third covered one leased tract, and apparently was occasioned by an application for approval of a new mining plan on the tract. The fourth, on another single mining plan, has been the subject of litigation, on the merits of which we intimate no view. See *Cady* v. *Morton*, 527 F. 2d 786 (CA9 1975).

NGPRP—were not parts of any plan or program to develop or encourage development of the Northern Great Plains. That court found no evidence that the individual coal development projects undertaken or proposed by private industry and public utilities in that part of the country are integrated into a plan or otherwise interrelated. These findings were not disturbed by the Court of Appeals, and they remain fully supported by the record in this Court.[11]

Quite apart from the fact that the statutory language requires an impact statement only in the event of a proposed action,[12] respondents' desire for a regional environmental impact statement cannot be met for practical reasons. In the absence of a proposal for a regional plan of development, there is nothing that could be the subject of the analysis envisioned by the statute for an impact statement. Section 102 (2)(C) requires that an impact statement contain, in essence, a detailed statement of the expected adverse environmental consequences of an action, the resource commitments involved

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[11] The Secretary's affidavit in support of the application for a stay of the Court of Appeals' injunction confirms that the situation regarding regional planning or a regional development program has not changed. See App. 195–196.

[12] The legislative history of NEPA fully supports our reading of § 102 (2)(C) as to when an impact statement is required. The bill passed by the House contained no provision comparable to § 102 (2)(C) of the Act. The bill that was reported to and, as amended, passed by the Senate did contain the forerunner of § 102 (2)(C). The committee report made clear that the impact statement was required in conjunction with specific proposals for action. S. Rep. No. 91–296, p. 20 (1969). After the House-Senate Conference, the managers on the part of the House, in a separate statement, explained § 102 (2)(C) in language that tracks the statute on the requirement of a proposal. H. R. Conf. Rep. No. 91–765, p. 8 (1969). See also 115 Cong. Rec. 40420 (1969).

in it, and the alternatives to it.[13] Absent an overall plan for regional development, it is impossible to predict the level of coal-related activity that will occur in the region identified by respondents, and thus impossible to analyze the environmental consequences and the resource commitments involved in, and the alternatives to, such activity. A regional plan would define fairly precisely the scope and limits of the proposed development of the region. Where no such plan exists, any attempt to produce an impact statement would be little more than a study along the lines of the NGPRP, containing estimates of potential development and attendant environmental consequences. There would be no factual predicate for the production of an environmental impact statement of the type envisioned by NEPA.[14]

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[13] Section 102 (2) (C) states that the statement must be a detailed statement on—

"(i) the environmental impact of the *proposed action,*

"(ii) any adverse environmental effects which cannot be avoided should the *proposal* be implemented,

"(iii) alternatives to the *proposed action,*

"(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

"(v) any irreversible and irretrievable commitments of resources which would be involved in the *proposed action* should it be implemented." (Emphasis added.)

[14] In contrast, with both an individual coal-related action and the new national coal-leasing program, an agency deals with specific action of known dimensions. With appropriate allowances for the inexactness of all predictive ventures, the agency can analyze the environmental consequences and describe alternatives as envisioned by § 102 (2) (C). Of course, since the kind of impact statement required depends upon the kind of "'federal action' being taken," *Aberdeen & Rockfish R. Co.* v. *SCRAP,* 422 U. S. 289, 322 (1975), the statement on a proposed mining plan or a lease application may bear little resemblance to the statement on the national coal-leasing program. Nevertheless, in each case the bounds of the

IV

A

The Court of Appeals, in reversing the District Court, did not find that there was a regional plan or program for development of the Northern Great Plains region. It accepted all of the District Court's findings of fact, but concluded nevertheless that the petitioners "contemplated" a regional plan or program. The court thought that the North Central Power Study, the Montana-Wyoming Aqueducts Study, and the NGPRP all constituted "attempts to control development" by individual companies on a regional scale. It also concluded that the interim report of the NGPRP, then expected to be released at any time, would provide the petitioners with the information needed to formulate the regional plan they had been "contemplating." The Court therefore remanded with instructions to the petitioners to inform the District Court of their role in the further development of the region within 30 days after the NGPRP interim report issued; if they decided to control that development, an impact statement would be required.

We conclude that the Court of Appeals erred in both its factual assumptions and its interpretation of NEPA. We think the court was mistaken in concluding, on the record before it, that the petitioners were "contemplating" a regional development plan or program. It considered the several studies undertaken by the petitioners to represent attempts to control development on a regional scale. This conclusion was based on a finding by the District Court that those studies, as well as the new national coal-leasing policy, were "attempts to control development by individual companies in a manner consistent with the policies and procedures of the Na-

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analysis are defined, which is not the case with coal development in general in the region identified by respondents.

tional Environmental Policy Act of 1969." But in context, that finding meant only that the named studies were efforts to gain background environmental information for subsequent application in the decisionmaking with respect to individual coal-related projects. This is the sense in which the District Court spoke of controlling development consistently with NEPA. Indeed, in the same paragraph containing the language relied upon by the Court of Appeals, the District Court expressly found that the studies were not part of a plan or program to develop or encourage development. See *supra,* at 400–401.

Moreover, at the time the Court of Appeals ruled there was no indication in the record that the NGPRP was aimed toward a regional plan or program, and subsequent events have shown that this was not its purpose. The interim report of the study, issued shortly after the Court of Appeals ruled, described the effects of several possible rates of coal development but stated in its preface that the alternatives "are for study and comparison only; they do not represent specific plans or proposals." All parties agreed in this Court that there still exists no proposal for a regional plan or program of development. See Tr. of Oral Arg. 48.

Even had the record justified a finding that a regional program was contemplated by the petitioners, the legal conclusion drawn by the Court of Appeals cannot be squared with the Act. The court recognized that the mere "contemplation" of certain action is not sufficient to require an impact statement. But it believed the statute nevertheless empowers a court to require the preparation of an impact statement to begin at some point prior to the formal recommendation or report on a proposal. The Court of Appeals accordingly devised its own four-part "balancing" test for determining when, during the contemplation of a plan or

other type of federal action, an agency must begin a statement. The factors to be considered were identified as the likelihood and imminence of the program's coming to fruition, the extent to which information is available on the effects of implementing the expected program and on alternatives thereto, the extent to which irretrievable commitments are being made and options precluded "as refinement of the proposal progresses," and the severity of the environmental effects should the action be implemented.

The Court of Appeals thought that as to two of these factors—the availability of information on the effects of any regional development program, and the severity of those effects—the time already was "ripe" for an impact statement. It deemed the record unclear, however, as to the likelihood of the petitioners' actually producing a plan to control the development, and surmised that irretrievable commitments were being avoided because petitioners had ceased approving most coal-related projects while the NGPRP study was underway. The court also thought that the imminent release of the NGPRP interim report would provide the officials with sufficient information to define their role in development of the region, and it believed that as soon as the NGPRP was completed the petitioners would begin approving individual projects in the region, thus permitting irrevocable commitments of resources. It was for this reason that the court in its remand required the petitioners to report to the District Court their decision on the federal role with respect to the Northern Great Plains as a region within 30 days after issuance of the NGPRP report.

The Court's reasoning and action find no support in the language or legislative history of NEPA. The statute clearly states when an impact statement is required, and mentions nothing about a balancing of factors. Rather, as we noted last Term, under the first

sentence of § 102 (2)(C) the moment at which an agency must have a final statement ready "is the time at which it makes a recommendation or report on a *proposal* for federal action." *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U. S. 289, 320 (1975) (*SCRAP II*) (emphasis in original). The procedural duty imposed upon agencies by this section is quite precise, and the role of the courts in enforcing that duty is similarly precise. A court has no authority to depart from the statutory language and, by a balancing of court-devised factors, determine a point during the germination process of a potential proposal at which an impact statement *should be prepared.* Such an assertion of judicial authority would leave the agencies uncertain as to their procedural duties under NEPA, would invite judicial involvement in the day-to-day decisionmaking process of the agencies, and would invite litigation. As the contemplation of a project and the accompanying study thereof do not necessarily result in a proposal for major federal action, it may be assumed that the balancing process devised by the Court of Appeals also would result in the preparation of a good many unnecessary impact statements.[15]

[15] This is not to say that § 102 (2)(C) imposes no duties upon an agency prior to its making a report or recommendation on a proposal for action. The section states that prior to preparing the impact statement the responsible official "shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved." Thus, the section contemplates a consideration of environmental factors by agencies during the evolution of a report or recommendation on a proposal. But the time at which a court enters the process is when the report or recommendation on the proposal is made, and someone protests either the absence or the adequacy of the final impact statement. This is the point at which an agency's action has reached sufficient maturity to assure that judicial intervention will not hazard unnecessary disruption.

B

Assuming that the Court of Appeals' theory about "contemplation" of regional action would permit a court to require preproposal preparation of an impact statement, the court's injunction against the Secretary's approval of the four mining plans in the Powder River Basin nevertheless would have been error. The District Court had found that respondents would not have been entitled to an injunction against any individual projects even if their claim of the need for a regional impact statement had been valid, because they had shown no irreparable harm that would result absent such an injunction and the record disclosed that irreparable harm *would* result to the intervenors who sought to carry out their business ventures and to the public who depended upon their operations. The Court of Appeals made no finding as to the equities at the time it originally entered the injunction; when it continued the injunction following its decision on the merits, it stated only that the "harm" justifying an injunction "matured" whenever an impact statement is due and not filed. But on the Court of Appeals' own terms there was in fact no harm. First, the Court of Appeals itself held that no regional impact statement was due at that moment, and it was uncertain whether one ever would be due. Second, there had been filed a comprehensive impact statement on the proposed Powder River Basin mining plans themselves, and its adequacy had not been challenged either before the District Court or the Court of Appeals in this case, or anywhere else.[16] Thus, in simple equitable terms there were

[16] Even had the Court of Appeals determined that a regional impact statement was due at that moment, it still would have erred in enjoining approval of the four mining plans unless it had made a finding that the impact statement covering them inadequately analyzed the environmental impacts of, and the alternatives to,

no grounds for the injunction: the District Court's finding of irreparable injury to the intervenors and to the public still stood, and there were—on the Court of Appeals' own terms—no countervailing equities.

V

Our discussion thus far has been addressed primarily to the decision of the Court of Appeals. It remains, however, to consider the contention now urged by respondents. They have not attempted to support the Court of Appeals' decision. Instead, respondents renew an argument they appear to have made to the Court of Appeals, but which that court did not reach. Respondents insist that, even without a comprehensive federal plan for the development of the Northern Great Plains, a "regional" impact statement nevertheless is required on all coal-related projects in the region because they are intimately related.

There are two ways to view this contention. First, it amounts to an attack on the sufficiency of the impact statements already prepared by the petitioners on the coal-related projects that they have approved or stand ready to approve. As such, we cannot consider it in this proceeding, for the case was not brought as a challenge to a particular impact statement and there is no impact statement in the record.[17] It also is possible to view the

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their approval. So long as the statement covering them was adequate, there would have been no reason to enjoin their approval pending preparation of a broader regional statement; that broader statement, when prepared, simply would have taken into consideration the regional environmental effects of the four mining plans once they were in operation, in determining the permissibility of further coal-related operations in the region. See Part V, *infra*.

[17] Petitioners lodged with this Court a copy of the massive six-volume impact statement on the projects in the Powder River Coal Basin, but it is not part of the record.

respondents' argument as an attack upon the decision of the petitioners not to prepare one comprehensive impact statement on all proposed projects in the region. This contention properly is before us, for the petitioners have made it clear they do not intend to prepare such a statement.

We begin by stating our general agreement with respondents' basic premise that § 102 (2)(C) may require a comprehensive impact statement in certain situations where several proposed actions are pending at the same time. NEPA announced a national policy of environmental protection and placed a responsibility upon the Federal Government to further specific environmental goals by "all practicable means, consistent with other essential considerations of national policy." § 101 (b), 42 U. S. C. § 4331 (b). Section 102 (2)(C) is one of the "action-forcing" provisions intended as a directive to "all agencies to assure consideration of the environmental impact of their actions in decisionmaking." Conference Report on NEPA, 115 Cong. Rec. 40416 (1969).[18] By requiring an impact statement Congress intended to assure such consideration during the development of a proposal or—as in this case—during the formulation of a position on a proposal submitted by private parties.[19] A comprehensive impact statement may be necessary in some cases for an agency to meet

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[18] The term "action-forcing" was applied to the provisions of what became § 102 (2) throughout their consideration by the Senate. See, *e. g.*, S. Rep. No. 91–296, p. 9 (1969); 115 Cong. Rec. 40416, 40419 (1969).

[19] The legislative history of the provision in the Senate, where it originated and where it received the most attention, supports this interpretation. See S. Rep. No. 91–296, *supra*, at 2, 20–21; 115 Cong. Rec. 29052–29053, 29055, 29058, 40416 (1969). The Conference Report to the House is consistent. See *id.*, at 40923–40928.

this duty. Thus, when several proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together.[20] Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action.[21]

Agreement to this extent with respondents' premise, however, does not require acceptance of their conclusion that all proposed coal-related actions in the Northern Great Plains region are so "related" as to require their analysis in a single comprehensive impact statement. Respondents informed us that the Secretary recently adopted an approach to impact statements on coal-related actions that provides:

> "A. As a general proposition, and as determined by the Secretary, when action is proposed involving

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[20] At some points in their brief respondents appear to seek a comprehensive impact statement covering contemplated projects in the region as well as those that already have been proposed. The statute, however, speaks solely in terms of *proposed* actions; it does not require an agency to consider the possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions. Should contemplated actions later reach the stage of actual proposals, impact statements on them will take into account the effect of their approval upon the existing environment; and the condition of that environment presumably will reflect earlier proposed actions and their effects. Cf. n. 26, *infra*.

[21] Neither the statute nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions. See *Scenic Hudson Preservation Conference* v. *FPC*, 453 F. 2d 463, 481 (CA2 1971), cert. denied, 407 U. S. 926 (1972). The only role for a court is to insure that the agency has taken a "hard look" at environmental consequences; it cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken." *Natural Resources Defense Council* v. *Morton*, 148 U. S. App. D. C. 5, 16, 458 F. 2d 827, 838 (1972).

> coal development such as issuing several coal leases or approving mining plans in the same region, such actions will be covered by a single EIS rather than by multiple statements. In such cases, the region covered will be determined by basin boundaries, drainage areas, areas of common reclamation problems, administrative boundaries, areas of economic interdependence, and other relevant factors." Brief for Respondents 20a.

At another point, the document containing the Secretary's approach [22] states that a "regional EIS" will be prepared "if a series of proposed actions with interrelated impacts are involved . . . unless a previous EIS has sufficiently analyzed the impacts of the proposed action(s)." *Id.*, at 20a–21a. Thus, the Department has decided to prepare comprehensive impact statements of the type contemplated by § 102(2)(C), although it has not

[22] The document is an "Executive Summary and Decision Document" signed by the Secretary and dated December 16, 1975. The decision as to impact statements is part of the implementation of the new coal-leasing policy based on staff recommendations following release of the Coal Programmatic EIS. See *supra*, at 397–398.

Respondents contend that this document represents a significant shift in Department policy since the start of this litigation, but we disagree. Early in the litigation the Department and three other agencies prepared the comprehensive impact statement on proposed actions in the Powder River Coal Basin, see *supra*, at 395; its preface—quoted by the District Court—states that it evaluated "the collective impact of the proposed actions and, insofar as now possible, the impacts of potential future coal mining within the geographic area." Moreover, the Secretary's consistent position, in affidavits dating back to the District Court, has been that statements might be prepared on regions or "subregions" once the Coal Programmatic EIS was completed. While the affidavits did not, until the application for a stay of the injunction, expressly predicate preparation of such statements upon the pendency of several proposals within the region or subregion, neither are they inconsistent with such predication.

deemed it appropriate to prepare such a statement on all proposed actions in the region identified by respondents.

Respondents conceded at oral argument that to prevail they must show that petitioners have acted arbitrarily in refusing to prepare one comprehensive statement on this entire region, and we agree. Tr. of Oral Arg. 67. The determination of the region, if any, with respect to which a comprehensive statement is necessary requires the weighing of a number of relevant factors, including the extent of the interrelationship among proposed actions and practical considerations of feasibility. Resolving these issues requires a high level of technical expertise and is properly left to the informed discretion of the responsible federal agencies. Cf. *SCRAP II*, 422 U. S., at 325–326. Absent a showing of arbitrary action, we must assume that the agencies have exercised this discretion appropriately. Respondents have made no showing to the contrary.

Respondents' basic argument is that one comprehensive statement on the Northern Great Plains is required because all coal-related activity in that region is "programmatically," "geographically," and "environmentally" related. Both the alleged "programmatic" relationship and the alleged "geographic" relationship resolve, ultimately, into an argument that the region is proper for a comprehensive impact statement because the petitioners themselves have approached environmental study in this area on a regional basis.[23] Respondents point primarily to the NGPRP, which they claim—and petitioners

[23] On the "programmatic" relationship, respondents also rely on the assertion that all of the projects involve similar methods of mining and converting the region's coal. Assuming this to be correct, we do not think it significant.

deny—focused on the region described in the complaint.[24] The precise region of the NGPRP is unimportant, for its irrelevance to the delineation of an appropriate area for analysis in a comprehensive impact statement has been well stated by the Secretary:

> "Resource studies [like the NGPRP] are one of many analytical tools employed by the Department to inform itself as to general resource availability, resource need and general environmental considerations so that it can intelligently determine the scope of environmental analysis and review specific actions it may take. Simply put, resource studies are a prelude to informed agency planning, and provide the data base on which the Department may decide to take specific actions for which impact statements are prepared. The scope of environmental impact statements seldom coincide with that of a given resource study, since the statements evolve from specific proposals for federal action while the studies simply provide an educational backdrop." Affidavit of Oct. 28, 1975, App. 191.

As for the alleged "environmental" relationship, respondents contend that the coal-related projects "will produce a wide variety of cumulative environmental impacts" throughout the Northern Great Plains region. They described them as follows: Diminished availability of water, air and water pollution, increases in population and industrial densities, and perhaps even climatic changes. Cumulative environmental impacts are, indeed, what require a comprehensive impact statement.

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[24] They rely also on the North Central Power Study and the Montana-Wyoming Aqueducts Study, but each covered an area different from respondents' region and, moreover, it is not clear that either was primarily an environmental study. See *supra,* at 397.

But determination of the extent and effect of these factors, and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies. Petitioners dispute respondents' contentions that the interrelationship of environmental impacts is region-wide [25] and, as respondents' own submissions indicate, petitioners appear to have determined that the appropriate scope of comprehensive statements should be based on basins, drainage areas, and other factors. See *supra,* at 410–411. We cannot say that petitioners' choices are arbitrary. Even if environmental interrelationships could be shown conclusively to extend across basins and drainage areas, practical considerations of feasibility might well necessitate restricting the scope of comprehensive statements.

In sum, respondents' contention as to the relationships between all proposed coal-related projects in the Northern Great Plains region does not require that petitioners prepare one comprehensive impact statement covering all before proceeding to approve specific pending applications.[26] As we already have determined that there

[25] For example, respondents assert that coal mines in the region are environmentally interrelated because opening one reduces the supply of water in the region for others. Petitioners contend that the water supply for each aquifer or basin within the region—of which there are many—is independent.

Moreover, petitioners state in their reply brief that few active or proposed mines in respondents' region are located within 50 miles of any other mine, and there are only 30 active or proposed mines in the entire 90,000 square miles of the region.

[26] Nor is it necessary that petitioners always complete a comprehensive impact statement on all proposed actions in an appropriate region before approving any of the projects. As petitioners have emphasized, and respondents have not disputed, approval of one lease or mining plan does not commit the Secretary to approval of any others; nor, apparently, do single approvals by the other peti-

exists no proposal for regionwide action that could require a regional impact statement, the judgment of the Court of Appeals must be reversed, and the judgment of the District Court reinstated and affirmed. The case is remanded for proceedings consistent with this opinion.

So ordered.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, concurring in part and dissenting in part.

While I agree with much of the Court's opinion, I must dissent from Part IV, which holds that the federal courts may not remedy violations of the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U. S. C. § 4321 *et seq.*—no matter how blatant—until it is too late for an adequate remedy to be formulated. As the Court today recognizes, NEPA contemplates agency consideration of environmental factors throughout the decisionmaking process. Since NEPA's enactment, however, litigation has been brought primarily at the end of that process—challenging agency decisions to act made without adequate environmental impact statements or without any statements at all. In such situations, the courts have had to content themselves with the largely unsatisfactory remedy of enjoining the proposed federal action and ordering the preparation of an adequate impact statement. This remedy is insufficient because, except by deterrence, it does nothing to further early consideration of environmental factors. And, as

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tioners commit them to subsequent approvals. Thus, an agency could approve one pending project that is fully covered by an impact statement, then take into consideration the environmental effects of that existing project when preparing the comprehensive statement on the cumulative impact of the remaining proposals. Cf. n. 20, *supra*.

with all after-the-fact remedies, a remand for preparation of an impact statement after the basic decision to act has been made invites *post hoc* rationalizations, cf. *Citizens to Preserve Overton Park* v. *Volpe,* 401 U. S. 402, 419–420 (1971), rather than the candid and balanced environmental assessments envisioned by NEPA. Moreover, the remedy is wasteful of resources and time, causing fully developed plans for action to be laid aside while an impact statement is prepared.

Nonetheless, until this lawsuit, such belated remedies were all the federal courts had had the opportunity to impose under NEPA. In this case, confronted with a situation in which, according to respondents' allegations, federal agencies were violating NEPA prior to their basic decision to act, the Court of Appeals for the District of Columbia Circuit seized the opportunity to devise a different and effective remedy. It recognized a narrow class of cases—essentially those where both the likelihood of eventual agency action and the danger posed by nonpreparation of an environmental impact statement were great—in which it would allow judicial intervention prior to the time at which an impact statement must be ready. The Court today loses sight of the inadequacy of other remedies and the narrowness of the category constructed by the Court of Appeals, and construes NEPA so as to preclude a court from ever intervening prior to a formal agency proposal. This decision, which unnecessarily limits the ability of the federal courts to effectuate the intent of NEPA, is mandated neither by the statute nor by the various equitable considerations upon which the Court relies.

I

The premises of the Court of Appeals' approach are not novel and indeed are reaffirmed by the Court today.

Under § 102 (2)(C) of NEPA, 42 U. S. C. § 4332 (2)(C), "the moment at which an agency *must have a final* [*environmental impact*] *statement ready* 'is the time at which it makes a recommendation or report on a *proposal* for federal action.'" *Ante,* at 406, quoting *Aberdeen & Rockfish R. Co.* v. *SCRAP,* 422 U. S. 289, 320 (1975) (first emphasis added). Preparation of an impact statement, particularly on a complicated project, takes a considerable amount of time. *Flint Ridge Dev. Co.* v. *Scenic Rivers Assn.,* 426 U. S. 776, 789 n. 10 (1976); Sixth Annual Report, Council on Environmental Quality 639 (1975). Necessarily, if the statement is to be completed by the time the agency makes its formal proposal to act, preparation must begin substantially before the proposal must be ready. In this litigation, for instance, the federal petitioners assert that a statement on the region in which respondents are interested would take more than three years to complete. Brief for Federal Petitioners 28 n. 22. Accordingly, since it would violate NEPA for the Government to propose a plan for regional development of the Northern Great Plains without an accompanying environmental impact statement, if the Government contemplates making such a proposal at any time in the next three years it should already be working on its impact statement.

But an early start on the statement is more than a procedural necessity. Early consideration of environmental consequences through production of an environmental impact statement is the whole point of NEPA, as the Court recognizes. The legislative history of NEPA demonstrates that "[b]y requiring an impact statement Congress intended to assure [environmental] consideration *during the development of a proposal* . . . ." *Ante,* at 409 (emphasis added). Compliance with this duty allows the decisionmaker to take environmental

factors into account when he is making decisions, at a time when he has an open mind and is more likely to be receptive to such considerations. Thus, the final impact statement itself is but "the tip of an iceberg, the visible evidence of an underlying planning and decision-making process that is usually unnoticed by the public." Sixth Annual Report, Council on Environmental Quality 628 (1975).

Because an early start in preparing an impact statement is necessary if an agency is to comply with NEPA, there comes a time when an agency that fails to begin preparation of a statement on a contemplated project is violating the law. It is this fact, which is not disputed by the Court today, that was recognized by the Court of Appeals and that formed the basis of its remedy. The Court devised a four-part test to enable a reviewing court to determine when judicial intervention might be proper in such cases. The questions formulated by the Court of Appeals were:

> "How likely is the program to come to fruition, and how soon will that occur? To what extent is meaningful information presently available on the effects of implementation of the program, and of alternatives and their effects? To what extent are irretrievable commitments being made and options precluded as refinement of the proposal progresses? How severe will be the environmental effects if the program is implemented?" 169 U. S. App. D. C. 20, 44, 514 F. 2d 856, 880 (1975).

While the Court's disapproval of this four-part inquiry precludes any future demonstration of its workability, the test is designed to allow judicial intervention only in the small number of cases where the need for work to begin on an environmental impact statement is clear

and the agency violation blatant.[1] And, indeed, the Court of Appeals refused to find a violation here, concluding instead that on two of the four factors the evidence was such as to negate the need for a prompt start on an impact statement.

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[1] Nothing in *Flint Ridge Dev. Co.* v. *Scenic Rivers Assn.*, 426 U. S. 776 (1976), suggests that work on an impact statement cannot successfully begin in situations identified by this four-part test. In *Flint Ridge*, in considering whether an agency should begin work on an impact statement arguably necessary for federal approval of certain private action by a real estate developer, we rejected the claim that the agency should begin work before the private action was submitted to the agency for approval. "The agency could not fruitfully begin the impact statement until the developer's plans were fully or largely worked out . . . ." *Id.*, at 791 n. 13.

This language is not contrary to the Court of Appeals' position here for two reasons. First, the quoted language recognizes that an impact statement could be begun when the developer's plans were largely worked out, essentially the situation the four-part test would identify as appropriate for initiation of work on an impact statement. Second, and more important, *Flint Ridge* concerned federal approval of private action rather than federal initiation of its own project, at issue here. This distinction has been recognized before, *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U. S. 289, 320 (1975), and is recognized by the Court today. When the federal agency is initiating its own proposal, NEPA is more demanding. In such circumstances, NEPA is "intended to assure [environmental] consideration during the development of [the] proposal," whereas when private action is to be approved, NEPA seeks only to assure such consideration "during the formulation of a position on [the] proposal submitted by private parties." *Ante*, at 409 (footnote omitted).

Nor are other parts of the Court's opinion today inconsistent with the Court of Appeals' approach. While it is true in general, as the Court observes, that in the absence of a proposal there is nothing for an impact statement to analyze, *ante*, at 401–402, the observation is a generalization plainly inapplicable to situations identified by the four-part test.

II

I believe the Court of Appeals' test is a sensible way to approach enforcement of NEPA, and none of the Court's reasons for concluding otherwise are, for me, persuasive.[2]

The Court begins its rejection of the four-part test by announcing that the procedural duty imposed on the agencies by § 102 (2)(C) is "quite precise" and leaves a court "no authority to depart from the statutory language . . . ." *Ante,* at 406. Given the history and wording of NEPA's impact statement requirement, this statement is baffling. A statute that imposes a complicated procedural requirement on all "proposals" for "major Federal actions significantly affecting the quality of the human environment" and then assiduously avoids giving any hint, either expressly or by way of legislative history, of what is meant by a "proposal" or by a "major Federal

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[2] The Court attempts to discredit the Court of Appeals' conclusion that the Government contemplates a regional development plan or proposal. The Court confuses the possibility of such a plan—all that is needed to prompt application of the four-part test—with its reality. All the parties, the District Court, and the Court of Appeals are agreed that no regional plan exists in this case. But the Government concedes that a regional plan is contemplated in the sense the Court of Appeals used the term. "[I]t would be accurate to conclude that petitioners 'contemplate' regional planning (although not necessarily for the region defined by respondents) because, as the district court found . . . , and as the *National Impact Statement* confirms, '[i]t is possible a decision will be made to prepare a statement for the entire Northern Great Plains region, but the information available [to petitioners] may indicate that statements on smaller subregions, geologic structures, basin, or selected individual actions' will be preferable." Brief for Federal Petitioners 40 n. 32.

Thus, the Court's conclusion that "the Court of Appeals erred in . . . its factual assumptions," *ante,* at 403, either misapprehends the factual assumptions necessary to the Court of Appeals' theory or is entirely without support in the record.

action" can hardly be termed precise. In fact, this vaguely worded statute seems designed to serve as no more than a catalyst for development of a "common law" of NEPA. To date, the courts have responded in just that manner and have created such a "common law." 169 U. S. App. D. C., at 34–36, 514 F. 2d, at 870–872. Indeed, that development is the source of NEPA's success. Of course, the Court is correct that the courts may not depart from NEPA's language. They must, however, give meaning to that language if there is to be anything in NEPA to enforce at all. And that is all the Court of Appeals did in this case.

But, claims the Court, judicial intervention of the sort approved by the Court of Appeals would leave the agencies uncertain about their procedural duties under NEPA. There is no basis for this claim. The agencies already know their duties under NEPA and the Court of Appeals did not alter them. All it did was create a mechanism to allow it to enforce those pre-existing duties.

Next, the Court fears, the four-part test would "invite judicial involvement in the day-to-day decisionmaking process of the agencies . . . ." *Ante,* at 406. This concern is in part untrue and in part exaggerated. The test would certainly result in judicial involvement with the single decision whether the time is right to begin an impact statement. But this is hardly a day-to-day process, and the involvement even in that decision would be limited to timing alone. The Court of Appeals made clear that, so long as their decision was not arbitrary or capricious, "definition of the proper region for comprehensive development and, therefore, the comprehensive impact statement should be left in the hands of the federal appellees," 169 U. S. App. D. C., at 45 n. 33, 514 F. 2d, at 881 n. 33, a position which the Court adopts today. *Ante,* at 412. And, most important, a federal

court would intervene at all only when the four-part test indicated an abdication of the agency's statutory duty and the necessity for judicial intervention.

The Court is also concerned that the proposed rule would invite litigation. But the recognition of any right invites litigation, and it is a curious notion of statutory construction that makes substantive rights depend on whether persons would seek to enforce them in court. See *United States* v. *Watson,* 423 U. S. 411, 433, 452 n. 19 (1976) (MARSHALL, J., dissenting). In any case, to the extent the litigation is the result of agency noncompliance with NEPA, the Court can hardly complain about it. And to the extent the litigation is frivolous, the four-part test is a stiff one and "the plaintiff can be hastened from [the] court by summary judgment." *Barlow* v. *Collins,* 397 U. S. 159, 175 n. 10 (1970) (opinion of BRENNAN, J.).

Lastly, the Court complains, since some contemplated projects might never come to fruition, the Court of Appeals' test might result "in the preparation of a good many unnecessary impact statements." *Ante,* at 406 (footnote omitted). Even bypassing the instances in which a project is dropped as a result of environmental considerations discovered in the course of preparing an impact statement, the Court's concerns are exaggerated. The Court of Appeals showed great sensitivity to the need for federal officials to be able "to dream out loud without filing an impact statement," 169 U. S. App. D. C., at 43, 514 F. 2d, at 879, and did not seek to disturb that freedom. Indeed, a major point of the four-part test is to avoid wasted effort—including the wasted effort of enjoining an already proposed project to allow the belated preparation of an impact statement—and the Court suggests, and I can imagine, no reason why the test is unlikely to be successful in achieving that goal.

In short, the Court offers nothing but speculation, misconception, and exaggeration to reject a reasonably designed test for enforcing the duty NEPA imposes upon the federal agencies. Whatever difficulties the Court may have with the initial application of the test in this case—and I agree that an injunction was not warranted on the facts before the Court of Appeals—the Court has articulated no basis for interring the test before it has been given a chance to breathe.

PASADENA CITY BOARD OF EDUCATION ET AL. *v.* SPANGLER ET AL.

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

No. 75–164. Argued April 27–28, 1976—Decided June 28, 1976

In 1968, respondents, Pasadena, Cal., high school students and their parents, brought a purported class action against various school officials seeking injunctive relief from allegedly unconstitutional segregation of the public schools in Pasadena. The United States intervened as a party plaintiff pursuant to § 902 of the Civil Rights Act of 1964, which provides that upon intervention "the United States shall be entitled to the same relief as if it had instituted the action." Ultimately in 1970 the District Court, holding that the defendants' educational policies and procedures violated the Fourteenth Amendment, enjoined the defendants from failing to adopt a desegregation plan, ordered them to submit a plan for desegregating the Pasadena schools which would provide that beginning with the 1970–1971 school year there would be no school "with a majority of any minority students," and retained jurisdiction so as to see that such a plan was carried out. The defendants did not appeal from this decree, and subsequently submitted the "Pasadena Plan," which was approved by the District Court. In 1974, however, petitioner school officials, successors to the original defendants, filed a motion with the District Court seeking to modify the 1970 order by eliminating the "no majority" requirement, whose meaning was admittedly unclear to all the parties, dissolving the injunction, and terminating the court's retained jurisdiction, or, in the alternative, to obtain approval of the petitioners' proposed modifications of the "Pasadena Plan." The District Court denied the motion, largely on the grounds that petitioners had failed to comply with the 1970 order, that literal compliance with the "no majority" requirement had occurred only in the initial year of the "Pasadena Plan's" operation, that subsequently a number of schools had violated that requirement, and that such requirement was an inflexible one to be applied anew each school year even though subsequent changes in the racial mix in the schools were caused by factors for which petitioners might not be considered responsible. The Court of Appeals affirmed, but with reservations,

which it felt the District Court would heed, as to that court's view that it had a lifetime commitment to the "no majority" requirement and as to the substance of such requirement. *Held:*

1. The United States' presence in the case pursuant to § 902 of the Civil Rights Act of 1964 ensures that the case is not moot, although it is moot as to respondent students and parents who were the original named plaintiffs because these students have graduated from the school system and thus they and their parents no longer have any stake in the outcome of the litigation, and there has been no certification of a class of unnamed students still attending the Pasadena schools to be represented by the named plaintiffs. Pp. 429–431.

2. Having adopted the "Pasadena Plan" in 1970 as establishing a racially neutral system of student assignment in the school system, the District Court exceeded its authority in enforcing its order so as to require annual readjustment of attendance zones so that there would not be a majority of any minority in any Pasadena public school. Pp. 431–440.

(a) Since the post-1971 shifts in the racial makeup of some of the schools resulted from changes in the demographics of Pasadena's residential pattern due to a normal pattern of people moving into, out of, and around the school system, and were not attributable to any segregative action on the school officials' part, neither the school officials nor the District Court were "constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." *Swann* v. *Board of Education*, 402 U. S. 1, 32. Pp. 435–436.

(b) The fact that even if the "no majority" requirement had been unambiguous it would be contrary to the intervening decision in *Swann, supra,* and that, being ambiguous, the parties interpreted it in a manner contrary to the District Court's ultimate interpretation, are factors, which, taken together, support modification of the 1970 decree. Pp. 437–438.

(c) The Court of Appeals' disapproval of the District Court's view that it had a lifetime commitment to the "no majority" requirement, and of the substance of that requirement, was not sufficient to remove the requirement from the case, since, even though the Court of Appeals assumed that the District Court would heed such disapproval on remand, the fact remains that despite such disapproval the Court of Appeals affirmed the

District Court's denial of the motion to amend the 1970 order, and thus subjected petitioners to contempt for violation of the injunctive decree notwithstanding that they might have reasonable and proper objections to the decree. On this phase of the case petitioners were entitled to a reversal of the District Court with respect to its treatment of the "no majority" requirement portion of the 1970 order. Pp. 438–440.

519 F. 2d 430, vacated and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 441. STEVENS, J., took no part in the consideration or decision of the case.

Phil C. Neal argued the cause for petitioners. With him on the briefs were *Lee G. Paul, Peter D. Collisson, Robert G. Lane, Philip B. Kurland,* and *Alan L. Unikel.*

Fred Okrand argued the cause and filed a brief for respondents Spangler et al. *Solicitor General Bork* argued the cause for the United States. With him on the brief were *Assistant Attorney General Pottinger, Deputy Solicitor General Wallace,* and *Brian K. Landsberg.**

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*Briefs of *amici curiae* urging affirmance were filed by *Vilma S. Martinez* and *Morris J. Baller* for the Mexican American Legal Defense and Educational Fund; by *Nathaniel R. Jones, William L. Taylor, Paul R. Dimond, William E. Caldwell, Norman J. Chachkin, Thomas D. Barr, John W. Douglas, J. Harold Flannery, Albert E. Jenner, Jr., Milan C. Miskovsky, Whitney North Seymour,* and *Chesterfield Smith* for the National Association for the Advancement of Colored People et al.; by *Jack Greenberg, James M. Nabrit III, Charles Stephen Ralston, Drew S. Days III,* and *Melvin Leventhal* for the N. A. A. C. P. Legal Defense and Educational Fund, Inc.; by *Ralph J. Moore, Jr., Richard M. Sharp, David Rubin, Peter T. Galiano,* and *Horace Wheatley* for the National Education Assn. et al.; and by *Nathaniel S. Colley* for the Western Regional Office, National Association for the Advancement of Colored People, et al.

Raymond B. Witt, Jr., filed a brief for the Board of Education of Chattanooga, Tenn., as *amicus curiae.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

In 1968, several students in the public schools of Pasadena, Cal., joined by their parents, instituted an action in the United States District Court for the Central District of California seeking injunctive relief from allegedly unconstitutional segregation of the high schools of the Pasadena Unified School District (PUSD). This action named as defendants the Pasadena City Board of Education, which operates the PUSD, and several of its officials. Before the defendants had filed an answer, the United States moved to intervene in the case pursuant to Title IX, § 902, of the Civil Rights Act of 1964, 78 Stat. 266, 42 U. S. C. § 2000h–2. The District Court granted this motion. Later, however, the court granted defendant Board's motion to strike those portions of the United States' complaint in intervention which sought to include in the case other areas of the Pasadena public school system: the elementary schools, the junior high schools, and the special schools. This ruling was the subject of an interlocutory appeal, see 28 U. S. C. § 1292 (a)(1), to the Court of Appeals for the Ninth Circuit. That court reversed the District Court and ordered the United States' demand for systemwide relief reinstated. 415 F. 2d 1242 (1969). No further review of this decision was sought.

Following remand from this decision, the District Court held a trial on the allegations that the Pasadena school system was unconstitutionally segregated. On January 23, 1970, the court entered a judgment in which it concluded that the defendants' educational policies and procedures were violative of the Fourteenth Amendment. The court ordered the defendants "enjoined from failing to prepare and adopt a plan to correct racial imbalance at all levels in the Pasadena Unified School

District." The defendants were further ordered to submit to the District Court a plan for desegregating the Pasadena schools. In addition to requiring provisions for the assignment of staff and the construction and location of facilities, the District Court ordered that

> "[t]he plan shall provide for student assignments in such a manner that, by or before the beginning of the school year that commences in September of 1970 there shall be no school in the District, elementary or junior high or senior high school, with a majority of any minority students." 311 F. Supp. 501, 505 (1970).

The court went on to retain

> "jurisdiction of this cause in order to continue to observe and evaluate the plans and the execution of the plans of the Pasadena Unified School District in regard to the hiring, promotion, and assignment of teachers and professional staff members, the construction and location of facilities, and the assignment of students." *Ibid.*

The defendant school officials voted to comply with the District Court's decree and not to appeal. They thereupon set out to devise and submit the plan demanded by the District Court. In February the defendants submitted their proposed plan, the "Pasadena Plan," and on March 10, 1970, the District Court approved the plan, finding it "to be in conformance with the Judgment entered herein January 23, 1970." App. 96. The "Pasadena Plan" was implemented the following September, and the Pasadena schools have been under its terms ever since.

In January 1974, petitioners, successors to the original defendants in this action, filed a motion with the District Court seeking relief from the court's 1970 order. Peti-

tioners sought four changes: to have the judgment modified so as to eliminate the requirement that there be "no school in the District, elementary or junior high or senior high school, with a majority of any minority students"; to have the District Court's injunction dissolved; to have the District Court terminate its "retained jurisdiction" over the actions of the Board; or, as an alternative, to obtain approval of petitioners' proposed modifications of the "Pasadena Plan."

The District Court held hearings on these motions and, on March 1, 1974, denied them in their entirety. In an opinion filed May 3, the court discussed its reasons for refusing the relief requested by petitioners. 375 F. Supp. 1304 (1974). Petitioners appealed to the Court of Appeals for the Ninth Circuit. A divided panel of that court affirmed the District Court, 519 F. 2d 430 (1975), but all three members of the panel expressed substantial reservations about some of the District Court's actions and the implications of some portions of its orders as they bore on the future operations of the Pasadena schools. Judges Ely and Chambers were apparently satisfied that the District Judge would heed the reservations expressed in their separate opinions, however, and they were content to affirm the District Court's order and remand the case. Judge Wallace dissented from the affirmance. Because the case seemed to present issues of importance regarding the extent of a district court's authority in imposing a plan designed to achieve a unitary school system, we granted certiorari. 423 U. S. 945 (1975). We vacate the judgment of the Court of Appeals and remand the case to that court for further proceedings.

I

We must first deal with petitioners' contention that there no longer exists any case or controversy sufficient

to support our jurisdiction. Petitioners assert that all the original student plaintiffs have graduated from the Pasadena school system, and that since the District Court never certified this suit as a class action pursuant to Fed. Rule Civ. Proc. 23, the case is moot. Respondents advance several theories why it is not moot.

Counsel for the individual named respondents, the original student plaintiffs and their parents, argue that this litigation was filed as a class action, that all the parties have until now treated it as a class action, and that the failure to obtain the class certification required under Rule 23 is merely the absence of a meaningless "verbal recital" which counsel insists should have no effect on the facts of this case. But these arguments overlook the fact that the named parties whom counsel originally undertook to represent in this litigation no longer have any stake in its outcome. As to them the case is clearly moot. And while counsel may wish to represent a class of unnamed individuals still attending the Pasadena public schools who do have some substantial interest in the outcome of this litigation, there has been no certification of any such class which is or was represented by a named party to this litigation. Except for the intervention of the United States, we think this case would clearly be moot. *Sosna* v. *Iowa,* 419 U. S. 393 (1975); *Indianapolis School Comm'rs* v. *Jacobs,* 420 U. S. 128 (1975).

The case did not remain an individual private action seeking to desegregate the Pasadena schools, however. The United States intervened in this case pursuant to 42 U. S. C. § 2000h–2. That section provides that "the United States shall be entitled to the same relief as if it had instituted the action." The meaning of this provision is somewhat ambiguous, and there is little legislative history to shed any light upon the intention

of Congress. But we think the statute is properly read to authorize the United States to continue as a party plaintiff in this action, despite the disappearance of the original plaintiffs and the absence of any class certification, so long as such participation serves the statutory purpose, and that the presence of the United States as a party ensures that this case is not moot.

II

Petitioners requested the District Court to dissolve its injunctive order requiring that there be no school in the PUSD with a majority of any minority students enrolled. The District Court refused this request, and ordered the injunction continued. The court apparently based this decision in large part upon its view that petitioners had failed properly to comply with its original order. This conclusion was in turn premised upon the fact that although the School Board had reorganized PUSD attendance patterns in conformity with the court-approved Pasadena Plan, literal compliance with the terms of the court's order had been obtained in only the initial year of the plan's operation. Following the 1970–1971 school year, black student enrollment at one Pasadena school exceeded 50% of that school's total enrollment. The next year, four Pasadena schools exceeded this 50% black enrollment figure; and at the time of the hearing on petitioners' motion some five schools, in a system of 32 regular schools, were ostensibly in violation of the District Court's "no majority of any minority" requirement. It was apparently the view of the majority of the Court of Appeals' panel that this failure to maintain literal compliance with the 1970 injunction indicated that the District Court had not abused its discretion in refusing to grant so much of petitioner's mo-

tion for modification as pertained to this aspect of the order.[1] We think this view was wrong.

We do not have before us any issue as to the validity of the District Court's original judgment, since petitioners' predecessors did not appeal from it. The District Court's conclusion that unconstitutional segregation existed in the PUSD; its decision to order a systemwide school reorganization plan based upon the guidelines which it submitted to the defendants; and the inclusion in those guidelines of the requirement that the plan contain provisions insuring that there be no majority of any minority in any Pasadena school, all became embodied in the 1970 decree. All that is now before us are the questions of whether the District Court was correct in denying relief when petitioners in 1974 sought to modify the "no majority" requirement as then interpreted by the District Court.

The meaning of this requirement, as originally established by the District Court, was apparently unclear even to the parties. In opposing the petitioners' request for relief in 1974, counsel for the original individual plaintiffs and counsel for the Government jointly stipulated that they were aware "of no violations of the Pasadena Plan up to and including the present." These

[1] In addition to several other factors, Judge Ely cited the fact that the defendants had been found in violation of the District Court's 1970 order as supplying evidence that the court "could rightly determine that the 'dangers' which induced the original determination of constitutional infringements in Pasadena have not diminished sufficiently to require modification or dissolution of the original Order." 519 F. 2d 430, 434 (1975). Judge Chambers, concurring in the result, relied only upon the fact that petitioners had apparently not yet complied with what he viewed as the "continuing duty to homogenize" imposed upon them by the District Court's 1970 order. Judge Chambers thought that as soon as the PUSD was brought in compliance with that order, the mandatory injunction should be terminated. *Id.*, at 440.

parties were, of course, aware that some of the Pasadena schools had "slipped out of compliance" [2] with the literal terms of the order. The stipulation was based upon the fact that the plaintiffs never understood the District Court's order to require annual reassignment of pupils in order to accommodate changing demographic residential patterns in Pasadena from year to year, as the Government candidly admits in its brief here. Brief for United States 16 n. 22.

Petitioners have argued that they never understood the injunction, or the provisions of the plan which they drafted to implement that order, to contain such a requirement either.[3] But at the hearing on petitioners' motion for relief the District Court made it clear that *its* understanding of the decree was quite different from that of the parties. In response to the arguments of petitioners' counsel, the judge stated that his 1970 order "meant to me that at least during my lifetime there would be no majority of any minority in any school in Pasadena." App. 270.

When the District Court's order in this case, as interpreted and applied by that court, is measured against what this Court said in its intervening decision in *Swann* v. *Board of Education,* 402 U. S. 1 (1971), regarding

[2] *Id.,* at 433 n. 3.

[3] There is some disagreement whether petitioners, or their predecessors at least, understood the District Court's order in the same manner as it was interpreted in 1974. There are some suggestions in the record that petitioners may have made some attempts to stay in compliance with the "no majority of any minority" guideline as demographic patterns in Pasadena changed. But there are no factual assessments in the record as to the understanding of the petitioners, and they have argued before us that their reading of the 1970 order was the same as that of the plaintiffs. However this factual issue might be resolved, we think petitioners were not foreclosed from challenging the District Court's decree as interpreted and applied in 1974. See *infra,* at 437–438.

the scope of the judicially created relief which might be available to remedy violations of the Fourteenth Amendment, we think the inconsistency between the two is clear. The District Court's interpretation of the order appears to contemplate the "substantive constitutional right [to a] particular degree of racial balance or mixing" which the Court in *Swann* expressly disapproved. *Id.*, at 24. It became apparent, at least by the time of the 1974 hearing, that the District Court viewed this portion of its order not merely as a "starting point in the process of shaping a remedy," which *Swann* indicated would be appropriate, *id.*, at 25, but instead as an "inflexible requirement," *ibid.*, to be applied anew each year to the school population within the attendance zone of each school.

The District Court apparently believed it had authority to impose this requirement even though subsequent changes in the racial mix in the Pasadena schools might be caused by factors for which the defendants could not be considered responsible. Whatever may have been the basis for such a belief in 1970, in *Swann* the Court cautioned that "it must be recognized that there are limits" beyond which a court may not go in seeking to dismantle a dual school system. *Id.*, at 28. These limits are in part tied to the necessity of establishing that school authorities have in some manner caused unconstitutional segregation, for "[a]bsent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis." *Ibid.* While the District Court found such a violation in 1970, and while this unappealed finding afforded a basis for its initial requirement that the defendants prepare a plan to remedy such racial segregation, its adoption of the Pasadena Plan in 1970 established a racially neutral system of student assignment in the PUSD. Having

done that, we think that in enforcing its order so as to require annual readjustment of attendance zones so that there would not be a majority of any minority in any Pasadena public school, the District Court exceeded its authority.

In so concluding, we think it important to note what this case does not involve. The "no majority of any minority" requirement with respect to attendance zones did not call for defendants to submit "step at a time" plans by definition incomplete at inception. See, *e. g.*, *United States* v. *Montgomery Board of Education,* 395 U. S. 225 (1969). Nor did it call for a plan embodying specific revisions of the attendance zones for particular schools, as well as provisions for later appraisal of whether such discrete individual modifications had achieved the "unitary system" required by *Brown* v. *Board of Education,* 349 U. S. 294, 300 (1955). The plan approved in this case applied in general terms to all Pasadena schools, and no one contests that its implementation did "achieve a system of determining admission to the public schools on a nonracial basis," *id.*, at 300–301.

There was also no showing in this case that those post-1971 changes in the racial mix of some Pasadena schools which were focused upon by the lower courts were in any manner caused by segregative actions chargeable to the defendants. The District Court rejected petitioners' assertion that the movement was caused by so-called "white flight" traceable to the decree itself. It stated that the "trends evidenced in Pasadena closely approximate the state-wide trends in California schools, both segregated and desegregated." 375 F. Supp., at 1306. The fact that black student enrollment at 5 out of 32 of the regular Pasadena schools came to exceed 50% during the 4-year period from 1970 to 1974 apparently resulted from people randomly moving into, out of, and

around the PUSD area. This quite normal pattern of human migration resulted in some changes in the demographics of Pasadena's residential patterns, with resultant shifts in the racial makeup of some of the schools. But as these shifts were not attributed to any segregative actions on the part of the petitioners, we think this case comes squarely within the sort of situation foreseen in *Swann:*

> "It does not follow that the communities served by [unitary] systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." 402 U. S., at 31–32.

It may well be that petitioners have not yet totally achieved the unitary system contemplated by this quotation from *Swann.* There has been, for example, dispute as to the petitioners' compliance with those portions of the plan specifying procedures for hiring and promoting teachers and administrators. See 384 F. Supp. 846 (1974), vacated, 537 F. 2d 1031 (1976). But that does not undercut the force of the principle underlying the quoted language from *Swann.* In this case the District Court approved a plan designed to obtain racial neutrality in the attendance of students at Pasadena's public schools. No one disputes that the initial implementation of this plan accomplished *that* objective. That being the case, the District Court was not entitled to require the PUSD to rearrange its attendance zones each year so as to ensure that the racial mix desired by the court was maintained in perpetuity. For hav-

ing once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns.

At least one of the judges of the Court of Appeals expressed the view that while all of the petitioners' contentions which we have discussed might be sound, they were barred from asserting them by their predecessors' failure to appeal from the 1970 decree of the District Court.[4] But this observation overlooks well-established rules governing modification of even a final decree entered by a court of equity. See *Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 18 How. 421 (1856); *United States* v. *Swift & Co.,* 286 U. S. 106 (1932); *System Federation* v. *Wright,* 364 U. S. 642 (1961). In the latter case this Court said:

> "There is also no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen. The source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief." *Id.,* at 647.

Even had the District Court's decree been unambiguous and clearly understood by the parties to mean what that court declared it to mean in 1974, the "no majority of any minority" provision would, as we have indicated

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[4] See 519 F. 2d, at 440 (opinion of Chambers, J.); cf. n. 1, *supra.*

previously, be contrary to the intervening decision of this Court in *Swann, supra.* The ambiguity of the provision itself, and the fact that the parties to the decree interpreted it in a manner contrary to the interpretation ultimately placed upon it by the District Court, is an added factor in support of modification. The two factors taken together make a sufficiently compelling case so that such modification should have been ordered by the District Court. *System Federation* v. *Wright, supra.*

There is little real dispute among the parties with our observations thus far.[5] Indeed, as the Government points out, each of the judges of the Court of Appeals disapproved both the District Court's statement regarding its lifetime commitment to the "no majority of any minority" rule and the substance of that rule itself, to the extent that either indicated a continuing, rigid insistence upon some particular degree of racial balance. Brief for United States 37. The Government adds that these disapprovals were, in its view, quite proper, and it concludes they were sufficient to remove the "no majority of any minority" requirement from this case.

It is here that we disagree with the Government. Violation of an injunctive decree such as that issued by the District Court in this case can result in punishment for contempt in the form of either a fine or imprisonment. Federal Rule Civ. Proc. 65 (d) concomitantly provides that "[e]very order granting an injunction and every re-

[5] Counsel for the original plaintiffs has urged, in the courts below and before us, that the District Court's perpetual "no majority of any minority" requirement was valid and consistent wtih *Swann,* at least until the school system achieved "unitary" status in all other respects such as the hiring and promoting of teachers and administrators. Since we have concluded that the case is moot with regard to these plaintiffs, these arguments are not properly before us. It should be clear from what we have said that they have little substance.

straining order shall . . . be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained . . . ." Because of the rightly serious view courts have traditionally taken of violations of injunctive orders, and because of the severity of punishment which may be imposed for such violation, such orders must in compliance with Rule 65 be specific and reasonably detailed.

Because of related concern that outstanding injunctive orders of courts be obeyed until modified or reversed by a court having the authority to do so, this Court has held that even though the constitutionality of the Act under which the injunction issued is challenged, disobedience of such an outstanding order of a federal court subjects the violator to contempt even though his constitutional claim might be later upheld. *United States* v. *Mine Workers,* 330 U. S. 258 (1947). The Court has likewise held that a State is constitutionally free to adopt a similar rule respecting punishment as contempt of violation of injunctive orders issued by its courts. *Walker* v. *City of Birmingham,* 388 U. S. 307 (1967). In both of these cases this Court quoted its own statement in the earlier decision of *Howat* v. *Kansas,* 258 U. S. 181 (1922):

> "It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished." *Id.,* at 190.

There is necessarily a counterpart to this well-established insistence that those who are subject to the commands of an injunctive order must obey those commands, notwithstanding eminently reasonable and

proper objections to the order, until it is modified or reversed. That counterpart is that when such persons heed this well-established rule and prosecute their remedy first by a motion to modify in the issuing court and then, failing there, by appeal of that court's denial of their motion, they are entitled in a proper case to obtain a definitive disposition of their objections. Here a majority of the Court of Appeals for the Ninth Circuit in separate opinions strongly intimated that the District Court erred in refusing to amend the "no majority of any minority" provision of its order, but the Court nonetheless affirmed the order of the District Court denying *in toto* the motion to modify that order.

Petitioners have plainly established that they were entitled to relief from the District Court's injunction insofar as it required them to alter school attendance zones in response to shifts in demographics within the PUSD. The order of the District Court which was affirmed by the Court of Appeals equally plainly envisioned the continuation of such a requirement. We do not think petitioners must be satisfied with what may have been the implicit assumption of the Court of Appeals that the District Court would heed the "disapproval" expressed by each member of the panel of that court in his opinion. Instead, we think petitioners were entitled on this phase of the case to a judgment of the Court of Appeals reversing the District Court with respect to its treatment of that portion of the order.

III

Because the case is to be returned to the Court of Appeals, that court will have an opportunity to reconsider its decision in light of our observations regarding the appropriate scope of equitable relief in this case. We thus think it unnecessary for us to consider petitioners' other contentions: that the District Court's 1970 in-

junction should in all respects be dissolved; that the District Court's jurisdiction over the PUSD should be terminated; or that petitioners' suggested modifications of the Pasadena Plan should be accepted as an alternative to the present plan. The record in this case reflects the situation in Pasadena as it was in 1974. At oral argument the Solicitor General discussed the Government's belief that if, as petitioners have represented, they have complied with the District Court's order during the intervening two years, they will probably be entitled to a lifting of the District Court's order in its entirety. Tr. of Oral Arg. 28–31. And while any determination of compliance or noncompliance must, of course, comport with our holding today, it must also depend on factual determinations which the Court of Appeals and the District Court are in a far better position than we are to make in the first instance. Accordingly the judgment of the Court of Appeals is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

So ordered.

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

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

I cannot agree with the Court that the District Court's refusal to modify the "no majority of any minority" provision of its order was erroneous. Because at the time of the refusal "racial discrimination through official action," *Swann* v. *Board of Education,* 402 U. S. 1, 32 (1971), had apparently not yet been eliminated from the Pasadena school system, it is my view that the District Court did not abuse its discretion in refusing to dissolve a major part of its order.

In denying petitioners' motion for modification of the 1970 desegregation order, the District Court described a 3-year pattern of opposition by a number of the members of the Board of Education to both the spirit and letter of the Pasadena Plan. It found that "the Pasadena Plan has not had the cooperation from the Board that permits a realistic measurement of its educational success or failure." 375 F. Supp. 1304, 1308 (CD Cal. 1974) (footnote omitted). Moreover, the 1974 Board of Education submitted to the District Court an alternative to the Pasadena Plan, which, at least in the mind of one member of the Court of Appeals, "would very likely result in rapid resegregation." 519 F. 2d 430, 435 (CA9 1975). I agree with Judge Ely that there is "abundant evidence upon which the district judge, in the reasonable exercise of his discretion, could rightly determine that the 'dangers' which induced the original determination of constitutional infringements in Pasadena have not diminished sufficiently to require modification or dissolution of the original Order." *Id.*, at 434.

The Court's conclusion that modification of the District Court's order is mandated is apparently largely founded on the fact that during the Pasadena Plan's first year, its implementation did result in no school's having a majority of minority students. According to the Court, it follows from our decision in *Swann, supra,* that as soon as the school attendance zone scheme had been successful, even for a very short period, in fulfilling its objectives, the District Court should have relaxed its supervision over that aspect of the desegregation plan. It is irrelevant to the Court that the system may not have achieved "'unitary' status in all other respects such as the hiring and promoting of teachers and administrators." *Ante,* at 438 n. 5.

In my view, the Court, in so ruling, has unwarrantedly extended our statement in *Swann* that "[n]either school

authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies *once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system.*" 402 U. S., at 31–32 (emphasis added). That statement recognizes on the one hand that a fully desegregated school system may not be compelled to adjust its attendance zones to conform to changing demographic patterns. But on the other hand, it also appears to recognize that *until* such a unitary system is established, a district court may act with broad discretion—discretion which includes the adjustment of attendance zones—so that the goal of a wholly unitary system might be sooner achieved.

In insisting that the District Court largely abandon its scrutiny of attendance patterns, the Court might well be insuring that a unitary school system in which segregation has been eliminated "root and branch," *Green* v. *County School Board,* 391 U. S. 430, 438 (1968), will never be achieved in Pasadena. For at the point that the Pasadena system is in compliance with the aspects of the plan specifying procedures for hiring and promoting teachers and administrators, it may be that the attendance patterns within the system will be such as to once again manifest substantial aspects of a segregated system. It seems to me singularly unwise for the Court to risk such a result.

We have held that "[o]nce 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." *Swann* v. *Board of Education, supra,* at 15. As the Court recognizes, *ante,* at 432, there is no issue before us as to the validity of the District Court's original judgment that unconstitutional segregation existed in the Pasadena

school system. Thus, there is no question as to there being both a "right and a violation." Moreover, at least as of the time that the District Court acted on the request for modification, the violation had not yet been entirely remedied. Particularly, given the breadth of discretion normally accorded a district court in fashioning equitable remedies, I see no reason to require the District Court in a case such as this to modify its order prior to the time that it is clear that the entire violation has been remedied and a unitary system has been achieved.[1] We should not compel the District Court to modify its order unless conditions have changed so much that "dangers, once substantial, have become attenuated to a shadow." *United States* v. *Swift & Co.*, 286 U. S. 106, 119 (1932). I, for one, cannot say that the District Court was in error in determining that such attenuation had not yet taken place and that modification of the order would "surely be to sign the death warrant of the Pasadena Plan and its objectives." 375 F. Supp., at 1309. Accordingly, I dissent.[2]

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[1] In the course of final argument, the District Judge did make the spontaneous statement that the 1970 order "meant to me that at least during my lifetime there would be no majority of any minority in any school in Pasadena." As did the Court of Appeals, I disapprove the statement to the extent that it suggests that continuous redistricting can be required "even *after* the court has determined that its plan has been effectively implemented and *racial discrimination* [*has been*] *eliminated from the system.*" 519 F. 2d, at 438 (emphasis added).

[2] While I dissent from the Court's opinion, I do acknowledge the narrowness of its holding. *Ante*, at 435. For instance, the Court intimates that it would view this case differently if the demographic changes were themselves a product of a desegregation order. *Ibid.* Moreover, as the Court observes, this case does not involve an attendance-zone requirement calling "for defendants to submit 'step at a time' plans by definition incomplete at inception." *Ibid.*

FITZPATRICK ET AL. *v.* BITZER, CHAIRMAN, STATE EMPLOYEES' RETIREMENT COMMISSION ET AL.

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

No. 75–251. Argued April 20–21, 1976—Decided June 28, 1976*

Present and retired male employees of the State of Connecticut (petitioners in No. 75–251) brought this class action alleging, *inter alia,* that certain provisions of the State's statutory retirement benefit plan discriminated against them because of their sex, in violation of Title VII of the Civil Rights Act of 1964, which, as amended, extends coverage to the States as employers. The District Court ruled in their favor and entered prospective injunctive relief against respondent state officials. But the court denied petitioners' request for an award of retroactive retirement benefits as compensation for losses caused by the State's discrimination, as well as "a reasonable attorney's fee as part of the costs," as provided in Title VII, holding that both would constitute recovery of money damages from the State's treasury and were thus precluded by the Eleventh Amendment and by this Court's decision in *Edelman* v. *Jordan,* 415 U. S. 651, where the District Court's award for welfare benefits wrongfully withheld was held to violate that Amendment, there being no authorization in the Social Security Act for a citizen to sue a State. The Court of Appeals reversed in the matter of attorneys' fees, the award of which was deemed to have only an "ancillary effect" on the state treasury of the sort permitted by *Edelman,* but otherwise affirmed. *Held:*

1. The Eleventh Amendment does not bar a backpay award to petitioners in No. 75–251, since that Amendment and the principle of state sovereignty that it embodies are limited by the enforcement provisions of § 5 of the Fourteenth Amendment, which grants Congress authority to enforce "by appropriate

*Together with No. 75–283, *Bitzer, Chairman, State Employees' Retirement Commission, et al.* v. *Matthews et al.,* also on certiorari to the same court.

legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. Congress in determining what legislation is appropriate for enforcing the Fourteenth Amendment may, as it has done in Title VII, provide for suits against States that are constitutionally impermissible in other contexts. The "threshold fact of congressional authorization" for a citizen to sue his state employer, which was absent in *Edelman, supra,* is thus present here. Pp. 451–456.

2. Congress' exercise of power in allowing reasonable attorneys' fees is similarly not barred by the Eleventh Amendment. Pp. 456–457.

519 F. 2d 559, affirmed in part, reversed in part.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. BRENNAN, J., *post,* p. 457, and STEVENS, J., *post,* p. 458, filed opinions concurring in the judgment.

Paul W. Orth argued the cause for petitioners in No. 75–251 and for respondents in No. 75–283. With him on the brief in No. 75–251 were *Austin Carey, Jr., Edward Gallant, Jack Greenberg,* and *Eric Schnapper.* With him on the brief in No. 75–283 were *Messrs. Carey* and *Gallant.*

Sidney D. Giber, Assistant Attorney General of Connecticut, argued the cause for respondents in No. 75–251 and for petitioners in No. 75–283. With him on the briefs were *Carl R. Ajello,* Attorney General, and *Bernard F. McGovern, Jr.,* Assistant Attorney General.

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* in both cases. With him on the brief were *Solicitor General Bork, Assistant Attorney General Pottinger,* and *Walter W. Barnett.*†

†Briefs of *amici curiae* urging reversal in No. 75–251 and affirmance in No. 75–283 were filed by *Michael H. Gottesman,*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

In the 1972 Amendments to Title VII of the Civil Rights Act of 1964, Congress, acting under § 5 of the Fourteenth Amendment, authorized federal courts to award money damages in favor of a private individual against a state government found to have subjected that person to employment discrimination on the basis of

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Armand Derfner, Robert M. Weinberg, Albert E. Jenner, Paul R. Dimond, William E. Caldwell, Nathaniel R. Jones, Vilma Martinez, Joel Contreras, Morris J. Baller, Melvin L. Wulf, and *E. Richard Larson* for the Lawyers Committee for Civil Rights under Law et al. *Gary J. Greenberg* filed a brief for Alan Rabinovitch as *amicus curiae* urging reversal in No. 75–251. Briefs of *amici curiae* urging reversal in No. 75–283 were filed by *Evelle J. Younger,* Attorney General, *Jack R. Winkler,* Chief Assistant Attorney General, *N. Eugene Hill* and *Edward P. O'Brien,* Assistant Attorneys General, *Edmund E. White, Richard M. Skinner, Gloria F. DeHart,* and *Patrick G. Golden,* Deputy Attorneys General, for the State of California; by *Louis J. Lefkowitz,* Attorney General, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Lillian Z. Cohen,* Assistant Attorney General, for the State of New York; and by *Robert P. Kane,* Attorney General, and *Lawrence Silver* and *Melvin R. Shuster,* Deputy Attorneys General, for the Commonwealth of Pennsylvania, joined by the Attorneys General for their respective States as follows: *Robert L. Shevin* of Florida, *Arthur K. Bolton* of Georgia, *Ronald Amemiya* of Hawaii, *Theodore L. Sendak* of Indiana, *Richard C. Turner* of Iowa, *Francis B. Burch* of Maryland, *John C. Danforth* of Missouri, *Paul L. Douglas* of Nebraska, *Robert List* of Nevada, *David H. Souter* of New Hampshire, *William F. Hyland* of New Jersey, *Rufus L. Edmisten* of North Carolina, *Allen I. Olson* of North Dakota, *William J. Brown* of Ohio, *Daniel R. McLeod* of South Carolina, *R. A. Ashley, Jr.,* of Tennessee, *John L. Hill* of Texas, *Andrew P. Miller* of Virginia, and *Chauncey H. Browning, Jr.,* of West Virigina. *Jack Greenberg* and *Eric Schnapper* filed a brief for the N. A. A. C. P. Legal Defense and Educational Fund, Inc., as *amicus curiae* urging affirmance in No. 75–283.

"race, color, religion, sex, or national origin." [1] The principal question presented by these cases is whether, as against the shield of sovereign immunity afforded the State by the Eleventh Amendment, *Edelman* v. *Jordan*, 415 U. S. 651 (1974), Congress has the power to authorize federal courts to enter such an award against the State as a means of enforcing the substantive guarantees of the Fourteenth Amendment. The Court of Appeals for the Second Circuit held that the effect of our decision in *Edelman* was to foreclose Congress' power. We granted certiorari to resolve this important constitutional question. 423 U. S. 1031 (1975). We reverse.

I

Petitioners in No. 75–251 sued in the United States District Court for the District of Connecticut on behalf of all present and retired male employees of the State of Connecticut. Their amended complaint asserted, *inter alia*, that certain provisions in the State's statutory retirement benefit plan discriminated against them because of their sex, and therefore contravened Title VII of the 1964 Act, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (1970 ed. and Supp. IV). Title VII, which originally did not include state and local govern-

[1] Section 703 (a) of the Civil Rights Act of 1964 (hereinafter 1964 Act), 78 Stat. 255, 42 U. S. C. § 2000e–2 (a) (1970 ed. and Supp. IV), provides:

"It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

ments, had in the interim been amended to bring the States within its purview.[2]

The District Court held that the Connecticut State Employees Retirement Act violated Title VII's prohibition against sex-based employment discrimination. 390 F. Supp. 278, 285–288 (1974).[3] It entered prospective injunctive relief in petitioners' favor against respondent state officials.[4] Petitioners also sought an award of retroactive retirement benefits as compensation for losses

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[2] As relevant here, the definition of "person" in § 701 (a) of the 1964 Act, 78 Stat. 253, 42 U. S. C. § 2000e (a), was amended by § 2 (1) of the Equal Employment Opportunity Act of 1972 (hereinafter the 1972 Amendments), 86 Stat. 103, 42 U. S. C. § 2000e (a) (1970 ed., Supp. IV), to include "governments, governmental agencies, [and] political subdivisions."

The express exclusion of "a State or political subdivision thereof" provided in § 701 (b) of the former was stricken by § 2 (2) of the latter, 86 Stat. 103, 42 U. S. C. § 2000e (b) (1970 ed., Supp. IV). Section 2 (5) of the 1972 Amendments, 86 Stat. 103, 42 U. S. C. § 2000e (f) (1970 ed., Supp. IV), amended § 701 (f) of the 1964 Act, 42 U. S. C. § 2000e (f), to include within the definition of "employee" those individuals "subject to the civil service laws of a State government, governmental agency or political subdivision."

The 1972 Amendments retained the right of an individual aggrieved by an employer's unlawful employment practice to sue on his or her own behalf, upon satisfaction of the statutory procedural prerequisites, and made clear that that right was being extended to persons aggrieved by public employers. See 1972 Amendments, § 4 (a), 86 Stat. 104, 42 U. S. C. §§ 2000e–5 (a)–(g) (1970 ed., Supp. IV).

[3] Petitioners had also alleged that the retirement plan was contrary to the Equal Protection Clause of the Fourteenth Amendment, but in view of its ruling under Title VII the District Court found no reason to address the constitutional claim. 390 F. Supp., at 290.

[4] In No. 75–251, respondent Bitzer is the Chairman of the State Employees' Retirement Commission, and the other respondents are the Treasurer and the Comptroller of the State of Connecticut. These officials are cross-petitioners in No. 75–283.

caused by the State's discrimination,[5] as well as "a reasonable attorney's fee as part of the costs." [6] But the District Court held that both would constitute recovery of money damages from the State's treasury, and were therefore precluded by the Eleventh Amendment and by this Court's decision in *Edelman* v. *Jordan, supra.*

On petitioners' appeal,[7] the Court of Appeals affirmed in part and reversed in part. It agreed with the District Court that the action, "insofar as it seeks damages, is in essence against the state and as such is subject to the Eleventh Amendment." 519 F. 2d 559, 565 (1975). The Court of Appeals also found that under the 1972 Amendments to Title VII, "Congress intended to authorize a private suit for backpay by state employees against the state." *Id.,* at 568. Notwithstanding this statutory authority, the Court of Appeals affirmed the District Court and held that under *Edelman* a "private federal action for retroactive damages" is not a "constitu-

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[5] Section 706 (g) of the 1964 Act, 78 Stat. 261, as amended, 86 Stat. 107, 42 U. S. C. § 2000e–5 (g) (1970 ed., Supp. IV), provides in part:

"If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission."

[6] See § 706 (k) of the 1964 Act, 78 Stat. 261, 42 U. S. C. § 2000e–5 (k).

[7] Respondent state officials did not appeal from the District Court's finding of a Title VII violation and the entry of prospective injunctive relief.

tionally permissible method of enforcing Fourteenth Amendment rights." 519 F. 2d, at 569. It reversed the District Court and remanded as to attorneys' fees, however, reasoning that such an award would have only an "ancillary effect" on the state treasury of the kind permitted under *Edelman, supra,* at 667–668. 519 F. 2d, at 571. The petition filed here by the state employees in No. 75–251 contends that Congress does possess the constitutional power under § 5 of the Fourteenth Amendment to authorize their Title VII damages action against the State. The state officials' cross-petition, No. 75–283, argues that under *Edelman* the Eleventh Amendment bars any award of attorneys' fees here because it would be paid out of the state treasury.

II

In *Edelman* this Court held that monetary relief awarded by the District Court to welfare plaintiffs, by reason of wrongful denial of benefits which had occurred previous to the entry of the District Court's determination of their wrongfulness, violated the Eleventh Amendment. Such an award was found to be indistinguishable from a monetary award against the State itself which had been prohibited in *Ford Motor Co.* v. *Department of Treasury,* 323 U. S. 459, 464 (1945). It was therefore controlled by that case rather than by *Ex parte Young,* 209 U. S. 123 (1908), which permitted suits against state officials to obtain prospective relief against violations of the Fourteenth Amendment.

Edelman went on to hold that the plaintiffs in that case could not avail themselves of the doctrine of waiver expounded in cases such as *Parden* v. *Terminal R. Co.,* 377 U. S. 184 (1964), and *Employees* v. *Missouri Public Health Dept.,* 411 U. S. 279 (1973), because the necessary predicate for that doctrine was congres-

sional intent to abrogate the immunity conferred by the Eleventh Amendment. We concluded that none of the statutes relied upon by plaintiffs in *Edelman* contained any authorization by Congress to join a State as defendant. The Civil Rights Act of 1871, 42 U. S. C. § 1983, had been held in *Monroe* v. *Pape,* 365 U. S. 167, 187–191 (1961), to exclude cities and other municipal corporations from its ambit; that being the case, it could not have been intended to include States as parties defendant. The provisions of the Social Security Act relied upon by plaintiffs were held by their terms not to "authorize suit against anyone," 415 U. S., at 674, and they, too, were incapable of supplying the predicate for a claim of waiver on the part of the State.

All parties in the instant litigation agree with the Court of Appeals that the suit for retroactive benefits by the petitioners is in fact indistinguishable from that sought to be maintained in *Edelman,* since what is sought here is a damages award payable to a private party from the state treasury.[8]

Our analysis begins where *Edelman* ended, for in this Title VII case the "threshold fact of congressional authorization," *id.,* at 672, to sue the State as employer is clearly present. This is, of course, the prerequisite found present in *Parden* and wanting in *Employees.* We are aware of the factual differences between the type of state activity involved in *Parden* and that involved in the present case, but we do not think that difference is material for our purposes. The congressional authorization involved in *Parden* was based on the power of Congress under the Commerce Clause; here, however, the

[8] The Court of Appeals rejected petitioners' arguments that the retroactive benefits would not be paid out of public funds from the state treasury, and that the rule in *Edelman* and *Ford Motor Co.* was therefore inapplicable. 519 F. 2d, at 564–565. Petitioners have not challenged this ruling here.

Eleventh Amendment defense is asserted in the context of legislation passed pursuant to Congress' authority under § 5 of the Fourteenth Amendment.[9]

As ratified by the States after the Civil War, that Amendment quite clearly contemplates limitations on their authority. In relevant part, it provides:

> "Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . . . .
>
> "Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The substantive provisions are by express terms directed at the States. Impressed upon them by those provisions are duties with respect to their treatment of private individuals. Standing behind the imperatives is Congress' power to "enforce" them "by appropriate legislation."

The impact of the Fourteenth Amendment upon the relationship between the Federal Government and the States, and the reach of congressional power under § 5, were examined at length by this Court in *Ex parte Virginia,* 100 U. S. 339 (1880). A state judge had been arrested and indicted under a federal criminal statute

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[9] There is no dispute that in enacting the 1972 Amendments to Title VII to extend coverage to the States as employers, Congress exercised its power under § 5 of the Fourteenth Amendment. See, *e. g.,* H. R. Rep. No. 92–238, p. 19 (1971); S. Rep. No. 92–415, pp. 10–11 (1971). Cf. *National League of Cities* v. *Usery,* 426 U. S. 833 (1976).

prohibiting the exclusion on the basis of race of any citizen from service as a juror in a state court. The judge claimed that the statute was beyond Congress' power to enact under either the Thirteenth [10] or the Fourteenth Amendment. The Court first observed that these Amendments "were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress." *Id.*, at 345. It then addressed the relationship between the language of § 5 and the substantive provisions of the Fourteenth Amendment:

> "The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact. . . . It is said the selection of jurors for her courts and the administration of her laws belong to each State; that they are her rights. This is true in the general. But in exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent. Nor can she deny to the general government the right to exercise all its

[10] "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"Section 2. Congress shall have power to enforce this article by appropriate legislation."

> granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted. Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them.
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> . . . . .
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> "The argument in support of the petition for a *habeas corpus* ignores entirely the power conferred upon Congress by the Fourteenth Amendment. Were it not for the fifth section of that amendment, there might be room for argument that the first section is only declaratory of the moral duty of the State . . . . But the Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete." *Id.*, at 346–348.

Ex parte Virginia's early recognition of this shift in the federal-state balance has been carried forward by more recent decisions of this Court. See, *e. g.*, *South Carolina* v. *Katzenbach*, 383 U. S. 301, 308 (1966); *Mitchum* v. *Foster*, 407 U. S. 225, 238–239 (1972).

There can be no doubt that this line of cases has sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States. The legislation considered in each case was grounded on the expansion of Congress' powers—with the corresponding diminution of state sovereignty—found to be intended by the Framers and made part of the Constitution upon the States' ratification of those

Amendments, a phenomenon aptly described as a "carv-[ing] out" in *Ex parte Virginia, supra,* at 346.

It is true that none of these previous cases presented the question of the relationship between the Eleventh Amendment and the enforcement power granted to Congress under § 5 of the Fourteenth Amendment. But we think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, see *Hans* v. *Louisiana,* 134 U. S. 1 (1890), are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.[11] See *Edelman* v. *Jordan,* 415 U. S. 651 (1974); *Ford Motor Co.* v. *Department of Treasury,* 323 U. S. 459 (1945).

III

In No. 75–283, the state officials contest the Court of Appeals' conclusion that an award of attorneys' fees in

[11] Apart from their claim that the Eleventh Amendment bars enforcement of the remedy established by Title VII in this case, respondent state officials do not contend that the substantive provisions of Title VII as applied here are not a proper exercise of congressional authority under § 5 of the Fourteenth Amendment.

this case would under *Edelman* have only an "ancillary effect" on the state treasury and could therefore be permitted as falling outside the Eleventh Amendment under the doctrine of *Ex parte Young,* 209 U. S. 123 (1908). 415 U. S., at 667–668. We need not address this question, since, given the express congressional authority for such an award in a case brought under Title VII,[12] it follows necessarily from our holding in No. 75–251 that Congress' exercise of power in this respect is also not barred by the Eleventh Amendment. We therefore affirm the Court of Appeals' judgment in No. 75–283 on this basis.

The judgment in No. 75–251 is

Reversed.

The judgment in No. 75–283 is

Affirmed.

MR. JUSTICE BRENNAN, concurring in the judgment.

This suit was brought by present and retired employees of the State of Connecticut against the State Treasurer, the State Comptroller, and the Chairman of the State Employees' Retirement Commission. In that circumstance, Connecticut may not invoke the Eleventh Amendment, since that Amendment bars only federal-court suits against States by citizens of other States. Rather, the question is whether Connecticut may avail itself of the nonconstitutional but ancient doctrine of sovereign immunity as a bar to a claim for damages under Title VII. In my view Connecticut may not assert sovereign immunity for the reason I expressed in dissent in *Employees* v. *Missouri Public Health Dept.,* 411 U. S. 279, 298 (1973): The States surrendered that immunity, in Hamilton's words, "in the plan of the Convention" that formed the Union, at least insofar as the States granted Congress

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

specifically enumerated powers. See *id.*, at 319 n. 7; *Edelman* v. *Jordan*, 415 U. S. 651, 687 (1974) (BRENNAN, J., dissenting); *Parden* v. *Terminal R. Co.*, 377 U. S. 184 (1964). Congressional authority to enact the provisions of Title VII at issue in this case is found in the Commerce Clause, Art. I, § 8, cl. 3, and in § 5 of the Fourteenth Amendment, two of the enumerated powers granted Congress in the Constitution. Cf. *Oregon* v. *Mitchell*, 400 U. S. 112, 131–134 (1970) (Black, J.); *id.*, at 135–150 (Douglas, J.); *id.*, at 216–217 (Harlan, J.); *id.*, at 236–281 (BRENNAN, WHITE, and MARSHALL, JJ.); *id.*, at 282–284 (STEWART, J.); *Katzenbach* v. *Morgan*, 384 U. S. 641, 651 (1966). I remain of the opinion that "because of its surrender, no immunity exists that can be the subject of a congressional declaration or a voluntary waiver." *Employees* v. *Missouri Public Health Dept.*, *supra*, at 300.

I therefore concur in the judgment of the Court.

MR. JUSTICE STEVENS, concurring in the judgment.

In my opinion the commerce power is broad enough to support federal legislation regulating the terms and conditions of state employment and, therefore, provides the necessary support for the 1972 Amendments to Title VII, even though Congress expressly relied on § 5 of the Fourteenth Amendment. But I do not believe plaintiffs proved a violation of the Fourteenth Amendment, and because I am not sure that the 1972 Amendments were "needed to secure the guarantees of the Fourteenth Amendment," see *Katzenbach* v. *Morgan*, 384 U. S. 641, 651, I question whether § 5 of that Amendment is an adequate reply to Connecticut's Eleventh Amendment defense. I believe the defense should be rejected for a different reason.

Even if the Eleventh Amendment does cover a citizen's

suit against his own State,[1] it does not bar an action against state officers enforcing an invalid statute, *Ex parte Young,* 209 U. S. 123, 159–160. Since the Connecticut pension law has been held to be invalid, at least in part, *Ex parte Young* makes it clear that the federal court properly acquired jurisdiction of the proceeding.

The Eleventh Amendment issue presented is whether the court has power to enter a judgment payable immediately out of trust assets which subsequently would be reimbursed from the general revenues of the State. Although I have great difficulty with a construction of the Eleventh Amendment which acknowledges the federal court's jurisdiction of a case and merely restricts the kind of relief the federal court may grant,[2] I must recognize that it has been so construed in *Edelman* v. *Jordan,* 415 U. S. 651, and that the language of that opinion would seem to cover this case. However, its actual holding appears to be limited to the situation in which the award is payable directly from state funds and "not as a necessary consequence of compliance in the future" with a substantive determination. *Id.,* at 668.

The holding in *Edelman* does not necessarily require the same result in this case; this award will not be paid directly from the state treasury, but rather from two

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[1] As Mr. Chief Justice Marshall has pointed out, the Eleventh Amendment is not literally applicable to this situation. See *Cohens* v. *Virginia,* 6 Wheat. 264, 412; see also *Employees* v. *Missouri Public Health Dept.,* 411 U. S. 279, 298–324 (BRENNAN, J., dissenting).

[2] Neither the language of the Eleventh Amendment nor the rationale of *Ex parte Young* draws any distinction between proceedings in law or in equity. The Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U. S. Const., Amdt. 11.

separate and independent pension funds. The fact that the State will have to increase its future payments into the funds as a consequence of this award does not, in my opinion, sufficiently distinguish this case from other cases in which a State may be required to conform its practices to the Federal Constitution and thereby to incur additional expense in the future. Since the rationale of *Ex parte Young* remains applicable to such cases, and since this case is not squarely covered by the holding in *Edelman,* I am persuaded that it is proper to reject the Eleventh Amendment defense.

With respect to the fee issue, even if the Eleventh Amendment were applicable, I would place fees in the same category as other litigation costs. Cf. *Fairmont Co.* v. *Minnesota,* 275 U. S. 70.

UTAH *v.* UNITED STATES

ON BILL OF COMPLAINT

No. 31, Orig. Decided February 19, 1975—Decree entered February 19, 1975—Further decree entered June 28, 1976

Further decree is entered.

Opinion reported: 403 U. S. 9; decree reported: 406 U. S. 484; *per curiam* and decree reported: 420 U. S. 304.

DECREE

IT IS ORDERED, ADJUDGED, AND DECREED THAT:

1. Taking into consideration Sections 1, 2, and 5 of the decree of this Court entered May 22, 1972, *Utah* v. *United States,* 406 U. S. 484, 485–486, Sections 1, 2, and 4 of the decree of this Court entered February 19, 1975, *Utah* v. *United States,* 420 U. S. 304, 305–306, and the further proceedings had herein pursuant to the decree of this Court entered February 19, 1975, *Utah* v. *United States,* 420 U. S. 304, and

2. Subject to any federal regulatory authority that may extend to the Great Salt Lake or its shorelands, the United States of America, its departments and agencies, are enjoined from asserting against the State of Utah any claim of right, title and interest:

(a) to any lands within the meander line of the Great Salt Lake (as duly surveyed prior to or in accordance with Section 1 of the Act of June 3, 1966, 80 Stat. 192), with the exception of any lands within the Bear River Migratory Bird Refuge, the Weber Basin Federal Reclamation Project, and the Hill Air Force Range (as bounded by water's edge June 15, 1967), the title to which last-named parcel is not decided by this decree;

(b) to the natural resources and living organisms in or beneath the lands delineated in (a) above; and

(c) to the natural resources and living organisms either within the waters of the Great Salt Lake, or extracted therefrom, as delineated in (a) above.

3. The State of Utah is not required to pay the United States for the lands, including the minerals, delineated in paragraph 2 above of this decree.

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

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

*When "lands" appears in this decree to describe the interests involved, the word is used to include the brines and minerals in solution in the brines or precipitated or extracted therefrom.

ANDRESEN *v.* MARYLAND

CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 74–1646. Argued February 25, 1976—Decided June 29, 1976

After an investigation by a State's Attorneys' fraud unit of real estate settlement activities in certain Maryland counties indicated that petitioner, while acting as a settlement attorney, had defrauded the purchaser of certain realty (Lot 13T), the investigators obtained warrants to search petitioner's offices. The warrants listed specified items pertaining to Lot 13T to be seized "together with other fruits, instrumentalities and evidence of crime at this [time] unknown." In the ensuing search a number of incriminating documents, including some containing statements made by petitioner, were seized. Petitioner was then charged, *inter alia*, with the crime of false pretenses based on a misrepresentation made to the purchaser of Lot 13T that title to the property was clear. Petitioner's motion to suppress the seized documents was granted as to some documents, but with respect to others the trial court ruled that their admission into evidence would not violate the Fourth and Fifth Amendments. At trial, which resulted in petitioner's conviction, a number of the seized items (including documents pertaining to a lot other than Lot 13T but located in the same subdivision and subject to the same liens as Lot 13T) were admitted in evidence, after being authenticated by prosecution witnesses. The Maryland Court of Special Appeals affirmed the conviction and rejected petitioner's constitutional claims. *Held:*

1. The search of petitioner's offices for business records, their seizure, and subsequent introduction into evidence did not offend the Fifth Amendment's proscription that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." Although the records seized contained statements that petitioner voluntarily had committed to writing, he was never required to say anything. The search for and seizure of these records were conducted by law enforcement personnel, and when the records were introduced at trial, they were authenticated by prosecution witnesses, not by petitioner. Therefore, any compulsion of petitioner to speak, other than the inherent psychological

pressure to respond at trial to unfavorable evidence, was not present. Pp. 470–477.

2. The searches and seizures were not "unreasonable" in violation of the Fourth Amendment. Pp. 478–484.

(a) The warrants were not rendered fatally "general" by the "together with" phrase, which appeared in each warrant at the end of a sentence listing the specified items to be seized, all pertaining to Lot 13T. This phrase must be read as authorizing only the search for and seizure of evidence relating to the crime of false pretenses with respect to Lot 13T. Pp. 479–482.

(b) The seizure of the documents pertaining to a lot other than Lot 13T in the same subdivision and subject to the same liens as Lot 13T did not violate the principle that when police seize " 'mere evidence,' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction," *Warden* v. *Hayden,* 387 U. S. 294, 307. The investigators reasonably could have believed that the evidence specifically dealing with fraudulent conduct respecting the other lot could be used to show petitioner's intent to defraud with respect to Lot 13T, and although such evidence was used to secure additional charges against petitioner, its suppression was not required. Pp. 482–484.

24 Md. App. 128, 331 A. 2d 78, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., *post,* p. 484, and MARSHALL, J., *post,* p. 493, filed dissenting opinions.

Peter C. Andresen, petitioner, *pro se,* argued the cause and filed a brief.

Jon F. Oster, Deputy Attorney General of Maryland, argued the cause for respondent. With him on the brief were *Francis B. Burch,* Attorney General, and *Clarence W. Sharp* and *Gilbert Rosenthal,* Assistant Attorneys General.

Deputy Solicitor General Randolph argued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Solicitor General Bork, Deputy Solici-*

tor General Frey, Stuart A. Smith, and *Edward R. Korman.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue whether the introduction into evidence of a person's business records, seized during a search of his offices, violates the Fifth Amendment's command that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." We also must determine whether the particular searches and seizures here were "unreasonable" and thus violated the prohibition of the Fourth Amendment.

I

In early 1972, a Bi-County Fraud Unit, acting under the joint auspices of the State's Attorneys' Offices of Montgomery and Prince George's Counties, Md., began an investigation of real estate settlement activities in the Washington, D. C., area. At the time, petitioner Andresen was an attorney who, as a sole practitioner, specialized in real estate settlements in Montgomery County. During the Fraud Unit's investigation, his activities came under scrutiny, particularly in connection with a transaction involving Lot 13T in the Potomac Woods subdivision of Montgomery County. The investigation, which included interviews with the purchaser, the mortgage holder, and other lienholders of Lot 13T, as well as an examination of county land records, disclosed that petitioner, acting as settlement attorney, had defrauded Standard-Young Associates, the purchaser of Lot 13T. Petitioner had represented that the property was free of liens and that, accordingly, no title insurance was necessary, when in fact, he knew that there were two outstanding liens on the property. In addition, investigators

learned that the lienholders, by threatening to foreclose their liens, had forced a halt to the purchaser's construction on the property. When Standard-Young had confronted petitioner with this information, he responded by issuing, as an agent of a title insurance company, a title policy guaranteeing clear title to the property. By this action, petitioner also defrauded that insurance company by requiring it to pay the outstanding liens.

The investigators, concluding that there was probable cause to believe that petitioner had committed the state crime of false pretenses, see Md. Ann. Code, Art. 27, § 140 (1976), against Standard-Young, applied for warrants to search petitioner's law office and the separate office of Mount Vernon Development Corporation, of which petitioner was incorporator, sole shareholder, resident agent, and director. The application sought permission to search for specified documents pertaining to the sale and conveyance of Lot 13T. A judge of the Sixth Judicial Circuit of Montgomery County concluded that there was probable cause and issued the warrants.

The searches of the two offices were conducted simultaneously during daylight hours on October 31, 1972.[1] Petitioner was present during the search of his law office and was free to move about. Counsel for him was present during the latter half of the search. Between 2% and 3% of the files in the office were seized. A single investigator, in the presence of a police officer, conducted

[1] Before these search warrants were executed, the Bi-County Fraud Unit had also received complaints concerning other Potomac Woods real estate transactions conducted by petitioner. The gist of the complaints was that petitioner, as settlement attorney, took money from three sets of home purchasers upon assurances that he would use it to procure titles to their properties free and clear of all encumbrances. It was charged that he had misappropriated the money so that they had not received clear title to the properties as promised.

the search of Mount Vernon Development Corporation. This search, taking about four hours, resulted in the seizure of less than 5% of the corporation's files.

Petitioner eventually was charged, partly by information and partly by indictment, with the crime of false pretenses, based on his misrepresentation to Standard-Young concerning Lot 13T, and with fraudulent misappropriation by a fiduciary, based on similar false claims made to three home purchasers. Before trial began, petitioner moved to suppress the seized documents. The trial court held a full suppression hearing. At the hearing, the State returned to petitioner 45 of the 52 items taken from the offices of the corporation. The trial court suppressed six other corporation items on the ground that there was no connection between them and the crimes charged. The net result was that the only item seized from the corporation's offices that was not returned by the State or suppressed was a single file labeled "Potomac Woods General." In addition, the State returned to petitioner seven of the 28 items seized from his law office, and the trial court suppressed four other law office items based on its determination that there was no connection between them and the crime charged.

With respect to all the items not suppressed or returned, the trial court ruled that admitting them into evidence would not violate the Fifth and Fourth Amendments. It reasoned that the searches and seizures did not force petitioner to be a witness against himself because he had not been required to produce the seized documents, nor would he be compelled to authenticate them. Moreover, the search warrants were based on probable cause, and the documents not returned or suppressed were either directly related to Lot 13T, and therefore within the express language of the warrants, or properly seized and otherwise admissible to show a pattern of

criminal conduct relevant to the charge concerning Lot 13T.

At trial, the State proved its case primarily by public land records and by records provided by the complaining purchasers, lienholders, and the title insurance company. It did introduce into evidence, however, a number of the seized items. Three documents from the "Potomac Woods General" file, seized during the search of petitioner's corporation, were admitted. These were notes in the handwriting of an employee who used them to prepare abstracts in the course of his duties as a title searcher and law clerk. The notes concerned deeds of trust affecting the Potomac Woods subdivision and related to the transaction involving Lot 13T.[2] Five items seized from petitioner's law office were also admitted. One contained information relating to the transactions with one of the defrauded home buyers. The second was a file partially devoted to the Lot 13T transaction; among the documents were settlement statements, the deed conveying the property to Standard-Young Associates, and the original and a copy of a notice to the buyer about releases of liens. The third item was a file devoted exclusively to Lot 13T. The fourth item consisted of a copy of a deed of trust, dated March 27, 1972, from the seller of certain lots in the Potomac Woods subdivision to a lienholder.[3] The fifth item contained drafts of

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[2] It is established that the privilege against self-incrimination may not be invoked with respect to corporate records. *Bellis* v. *United States,* 417 U. S. 85, 88–89 (1974); *Grant* v. *United States,* 227 U. S. 74 (1913); *Hale* v. *Henkel,* 201 U. S. 43, 70 (1906). It appears, however, that the records seized at the corporation's office were really not corporate records, but were records generated by petitioner's practice as a real estate lawyer. United States Appendix of Exhibits 1–3.

[3] This item was introduced as proof that petitioner failed to pay

documents and memoranda written in petitioner's handwriting.

After a trial by jury, petitioner was found guilty upon five counts of false pretenses and three counts of fraudulent misappropriation by a fiduciary. He was sentenced to eight concurrent two-year prison terms.

On appeal to the Court of Special Appeals of Maryland, four of the five false-pretenses counts were reversed because the indictment had failed to allege intent to defraud, a necessary element of the state offense. Only the count pertaining to Standard-Young's purchase of Lot 13T remained. With respect to this count of false pretenses and the three counts of misappropriation by a fiduciary, the Court of Special Appeals rejected petitioner's Fourth and Fifth Amendment Claims.[4] Specifically, it held that the warrants were supported by probable cause, that they did not authorize a general search in violation of the Fourth Amendment, and that the items admitted into evidence against petitioner at trial were within the scope of the warrants or were otherwise properly seized. It agreed with the trial court that the search had not violated petitioner's Fifth Amendment rights because petitioner had not been compelled to do anything. 24 Md. App. 128, 331 A. 2d 78 (1975).

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recording taxes, a charge that was abandoned before the case was submitted to the jury.

[4] The Solicitor General, in an *amicus* brief filed with this Court, has suggested that the evidence forming the basis of two of the counts of misappropriation by a fiduciary, which were upheld on appeal, was obtained entirely from sources other than petitioner's offices. Brief for United States as *Amicus Curiae* 12–14, 24–25, n. 17. This fact, if true, does not, of course, affect our jurisdiction but it would permit us to apply the discretionary concurrent-sentence doctrine, *Benton* v. *Maryland,* 395 U. S. 784, 791 (1969), and thereby decline to consider petitioner's constitutional claims. *Barnes* v. *United States,* 412 U. S. 837, 848 n. 16 (1973).

We granted certiorari limited to the Fourth and Fifth Amendment issues. 423 U. S. 822 (1975).[5]

II

The Fifth Amendment, made applicable to the States by the Fourteenth Amendment, *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964), provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." As the Court often has noted, the development of this protection was in part a response to certain historical practices, such as ecclesiastical inquisitions and the proceedings of the Star Chamber, "which placed a premium on compelling subjects of the investigation to admit guilt from their own lips." *Michigan* v. *Tucker*, 417 U. S. 433, 440 (1974). See generally L. Levy, Origins of the Fifth Amendment (1968). The "historic function" of the privilege has been to protect a " 'natural individual from compulsory incrimination through his

[5] Both the trial and appellate courts in this case recognized the conflict among the Federal Courts of Appeals over whether documentary evidence not obtainable by means of a subpoena or a summons may be obtained by means of a search warrant. Thus, in *Hill* v. *Philpott*, 445 F. 2d 144 (CA7), cert. denied, 404 U. S. 991 (1971), the Court of Appeals held that evidence not obtainable by means of a subpoena could not be seized by means of a search warrant. The substantial majority position is of the opposite view. *Shaffer* v. *Wilson*, 523 F. 2d 175 (CA10 1975), cert. pending, No. 75–601; *United States* v. *Murray*, 492 F. 2d 178, 191 (CA9 1973); *Taylor* v. *Minnesota*, 466 F. 2d 1119 (CA8 1972), cert. denied, 410 U. S. 956 (1973); *United States* v. *Blank*, 459 F. 2d 383 (CA6), cert. denied, 409 U. S. 887 (1972); *United States* v. *Scharfman*, 448 F. 2d 1352 (CA2 1971), cert. denied, 405 U. S. 919 (1972); *United States* v. *Bennett*, 409 F. 2d 888, 896 (CA2), cert. denied *sub nom. Jessup* v. *United States*, 396 U. S. 852 (1969). The majority position accords with the views of Wigmore. 8 J. Wigmore, Evidence § 2264, p. 380 (McNaughton Rev. 1961).

The Court of Special Appeals adopted the majority position and, therefore, upheld the admission of the records into evidence.

own testimony or personal records.'" *Bellis* v. *United States,* 417 U. S. 85, 89–90 (1974), quoting from *United States* v. *White,* 322 U. S. 694, 701 (1944).

There is no question that the records seized from petitioner's offices and introduced against him were incriminating. Moreover, it is undisputed that some of these business records contain statements made by petitioner. Cf. *United States* v. *Mara,* 410 U. S. 19, 21–22 (1973); *United States* v. *Dionisio,* 410 U. S. 1 (1973); *Gilbert* v. *California,* 388 U. S. 263, 266–267 (1967); *United States* v. *Wade,* 388 U. S. 218 (1967); and *Schmerber* v. *California,* 384 U. S. 757 (1966). The question, therefore, is whether the seizure of these business records, and their admission into evidence at his trial, compelled petitioner to testify against himself in violation of the Fifth Amendment. This question may be said to have been reserved in *Warden* v. *Hayden,* 387 U. S. 294, 302–303 (1967), and it was adverted to in *United States* v. *Miller,* 425 U. S. 435, 441 n. 3 (1976).

Petitioner contends that "the Fifth Amendment prohibition against compulsory self-incrimination applies as well to personal business papers seized from his offices as it does to the same papers being required to be produced under a subpoena." Brief for Petitioner 9. He bases his argument, naturally, on dicta in a number of cases which imply, or state, that the search for and seizure of a person's private papers violate the privilege against self-incrimination. Thus, in *Boyd* v. *United States,* 116 U. S. 616, 633 (1886), the Court said: "[W]e have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." And in *Hale* v. *Henkel,* 201 U. S. 43, 76 (1906), it was observed that "the substance of the offense is the compulsory production of private

papers, whether under a search warrant or a *subpoena duces tecum,* against which the person . . . is entitled to protection."

We do not agree, however, that these broad statements compel suppression of this petitioner's business records as a violation of the Fifth Amendment. In the very recent case of *Fisher* v. *United States,* 425 U. S. 391 (1976), the Court held that an attorney's production, pursuant to a lawful summons, of his client's tax records in his hands did not violate the Fifth Amendment privilege of the taxpayer "because enforcement against a taxpayer's lawyer would not 'compel' the taxpayer to do anything—and certainly would not compel him to be a 'witness' against himself." *Id.,* at 397. We recognized that the continued validity of the broad statements contained in some of the Court's earlier cases had been discredited by later opinions. *Id.,* at 407–409. In those earlier cases, the legal predicate for the inadmissibility of the evidence seized was a violation of the Fourth Amendment; the unlawfulness of the search and seizure was thought to supply the compulsion of the accused necessary to invoke the Fifth Amendment.[6] Compulsion of the accused was also absent in *Couch* v. *United States,*

[6] In *Boyd* v. *United States,* 116 U. S. 616 (1886), for example, it was held that the Government could not, consistently with the Fourth Amendment, obtain "mere evidence" from the accused; accordingly, a subpoena seeking "mere evidence" constituted compulsion of the accused against which he could invoke the Fifth Amendment. The "mere evidence" rule was overturned in *Warden* v. *Hayden,* 387 U. S. 294, 301–302 (1967).

The "convergence theory" of the Fourth and Fifth Amendments is also illustrated by *Agnello* v. *United States,* 269 U. S. 20 (1925), where the seizure of contraband pursuant to a search not incident to arrest and otherwise unlawful in violation of the Fourth Amendment was held to permit the accused to invoke the Fifth Amendment when the Government sought to introduce this evidence in a criminal proceeding against him.

409 U. S. 322 (1973), where the Court held that a summons served on a taxpayer's accountant requiring him to produce the taxpayer's personal business records in his possession did not violate the taxpayer's Fifth Amendment rights.[7]

Similarly, in this case, petitioner was not asked to say or to do anything. The records seized contained statements that petitioner had voluntarily committed to writing. The search for and seizure of these records were conducted by law enforcement personnel. Finally, when these records were introduced at trial, they were authenticated by a handwriting expert, not by petitioner. Any compulsion of petitioner to speak, other than the inherent psychological pressure to respond at trial to unfavorable evidence, was not present.

This case thus falls within the principle stated by Mr. Justice Holmes: "A party is privileged from producing the evidence but not from its production." *Johnson* v. *United States,* 228 U. S. 457, 458 (1913). This principle recognizes that the protection afforded by the Self-Incrimination Clause of the Fifth Amendment "adheres basically to the person, not to information that may incriminate him." *Couch* v. *United States,* 409 U. S., at 328. Thus, although the Fifth Amendment may protect an individual from complying with a subpoena for the

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[7] Petitioner relies on the statement in *Couch* that "possession bears the closest relationship to the personal compulsion forbidden by the Fifth Amendment," 409 U. S., at 331, in support of his argument that possession of incriminating evidence itself supplies the predicate for invocation of the privilege. *Couch,* of course, was concerned with the production of documents pursuant to a summons directed to the accountant where there might have been a possibility of compulsory self-incrimination by the principal's implicit or explicit "testimony" that the documents were those identified in the summons. The risk of authentication is not present where the documents are seized pursuant to a search warrant.

production of his personal records in his possession because the very act of production may constitute a compulsory authentication of incriminating information, see *Fisher* v. *United States, supra,* a seizure of the same materials by law enforcement officers differs in a crucial respect—the individual against whom the search is directed is not required to aid in the discovery, production, or authentication of incriminating evidence.

A contrary determination that the seizure of a person's business records and their introduction into evidence at a criminal trial violates the Fifth Amendment, would undermine the principles announced in earlier cases. Nearly a half century ago, in *Marron* v. *United States,* 275 U. S. 192 (1927), the Court upheld, against both Fourth and Fifth Amendment claims, the admission into evidence of business records seized during a search of the accused's illegal liquor business. And in *Abel* v. *United States,* 362 U. S. 217 (1960), the Court again upheld, against both Fourth and Fifth Amendment claims, the introduction into evidence at an espionage trial of false identity papers and a coded message seized during a search of the accused's hotel room. These cases recognize a general rule: "There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized, and if they be adequately described in the affidavit and warrant." *Gouled* v. *United States,* 255 U. S. 298, 309 (1921).

Moreover, a contrary determination would prohibit the admission of evidence traditionally used in criminal cases and traditionally admissible despite the Fifth Amendment. For example, it would bar the admission of an accused's gambling records in a prosecution for

gambling; a note given temporarily to a bank teller during a robbery and subsequently seized in the accused's automobile or home in a prosecution for bank robbery; and incriminating notes prepared, but not sent, by an accused in a kidnaping or blackmail prosecution.

We find a useful analogy to the Fifth Amendment question in those cases that deal with the "seizure" of oral communications. As the Court has explained, "'[t]he constitutional privilege against self-incrimination . . . is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him.'" *Bellis* v. *United States,* 417 U. S., at 88, quoting *United States* v. *White,* 322 U. S., at 698. The significant aspect of this principle was apparent and applied in *Hoffa* v. *United States,* 385 U. S. 293 (1966), where the Court rejected the contention that an informant's "seizure" of the accused's conversation with him, and his subsequent testimony at trial concerning that conversation, violated the Fifth Amendment. The rationale was that, although the accused's statements may have been elicited by the informant for the purpose of gathering evidence against him, they were made voluntarily. We see no reasoned distinction to be made between the compulsion upon the accused in that case and the compulsion in this one. In each, the communication, whether oral or written, was made voluntarily. The fact that seizure was contemporaneous with the communication in *Hoffa* but subsequent to the communication here does not affect the question whether the accused was compelled to speak.

Finally, we do not believe that permitting the introduction into evidence of a person's business records seized during an otherwise lawful search would offend or under-

mine any of the policies undergirding the privilege. *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, 55 (1964).[8]

In this case, petitioner, at the time he recorded his communication, at the time of the search, and at the time the records were admitted at trial, was not subjected to "the cruel trilemma of self-accusation, perjury or contempt." *Ibid.* Indeed, he was never required to say or to do anything under penalty of sanction. Similarly, permitting the admission of the records in question does not convert our accusatorial system of justice into an inquisitorial system. "The requirement of specific charges, their proof beyond a reasonable doubt, the protection of the accused from confessions extorted through whatever form of police pressures, the right to a prompt hearing before a magistrate, the right to assistance of counsel, to be supplied by government when circumstances make it necessary, the duty to advise an accused of his constitutional rights—these are all characteristics of the accusatorial system and manifestations of its demands." *Watts* v. *Indiana,* 338 U. S. 49, 54 (1949). None of these

[8] "The privilege against self-incrimination . . . reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load' . . . ; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life' . . . ; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'"

attributes is endangered by the introduction of business records "independently secured through skillful investigation." *Ibid.* Further, the search for and seizure of business records pose no danger greater than that inherent in every search that evidence will be "elicited by inhumane treatment and abuses." 378 U. S., at 55. In this case, the statements seized were voluntarily committed to paper before the police arrived to search for them, and petitioner was not treated discourteously during the search. Also, the "good cause" to "disturb," *ibid.*, petitioner was independently determined by the judge who issued the warrants; and the State bore the burden of executing them. Finally, there is no chance, in this case, of petitioner's statements being self-deprecatory and untrustworthy because they were extracted from him—they were already in existence and had been made voluntarily.

We recognize, of course, that the Fifth Amendment protects privacy to some extent. However, "the Court has never suggested that every invasion of privacy violates the privilege." *Fisher* v. *United States,* 425 U. S., at 399. Indeed, we recently held that unless incriminating testimony is "compelled," any invasion of privacy is outside the scope of the Fifth Amendment's protection, saying that "the Fifth Amendment protects against 'compelled self-incrimination, not [the disclosure of] private information.'" *Id.,* at 401. Here, as we have already noted, petitioner was not compelled to testify in any manner.

Accordingly, we hold that the search of an individual's office for business records, their seizure, and subsequent introduction into evidence do not offend the Fifth Amendment's proscription that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."

III

We turn next to petitioner's contention that rights guaranteed him by the Fourth Amendment were violated because the descriptive terms of the search warrants were so broad as to make them impermissible "general" warrants, and because certain items were seized in violation of the principles of *Warden* v. *Hayden*, 387 U. S. 294 (1967).[9]

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[9] Petitioner also contends that the affidavits do not establish probable cause and that the failure of the State formally to introduce the warrants into evidence violated his constitutional rights. These contentions may be disposed of summarily.

The bases of petitioner's argument that the affidavits failed to establish probable cause are two: The affidavits, in violation of *Aguilar* v. *Texas*, 378 U. S. 108 (1964), did not establish the reliability of the information or the credibility of the informants; and the information on which they were based was so stale that there was no reason to believe that the documents sought were still in petitioner's possession.

The affidavits clearly establish the reliability of the information related and the credibility of its sources. The complainants are named, their positions are described, and their transactions with petitioner are related in a comprehensive fashion. In addition, the special-agent affiants aver that they have verified, at least in part, the complainants' charges by examining their correspondence with petitioner, numerous documents reflecting the transactions, and public land records. Copies of many of these records and documents are attached to the affidavits; others are described in detail. Finally, the agents aver that they have interviewed, with positive results, other persons involved in the real estate transactions that were the object of the investigation. Rarely have we seen warrant-supporting affidavits so complete and so thorough. Petitioner's probable-cause argument is without merit. See *United States* v. *Ventresca*, 380 U. S. 102 (1965).

It is also argued that there was a three-month delay between the completion of the transactions on which the warrants were based, and the ensuing searches, and that this time lapse precluded a determination that there was probable cause to believe that petitioner's offices contained evidence of the crime. This contention is

The specificity of the search warrants. Although petitioner concedes that the warrants for the most part were models of particularity, Brief for Petitioner 28, he contends that they were rendered fatally "general" by the addition, in each warrant, to the exhaustive list of particularly described documents, of the phrase "together with other fruits, instrumentalities and evidence of crime at this [time] unknown." App. A. 95–A. 96, A. 115. The quoted language, it is argued, must be read in isolation and without reference to the rest of the long sentence at the end of which it appears. When

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belied by the particular facts of the case. The business records sought were prepared in the ordinary course of petitioner's business in his law office or that of his real estate corporation. It is eminently reasonable to expect that such records would be maintained in those offices for a period of time and surely as long as the three months required for the investigation of a complex real estate scheme. In addition, special investigators knew that petitioner had secured a release on Lot 13T with respect to one lienholder only three weeks before the searches and that another lien remained to be released. All this, when considered with other information demonstrating that Potomac Woods was still a current concern of petitioner, amply supports the belief that petitioner retained the sought-for records.

The final contention is that under *Bumper* v. *North Carolina,* 391 U. S. 543, 550 n. 15 (1968), the failure of the prosecution formally to introduce the warrants into evidence precludes the State from relying upon them to justify the searches. We reject the argument for two reasons. First, it appears that petitioner based this claim of error solely on state grounds in the Court of Special Appeals. Second, even if the claim is properly before us, it fails. Both the State and the petitioner referred to and extensively discussed the language and terms of the warrants during the suppression hearing, and the trial judge, in deciding the motion to suppress, made numerous references to the warrants. The present case, therefore, is a far cry from *Bumper* where the prosecution's assertion that it had a search warrant was made for the first time during oral argument before this Court. There is nothing in the Fourth Amendment that requires us so to exalt formalism over substance.

read "properly," petitioner contends, it permits the search for and seizure of any evidence of any crime.

General warrants, of course, are prohibited by the Fourth Amendment. "[T]he problem [posed by the general warrant] is not that of intrusion *per se*, but of a general, exploratory rummaging in a person's belongings. . . . [The Fourth Amendment addresses the problem] by requiring a 'particular description' of the things to be seized." *Coolidge* v. *New Hampshire*, 403 U. S. 443, 467 (1971). This requirement "'makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.'" *Stanford* v. *Texas*, 379 U. S. 476, 485 (1965), quoting *Marron* v. *United States*, 275 U. S., at 196.

In this case we agree with the determination of the Court of Special Appeals of Maryland that the challenged phrase must be read as authorizing only the search for and seizure of evidence relating to "the crime of false pretenses with respect to Lot 13T." 24 Md. App., at 167, 331 A. 2d, at 103. The challenged phrase is not a separate sentence. Instead, it appears in each warrant at the end of a sentence containing a lengthy list of specified and particular items to be seized, all pertaining to Lot 13T.[10] We think it clear from the context

[10] "[T]he following items pertaining to sale, purchase, settlement and conveyance of lot 13, block T, Potomac Woods subdivision, Montgomery County, Maryland:

"title notes, title abstracts, title rundowns; contracts of sale and/or assignments from Raffaele Antonelli and Rocco Caniglia to Mount Vernon Development Corporation and/or others; lien payoff correspondence and lien pay-off memoranda to and from lienholders and noteholders; correspondence and memoranda to and from trustees of deeds of trust; lenders instructions for a construction loan or construction and permanent loan; disbursement sheets and

that the term "crime" in the warrants refers only to the crime of false pretenses with respect to the sale of Lot 13T. The "other fruits" clause is one of a series that follows the colon after the word "Maryland." All clauses in the series are limited by what precedes that colon, namely, "items pertaining to . . . lot 13, block T." The warrants, accordingly, did not authorize the executing officers to conduct a search for evidence of

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disbursement memoranda; checks, check stubs and ledger sheets indicating disbursement upon settlement; correspondence and memoranda concerning disbursements upon settlement; settlement statements and settlement memoranda; fully or partially prepared deed of trust releases, whether or not executed and whether or not recorded; books, records, documents, papers, memoranda and correspondence, showing or tending to show a fraudulent intent, and/or knowledge as elements of the crime of false pretenses, in violation of Article 27, Section 140, of the Annotated Code of Maryland, 1957 Edition, as amended and revised, together with other fruits, instrumentalities and evidence of crime at this [time] unknown." App. A. 95–A. 96, A. 115.

Petitioner also suggests that the specific list of the documents to be seized constitutes a "general" warrant. We disagree. Under investigation was a complex real estate scheme whose existence could be proved only by piecing together many bits of evidence. Like a jigsaw puzzle, the whole "picture" of petitioner's false-pretense scheme with respect to Lot 13T could be shown only by placing in the proper place the many pieces of evidence that, taken singly, would show comparatively little. The complexity of an illegal scheme may not be used as a shield to avoid detection when the State has demonstrated probable cause to believe that a crime has been committed and probable cause to believe that evidence of this crime is in the suspect's possession. The specificity with which the documents are named here contrasts sharply with the absence of particularity in *Berger* v. *New York,* 388 U. S. 41, 58–59 (1967), where a state eavesdropping statute which authorized eavesdropping "without requiring belief that any particular offense has been or is being committed; nor that the 'property' sought, the conversations, be particularly described," was invalidated.

other crimes but only to search for and seize evidence relevant to the crime of false pretenses and Lot 13T.[11]

The admissibility of certain items of evidence in light of Warden v. Hayden. Petitioner charges that the seizure of documents pertaining to a lot other than Lot 13T violated the principles of *Warden* v. *Hayden* and therefore should have been suppressed. His objection appears to be that these papers were not relevant to the Lot 13T charge and were admissible only to prove another crime with which he was charged after the search. The fact that these documents were used to help form the evidentiary basis for another charge, it is argued, shows that the documents were seized solely for that purpose.

The State replies that *Warden* v. *Hayden* was not violated and that this is so because the challenged evidence is relevant to the question whether petitioner committed the crime of false pretenses with respect to Lot 13T. In Maryland, the crime is committed when a per-

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[11] The record discloses that the officials executing the warrants seized numerous papers that were not introduced into evidence. Although we are not informed of their content, we observe that to the extent such papers were not within the scope of the warrants or were otherwise improperly seized, the State was correct in returning them voluntarily and the trial judge was correct in suppressing others.

We recognize that there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable. In searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized. Similar dangers, of course, are present in executing a warrant for the "seizure" of telephone conversations. In both kinds of searches, responsible officials, including judicial officials, must take care to assure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy.

son makes a false representation of a past or existing fact, with intent to defraud and knowledge of its falsity, and obtains any chattel, money, or valuable security from another, who relies on the false representation to his detriment. *Polisher* v. *State,* 11 Md. App. 555, 560, 276 A. 2d 102, 104 (1971). Thus, the State is required to prove intent to defraud beyond a reasonable doubt. The State consequently argues that the documents pertaining to another lot in the Potomac Woods subdivision demonstrate that the misrepresentation with respect to Lot 13T was not the result of mistake on the part of petitioner.

In *Warden* v. *Hayden,* 387 U. S., at 307, the Court stated that when the police seize " 'mere evidence,' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. In so doing, consideration of police purposes will be required." In this case, we conclude that the trained special investigators reasonably could have believed that the evidence specifically dealing with another lot in the Potomac Woods subdivision could be used to show petitioner's intent with respect to the Lot 13T transaction.

The Court has often recognized that proof of similar acts is admissible to show intent or the absence of mistake. In *Nye & Nissen* v. *United States,* 336 U. S. 613 (1949), for example, a case involving a scheme of fraudulent conduct, it was said:

> "The evidence showed the presentation of eleven other false invoices. . . . The trial court also admitted it at the conclusion of the case 'for the sole purpose of proving guilty intent, motive, or guilty knowledge' of the defendants. Evidence that similar and related offenses were committed in this period tended to show a consistent pattern of conduct highly relevant to the issue of intent." *Id.,* at 618.

In the present case, when the special investigators secured the search warrants, they had been informed of a number of similar charges against petitioner arising out of Potomac Woods transactions. And, by reading numerous documents and records supplied by the Lot 13T and other complainants, and by interviewing witnesses, they had become familiar with petitioner's method of operation. Accordingly, the relevance of documents pertaining specifically to a lot other than Lot 13T, and their admissibility to show the Lot 13T offense, would have been apparent. Lot 13T and the other lot had numerous features in common. Both were in the same section of the Potomac Woods subdivision; both had been owned by the same person; and transactions concerning both had been handled extensively by petitioner. Most important was the fact that there were two deeds of trust in which both lots were listed as collateral. Unreleased liens respecting both lots were evidenced by these deeds of trusts. Petitioner's transactions relating to the other lot, subject to the same liens as Lot 13T, therefore, were highly relevant to the question whether his failure to deliver title to Lot 13T free of all encumbrances was mere inadvertence. Although these records subsequently were used to secure additional charges against petitioner, suppression of this evidence in this case was not required. The fact that the records could be used to show intent to defraud with respect to Lot 13T permitted the seizure and satisfied the requirements of *Warden* v. *Hayden.*

The judgment of the Court of Special Appeals of Maryland is affirmed.

It is so ordered.

MR. JUSTICE BRENNAN, dissenting.

In a concurring opinion earlier this Term in *Fisher* v. *United States,* 425 U. S. 391, 414 (1976), I stated my view

that the Fifth Amendment protects an individual citizen against the compelled production of testimonial matter that might tend to incriminate him, provided it is matter that comes within the zone of privacy recognized by the Amendment to secure to the individual "a private inner sanctum of individual feeling and thought." *Couch* v. *United States,* 409 U. S. 322, 327 (1973). Accordingly, the production of testimonial material falling within this zone of privacy may not be compelled by subpoena. The Court holds today that the search and seizure, pursuant to a valid warrant, of business records in petitioner's possession and containing statements made by the petitioner does not violate the Fifth Amendment. I can perceive no distinction of meaningful substance between compelling the production of such records through subpoena and seizing such records against the will of the petitioner. Moreover, I believe that the warrants under which petitioner's papers were seized were impermissibly general. I therefore dissent.[1]

I

"There is no question that the records seized from petitioner's offices and introduced against him were incriminating. Moreover, it is undisputed that some of these business records contain statements made by petitioner." *Ante,* at 471. It also cannot be questioned that these records fall within the zone of privacy protected by the Fifth Amendment. *Bellis* v. *United States,* 417 U. S. 85, 87–88 (1974), squarely recognized that "[t]he privilege applies to the business records of the sole proprietor or sole prac-

[1] Today's decision is doubtless consistent with the recent trend of decisions to eviscerate Fourth Amendment protections. See, *e. g., Texas* v. *White,* 423 U. S. 67 (1975); *United States* v. *Miller,* 425 U. S. 435 (1976); *United States* v. *Watson,* 423 U. S. 411 (1976); *United States* v. *Santana, ante,* p. 38.

titioner as well as to personal documents containing more intimate information about the individual's private life." The Court today retreats from this view. Though recognizing the value of privacy protected by the Fifth Amendment, see *ante,* at 477, and the " 'right of each individual "to a private enclave where he may lead a private life," ' " *ante,* at 476 n. 8, the Court declines, without adequate explanation, to include business records within that private zone comprising the mere physical extensions of an individual's thoughts and knowledge. As I noted in *Fisher,* the failure to give effect to such a zone ignores the essential spirit of the Fifth Amendment: "[Business] records are at least an extension of an aspect of a person's activities, though concededly not the more intimate aspects of one's life. Where the privilege would have protected one's mental notes of his business affairs in a less complicated day and age, it would seem that that protection should not fall away because the complexities of another time compel one to keep business records. Cf. *Olmstead* v. *United States,* 277 U. S. 438, 474 (1928) (Brandeis, J., dissenting)." 425 U. S., at 426–427 (BRENNAN, J., concurring in judgment).

As indicated at the outset, today's assault on the Fifth Amendment is not limited to narrowing this view of the scope of privacy respected by it. The Court also sanctions circumvention of the Amendment by indulging an unjustified distinction between production compelled by subpoena and production secured against the will of the petitioner through warrant. But a privilege protecting against the compelled production of testimonial material is a hollow guarantee where production of that material may be secured through the expedient of search and seizure.

The matter cannot be resolved on any simplistic notion of compulsion. Search and seizure is as rife with

elements of compulsion as subpoena. The intrusion occurs under the lawful process of the State. The individual is not free to resist that authority. To be sure, as the Court observes, "[p]etitioner was present during the search of his law office and was free to move about," *ante,* at 466, but I do not believe the Court means to suggest that petitioner was free to obstruct the investigators' search through his files.[2]

And compulsion does not disappear merely because the individual is absent at the time of search and seizure. The door to one's house, for example, is as much the individual's resistance to the intrusion of outsiders as his personal physical efforts to prevent the same. To refuse recognition to the sanctity of that door and, more generally, to confine the dominion of privacy to the mind, compels an unconstitutional disclosure by denying to the individual a zone of physical freedom necessary for conducting one's affairs. True to this principle, a value enshrined by the Fifth Amendment, the Court carefully observed in *Couch* that "actual possession of documents bears the most significant relationship to Fifth Amendment protections against governmental compulsions upon the individual accused of crime," 409 U. S., at 333, and that "[w]e do indeed attach constitutional importance to possession, but only because of its close relationship to those personal compulsions and intrusions which the Fifth Amendment forbids." *Id.,* at 336 n. 20. *Couch* also plainly indicated that it is not necessary that

[2] There is no meaningful distinction between requiring petitioner in this case to stand idly by while papers are extracted from his files and requiring the petitioner in *Schmerber* v. *California,* 384 U. S. 757 (1966), similarly to submit to the extraction of blood from his body. In either case, seizure is obtained by compulsion, yet in *Schmerber,* unlike here, Fifth Amendment limitations were recognized as applicable.

there be actual possession in order to invoke Fifth Amendment limitations, for "situations may well arise where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact." *Id.*, at 333.[3]

Though the records involved in this case were clearly within petitioner's possession or at least constructive possession, the Court avoids application of these principles and the values they protect by what I submit is a mischaracterization of *Couch* as concerned with the "possibility of compulsory self-incrimination by the principal's implicit or explicit 'testimony' that the documents were those identified in the summons." *Ante*, at 473 n. 7. Whether or not *Couch* was concerned with this possibility—and I believe that even under the most strained reading it was not—*Couch* was clearly concerned with whether production of documents in the possession of the accused's accountant pursuant to a summons directed to the accountant operated personally to compel the accused. It was in this regard that *Couch* recognized that "possession bears the closest relationship to the personal compulsion forbidden by the Fifth Amendment,"

[3] Similarly, I recognized writing separately in *Couch:*

"[S]urely the availability of the Fifth Amendment privilege cannot depend on whether or not the owner of the documents is compelled personally to turn the documents over to the Government. If private, testimonial documents held in the owner's own possession are privileged under the Fifth Amendment, then the Government cannot nullify that privilege by finding a way to obtain the documents without requiring the owner to take them in hand and personally present them to the Government agents. Where the Government takes private records from, for example, a safety deposit box against the will of the owner of the documents, the owner has been compelled, in my view, to incriminate himself within the meaning of the Fifth Amendment." 409 U. S., at 337 n. (concurring).

409 U. S., at 331, a matter with which the Court refuses to deal in its treatment of *Couch*.

Couch only reflects the view of a long line of decisions explicitly recognizing that the seizure of private papers may violate the Fifth Amendment. As early as *Boyd* v. *United States,* 116 U. S. 616, 633 (1886), the Court was "unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." Though the Court in *Boyd* held that compelling a person to be a witness against himself was tantamount to an unreasonable search and seizure, it never required a search and seizure to be independently unreasonable in order that it violate the Fifth Amendment. And though the several decisions which have found a Fifth Amendment violation stemming from a search and seizure all involved unreasonable search and seizures, it has never been established, contrary to the Court's assertion, *ante,* at 472, that the unlawfulness of the search and seizure is necessary to invoke the Fifth Amendment. *Gouled* v. *United States,* 255 U. S. 298 (1921), though also involving a Fourth Amendment violation, makes it clear that the illegality of the search and seizure is not a prerequisite for a Fifth Amendment violation. Under *Gouled,* a Fifth Amendment violation exists because the "[accused] is the unwilling source of the evidence," *id.,* at 306, a matter which does not depend on the illegality *vel non* of the search and seizure.[4]

Until today, no decision by this Court had held that the seizure of testimonial evidence by legal process did

[4] As the Court notes, *ante,* at 474, *Gouled* also observed that there is no special sanctity in papers rendering them immune from search and seizure. 255 U. S., at 309. The observation, however, was hedged with qualifications, see *ibid.,* and *Gouled* itself makes clear that this was only a general proposition inapplicable in the case of private papers. See *id.,* at 306.

not violate the Fifth Amendment. Indeed, with few exceptions,[5] the indications were strongly to the contrary. See, *e. g., United States* v. *Lefkowitz,* 285 U. S. 452, 465–467 (1932); *Weeks* v. *United States,* 232 U. S. 383, 397 (1914); *Hale* v. *Henkel,* 201 U. S. 43, 76 (1906).[6] More

[5] The Court cites *Marron* v. *United States,* 275 U. S. 192 (1927), as one exception, that decision having permitted the seizure of business records during the search of an illegal liquor business. *Marron,* however, provides little, if any, foundation for the Court's view. Though erring in the light of subsequent cases, the Court there did not view the business records as private papers or testimonial evidence. Rather, the records were viewed merely as "a part of the outfit or equipment actually used to commit the offense." *Id.,* at 199. Moreover, the aspect of *Marron* upon which the Court relies was clearly overruled in *United States* v. *Lefkowitz,* 285 U. S. 452 (1932)—the ostensible effort in *Lefkowitz* to distinguish it from *Marron* notwithstanding.

The Court also cites *Abel* v. *United States,* 362 U. S. 217 (1960), as supporting its position that private testimonial papers may be seized without violating the Fifth Amendment. The papers seized in that case, however, even if fairly characterizable as private and testimonial—a matter about which I have doubt—were not admitted for the purpose of utilizing their testimonial contents as evidence.

Finally, this Court's wiretapping cases also lend little support to the Court's position. Two of those cases expressly recognized the danger to Fifth Amendment rights posed by wiretapping. See *Berger* v. *New York,* 388 U. S. 41, 56, 62 (1967); *Osborn* v. *United States,* 385 U. S. 323, 329 n. 7 (1966). All cases permitting seizure have involved conversations between two or more parties under other than what could be considered confidential circumstances. Grave questions would be raised, however, where conversations are seized from the privacy of the home or where the conversations are between parties who speak at other than arm's length. In such circumstances there is danger that the zone of privacy recognized by the Fifth Amendment will have been invaded. See *Olmstead* v. *United States,* 277 U. S. 438, 471–479 (1928) (Brandeis, J., dissenting).

[6] Though one component of the rationale in these cases precluding the seizure of papers appears to be the "mere evidence" rule, which was repudiated in *Warden* v. *Hayden,* 387 U. S. 294 (1967), they also

recently, *Schmerber* v. *California,* 384 U. S. 757, 767 (1966), noted that the "values protected by the Fourth Amendment . . . substantially overlap those the Fifth Amendment helps to protect," and clearly indicated that in considering whether to suppress seized evidence, a first inquiry is whether its testimonial nature, if any, precludes its introduction in evidence. See *id.,* at 760–765. Subsequent to *Schmerber, Warden* v. *Hayden,* 387 U. S. 294, 302–303 (1967), carefully observed that the items of clothing seized in that case were "not 'testimonial' or 'communicative' in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment." [7] These cases all reflect the root understanding of *Boyd* v. *United States,* 116 U. S., at 630: "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence [to the Fifth Amendment]; but it is the invasion of his indefeasible right of personal security, personal liberty

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view such seizures as tantamount to the compulsion of testimony, an unlawful act conceptually distinct from the once unlawful act of seizing mere evidence. *United States* v. *Lefkowitz, supra,* at 466–467, for example, reiterates *Boyd*'s condemnation of the *compulsory* extraction of a man's private papers. Similarly, *Weeks* v. *United States,* 232 U. S., at 397, recognized that the seizure of a man's papers was an offense because it constituted the *compulsory* production of private papers. Accordingly, the doctrinal demise of the "mere evidence" rule left untouched the principles of these cases respecting the Fifth Amendment. See *Fisher* v. *United States,* 425 U. S. 391, 420–422, n. 5 (1976) (BRENNAN, J., concurring in judgment).

[7] By further observing that "[t]his case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure," 387 U. S., at 303, *Hayden,* at the very least, clearly left open the question whether lawful seizure of testimonial evidence violated the Fifth Amendment.

and private property . . . . [A]ny forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime . . . , is within the condemnation of [the Amendment]. In this regard the Fourth and Fifth Amendments run almost into each other."

II

Even if a Fifth Amendment violation is not to be recognized in the seizure of petitioner's papers, a violation of Fourth Amendment protections clearly should be, for the warrants under which those papers were seized were impermissibly general. General warrants are especially prohibited by the Fourth Amendment. The problem to be avoided is "not that of intrusion *per se,* but of a general, exploratory rummaging in a person's belongings." *Coolidge* v. *New Hampshire,* 403 U. S. 443, 467 (1971). Thus the requirement plainly appearing on the face of the Fourth Amendment that a warrant specify with particularity the place to be searched and the things to be seized is imposed to the end that "unauthorized invasions of 'the sanctity of a man's home and the privacies of life' " be prevented. *Berger* v. *New York,* 388 U. S. 41, 58 (1967). " 'As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.' " *Stanford* v. *Texas,* 379 U. S. 476, 485 (1965) (quoting *Marron* v. *United States,* 275 U. S. 192, 196 (1927)).

The Court recites these requirements, but their application in this case renders their limitation on unlawful governmental conduct an empty promise. After a lengthy and admittedly detailed listing of items to be seized, the warrants in this case further authorized the seizure of "other fruits, instrumentalities and evidence of crime at this [time] unknown." App. A. 96, A. 115. The Court construes this sweeping authorization to be

limited to evidence pertaining to the crime of false pretenses with respect to the sale of Lot 13T. However, neither this Court's construction of the warrants nor the similar construction by the Court of Special Appeals of Maryland was available to the investigators at the time they executed the warrants. The question is not how those warrants are to be viewed in hindsight, but how they were in fact viewed by those executing them. The overwhelming quantity of seized material that was either suppressed or returned to petitioner is irrefutable testimony to the unlawful generality of the warrants.[8] The Court's attempt to cure this defect by *post hoc* judicial construction evades principles settled in this Court's Fourth Amendment decisions. "The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge . . . ." *Terry* v. *Ohio,* 392 U. S. 1, 21 (1968). See *Berger* v. *New York, supra,* at 54; *Johnson* v. *United States,* 333 U. S. 10, 13–14 (1948). It is not the function of a detached and neutral review to give effect to warrants whose terms unassailably authorize the far-reaching search and seizure of a person's papers, especially where that has in fact been the result of executing those warrants.

MR. JUSTICE MARSHALL, dissenting.

I agree with MR. JUSTICE BRENNAN that the business records introduced at petitioner's trial should have been suppressed because they were seized pursuant to a general warrant. Accordingly, I need not consider

[8] Testimony by investigators at the suppression hearing requested by the petitioner indicates that seizure of many of his papers occurred indiscriminately. See App. A. 155, A. 156.

whether petitioner's alternative contention—that the Fifth Amendment precludes the seizure of private papers, even pursuant to a warrant—can survive *Fisher* v. *United States,* 425 U. S. 391 (1976), and, if so, whether this Fifth Amendment argument would protect the business records seized in this case.

Syllabus

MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* LUCAS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

No. 75–88. Argued January 13, 1976—Decided June 29, 1976

The Social Security Act provides that a child of an individual who died fully insured under the Act, is entitled to surviving child's benefits if the child is under 18, or a student under 22, and was dependent at the time of the parent's death. A child is considered dependent if the insured parent was living with him or contributed to the child's support at the time of death. Certain children, however, need not submit such individualized proof of dependency. Unless adopted by some other person, a child who is legitimate or would be entitled to inherit from the insured parent under state law is considered dependent at the time of the parent's death, or even lacking this relationship under state intestacy law is entitled to a presumption of dependency if the decedent before death had gone through a marriage ceremony with the other parent, resulting in a purported marriage which, but for a nonobvious defect, would have been valid, or had acknowledged in writing that the child was his, or had been decreed by a court to be the child's father, or had been ordered by a court to support the child because the child was his. After their father died, appellee illegitimate children were administratively denied surviving children's benefits on the ground that they failed to show dependency by proof that their father lived with them or was contributing to their support at the time of his death, or by any of the statutory presumptions of dependency. After this ruling was upheld on administrative appeal, appellees filed an action for review against appellant Secretary of Health, Education, and Welfare, alleging that the denial of benefits violated the equal protection component of the Due Process Clause of the Fifth Amendment because other children, including all legitimate children, are statutorily entitled, as appellee children are not, to survivors' benefits regardless of actual dependency. The District Court held that the statutory classifications were constitutionally impermissible, reversing the administrative decision and ordering that benefits be paid to the children. *Held:*

1. The judicial scrutiny traditionally devoted to cases involving

discrimination along lines of race or national origin is not required because legislation treats legitimate and illegitimate offspring differently. Pp. 503–506.

2. The challenged statutory classifications are permissible because they are reasonably related to the likelihood of dependency at death, and in failing to extend any presumption of dependency to appellee children and others like them, the Act does not impermissibly discriminate against them as compared with legitimate children or those illegitimate children who are statutorily deemed dependent. Pp. 507–516.

(a) While Congress was unwilling to assume that every child of a deceased insured was dependent at the time of death, by presuming dependency on the basis of relatively readily documented facts, such as legitimate birth, or a support order or paternity decree, which could be relied upon to indicate the likelihood of continued actual dependency, Congress was able to avoid the burden and expense of specific case-by-case determination in the large number of cases where dependency is objectively probable. Such presumptions in aid of administrative functions, though they may approximate, rather than precisely mirror, the results that case-by-case adjudication would show, are permissible under the Fifth Amendment, so long as that lack of precise equivalence does not exceed the bounds of substantiality tolerated by the applicable level of scrutiny. Pp. 509–510.

(b) The challenged classifications are justified as reasonable empirical judgments that are consistent with a design to qualify entitlement to benefits upon a child's dependency at the time of the parent's death. *Gomez* v. *Perez,* 409 U. S. 535; *New Jersey Welfare Rights Org.* v. *Cahill,* 411 U. S. 619; *Weber* v. *Aetna Casualty & Surety Co.,* 406 U. S. 164; *Levy* v. *Louisiana,* 391 U. S. 68; *Jimenez* v. *Weinberger,* 417 U. S. 628; *Frontiero* v. *Richardson,* 411 U. S. 677, distinguished. Pp. 510–516.

390 F. Supp. 1310, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post,* p. 516.

Deputy Solicitor General Jones argued the cause for appellant. On the brief were *Solicitor General Bork, Assistant Attorney General Lee,* and *William Kanter.*

C. Christopher Brown argued the cause for appellees. On the brief was *Thomas W. Pearlman.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue of the constitutionality, under the Due Process Clause of the Fifth Amendment, of those provisions of the Social Security Act that condition the eligibility of certain illegitimate children for a surviving child's insurance benefits upon a showing that the deceased wage earner was the claimant child's parent and, at the time of his death, was living with the child or was contributing to his support.

I

Robert Cuffee, now deceased, lived with Belmira Lucas during the years 1948 through 1966, but they were never married. Two children were born to them during these years: Ruby M. Lucas, in 1953, and Darin E. Lucas, in 1960. In 1966 Cuffee and Lucas separated. Cuffee died in Providence, R. I., his home, in 1968. He died without ever having acknowledged in writing his paternity of either Ruby or Darin, and it was never determined in any judicial proceeding during his lifetime that he was the father of either child. After Cuffee's death, Mrs. Lucas filed an application on behalf of Ruby and Darin for surviving children's benefits under § 202 (d)(1) of the Social Security Act, 70 Stat. 807, as amended, 42 U. S. C. § 402 (d)(1) (1970 ed. and Supp. IV), based upon Cuffee's earnings record.

II

In operative terms, the Act provides that an unmarried son or daughter of an individual, who died fully or currently insured under the Act, may apply for and be

entitled to a survivor's benefit, if the applicant is under 18 years of age at the time of application (or is a full-time student and under 22 years of age) and was dependent, within the meaning of the statute, at the time of the parent's death.[1] A child is considered dependent for this purpose if the insured father was living with or contributing to the child's support at the time of death. Certain children, however, are relieved of the burden of such individualized proof of dependency. Unless the child has been adopted by some other individual, a child

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[1] Section 202 (d) (1) of the Act, as set forth in 42 U. S. C. § 402 (d) (1), provides in pertinent part:

"Every child (as defined in section 416 (e) of this title) . . . of an individual who dies a fully or currently insured individual, if such child—

"(A) has filed application for child's insurance benefits,

"(B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time student and had not attained the age of 22 . . . and

"(C) was dependent upon such individual—

. . . . . .

"(ii) if such individual has died, at the time of such death, . . .

. . . . . .

"shall be entitled to a child's insurance benefit for each month, beginning with the first month after August 1950 in which such child becomes so entitled to such insurance benefits . . . ."

Section 216 (e), 42 U. S. C. § 416 (e), includes, under the definition of child, *inter alia*, "the child . . . of an individual," certain legally adopted children, certain stepchildren, and certain grandchildren and stepgrandchildren. Additionally, § 216 (h) (2) (A) of the Act, 42 U. S. C. § 416 (h) (2) (A), provides:

"In determining whether an applicant is the child . . . of a fully or currently insured individual for purposes of this subchapter, the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property . . . by the courts of the State in which [such insured individual] was domiciled at the time of his death . . . . Applicants who according to such law would have the same status relative to taking intestate personal property as a child . . . shall be deemed such."

who is legitimate, or a child who would be entitled to inherit personal property from the insured parent's estate under the applicable state intestacy law, is considered to have been dependent at the time of the parent's death.[2] Even lacking this relationship under state law, a child, unless adopted by some other individual, is entitled to a presumption of dependency if the decedent, before death, (a) had gone through a marriage ceremony with the other parent, resulting in a purported marriage between them which, but for a nonobvious legal defect, would have been valid, or (b) in writing had acknowledged the child to be his, or (c) had been decreed by a court to be the child's father, or (d) had been ordered by a court to support the child because the child was his.[3]

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[2] Section 202 (d)(3) of the Act, 42 U. S. C. § 402 (d)(3), provides in pertinent part:

"A child shall be deemed dependent upon his father or adopting father or his mother or adopting mother at the time specified in paragraph (1)(C) of this subsection unless, at such time, such individual was not living with or contributing to the support of such child and—

"(A) such child is neither the legitimate nor adopted child of such individual, or

"(B) such child has been adopted by some other individual."

Additionally, any child who qualifies under § 216 (h)(2)(A), see n. 1, *supra,* is considered legitimate for § 202 (d)(3) purposes, and thus dependent.

[3] Section 202 (d)(3), as set forth in 42 U. S. C. § 402 (d)(3), provides in pertinent part that "a child deemed to be a child of a fully or currently insured individual pursuant to section 416 (h)(2)(B) or section 416 (h)(3) . . . shall be deemed to be the legitimate child of such individual," and therefore presumptively dependent. Section 216 (h)(2)(B), as set forth in 42 U. S. C. § 416 (h)(2)(B), provides:

"If an applicant is a son or daughter of a fully or currently insured individual but is not (and is not deemed to be) the child of such insured individual under subparagraph (A), such applicant shall nevertheless be deemed to be the child of such insured individual if

An Examiner of the Social Security Administration, after hearings, determined that while Cuffee's paternity was established, the children had failed to demonstrate their dependency by proof that Cuffee either lived with them or was contributing to their support at the time

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such insured individual and the mother or father, as the case may be, of such applicant went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of paragraph (1)(B), would have been a valid marriage."

The specified last sentence of § 216 (h)(1)(B), 42 U. S. C. § 416 (h)(1)(B), in turn, refers only to

"an impediment (i) resulting from the lack of dissolution of a previous marriage or otherwise arising out of such previous marriage or its dissolution, or (ii) resulting from a defect in the procedure followed in connection with such purported marriage."

Section 216 (h)(3), as set forth in 42 U. S. C. § 416 (h)(3), provides:

"An applicant who is the son or daughter of a fully or currently insured individual, but who is not (and is not deemed to be) the child of such insured individual under paragraph (2) of this subsection, shall nevertheless be deemed to be the child of such insured individual if:

. . . . . .

"(C) In the case of a deceased individual—

"(i) such insured individual—

"(I) had acknowledged in writing that the applicant is his son or daughter,

"(II) had been decreed by a court to be the father of the applicant, or

"(III) had been ordered by a court to contribute to the support of the applicant because the applicant was his son or daughter,

"and such acknowledgment, court decree, or court order was made before the death of such individual, or

"(ii) such insured individual is shown by evidence satisfactory to the Secretary to have been the father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died."

of his death, or by any of the statutory presumptions of dependency, and thus that they were not entitled to survivorship benefits under the Act. The Appeals Council of the Social Security Administration affirmed these rulings, and they became the final decision of the Secretary of Health, Education, and Welfare. Lucas then timely filed this action, pursuant to § 205 (g) of the Act, 42 U. S. C. § 405 (g), in the United States District Court for the District of Rhode Island on behalf of the two children (hereinafter sometimes called the appellees) for review of the Secretary's decision.

The District Court ultimately affirmed each of the factual findings of the administrative agency: that Robert Cuffee was the children's father; that he never acknowledged his paternity in writing; that his paternity or support obligations had not been the subject of a judicial proceeding during his lifetime; that no common-law marriage had ever been contracted between Cuffee and Lucas, so that the children could not inherit Cuffee's personal property under the intestacy law of Rhode Island; and that, at the time of his death, he was neither living with the children nor contributing to their support. 390 F. Supp. 1310, 1312–1314 (1975). None of these factual matters is at issue here.[4]

[4] Upon the original petition for review under § 205 (g), the District Court affirmed the administrative findings that had then been made, but remanded the case to the Secretary for him to determine the common-law status of the relationship between the children's parents, a question left unconsidered in the first administrative proceeding. After an adverse determination on this point and an unsuccessful administrative appeal, Lucas, on behalf of the children, again timely sought review in the District Court, presenting the common-law marriage question and asserting a constitutional challenge to the Act. The District Court affirmed the administrative conclusion of no common-law marriage, and then turned to the constitutional questions that are the subject of this appeal.

A motion for summary judgment, filed by the appellees, relied on *Jimenez* v. *Weinberger*, 417 U. S. 628 (1974). It was urged that denial of benefits in this case, where paternity was clear, violated the Fifth Amendment's Due Process Clause, as that provision comprehends the principle of equal protection of the laws,[5] because other children, including all legitimate children, are statutorily entitled, as the Lucas children are not, to survivorship benefits regardless of actual dependency. Addressing this issue, the District Court ruled that the statutory classifications were constitutionally impermissible.[6] 390 F. Supp., at 1314–1321. Recognizing that the web of statutory provisions regarding presumptive dependency was overinclusive because it entitled some children, who were not actually dependent, to survivorship benefits under the Act—although not underinclusive, since no otherwise eligible child who could establish actual dependency at the time of death was denied such benefits—the court concluded that the Act was *not* intended merely to replace actual support that a child lost through the death of the insured parent. *Id.*, at 1319–1320. Rather, the court characterized the statute as one designed to replace obligations of support or potential

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[5] See, *e. g.*, *Jimenez* v. *Weinberger*, 417 U. S., at 637; *United States Dept. of Agriculture* v. *Moreno*, 413 U. S. 528, 533 n. 5 (1973); *Frontiero* v. *Richardson*, 411 U. S. 677, 680 n. 5 (1973) (plurality opinion).

[6] The District Court affirmed the Secretary's factual findings in a "Memorandum and Order" entered August 30, 1974. Viewing the constitutional claim as one requiring the convention of a three-judge district court under 28 U. S. C. §§ 2282 and 2284, the single District Judge did not reach that issue. A three-judge District Court was convened, but disbanded when appellees' renewed motion for summary judgment omitted their earlier request for injunctive relief. The constitutional claim thus was correctly determined by a single District Judge.

support lost through death, where the obligation was perceived by Congress, on the basis of the responsibility of the relation between the child's parents, to be a valid one. Thus, the court concluded:

> "[The Act] conditions eligibility on the basis of Congress' views as to who is entitled to support and reflects society's view that legitimate and 'legitimated' children are more entitled to support by or through a parent than are illegitimate children. But this is *not* a legitimate governmental interest, and thus cannot support the challenged classification. *Gomez* v. *Perez,* [409 U. S. 535 (1973)]." *Id.,* at 1320. (Emphasis in original.)

With this conclusion, the District Court reversed the administrative decision and ordered the Secretary to pay benefits for both children. Jurisdictional Statement 28a.

The Secretary appealed directly to this Court. 28 U. S. C. § 1252. We noted probable jurisdiction and set the case for argument with *Norton* v. *Mathews, post,* p. 524. 423 U. S. 819 (1975).

III

The Secretary does not disagree that the Lucas children and others similarly circumstanced are treated differently, as a class, from those children—legitimate and illegitimate—who are relieved by statutory presumption of any requirement of proving actual dependency at the time of death through cohabitation or contribution: for children in the advantaged classes may be statutorily entitled to benefits even if they have never been dependent upon the father through whom they claim.[7] Statutory

[7] It adds nothing to say that the illegitimate child is also saddled with the procedural burden of proving entitlement on the basis of facts the legitimate child need not prove. The legitimate child is re-

classifications, of course, are not *per se* unconstitutional; the matter depends upon the character of the discrimination and its relation to legitimate legislative aims. "The essential inquiry . . . is . . . inevitably a dual one: What legitimate [governmental] interest does the classification promote? What fundamental personal rights might the classification endanger?" *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 173 (1972).

Although the District Court concluded that close judicial scrutiny of the statute's classifications was not necessary to its conclusion invalidating those classifications, it also concluded that legislation treating legitimate and illegitimate offspring differently is constitutionally suspect,[8] 390 F. Supp., at 1318–1319, and requires the judicial scrutiny traditionally devoted to cases involving discrimination along lines of race [9] or national origin.[10] Appellees echo this approach. We disagree.[11]

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quired, like the illegitimate, to prove the facts upon which his statutory entitlement rests.

[8] Appellees do not suggest, nor could they successfully, that strict judicial scrutiny of the statutory classifications is required here because, in regulating entitlement to survivorship benefits, the statute discriminatorily interferes with interests of constitutional fundamentality. *Weinberger* v. *Salfi*, 422 U. S. 749, 768–770 (1975); *Dandridge* v. *Williams*, 397 U. S. 471 (1970).

The Court, of course, has found the privacy of familial relationships to be entitled to procedural due process protections from disruption by the State, whether or not those relationships were legitimized by marriage under state law. *Stanley* v. *Illinois*, 405 U. S. 645 (1972). But the concerns relevant to that context are only tangential to the analysis here, since the statutory scheme does not interfere in any way with familial relations.

[9] See *Loving* v. *Virginia*, 388 U. S. 1, 11 (1967); *Bolling* v. *Sharpe*, 347 U. S. 497 (1954).

[10] See *Oyama* v. *California*, 332 U. S. 633, 644–646 (1948); *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944); *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943).

[11] That the statutory classifications challenged here discriminate

It is true, of course, that the legal status of illegitimacy, however defined, is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society. The Court recognized in *Weber* that visiting condemnation upon the child in order to express society's disapproval of the parents' liaisons

> "is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent." 406 U. S., at 175. (Footnote omitted.)

But where the law is arbitrary in such a way, we have had no difficulty in finding the discrimination impermissible on less demanding standards than those advocated here. *New Jersey Welfare Rights Org.* v. *Cahill,* 411 U. S. 619 (1973); *Richardson* v. *Davis,* 409 U. S. 1069 (1972); *Richardson* v. *Griffin,* 409 U. S. 1069 (1972); *Weber, supra; Levy* v. *Louisiana,* 391 U. S. 68 (1968). And such irrationality in some classifications does not in itself demonstrate that other, possibly rational, distinctions made in part on the basis of legitimacy are inherently untenable. Moreover, while the law has long

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among illegitimate children does not mean, of course, that they are not also properly described as discriminating between legitimate and illegitimate children. See *Frontiero* v. *Richardson, supra;* cf. *Weber* v. *Aetna Casualty & Surety Co.,* 406 U. S. 164, 169, 172 (1972). In view of our conclusion regarding the applicable standard of judicial scrutiny, we need not consider how the classes of legitimate and illegitimate children would be constitutionally defined under appellees' approach.

placed the illegitimate child in an inferior position relative to the legitimate in certain circumstances, particularly in regard to obligations of support or other aspects of family law, see generally, *e. g.*, H. Krause, Illegitimacy: Law and Social Policy 21–42 (1971); Gray & Rudovsky, The Court Acknowledges the Illegitimate: *Levy v. Louisiana* and *Glona v. American Guarantee & Liability Insurance Co.*, 118 U. Pa. L. Rev. 1, 19–38 (1969), perhaps in part because the roots of the discrimination rest in the conduct of the parents rather than the child,[12] and perhaps in part because illegitimacy does not carry an obvious badge, as race or sex do, this discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes. See *Frontiero* v. *Richardson*, 411 U. S. 677, 684–686 (1973) (plurality opinion).

We therefore adhere to our earlier view, see *Labine* v. *Vincent*, 401 U. S. 532 (1971), that the Act's discrimination between individuals on the basis of their legitimacy does not "command extraordinary protection from the majoritarian political process," *San Antonio School Dist.* v. *Rodriguez*, 411 U. S. 1, 28 (1973), which our most exacting scrutiny would entail.[13] See *Jimenez*, 417 U. S., at 631–634, 636; *Weber*, 406 U. S., at 173, 175–176.

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[12] The significance of this consideration would seem to be suggested by provisions enabling the parents to legitimatize children born illegitimate. Compare *Weber*, 406 U. S., at 170–171, with *Labine* v. *Vincent*, 401 U. S. 532, 539 (1971). Of course, the status of "dependency" as recognized by the statute here is wholly within the control of the parent.

[13] In *Rodriguez* the Court identified a "suspect class" entitled to the protections of strict judicial scrutiny as one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." 411 U. S., at 28.

IV

Relying on *Weber,* the Court, in *Gomez* v. *Perez,* 409 U. S. 535, 538 (1973), held that "once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother." The same principle, which we adhere to now, applies when the judicially enforceable right to needed support lies against the Government rather than a natural father. See *New Jersey Welfare Rights Org.* v. *Cahill, supra.*

Consistent with our decisions, the Secretary explains the design of the statutory scheme assailed here as a program to provide for all children of deceased insureds who can demonstrate their "need" in terms of dependency at the times of the insureds' deaths. Cf. *Jimenez,* 417 U. S., at 634. He authenticates this description by reference to the explicit language of the Act specifying that the applicant child's classification as legitimate, or acknowledged, etc., is ultimately relevant only to the determination of dependency, and by reference to legislative history indicating that the statute was not a general welfare provision for legitimate or otherwise "approved" children of deceased insureds, but was intended just "to replace the support lost by a child when his father . . . dies . . . ." S. Rep. No. 404, 89th Cong., 1st Sess., 110 (1965).

Taking this explanation at face value, we think it clear that conditioning entitlement upon dependency at the time of death is not impermissibly discriminatory in providing only for those children for whom the loss of the parent is an immediate source of the need. Cf. *Geduldig* v. *Aiello,* 417 U. S. 484, 492–497 (1974); *Jefferson* v. *Hackney,* 406 U. S. 535 (1972); *Richardson* v. *Belcher,*

404 U. S. 78 (1971). See also *Weber,* 406 U. S., at 174–175.

But appellees contend that the actual design of the statute belies the Secretary's description, and that the statute was intended to provide support for insured decedents' children generally, if they had a "legitimate" claim to support, without regard to actual dependency at death; in any case, they assert, the statute's matrix of classifications bears no adequate relationship to actual dependency at death. Since such dependency does not justify the statute's discriminations, appellees argue, those classifications must fall under *Gomez* v. *Perez, supra.* These assertions are in effect one and the same.[14] The basis for appellees' argument is the obvious fact that

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[14] We are not bound to agree with the Secretary's description of the legislative design if the legislative history and the structure of the provisions themselves belie it. *Weinberger* v. *Wiesenfeld,* 420 U. S. 636, 648 n. 16 (1975); *Jimenez* v. *Weinberger,* 417 U. S., at 634. Appellees are unable, however, to summon any meaningful legislative history to support their position regarding the congressional design. They rely largely upon a section of the House-Senate Conference Committee Report on the 1965 Amendments to the Social Security Act, reproduced at 111 Cong. Rec. 18383 (1965), partially explaining, *id.,* at 18387, the addition of § 216 (h) (3), set forth in n. 3, *supra,* to the Act:

"A child would be paid benefits based on his father's earnings without regard to whether he has the status of a child under State inheritance laws if the father was supporting the child or had a legal obligation to do so."

But the clause's reference to legal obligations to support hardly establishes that the statute was designed to replace any potential source of lifetime support; in our view the passage appears only to be a partial description of the actual effect of §§ 416 (h) (3) (C) (i) (II) and (III), set forth in n. 3, *supra,* not an enunciation of the general purpose of the Act.

Thus, appellees, in order to make their case, must ultimately rely upon the asserted failure of the legislative product adequately to fit the purported legitimate aim.

each of the presumptions of dependency renders the class of benefit-recipients incrementally overinclusive, in the sense that some children within each class of presumptive dependents are automatically entitled to benefits under the statute although they could not in fact prove their economic dependence upon insured wage earners at the time of death. We conclude that the statutory classifications are permissible, however, because they are reasonably related to the likelihood of dependency at death.

A

Congress' purpose in adopting the statutory presumptions of dependency was obviously to serve administrative convenience. While Congress was unwilling to assume that every child of a deceased insured was dependent at the time of death, by presuming dependency on the basis of relatively readily documented facts, such as legitimate birth, or existence of a support order or paternity decree, which could be relied upon to indicate the likelihood of continued actual dependency, Congress was able to avoid the burden and expense of specific case-by-case determination in the large number of cases where dependency is objectively probable. Such presumptions in aid of administrative functions, though they may approximate, rather than precisely mirror, the results that case-by-case adjudication would show, are permissible under the Fifth Amendment, so long as that lack of precise equivalence does not exceed the bounds of substantiality tolerated by the applicable level of scrutiny. See *Weinberger* v. *Salfi,* 422 U. S. 749, 772 (1975).[15]

In cases of strictest scrutiny, such approximations must be supported at least by a showing that the Govern-

[15] That these provisions may thus reflect a "secondary" purpose of Congress is, of course, of no moment. *McGinnis* v. *Royster,* 410 U. S. 263, 274–277 (1973).

ment's dollar "lost" to overincluded benefit recipients is returned by a dollar "saved" in administrative expense avoided. *Frontiero* v. *Richardson,* 411 U. S., at 689 (plurality opinion). Under the standard of review appropriate here, however, the materiality of the relation between the statutory classifications and the likelihood of dependency they assertedly reflect need not be " 'scientifically substantiated.' " *James* v. *Strange,* 407 U. S. 128, 133 (1972), quoting *Roth* v. *United States,* 354 U. S. 476, 501 (1957) (opinion of Harlan, J.). Nor, in any case, do we believe that Congress is required in this realm of less than strictest scrutiny to weigh the burdens of administrative inquiry solely in terms of dollars ultimately "spent," ignoring the relative amounts devoted to administrative rather than welfare uses. Cf. *Weinberger* v. *Salfi,* 422 U. S., at 784. Finally, while the scrutiny by which their showing is to be judged is not a toothless one, *e. g., Jimenez* v. *Weinberger,* 417 U. S. 628 (1974); *Frontiero* v. *Richardson,* 411 U. S., at 691 (STEWART, J., concurring in judgment, POWELL, J., concurring in judgment); *Reed* v. *Reed,* 404 U. S. 71 (1971), the burden remains upon the appellees to demonstrate the insubstantiality of that relation. See *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78–79 (1911); cf. *United States* v. *Gainey,* 380 U. S. 63, 67 (1965).

B

Applying these principles, we think that the statutory classifications challenged here are justified as reasonable empirical judgments that are consistent with a design to qualify entitlement to benefits upon a child's dependency at the time of the parent's death. To begin with, we note that the statutory scheme is significantly different from the provisions confronted in cases in which the

Court has invalidated legislative discriminations among children on the basis of legitimacy. See *Gomez* v. *Perez,* 409 U. S. 535 (1973); *New Jersey Welfare Rights Org.* v. *Cahill,* 411 U. S. 619 (1973); *Weber* v. *Aetna Casualty & Surety Co.,* 406 U. S. 164 (1972); *Levy* v. *Louisiana,* 391 U. S. 68 (1968). These differences render those cases of little assistance to appellees. It could not have been fairly argued, with respect to any of the statutes struck down in those cases, that the legitimacy of the child was simply taken as an indication of dependency, or of some other valid ground of qualification. Under all but one of the statutes, not only was the legitimate child automatically entitled to benefits, but an illegitimate child was denied benefits solely and finally on the basis of illegitimacy, and regardless of any demonstration of dependency or other legitimate factor. See also *Griffin* v. *Richardson,* 346 F. Supp. 1226 (Md.), summarily aff'd, 409 U. S. 1069 (1972); *Davis* v. *Richardson,* 342 F. Supp. 588 (Conn.), summarily aff'd, 409 U. S. 1069 (1972). In *Weber* v. *Aetna Casualty & Surety Co., supra,* the sole partial exception, the statutory scheme provided for a child's equal recovery under a workmen's compensation plan in the event of the death of the father, not only if the child was dependent, but *also* only if the dependent child was legitimate. 406 U. S., at 173–174, and n. 12. *Jimenez* v. *Weinberger, supra,* invalidating discrimination among afterborn illegitimate children as to entitlement to a child's disability benefits under the Social Security Act, is similarly distinguishable. Under the somewhat related statutory matrix considered there, legitimate children and those capable of inheriting personal property under state intestacy law, and those illegitimate solely on account of a nonobvious defect in their parents' marriage, were eligible for benefits, even if they were born after the onset of the father's disability.

Other (illegitimate) afterborn children were conclusively denied any benefits, regardless of any showing of dependency. The Court held the discrimination among illegitimate afterborn children impermissible, rejecting the Secretary's claim that the classification was based upon considerations regarding trustworthy proof of dependency, because it could not accept the assertion:

> "[T]he blanket and conclusive exclusion of appellants' subclass of illegitimates is reasonably related to the prevention of spurious claims [of dependency]. Assuming that the appellants are in fact dependent on the claimant [father], it would not serve the purposes of the Act to conclusively deny them an opportunity to establish their dependency and their right to insurance benefits." 417 U. S., at 636.

Hence, it was held that

> "to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws guaranteed by the due process provision of the Fifth Amendment." *Id.*, at 637.

See also *Weinberger* v. *Wiesenfeld,* 420 U. S. 636, 645 (1975); cf. *Labine* v. *Vincent,* 401 U. S., at 539. But this conclusiveness in denying benefits to some classes of afterborn illegitimate children, which belied the asserted legislative reliance on dependency in *Jimenez,* is absent here, for, as we have noted, any otherwise eligible child may qualify for survivorship benefits by showing contribution to support, or cohabitation, at the time of death. Cf. *Vlandis* v. *Kline,* 412 U. S. 441, 452–453, n. 9 (1973), distinguishing *Starns* v. *Malkerson,* 326 F. Supp. 234 (Minn. 1970), summarily aff'd, 401 U. S. 985 (1971).

It is, of course, not enough simply that any child of a deceased insured is eligible for benefits upon *some* show-

ing of dependency. In *Frontiero* v. *Richardson, supra,* we found it impermissible to qualify the entitlement to dependent's benefits of a married woman in the uniformed services upon an individualized showing of her husband's actual dependence upon her for more than half his income, when no such showing of actual dependency was required of a married man in the uniformed services to obtain dependent's benefits on account of his wife. The invalidity of that gender-based discrimination rested upon the "overbroad" assumption, *Schlesinger* v. *Ballard,* 419 U. S. 498, 508 (1975), underlying the discrimination "that male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support." *Weinberger* v. *Wiesenfeld,* 420 U. S., at 643; see *Frontiero,* 411 U. S., at 689 n. 23. Here, by contrast, the statute does not broadly discriminate between legitimates and illegitimates without more, but is carefully tuned to alternative considerations. The presumption of dependency is withheld only in the absence of any significant indication of the likelihood of actual dependency. Moreover, we cannot say that the factors that give rise to a presumption of dependency lack any substantial relation to the likelihood of actual dependency. Rather, we agree with the assessment of the three-judge court as it originally ruled in *Norton* v. *Weinberger,* 364 F. Supp. 1117, 1128 (Md. 1973): [16]

> "[I]t is clearly rational to presume the overwhelming number of legitimate children are actually dependent upon their parents for support. Likewise . . . the children of an invalid marriage . . .

[16] Vacated and remanded for further proceedings in light of *Jimenez,* 418 U. S. 902 (1972); adhered to on remand, 390 F. Supp. 1084 (1975); aff'd *sub nom. Norton* v. *Mathews, post,* p. 524.

> would typically live in the wage earner's home or be supported by him. . . . When an order of support is entered by a court, it is reasonable to assume compliance occurred. A paternity decree, while not necessarily ordering support, would almost as strongly suggest support was subsequently obtained. Conceding that a written acknowledgment lacks the imprimatur of a judicial proceeding, it too establishes the basis for a rational presumption. Men do not customarily affirm in writing their responsibility for an illegitimate child unless the child is theirs and a man who has acknowledged a child is more likely to provide it support than one who does not."

Similarly, we think, where state intestacy law provides that a child may take personal property from a father's estate, it may reasonably be thought that the child will more likely be dependent during the parent's life and at his death.[17] For in its embodiment of the popular

[17] The Secretary, pointing out that § 202 (d) (3), as set forth in 42 U. S. C. § 402 (d) (3), in specific terms provides only that "a child deemed to be a child of a fully or currently insured individual pursuant to section 416 (h) (2) (B) or section 416 (h) (3) . . . shall be deemed to be the legitimate child of such individual," urges that we misconstrued the statute in *Jimenez*, 417 U. S., at 631 n. 2, in concluding that an applicant qualifying as a child under § 216 (h) (2) (A) is to be considered as a *legitimate* child and therefore dependent under § 202 (d) (3). We have no question, however, as to the correctness of that conclusion. First, it is only through operation of § 216 (h) (2) (A) that the recognition of "legitimacy" by state law under § 202 (d) (3) (A) as giving rise to a presumption of dependency takes on a consistent operational meaning. Second, §§ 216 (h) (2) (B) and (3) specifically exclude any child qualified under § 216 (h) (2) (A); if a § 216 (h) (2) (A) child were not considered legitimate under § 202 (d) (3), this would have the anomalous effect that an illegitimate child who had been acknowledged in a written statement by the in-

view within the jurisdiction of how a parent would have his property devolve among his children in the event of death, without specific directions, such legislation also reflects to some degree the popular conception within the jurisdiction of the felt parental obligation to such an "illegitimate" child in other circumstances, and thus something of the likelihood of actual parental support during, as well as after, life.[18] Accord, *Watts* v. *Veneman,* 155 U. S. App. D. C. 84, 88, 476 F. 2d 529, 533 (1973).

To be sure, none of these statutory criteria compels the extension of a presumption of dependency. But the constitutional question is not whether such a presumption is required, but whether it is permitted. Nor, in ratifying these statutory classifications, is our role to hypothesize independently on the desirability or feasibility of any possible alternative basis for presumption. These matters of practical judgment and empirical calculation are for Congress. Drawing upon its own practical experi-

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sured father, for example, would be deprived of otherwise established eligibility for benefits, see § 216 (h) (3) (C) (i) (I), if under applicable state law such an acknowledgment worked to make the child an intestate heir. Moreover, the legislative history is clear that the Social Security Amendments of 1960, Pub. L. 86–778, 74 Stat. 924, §§ 208 (b) and (d), 42 U. S. C. § 408 (b) and (d), adding § 216 (h) (2) (B) to the Act and inserting the provision in § 202 (d) (3) specifying that a § 216 (h) (2) (B) child shall be deemed to be a legitimate, and therefore dependent, child for death benefit purposes, were intended to have the effect of deeming *any* § 216 (h) (2) child "legitimate" and thus "dependent." See S. Rep. No. 1856, 86th Cong., 2d Sess., 78–79, 133 (1960) (discussing §§ 207 (b) and (d)); H. R. Rep. No. 1799, 86th Cong., 2d Sess., 91–92, 152 (1960).

[18] Appellees do not suggest, and we are unwilling to assume, that discrimination against children in appellees' class in state intestacy laws is constitutionally prohibited, see *Labine* v. *Vincent,* 401 U. S. 532 (1971), in which case appellees would be made eligible for benefits under § 216 (h) (2) (A).

ence, Congress has tailored statutory classifications in accord with its calculations of the likelihood of actual support suggested by a narrow set of objective and apparently reasonable indicators. Our role is simply to determine whether Congress' assumptions are so inconsistent or insubstantial as not to be reasonably supportive of its conclusions that individualized factual inquiry in order to isolate each nondependent child in a given class of cases is unwarranted as an administrative exercise. In the end, the precise accuracy of Congress' calculations is not a matter of specialized judicial competence; and we have no basis to question their detail beyond the evident consistency and substantiality. Cf. *United States* v. *Gainey,* 380 U. S., at 67. We cannot say that these expectations are unfounded, or so indiscriminate as to render the statute's classifications baseless. We conclude, in short, that, in failing to extend any presumption of dependency to appellees and others like them, the Act does not impermissibly discriminate against them as compared with legitimate children or those illegitimate children who are statutorily deemed dependent.

Reversed.

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

The reason why the United States Government should not add to the burdens that illegitimate children inevitably acquire at birth is radiantly clear: We are committed to the proposition that all persons are created equal. The Court's reason for approving discrimination against this class—"administrative convenience"—is opaque and insufficient: opaque because the difference between this justification and the argument rejected in *Jimenez* v. *Weinberger,* 417 U. S. 628, is so difficult to

discern; insufficient because it unfairly evaluates the competing interests at stake.

I

Jimenez involved a requirement that the wage earner must have contributed to the support of his illegitimate child prior to the onset of his disability; this case involves the requirement that the deceased wage earner was contributing to the support of his illegitimate child at the time of his death. The critical objections to the classification held invalid in *Jimenez* apply with equal force in this case.

The classification in *Jimenez* was "overinclusive" because it conclusively presumed that all legitimates and some illegitimates were dependent on the disabled wage earner when many such persons were not in fact dependent. Since legitimate as well as illegitimate children are sometimes abandoned by their father before his death, precisely the same objection applies to this statutory classification. Moreover, the *Jimenez* classification was "underinclusive" because it conclusively excluded some illegitimates who were in fact dependent on the wage earner.[1] In this case the two appellee children

[1] "Even if children might rationally be classified on the basis of whether they are dependent upon their disabled parent, the Act's definition of these two subclasses of illegitimates is 'overinclusive' in that it benefits some children who are legitimated, or entitled to inherit, or illegitimate solely because of a defect in the marriage of their parents, but who are not dependent on their disabled parent. Conversely, the Act is 'underinclusive' in that it conclusively excludes some illegitimates in appellants' subclass who are, in fact, dependent upon their disabled parent. Thus, for all that is shown in this record, the two subclasses of illegitimates stand on equal footing, and the potential for spurious claims is the same as to both; hence to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the

were conclusively excluded from the class of eligibles even though they had been supported by their father for 15 years and eight years respectively. If the underinclusiveness of the *Jimenez* classification was arbitrary, this classification is even more objectionable because it attaches greater weight to support at a particular moment in time than to support of several years' duration.

In *Jimenez* the Secretary told the Court that the classification was "designed only to prevent spurious claims." *Id.*, at 633. The Court held that objective insufficient to justify "the blanket and conclusive exclusion" of a subclass of illegitimates. *Id.*, at 636. The statute has not changed but now we are told that the justification for a similar blanket and conclusive exclusion is "administrative convenience." I suggest that this is merely a different name for the same federal interest. For the statutory classification will not affect the processing of claims in any way except by substituting a mechanical test of dependency for the kind of inquiry that would otherwise be required to differentiate between the spurious and the genuine.

I am unable to identify a relevant difference between *Jimenez* and this case.

II

The Court recognizes "that the legal status of illegitimacy, however defined, is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society." *Ante,* at 505. For that reason, as the Court also recognizes, " 'imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some rela-

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laws guaranteed by the due process provision of the Fifth Amendment." 417 U. S., at 637.

tionship to individual responsibility or wrongdoing.' " *Ibid.* Thus the Court starts its analysis from the premise that the statutory classification is both " 'illogical and unjust.' " *Ibid.* It seems rather plain to me that this premise demands a conclusion that the classification is invalid unless it is justified by a weightier governmental interest than merely "administrative convenience."

The Court has characterized the purpose of the statute as providing benefits not for those individuals who had a legitimate claim to support from the deceased wage earner but rather for those who were actually dependent on the wage earner at the time of his death. In this analysis, the provisions of the statute which allow certain classes—such as legitimate children—to receive benefits without showing actual dependency are no more than statutory presumptions in aid of administrative convenience. This is an appropriate reading of the statute.[2]

The Court goes on, however, to hold that such presumptions in aid of "administrative convenience" are permissible so long as the lack of precise equivalence between the fact giving rise to the presumption and the fact presumed "does not exceed the bounds of substantiality tolerated by the applicable level of scrutiny," *ante,* at 509. The opinion tells us very little, however, about the "applicable level of scrutiny." It is not "our most exacting scrutiny," *ante,* at 506; on the other hand, if the classification derives "possibly rational" support from another source, it is not "inherently untenable" simply because it rests in part on illegitimacy. *Ante,* at 505. I believe an admittedly illogical and unjust re-

[2] There are other survivors who receive benefits only if they show dependency, *e. g.,* parents, 42 U. S. C. § 402 (h), and widowers, 42 U. S. C. § 402 (f).

sult should not be accepted without both a better explanation and also something more than a "possibly rational" basis.

The Court has repeatedly held that distinctions which disfavor illegitimates simply because they are illegitimate are invalid. *Gomez* v. *Perez,* 409 U. S. 535; *Weber* v. *Aetna Casualty & Surety Co.,* 406 U. S. 164. However irrational it may be to burden innocent children because their parents did not marry, illegitimates are nonetheless a traditionally disfavored class in our society. Because of that tradition of disfavor the Court should be especially vigilant in examining any classification which involves illegitimacy. For a traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification. Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white. But that sort of stereotyped reaction may have no rational relationship—other than pure prejudicial discrimination[3]—to the

[3] Such pure discrimination is most certainly not a "legitimate purpose" for our Federal Government, which should be especially sensitive to discrimination on grounds of birth. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States,* 320 U. S. 81, 100. From its inception, the Federal Government has been directed to treat all its citizens as having been "created equal" in the eyes of the law. The Declaration of Independence states:

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

And the rationale behind the prohibition against the grant of any title of nobility by the United States, see U. S. Const., Art. I, § 9,

stated purpose for which the classification is being made.

In this case, the "true" classification, according to the Court, is one between children dependent on their fathers and children who are not so dependent. All of the subsidiary classifications (which have the actual effect of allowing certain children to be eligible for benefits regardless of actual dependency) are supposedly justified by the increased convenience for the agency in not being required in every case to determine dependency. But do these classifications actually bear any substantial relationship to the fact of dependency?

In this statute, one or another of the criteria giving rise to a "presumption of dependency" exists to make almost all children of deceased wage earners eligible. If a child is legitimate, he qualifies. If the child is illegitimate only because of a nonobvious defect in his parents' marriage, he qualifies. If a court has declared his father to be in fact his father, or has issued an order of support against his father, or if the father has acknowledged the child in writing, he qualifies. Apart from any of these qualifications, if the child is lucky enough to live in a State which allows him to inherit from his intestate father on a par with other children, he also qualifies. And in none of these situations need he allege, much less prove, actual dependency. Indeed, if the contrary fact is undisputed, he is nevertheless qualified.

The Court today attempts, at some length, to explain that each of these factors is rationally and substantially related to the actual fact of dependency, adopting even the somewhat tenuous rationalization of the District Court that " '[m]en do not customarily affirm in writing their responsibility for an illegitimate child unless the

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cl. 8, equally would prohibit the United States from attaching any badge of ignobility to a citizen at birth.

child is theirs and a man who has acknowledged a child is more likely to provide it support than one who does not,' " *ante,* at 514, without also noting that a man who lives with a woman for 18 years, during which two children are born, who has always orally acknowledged that the children are his, and who has lived with the children and supported them, may never perceive a need to make a formal written acknowledgment of paternity. Even more tenuous is the asserted relationship between the status of the illegitimate under state intestacy law and actual dependency. The Court asserts that "in its embodiment of the popular view within the jurisdiction of how a parent would have his property devolve among his children in the event of death, without specific directions, such legislation also reflects to some degree the popular conception within the jurisdiction of the felt parental obligation to such an 'illegitimate' child in other circumstances, and thus something of the likelihood of actual parental support during, as well as after, life." *Ante,* at 514–515. That nebulous inference upon inference is treated as more acceptable evidence of actual dependency than proof of actual support for many years.[4]

Whether the classification is expressed in terms of eligible classes or in terms of presumptions of dependency, the fact remains that legitimacy, written acknowledgments, or state law make eligible many children who are no more likely to be "dependent" than are the children in appellees' situation. Yet in the name of "administrative convenience" the Court allows these survivors' benefits to be allocated on grounds which have

[4] If the relationship between an entitling presumption and the actual fact of dependency is so nebulous that the conclusion can be supported only by resort to a supposed popular conception within a jurisdiction, the classification must either be irrational, or serve a purpose other than the one by which it is assertedly justified.

only the most tenuous connection to the supposedly controlling factor—the child's dependency on his father.

I am persuaded that the classification which is sustained today in the name of "administrative convenience" is more probably the product of a tradition of thinking of illegitimates as less deserving persons than legitimates. The sovereign should firmly reject that tradition. The fact that illegitimacy is not as apparent to the observer as sex or race does not make this governmental classification any less odious. It cannot be denied that it is a source of social opprobrium, even if wholly unmerited, or that it is a circumstance for which the individual has no responsibility whatsoever.

A fair evaluation of the competing interests at stake in this litigation requires affirmance of the judgment of the District Court.

I respectfully dissent.

NORTON, A MINOR, BY CHILES *v.* MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

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

No. 74–6212. Argued January 13, 1976—Decided June 29, 1976

The Social Security Act provides child survivor benefits only to a child who was "dependent" upon the deceased insured parent at the time of the parent's death. Appellant illegitimate child, who did not come under any of the statutory presumptions of dependency to which legitimate children and illegitimate children under some circumstances are entitled under the Act, could establish his status as a dependent child only by showing that his father lived with him or was contributing to his support at the time of death. Appellant was administratively denied benefits because he could not make such a showing, his father having been killed in military service and never having assumed support. After this denial was upheld on administrative appeal, a class action was brought on appellant's behalf against appellee Secretary of Health, Education, and Welfare, seeking relief against denial of the benefits and claiming, *inter alia,* that by creating a presumption of dependency, and consequent qualification for benefits, for legitimate children generally, and for illegitimate children under certain circumstances, but denying the presumption to appellant and others similarly situated, the Act discriminated against appellant's class in violation of the equal protection guarantee implicit in the Due Process Clause of the Fifth Amendment. Ultimately, a three-judge District Court, convened when classwide injunctive relief was requested against the allegedly unconstitutional operation of the Act's presumptions of dependency, ruled in appellee's favor on the merits of the constitutional claim and granted summary judgment in his favor. *Held:* Since the decision in *Mathews* v. *Lucas, ante,* p. 495, renders the merits of the present case a decided issue in favor of appellee and thus one no longer substantial in the jurisdictional sense, it is unnecessary to decide the jurisdictional question presented as to whether a three-judge court was properly convened upon appellant's demand for injunctive relief and hence

whether this Court had jurisdiction over the direct appeal under 28 U. S. C. § 1253. Pp. 528–533.

390 F. Supp. 1084, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 533.

C. Christopher Brown argued the cause and filed briefs for appellant.

Deputy Solicitor General Jones argued the cause for appellee. With him on the brief were *Solicitor General Bork, Assistant Attorney General Lee, Harriet S. Shapiro,* and *William Kanter.**

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

On the merits, this case raises the same question as to the constitutionality of §§ 202 (d)(3) and 216 (h)(3)(C)(ii) of the Social Security Act, 64 Stat. 484, as amended, and 79 Stat. 410, 42 U. S. C. §§ 402 (d)(3) and 416 (h)(3)(C)(ii), as was presented in *Mathews* v. *Lucas, ante,* p. 495. The present litigation, however, also raises certain jurisdictional issues. It now has become apparent that the simultaneous submission of *Lucas* to the Court, and our decision in that case today, make it unnecessary for us specifically to decide the jurisdictional questions.

I

Appellant Gregory Norton, Jr., was born out of wedlock in February 1964. Both his father and his mother then were high school students, aged, respectively, 16 and 14, who lived separately at home with their parents.

**Thomas R. Adams* filed a brief for John J. Romero, Jr., as *amicus curiae* urging reversal.

The two never married and, indeed, never lived together. Appellant always has resided with his maternal grandmother and has been cared for by her. When Gregory was born, his father contributed six dollars and some clothing and other habiliments for the baby, but, being so young and unemployed, he never assumed appellant's actual support.

In February 1965 the father entered military service. He was killed in Vietnam on May 19, 1966, at age 19. Before his death, the father apparently took some initial steps (the procurement of a birth certificate and other items) necessary for the processing of a dependent child's military allotment. The father failed, however, to complete the required procedures before he was killed.

In September 1969 appellant's maternal grandmother filed on his behalf an application for a surviving child's benefits under § 202 (d)(1) of the Act, 42 U. S. C. § 402 (d)(1), based on the father's earnings record. An administrative hearing followed. The Hearing Examiner concluded that appellant was not entitled to benefits as a dependent child because his father, at the time of his death, was neither living with appellant nor contributing to appellant's support.[1] App. 13–19. The subse-

[1] Section 202 (d)(1) provides survivorship benefits only to a child who was "dependent" upon the deceased insured parent at the time of the parent's death. A legitimate child, a child entitled under the intestacy laws of the insured parent's domicile to inherit personal property from the parent, a child whose illegitimacy results from a formal defect in the parents' purported marriage ceremony, and a child acknowledged in writing by the insured father as his son or daughter or judicially decreed (during the father's lifetime) to be such, are all deemed under the Act to be dependent upon the parent, unless the child has been adopted by some other individual, and thus are relieved of otherwise proving actual dependency. §§ 202 (d)(1), 202 (d)(3), 216 (e), 216 (h)(2), and 216 (h)(3)(C)(i), 42 U. S. C. §§ 402 (d)(1), 402 (d)(3), 416 (e), 416 (h)(2), and 416 (h)(3)(C)(i) (1970 ed. and Supp. IV). Since appellant

quent administrative appeal was no more successful. *Id.*, at 20–21.

The present action was then instituted on behalf of appellant against the Secretary of Health, Education, and Welfare. By the complaint, relief was sought alternatively on statutory and constitutional grounds. First, it was asserted that, by his attempt to secure a military allotment for appellant, the father, at the time of his death, in fact was contributing to appellant's support, within the meaning of § 216 (h)(3)(C)(ii) of the Act, and that appellant therefore was a dependent of the father, under §§ 202 (d)(1) and (3) (1970 ed. and Supp. IV), and entitled to benefits. Second, it was asserted that, by creating a presumption of dependency, and consequent qualification for benefits, for legitimate children generally, and for illegitimate children under certain circumstances, see n. 1, but denying the presumption to appellant and others similarly situated, the Act discriminated against appellant's class, in violation of the guarantee of equal protection implicit in the Due Process Clause of the Fifth Amendment.

Appellant's statutory claim was initially considered and rejected by a single District Judge. *Norton* v. *Richardson,* 352 F. Supp. 596 (Md. 1972). In view of the complaint's request for certification of a class pursuant to Fed. Rule Civ. Proc. 23 (c)(1), and for classwide injunctive relief against the alleged unconstitutional operation of the Act's presumptions of dependency, a three-judge court was convened under 28 U. S. C. §§ 2282 and 2284 (1970 ed. and Supp. IV) to pass upon the constitutional

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did not come within any of these categories, he could establish his status as a dependent child under the Act only by showing that his father lived with him or contributed to his support at the time of his death. §§ 202 (d)(3) and 216 (h)(3)(C)(ii), 42 U. S. C. §§ 402 (d)(3) and 416 (h)(3)(C)(ii). See generally *Mathews* v. *Lucas, ante,* p. 495.

claim. The three-judge court first agreed with, and reaffirmed, the single judge's rejection of appellant's statutory claim. *Norton* v. *Weinberger,* 364 F. Supp. 1117, 1120 (1973). The court went on to identify the plaintiff class, *id.,* at 1120–1121,[2] but on the merits of the constitutional claim it ruled in favor of the Secretary and granted summary judgment in his favor. *Id.,* at 1121–1131.

Appellant, taking the position that the three-judge court had denied his request for an order enjoining enforcement of provisions of the Act, lodged a direct appeal here pursuant to 28 U. S. C. § 1253. While his jurisdictional statement was pending, *Jimenez* v. *Weinberger,* 417 U. S. 628 (1974), was decided. This Court thereafter vacated the three-judge court's judgment and remanded the case for further consideration in the light of *Jimenez. Norton* v. *Weinberger,* 418 U. S. 902 (1974).

On the remand, the same three-judge court, with one judge now dissenting, adhered to its earlier conclusion in favor of constitutionality. *Norton* v. *Weinberger,* 390 F. Supp. 1084 (1975). Appellant has again appealed. We postponed the question of jurisdiction to the hearing of the case on the merits, 422 U. S. 1054 (1975), and, in doing so, cited *Weinberger* v. *Salfi,* 422 U. S. 749, 763 n. 8 (1975), which just then had been decided. Subsequently, we set the case for oral argument with *Mathews* v. *Lucas, ante,* p. 495. 423 U. S. 819 (1975).

II

The question whether the three-judge court was properly convened upon appellant's demand for injunctive re-

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[2] The definition of the class, however, does not appear to have been formalized in the three-judge court's judgment. App. 59.

lief is relevant, of course, to our appellate jurisdiction. If the court was not empowered to enjoin the operation of a federal statute, then three judges were not required to hear the case under 28 U. S. C. § 2282, and this Court has no jurisdiction under 28 U. S. C. § 1253.[3] Accordingly, appellant and the Secretary have debated whether the District Court possessed injunctive power under § 205 (g) of the Act,[4] 42 U. S. C. § 405 (g), and whether, in the light of § 205 (h),[5] 42 U. S. C. § 405 (h), relief was available under the mandamus statute, 28 U. S. C.

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[3] In contrast to the situation in *Weinberger* v. *Salfi,* 422 U. S. 749, 763 n. 8 (1975), there is no jurisdiction here under 28 U. S. C. § 1252, since the District Court's decision was in favor of the statute's constitutionality.

[4] Section 205 (g) reads in pertinent part:

"Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action . . . . Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides . . . . As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing."

[5] Section 205 (h) reads in pertinent part:

"The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under [§ 1331 and other specified sections] of Title 28 to recover on any claim arising under this [subchapter II of the Social Security Act]."

See *Weinberger* v. *Salfi,* 422 U. S., at 756 n. 3.

§ 1361,[6] or under the Administrative Procedure Act, 5 U. S. C. § 701 *et seq.*[7]

We think it unnecessary, however, to resolve the details of these difficult and perhaps close jurisdictional arguments. The substantive questions raised on this appeal now have been determined in *Mathews* v. *Lucas, ante,* p. 495.[8] This disposition renders the merits in the

[6] The initiating judge observed that jurisdiction for his court was asserted under the general federal-question provision of 28 U. S. C. § 1331, and under 28 U. S. C. § 1361, vesting the district courts with jurisdiction "in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." *Norton* v. *Richardson,* 352 F. Supp. 596, 598 n. 2 (Md. 1972).

[7] The Solicitor General contends that a district court has jurisdiction to review a Social Security ruling only under § 205 (g) because § 205 (h) specifically excludes any other source of review of such determinations. He then contends that, for two reasons, there was no jurisdiction here to issue an injunction under § 205 (g). First, § 205 (g) in terms specifies that a district court may enter a judgment only "affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing," but does not say it may enjoin him, and, moreover, in this statutory structure an injunction is out of place. Second, although the suit was made to sound as a class action, a class action is never appropriate under § 205 (g), and in any case the class was not properly certified, inasmuch as there was no allegation that the members had even filed applications for benefits; thus there is no jurisdiction over the class aspects of the case. *Weinberger* v. *Salfi, supra,* is cited. Since only the individual claim remains, even if injunctive power were available under § 205 (g), it would not be appropriately exercised in review of a single claimant's case.

The appellant contends in rebuttal that the "affirming, modifying, or reversing" language in § 205 (g) does not withdraw a district court's general and inherent equity powers, including the power to enjoin, and that, in any event, jurisdiction remains, and an injunction may be issued, under the other cited statutes.

[8] The respective jurisdictional statements for the original appeal and for the present one preserved appellant's statutory claim along with his constitutional contention. The statutory claim, however,

present case a decided issue and thus one no longer substantial in the jurisdictional sense.

Assuming that the three-judge court was correctly convened, and that we have jurisdiction over the appeal, the appropriate disposition, in the light of *Mathews* v. *Lucas,* plainly would be to affirm the judgment entered in this case in favor of the Secretary. Assuming, on the other hand, that we lack jurisdiction because the three-judge court was needlessly convened, the appropriate disposition would be to dismiss the appeal. When an appeal to this Court is sought from an erroneously convened three-judge district court, we retain the power " 'to make such corrective order as may be appropriate to the enforcement of the limitations' " which 28 U. S. C. § 1253 imposes. *Bailey* v. *Patterson,* 369 U. S. 31, 34 (1962), quoting *Gully* v. *Interstate Natural Gas Co.,* 292 U. S. 16, 18 (1934). What we have done recently, and in most such cases where the jurisdictional issue was previously unsettled—and we do not imply that our doing so is statutorily or otherwise compelled—has been to vacate the district court judgment and remand the case for the entry of a fresh decree from which an appeal may be taken to the appropriate court of appeals. *Gonzalez* v. *Employees Credit Union,* 419 U. S. 90, 101 (1974), is an example. In the present case, however, the decision in *Lucas* has rendered the constitutional issues insubstantial and so much so as not even to support the jurisdiction of a three-judge district court to consider their merits on remand. See, *e. g., Hicks* v. *Miranda,* 422 U. S. 332, 343–345 (1975); *Hagans* v. *Lavine,* 415 U. S. 528, 536–538 (1974). Thus, there is no point in remanding to enable the merits to be considered by a court of

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was not pressed in appellant's brief in the present case, and at oral argument it explicitly was abandoned. Tr. of Oral Arg. 5–6.

appeals. See *McLucas* v. *DeChamplain,* 421 U. S. 21 (1975).[9]

It thus is evident that, whichever disposition we undertake, the effect is the same. It follows that there is no need to decide the theoretical question of jurisdiction in this case. In the past, we similarly have reserved difficult questions of our jurisdiction when the case alternatively could be resolved on the merits in favor of the same party. See *Secretary of the Navy* v. *Avrech,* 418 U. S. 676 (1974). The Court has done this even when the original reason for granting certiorari was to resolve the jurisdictional issue. See *United States* v. *Augenblick,* 393 U. S. 348, 349–352 (1969). Although such a disposition would not be desirable under all circumstances, we perceive no reason why we may not so proceed in this case where the merits have been rendered plainly insubstantial. Cf. *McLucas* v. *DeChamplain,* 421 U. S., at 32. Making the assumption, then, without deciding, that our jurisdiction in this cause is established, we affirm the judgment in favor of the Secretary

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[9] In *McLucas* a single District Judge enjoined the enforcement of Art. 134 of the Uniform Code of Military Justice, 10 U. S. C. § 934, without convening a three-judge court. He did so because he considered the constitutional infirmity of the Article to be plain. See *Bailey* v. *Patterson,* 369 U. S. 31 (1962). On direct appeal, under 28 U. S. C. § 1252, the propriety of proceeding without a three-judge court was questioned. We observed that if a three-judge court was originally required under 28 U. S. C. § 2282, we ordinarily were bound to vacate the judgment and remand for the convening of a three-judge court. *Flemming* v. *Nestor,* 363 U. S. 603, 607 (1960); *FHA* v. *The Darlington, Inc.,* 352 U. S. 977 (1957). Concluding, however, that no purpose could be served by deciding whether a three-judge court was required originally, because intervening decisions of this Court sustaining the constitutionality of Art. 134 had rendered the merits issue plainly insubstantial by the time the case was before us, we vacated the judgment and remanded the case, directing dismissal. 421 U. S., at 32.

on the basis of our decision in *Mathews* v. *Lucas, ante,* p. 495.

It is so ordered.

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

In *Jimenez* v. *Weinberger,* 417 U. S. 628, this Court held, *sub silentio,* that a three-judge court was properly convened in a case raising the same jurisdictional issue this case raises. See *Jimenez* v. *Weinberger,* 523 F. 2d 689, 693 n. 5 (CA7 1975).

In 1974 when this Court vacated the judgment of the three-judge court in this case and remanded for further consideration in light of the *Jimenez* case, *Norton* v. *Weinberger,* 418 U. S. 902, the Court again implicitly held that the three-judge court had been properly convened. See *ante,* at 529 n. 3.

Today the Court enters a judgment of affirmance which it has no power to enter unless the three-judge court was properly convened. For we have no jurisdiction over a direct appeal from a district court order denying an injunction unless a three-judge district court was *required.* 28 U. S. C. § 1253. Since I believe such a court was required to consider the appellant's constitutional claim, I am satisfied that we have jurisdiction over this appeal.

The jurisdictional statute, § 205 (g) of the Social Security Act, 42 U. S. C. § 405 (g), authorizes the claimant to commence a "civil action" against the Secretary to obtain review of an adverse decision. In such an action the Secretary is a litigant. If the Secretary's decision rested on a statutory provision which is challenged as unconstitutional, the District Court has jurisdiction to decide the constitutional issue. *Weinberger* v. *Salfi,* 422

U. S. 749, 762, 764. Before this Court raised the question on its own initiative in that opinion, *id.*, at 763 n. 8, this Court, the lower federal courts,[1] and the Secretary himself,[2] had uniformly assumed that if the district court should hold the statute unconstitutional, it could then enter appropriate injunctive relief. I believe this uniform understanding of the meaning of the statute is correct.

The Secretary argues, however, that injunctive relief is superfluous in an action by an individual plaintiff, since he can obtain all the relief to which he is entitled by an order "affirming, modifying, or reversing" the administrative decision. The Secretary also argues that the same reasoning applies to class actions, since an application for benefits by unnamed members of the plaintiff class and a denial of benefits are jurisdictional prerequisites to an action under § 205 (g). Alternatively, the Secretary contends that a plaintiff class will never

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[1] See, *e. g.*, *Jimenez* v. *Richardson*, 353 F. Supp. 1356, 1358 (ND Ill. 1973), vacated and remanded on other grounds *sub nom. Jimenez* v. *Weinberger*, 417 U. S. 628; *Maracle* v. *Richardson*, 348 F. Supp. 234, 235, 237 (WDNY 1972) (three-judge court); *Williams* v. *Richardson*, 347 F. Supp. 544, 548, 552 (WDNC 1972) (three-judge court).

[2] The Secretary has repeatedly asserted jurisdiction in this Court under 28 U. S. C. § 1253 where a three-judge District Court has enjoined enforcement of provisions of the Social Security Act. See Jurisdictional Statement in *Mathews* v. *Diaz*, O. T. 1973, No. 73–1046, p. 2; Jurisdictional Statement in *Weinberger* v. *Salfi*, O. T. 1974, No. 74–214, p. 2; Jurisdictional Statement in *Weinberger* v. *Wiesenfield*, O. T. 1974, No. 73–1892, p. 2. Indeed, when the present case was first here, the Secretary moved to affirm, not to dismiss for want of jurisdiction, even though no greater basis for jurisdiction was present then than now. See Jurisdictional Statement in *Norton* v. *Weinberger*, O. T. 1973, No. 73–5598, p. 2, Motion to Affirm 1. See also Brief for Appellee in *Jimenez* v. *Weinberger*, O. T. 1973, No. 72–6609, p. 2.

be proper in a § 205 (g) action, and in any event, that a plaintiff class could not properly be certified in this case.

Even asuming that equitable relief is unavailable to a plaintiff suing only on his own behalf, the Secretary's conclusions with respect to class actions in general, and with respect to the present class action in particular, do not follow. Indeed, the Secretary's argument proves too much. Injunctive relief in a class action is so similar to that expressly authorized by § 205 (g) that Congress could not have intended to allow one but not the other. The Secretary suggests only one distinction between an order reversing or modifying the denial of benefits to the members of a plaintiff class and an injunction requiring payment of benefits to all such persons: if an official disobeys an order reversing or modifying a decision of the Secretary, he cannot be held in contempt without issuance of mandamus or injunctive relief compelling compliance with the order; but if he disobeys an injunction, he may be held in contempt immediately.[3] Surely Congress did not intend § 205 (g) to provide reluctant federal officials with a means of delay in the remote eventuality that they might not feel bound by the judgment of a federal court. Assuming a district court may issue classwide relief reversing or modifying a decision of the Secretary, I see no reason why it may not issue injunctive relief of equal breadth and virtually identical effect.

Nor can I accept the Secretary's argument that a plaintiff class may never be properly certified in a § 205 (g) action or that no class could properly be certified in this case. He contends that since § 205 (g) permits review only of "any final decision of the Secretary made after a hearing to which [the plaintiff] was a party," it manifests a congressional intent that judicial review proceed only on a case-by-case basis. I fail to see, however,

[3] Tr. of Oral Arg. 33–35.

why the need for case-by-case adjudication is not fully satisfied by limiting the plaintiff class to those who have satisfied the prerequisites to an action under § 205 (g).[4] By definition, such persons have been denied relief for failure to meet the statutory requirement under constitutional attack[5] and upon an administrative record sufficiently complete to permit judicial review. Once such persons are identified from their administrative records, relief may be granted expeditiously.[6] Although

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[4] These prerequisites are: "(1) a final decision of the Secretary made after a hearing; (2) commencement of a civil action within 60 days after the mailing of notice of such decision (or within such further time as the Secretary may allow); and (3) filing of the action in an appropriate district court, in general that of the plaintiff's residence or principal place of business." *Weinberger* v. *Salfi,* 422 U. S. 749, 763–764. The last two requirements may be waived entirely by the Secretary and the first may be partially waived or satisfied by less than literal compliance. See *id.,* at 763–767; *Mathews* v. *Eldridge,* 424 U. S. 319, 326–332; *Mathews* v. *Diaz,* 426 U. S. 67, 75–77.

[5] The District Court certified the plaintiff class "to include all of those persons otherwise eligible for child's insurance benefits under 42 U. S. C. § 402 (d)(1) but who cannot qualify for such child's insurance benefits solely because they cannot meet the requirement of 42 U. S. C. § 416 (h)(3)(C)(ii) that they be living with or supported by their father on the date on his death." *Norton* v. *Weinberger,* 364 F. Supp. 1117, 1121 (Md. 1973). Although this class is too broadly defined, it may be appropriately narrowed to include only those who satisfy the prerequisites to an action under § 205 (g). See n. 7, *infra.*

[6] The Secretary also suggests that a plaintiff class would fail to satisfy the requirement that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Fed. Rule Civ. Proc. 23 (b)(3). He contends that individual members of the plaintiff class probably will assert independent grounds for relief that they do not share with the class. However, if the class action succeeds on the merits, such claims would simply become moot. In any event, the class in this case was certified under the separate

the plaintiff class in this case was erroneously defined to include persons who did not satisfy the prerequisites for judicial review specified in § 205 (g), the overbreadth of the class did not deprive the District Court of jurisdiction over members of the class properly before it.[7] Nor would it prevent later certification of an appropriate, narrower class. Cf. *Jimenez* v. *Weinberger,* 523 F. 2d, at 695.[8]

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requirements of Fed. Rule Civ. Proc. 23 (b)(2). 364 F. Supp., at 1120.

[7] The Secretary argues to the contrary, relying upon a statement in *Salfi* that a similar defect in the class action allegations in that case deprived the District Court of jurisdiction over the entire class. *Weinberger* v. *Salfi, supra,* at 764. However, the statement in *Salfi* was unnecessary to the decision in that case, since this Court possessed jurisdiction over the case on independent grounds and relief was ultimately denied on the merits. See 422 U. S., at 763 n. 8, 767–785. This Court has subsequently pointed out in a similar situation that the question whether a properly defined class may be certified need not be reached. *Mathews* v. *Diaz, supra,* at 71–72, n. 3. Accordingly, I do not read the statement in *Salfi* to preclude certification of a more narrowly defined class in this case. The District Court possessed jurisdiction over those members of the certified class who satisfied the prerequisites of a § 205 (g) action. It follows that it possessed jurisdiction to grant injunctive relief to that subclass and that the denial of such relief is appealable to this Court under 28 U. S. C. § 1253.

[8] The Secretary asserts that a limited class would not satisfy the "numerosity" requirement of Fed. Rule Civ. Proc. 23 (a)(1): "the class [must be] so numerous that joinder of all members is impracticable." But as a general matter, one surely cannot say that this requirement could *never* be satisfied in any § 205 (g) action that might be brought. The Secretary offers no justification for such a broad assertion. Even if the Secretary has advanced a colorable claim on this record that a plaintiff class could not be certified in accord with the requirements of Rule 23, surely the jurisdiction of this Court—the question directly at issue—should not turn on that question. Such a jurisdictional rule would only increase the burden of three-judge court litigation to the breaking point, particularly as it affects the summary dispositions of this Court.

Accordingly, I would hold that the District Court had power to issue injunctive relief after certification of the plaintiff class and that an appeal from denial of such relief lies under 28 U. S. C. § 1253.

On the merits, I dissent for the reasons stated in my dissenting opinion in *Mathews* v. *Lucas, ante,* p. 516. I would reverse the judgment of the District Court.

Syllabus

NEBRASKA PRESS ASSN. ET AL. *v.* STUART, JUDGE, ET AL.

CERTIORARI TO THE SUPREME COURT OF NEBRASKA

No. 75–817. Argued April 19, 1976—Decided June 30, 1976

Respondent Nebraska state trial judge, in anticipation of a trial for a multiple murder which had attracted widespread news coverage, entered an order which, as modified by the Nebraska Supreme Court, restrained petitioner newspapers, broadcasters, journalists, news media associations, and national newswire services from publishing or broadcasting accounts of confessions or admissions made by the accused to law enforcement officers or third parties, except members of the press, and other facts "strongly implicative" of the accused. The modification of the order had occurred in the course of an action by petitioners, which had sought a stay of the trial court's original order and in which the accused and the State of Nebraska intervened. This Court granted certiorari to determine whether the order violated the constitutional guarantee of freedom of the press. The order expired by its own terms when the jury was impaneled. Respondent was convicted; his appeal is pending in the Nebraska Supreme Court. *Held:*

1. The case is not moot simply because the order has expired, since the controversy between the parties is "capable of repetition, yet evading review." Pp. 546–547.

2. While the guarantees of freedom of expression are not an absolute prohibition under all circumstances, the barriers to prior restraint remain high and the presumption against its use continues intact. Although it is unnecessary to establish a priority between First Amendment rights and the Sixth Amendment right to a fair trial under all circumstances, as the authors of the Bill of Rights themselves declined to do, the protection against prior restraint should have particular force as applied to reporting of criminal proceedings. Pp. 556–562.

3. The heavy burden imposed as a condition to securing a prior restraint was not met in this case. Pp. 562–570.

(a) On the pretrial record the trial judge was justified in concluding that there would be intense and pervasive pretrial publicity concerning the case, and he could also reasonably

conclude, based on common human experience, that publicity might impair the accused's right to a fair trial. His conclusion as to the impact of such publicity on prospective jurors was of necessity speculative, however, dealing as he was with factors unknown and unknowable. Pp. 562–563.

(b) There is no finding that measures short of prior restraint on the press and speech would not have protected the accused's rights; the Nebraska Supreme Court no more than implied that alternative measures might not suffice, and the record lacks evidence that would support such a finding. Pp. 563–565.

(c) It is not clear that prior restraint on publication would have effectively protected the accused's rights, in view of such practical problems as the limited territorial jurisdiction of the trial court issuing the restraining order, the difficulties inherent in predicting what information will in fact undermine the jurors' impartiality, the problem of drafting an order that will effectively keep prejudicial information from prospective jurors, and the fact that in this case the events occurred in a small community where rumors would travel swiftly by word of mouth. Pp. 565–567.

(d) To the extent that the order prohibited the reporting of evidence adduced at the open preliminary hearing held to determine whether the accused should be bound over for trial, it violated the settled principle that "there is nothing that proscribes the press from reporting events that transpire in the courtroom," *Sheppard* v. *Maxwell*, 384 U. S. 333, 362–363, and the portion of the order restraining publication of other facts "strongly implicative" of the accused is too vague and too broad to survive the scrutiny given to restraints on First Amendment rights. Pp. 567–568.

194 Neb. 783, 236 N. W. 2d 794, reversed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. WHITE, J., *post*, p. 570, and POWELL, J., *post*, p. 571, filed concurring opinions. BRENNAN, J., filed an opinion concurring in the judgment, in which STEWART and MARSHALL, JJ., joined, *post*, p. 572. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 617.

E. Barrett Prettyman, Jr., argued the cause for petitioners. With him on the briefs were *James L. Koley* and *Stephen T. McGill.*

Harold Mosher, Assistant Attorney General of Nebraska, argued the cause for respondent Stuart. With him on the brief was *Paul L. Douglas,* Attorney General. *Milton R. Larson* argued the cause for respondent State of Nebraska. With him on the brief was *Erwin N. Griswold. Leonard P. Vyhnalek* filed a brief for respondent Simants.

Floyd Abrams argued the cause for the National Broadcasting Co. et al. as *amici curiae* urging reversal. With him on the brief were *Eugene R. Scheiman, Corydon B. Dunham, David H. Marion, Harold E. Kohn, Robert Sack, John B. Summers, William Barnabas McHenry, David Otis Fuller, Jr., Richard M. Schmidt, Jr., Ian Volner,* and *J. Laurent Scharff.**

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

The respondent State District Judge entered an order restraining the petitioners from publishing or broadcasting accounts of confessions or admissions made by the accused or facts "strongly implicative" of the accused in a widely reported murder of six persons. We granted certiorari to decide whether the entry of such an order on the showing made before the state court violated the constitutional guarantee of freedom of the press.

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*Briefs of *amici curiae* urging reversal were filed by *Melvin L. Wulf, Joel M. Gora, Charles C. Marson,* and *Joseph Remcho* for the American Civil Liberties Union et al.; by *Arthur B. Hanson* for the American Newspaper Publishers Assn.; by *William I. Harkaway* for the National Press Club; by *Lawrence Speiser* for the Reporters Committee for Freedom of the Press Legal Defense and Research Fund; by *Don H. Reuben* and *Lawrence Gunnels* for the Tribune Co.; and by *Joseph A. Califano, Jr., John G. Kester, Richard M. Cooper, Alan R. Finberg, Robert C. Lobdell, David R. Hardy, Dan Paul, Edgar A. Zingman,* and *Donald B. Holbrook* for the Washington Post Co. et al.

I

On the evening of October 18, 1975, local police found the six members of the Henry Kellie family murdered in their home in Sutherland, Neb., a town of about 850 people. Police released the description of a suspect, Erwin Charles Simants, to the reporters who had hastened to the scene of the crime. Simants was arrested and arraigned in Lincoln County Court the following morning, ending a tense night for this small rural community.

The crime immediately attracted widespread news coverage, by local, regional, and national newspapers, radio and television stations. Three days after the crime, the County Attorney and Simants' attorney joined in asking the County Court to enter a restrictive order relating to "matters that may or may not be publicly reported or disclosed to the public," because of the "mass coverage by news media" and the "reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury and tend to prevent a fair trial." The County Court heard oral argument but took no evidence; no attorney for members of the press appeared at this stage. The County Court granted the prosecutor's motion for a restrictive order and entered it the next day, October 22. The order prohibited everyone in attendance from "releas[ing] or authoriz[ing] the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced"; the order also required members of the press to observe the Nebraska Bar-Press Guidelines.[1]

[1] These Guidelines are voluntary standards adopted by members of the state bar and news media to deal with the reporting of crimes and criminal trials. They outline the matters of fact that may appropriately be reported, and also list what items are not generally appropriate for reporting, including confessions, opinions

Simants' preliminary hearing was held the same day, open to the public but subject to the order. The County Court bound over the defendant for trial to the State District Court. The charges, as amended to reflect the autopsy findings, were that Simants had committed the murders in the course of a sexual assault.

Petitioners—several press and broadcast associations, publishers, and individual reporters—moved on October 23 for leave to intervene in the District Court, asking that the restrictive order imposed by the County Court be vacated. The District Court conducted a hearing, at which the County Judge testified and newspaper articles about the *Simants* case were admitted in evidence. The District Judge granted petitioners' motion to intervene and, on October 27, entered his own restrictive order. The judge found "because of the nature of the crimes charged in the complaint that there is a clear and present danger that pre-trial publicity could impinge upon the defendant's right to a fair trial." The order applied only until the jury was impaneled, and specifically prohibited petitioners from reporting five subjects: (1) the existence or contents of a confession Simants had made to law enforcement officers, which had been introduced in open court at arraignment; (2) the fact or nature of statements Simants had made to other persons; (3) the contents of a note he had written the night of the crime; (4) certain aspects of the medical testimony at the preliminary hearing; and (5) the identity of the

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on guilt or innocence, statements that would influence the outcome of a trial, the results of tests or examinations, comments on the credibility of witnesses, and evidence presented in the jury's absence. The publication of an accused's criminal record should, under the Guidelines, be "considered very carefully." The Guidelines also set out standards for taking and publishing photographs, and set up a joint bar-press committee to foster cooperation in resolving particular problems that emerge.

victims of the alleged sexual assault and the nature of the assault. It also prohibited reporting the exact nature of the restrictive order itself. Like the County Court's order, this order incorporated the Nebraska Bar-Press Guidelines. Finally, the order set out a plan for attendance, seating, and courthouse traffic control during the trial.

Four days later, on October 31, petitioners asked the District Court to stay its order. At the same time, they applied to the Nebraska Supreme Court for a writ of mandamus, a stay, and an expedited appeal from the order. The State of Nebraska and the defendant Simants intervened in these actions. The Nebraska Supreme Court heard oral argument on November 25, and issued its *per curiam* opinion December 1. *State* v. *Simants*, 194 Neb. 783, 236 N. W. 2d 794 (1975).[2]

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[2] In the interim, petitioners applied to MR. JUSTICE BLACKMUN as Circuit Justice for a stay of the State District Court's order. He postponed ruling on the application out of deference to the Nebraska Supreme Court, 423 U. S. 1319 (Nov. 13, 1975) (in chambers); when he concluded that the delay before that court had "exceed[ed] tolerable limits," he entered an order. 423 U. S. 1327, 1329 (Nov. 20, 1975) (in chambers). We need not set out in detail MR. JUSTICE BLACKMUN's careful decision on this difficult issue. In essence he stayed the order insofar as it incorporated the admonitory Bar-Press Guidelines and prohibited reporting of some other matters. But he declined "at least on an application for a stay and at this distance, [to] impose a prohibition upon the Nebraska courts from placing any restrictions at all upon what the media may report prior to trial." *Id.*, at 1332. He therefore let stand that portion of the District Court's order that prohibited reporting the existence or nature of a confession, and declined to prohibit that court from restraining publication of facts that were so "highly prejudicial" to the accused or "strongly implicative" of him that they would "irreparably impair the ability of those exposed to them to reach an independent and impartial judgment as to guilt." *Id.*, at 1333. Subsequently, petitioners applied for a more extensive stay; this was denied by the full Court. 423 U. S. 1027 (1975).

The Nebraska Supreme Court balanced the "heavy presumption against . . . constitutional validity" that an order restraining publication bears, *New York Times Co.* v. *United States,* 403 U. S. 713, 714 (1971), against the importance of the defendant's right to trial by an impartial jury. Both society and the individual defendant, the court held, had a vital interest in assuring that Simants be tried by an impartial jury. Because of the publicity surrounding the crime, the court determined that this right was in jeopardy. The court noted that Nebraska statutes required the District Court to try Simants within six months of his arrest, and that a change of venue could move the trial only to adjoining counties, which had been subject to essentially the same publicity as Lincoln County. The Nebraska Supreme Court held that "[u]nless the absolutist position of the relators was constitutionally correct, it would appear that the District Court acted properly." 194 Neb., at 797, 236 N. W. 2d, at 803.

The Nebraska Supreme Court rejected that "absolutist position," but modified the District Court's order to accommodate the defendant's right to a fair trial and the petitioners' interest in reporting pretrial events. The order as modified prohibited reporting of only three matters: (a) the existence and nature of any confessions or admissions made by the defendant to law enforcement officers, (b) any confessions or admissions made to any third parties, except members of the press, and (c) other facts "strongly implicative" of the accused. The Nebraska Supreme Court did not rely on the Nebraska Bar-Press Guidelines. See n. 1, *supra.* After construing Nebraska law to permit closure in certain circumstances, the court remanded the case to the District Judge for reconsideration of the issue whether pretrial hearings should be closed to the press and public.

We granted certiorari to address the important issues raised by the District Court order as modified by the Nebraska Supreme Court, but we denied the motion to expedite review or to stay entirely the order of the State District Court pending Simants' trial. 423 U. S. 1027 (1975). We are informed by the parties that since we granted certiorari, Simants has been convicted of murder and sentenced to death. His appeal is pending in the Nebraska Supreme Court.

II

The order at issue in this case expired by its own terms when the jury was impaneled on January 7, 1976. There were no restraints on publication once the jury was selected, and there are now no restrictions on what may be spoken or written about the *Simants* case. Intervenor Simants argues that for this reason the case is moot.

Our jurisdiction under Art. III, § 2, of the Constitution extends only to actual cases and controversies. *Indianapolis School Comm'rs* v. *Jacobs,* 420 U. S. 128 (1975); *Sosna* v. *Iowa,* 419 U. S. 393, 397–403 (1975). The Court has recognized, however, that jurisdiction is not necessarily defeated simply because the order attacked has expired, if the underlying dispute between the parties is one "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC,* 219 U. S. 498, 515 (1911).

The controversy between the parties to this case is "capable of repetition" in two senses. First, if Simants' conviction is reversed by the Nebraska Supreme Court and a new trial ordered, the District Court may enter another restrictive order to prevent a resurgence of prejudicial publicity before Simants' retrial. Second, the State of Nebraska is a party to this case; the Nebraska Supreme Court's decision authorizes state prosecutors to

seek restrictive orders in appropriate cases. The dispute between the State and the petitioners who cover events throughout the State is thus "capable of repetition." Yet, if we decline to address the issues in this case on grounds of mootness, the dispute will evade review, or at least considered plenary review in this Court, since these orders are by nature short-lived. See, *e. g., Weinstein* v. *Bradford,* 423 U. S. 147 (1975); *Sosna* v. *Iowa, supra; Roe* v. *Wade,* 410 U. S. 113, 125 (1973); *Moore* v. *Ogilvie,* 394 U. S. 814, 816 (1969); *Carroll* v. *Princess Anne,* 393 U. S. 175, 178–179 (1968). We therefore conclude that this case is not moot, and proceed to the merits.

III

The problems presented by this case are almost as old as the Republic. Neither in the Constitution nor in contemporaneous writings do we find that the conflict between these two important rights was anticipated, yet it is inconceivable that the authors of the Constitution were unaware of the potential conflicts between the right to an unbiased jury and the guarantee of freedom of the press. The unusually able lawyers who helped write the Constitution and later drafted the Bill of Rights were familiar with the historic episode in which John Adams defended British soldiers charged with homicide for firing into a crowd of Boston demonstrators; they were intimately familiar with the clash of the adversary system and the part that passions of the populace sometimes play in influencing potential jurors. They did not address themselves directly to the situation presented by this case; their chief concern was the need for freedom of expression in the political arena and the dialogue in ideas. But they recognized that there were risks to private rights from an unfettered press. Jefferson, for ex-

ample, writing from Paris in 1786 concerning press attacks on John Jay, stated:

> "In truth it is afflicting that a man who has past his life in serving the public . . . should yet be liable to have his peace of mind so much disturbed by any individual who shall think proper to arraign him in a newspaper. It is however an evil for which there is no remedy. Our liberty depends on the freedom of the press, and that cannot be limited without being lost. . . ." 9 Papers of Thomas Jefferson 239 (J. Boyd ed. 1954).

See also F. Mott, Jefferson and the Press 21, 38–46 (1943).

The trial of Aaron Burr in 1807 presented Mr. Chief Justice Marshall, presiding as a trial judge, with acute problems in selecting an unbiased jury. Few people in the area of Virginia from which jurors were drawn had not formed some opinions concerning Mr. Burr or the case, from newspaper accounts and heightened discussion both private and public. The Chief Justice conducted a searching *voir dire* of the two panels eventually called, and rendered a substantial opinion on the purposes of *voir dire* and the standards to be applied. See 1 Causes Celebres, Trial of Aaron Burr for Treason 404–427, 473–481 (1879); *United States* v. *Burr*, 25 F. Cas. 49 (No. 14,692g) (CC Va. 1807). Burr was acquitted, so there was no occasion for appellate review to examine the problem of prejudicial pretrial publicity. Mr. Chief Justice Marshall's careful *voir dire* inquiry into the matter of possible bias makes clear that the problem is not a new one.

The speed of communication and the pervasiveness of the modern news media have exacerbated these problems, however, as numerous appeals demonstrate. The trial of Bruno Hauptmann in a small New Jersey community for

the abduction and murder of the Charles Lindberghs' infant child probably was the most widely covered trial up to that time, and the nature of the coverage produced widespread public reaction. Criticism was directed at the "carnival" atmosphere that pervaded the community and the courtroom itself. Responsible leaders of press and the legal profession—including other judges—pointed out that much of this sorry performance could have been controlled by a vigilant trial judge and by other public officers subject to the control of the court. See generally Hudon, Freedom of the Press Versus Fair Trial: The Remedy Lies With the Courts, 1 Val. U. L. Rev. 8, 12–14 (1966); Hallam, Some Object Lessons on Publicity in Criminal Trials, 24 Minn. L. Rev. 453 (1940); Lippmann, The Lindbergh Case in Its Relation to American Newspapers, in Problems of Journalism 154–156 (1936).

The excesses of press and radio and lack of responsibility of those in authority in the *Hauptmann* case and others of that era led to efforts to develop voluntary guidelines for courts, lawyers, press, and broadcasters. See generally J. Lofton, Justice and the Press 117–130 (1966).[3] The effort was renewed in 1965 when the American Bar Association embarked on a project to develop standards for all aspects of criminal justice, including guidelines to accommodate the right to a fair trial and the rights of a free press. See Powell, The Right to a

[3] The Warren Commission conducting an inquiry into the murder of President Kennedy implied grave doubts whether, after the dissemination of "a great deal of misinformation" prejudicial to Oswald, a fair trial could be had. Report of the President's Commission on the Assassination of President John F. Kennedy 231 (1964). Probably the same could be said in turn with respect to a trial of Oswald's murderer even though a multitude were eyewitnesses to the guilty act. See generally *id.*, at 231–242; Jaffe, Trial by Newspaper, 40 N. Y. U. L. Rev. 504 (1965); Powell, The Right to a Fair Trial, 51 A. B. A. J. 534 (1965).

Fair Trial, 51 A. B. A. J. 534 (1965). The resulting standards, approved by the Association in 1968, received support from most of the legal profession. American Bar Association Project on Standards for Criminal Justice, Fair Trial and Free Press (Approved Draft 1968). Other groups have undertaken similar studies. See Report of the Judicial Conference Committee on the Operation of the Jury System, "Free Press-Fair Trial" Issue, 45 F. R. D. 391 (1968); Special Committee on Radio, Television, and the Administration of Justice of the Association of the Bar of the City of New York, Freedom of the Press and Fair Trial (1967). In the wake of these efforts, the cooperation between bar associations and members of the press led to the adoption of voluntary guidelines like Nebraska's. See n. 1, *supra;* American Bar Association Legal Advisory Committee on Fair Trial and Free Press, The Rights of Fair Trial and Free Press 1–6 (1969).

In practice, of course, even the most ideal guidelines are subjected to powerful strains when a case such as Simants' arises, with reporters from many parts of the country on the scene. Reporters from distant places are unlikely to consider themselves bound by local standards. They report to editors outside the area covered by the guidelines, and their editors are likely to be guided only by their own standards. To contemplate how a state court can control acts of a newspaper or broadcaster outside its jurisdiction, even though the newspapers and broadcasts reach the very community from which jurors are to be selected, suggests something of the practical difficulties of managing such guidelines.

The problems presented in this case have a substantial history outside the reported decisions of courts, in the efforts of many responsible people to accommodate the competing interests. We cannot resolve all of them, for

it is not the function of this Court to write a code. We look instead to this particular case and the legal context in which it arises.

IV

The Sixth Amendment in terms guarantees "trial, by an impartial jury . . ." in federal criminal prosecutions. Because "trial by jury in criminal cases is fundamental to the American scheme of justice," the Due Process Clause of the Fourteenth Amendment guarantees the same right in state criminal prosecutions. *Duncan* v. *Louisiana,* 391 U. S. 145, 149 (1968).

> "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. . . . 'A fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison,* 349 U. S. 133, 136. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial." *Irvin* v. *Dowd,* 366 U. S. 717, 722 (1961).

In the overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats to this important right. But when the case is a "sensational" one tensions develop between the right of the accused to trial by an impartial jury and the rights guaranteed others by the First Amendment. The relevant decisions of this Court, even if not dispositive, are instructive by way of background.

In *Irvin* v. *Dowd, supra,* for example, the defendant was convicted of murder following intensive and hostile news coverage. The trial judge had granted a defense motion for a change of venue, but only to an

adjacent county, which had been exposed to essentially the same news coverage. At trial, 430 persons were called for jury service; 268 were excused because they had fixed opinions as to guilt. Eight of the 12 who served as jurors thought the defendant guilty, but said they could nevertheless render an impartial verdict. On review the Court vacated the conviction and death sentence and remanded to allow a new trial for, "[w]ith his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion . . . ." 366 U. S., at 728.

Similarly, in *Rideau* v. *Louisiana,* 373 U. S. 723 (1963), the Court reversed the conviction of a defendant whose staged, highly emotional confession had been filmed with the cooperation of local police and later broadcast on television for three days while he was awaiting trial, saying "[a]ny subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." *Id.,* at 726. And in *Estes* v. *Texas,* 381 U. S. 532 (1965), the Court held that the defendant had not been afforded due process where the volume of trial publicity, the judge's failure to control the proceedings, and the telecast of a hearing and of the trial itself "inherently prevented a sober search for the truth." *Id.,* at 551. See also *Marshall* v. *United States,* 360 U. S. 310 (1959).

In *Sheppard* v. *Maxwell,* 384 U. S. 333 (1966), the Court focused sharply on the impact of pretrial publicity and a trial court's duty to protect the defendant's constitutional right to a fair trial. With only Mr. Justice Black dissenting, and he without opinion, the Court ordered a new trial for the petitioner, even though the first trial had occurred 12 years before. Beyond doubt the press had shown no responsible concern for the constitutional guarantee of a fair trial; the com-

munity from which the jury was drawn had been inundated by publicity hostile to the defendant. But the trial judge "did not fulfill his duty to protect [the defendant] from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom." *Id.*, at 363. The Court noted that "unfair and prejudicial news comment on pending trials has become increasingly prevalent," *id.*, at 362, and issued a strong warning:

> "Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, *the trial courts must take strong measures to ensure that the balance is never weighed against the accused.* . . . Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should *continue the case* until the threat abates, *or transfer it* to another county not so permeated with publicity. In addition, *sequestration of the jury* was something the judge should have raised *sua sponte* with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. *Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the*

> *court should be permitted to frustrate its function.* Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." *Id.*, at 362–363 (emphasis added).

Because the trial court had failed to use even minimal efforts to insulate the trial and the jurors from the "deluge of publicity," *id.*, at 357, the Court vacated the judgment of conviction and a new trial followed, in which the accused was acquitted.

Cases such as these are relatively rare, and we have held in other cases that trials have been fair in spite of widespread publicity. In *Stroble* v. *California,* 343 U. S. 181 (1952), for example, the Court affirmed a conviction and death sentence challenged on the ground that pretrial news accounts, including the prosecutor's release of the defendant's recorded confession, were allegedly so inflammatory as to amount to a denial of due process. The Court disapproved of the prosecutor's conduct, but noted that the publicity had receded some six weeks before trial, that the defendant had not moved for a change of venue, and that the confession had been found voluntary and admitted in evidence at trial. The Court also noted the thorough examination of jurors on *voir dire* and the careful review of the facts by the state courts, and held that petitioner had failed to demonstrate a denial of due process. See also *Murphy* v. *Florida,* 421 U. S. 794 (1975); *Beck* v. *Washington,* 369 U. S. 541 (1962).

Taken together, these cases demonstrate that pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial. The capacity of the jury eventually impaneled to decide the case fairly is influenced by the tone and extent of the publicity,

which is in part, and often in large part, shaped by what attorneys, police, and other officials do to precipitate news coverage. The trial judge has a major responsibility. What the judge says about a case, in or out of the courtroom, is likely to appear in newspapers and broadcasts. More important, the measures a judge takes or fails to take to mitigate the effects of pretrial publicity—the measures described in *Sheppard*—may well determine whether the defendant receives a trial consistent with the requirements of due process. That this responsibility has not always been properly discharged is apparent from the decisions just reviewed.

The costs of failure to afford a fair trial are high. In the most extreme cases, like *Sheppard* and *Estes,* the risk of injustice was avoided when the convictions were reversed. But a reversal means that justice has been delayed for both the defendant and the State; in some cases, because of lapse of time retrial is impossible or further prosecution is gravely handicapped. Moreover, in borderline cases in which the conviction is not reversed, there is some possibility of an injustice unredressed. The "strong measures" outlined in *Sheppard* v. *Maxwell* are means by which a trial judge can try to avoid exacting these costs from society or from the accused.

The state trial judge in the case before us acted responsibly, out of a legitimate concern, in an effort to protect the defendant's right to a fair trial.[4] What we must decide is not simply whether the Nebraska courts erred

[4] The record also reveals that counsel for both sides acted responsibly in this case, and there is no suggestion that either sought to use pretrial news coverage for partisan advantage. A few days after the crime, newspaper accounts indicated that the prosecutor had announced the existence of a confession; we learned at oral argument that these accounts were false, although in fact a confession had been made. Tr. of Oral Arg. 36–37, 59.

in seeing the possibility of real danger to the defendant's rights, but whether in the circumstances of this case the means employed were foreclosed by another provision of the Constitution.

V

The First Amendment provides that "Congress shall make no law . . . abridging the freedom . . . of the press," and it is "no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action." *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697, 707 (1931). See also *Grosjean* v. *American Press Co.,* 297 U. S. 233, 244 (1936). The Court has interpreted these guarantees to afford special protection against orders that prohibit the publication or broadcast of particular information or commentary—orders that impose a "previous" or "prior" restraint on speech. None of our decided cases on prior restraint involved restrictive orders entered to protect a defendant's right to a fair and impartial jury, but the opinions on prior restraint have a common thread relevant to this case.

In *Near* v. *Minnesota ex rel. Olson, supra,* the Court held invalid a Minnesota statute providing for the abatement as a public nuisance of any "malicious, scandalous and defamatory newspaper, magazine or other periodical." Near had published an occasional weekly newspaper described by the County Attorney's complaint as "largely devoted to malicious, scandalous and defamatory articles" concerning political and other public figures. 283 U. S., at 703. Publication was enjoined pursuant to the statute. Excerpts from Near's paper, set out in the dissenting opinion of Mr. Justice Butler, show beyond question that one of its principal characteristics was blatant anti-Semitism. See *id.,* at 723, 724–727, n. 1.

Mr. Chief Justice Hughes, writing for the Court, noted that freedom of the press is not an absolute right, and the State may punish its abuses. He observed that the statute was "not aimed at the redress of individual or private wrongs." *Id.,* at 708, 709. He then focused on the statute:

> "[T]he operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter . . . and unless the owner or publisher is able . . . to satisfy the judge that the [matter is] true and . . . published with good motives . . . his newspaper or periodical is suppressed . . . . This is of the essence of censorship." *Id.,* at 713.

The Court relied on *Patterson* v. *Colorado ex rel. Attorney General,* 205 U. S. 454, 462 (1907): "[T]he main purpose of [the First Amendment] is 'to prevent all such *previous restraints* upon publications as had been practiced by other governments.' " [5]

The principles enunciated in *Near* were so universally accepted that the precise issue did not come before us again until *Organization for a Better Austin* v. *Keefe,*

[5] In *Near* v. *Minnesota,* Mr. Chief Justice Hughes was also able to say: "There is also the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions." 283 U. S., at 715. A subsequent line of cases limited sharply the circumstances under which courts may exact such punishment. See *Craig* v. *Harney,* 331 U. S. 367 (1947); *Pennekamp* v. *Florida,* 328 U. S. 331 (1946); *Bridges* v. *California,* 314 U. S. 252 (1941). Because these cases deal with punishment based on contempt, however, they deal with problems substantially different from those raised by prior restraint. See also Barist, The First Amendment and Regulation of Prejudicial Publicity—An Analysis, 36 Ford. L. Rev. 425, 433–442 (1968).

402 U. S. 415 (1971). There the state courts had enjoined the petitioners from picketing or passing out literature of any kind in a specified area. Noting the similarity to *Near* v. *Minnesota,* a unanimous Court held:

> "Here, as in that case, the injunction operates, not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature 'of any kind' in a city of 18,000.
>
> . . . . . .
>
> "Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity. *Carroll* v. *Princess Anne,* 393 U. S. 175, 181 (1968); *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58, 70 (1963). Respondent thus carries a heavy burden of showing justification for the imposition of such a restraint. He has not met that burden. . . . Designating the conduct as an invasion of privacy, the apparent basis for the injunction here, is not sufficient to support an injunction against peaceful distribution of informational literature of the nature revealed by this record." 402 U. S., at 418–420.

More recently in *New York Times Co.* v. *United States,* 403 U. S. 713 (1971), the Government sought to enjoin the publication of excerpts from a massive, classified study of this Nation's involvement in the Vietnam conflict, going back to the end of the Second World War. The dispositive opinion of the Court simply concluded that the Government had not met its heavy burden of showing justification for the prior restraint. Each of the six concurring Justices and the three dissenting Justices expressed his views separately, but "every member of the Court, tacitly or explicitly, accepted the *Near* and *Keefe* condemnation of prior restraint as presumptively unconstitutional." *Pittsburgh Press Co.* v. *Human Rel.*

Comm'n, 413 U. S. 376, 396 (1973) (BURGER, C. J., dissenting). The Court's conclusion in *New York Times* suggests that the burden on the Government is not reduced by the temporary nature of a restraint; in that case the Government asked for a temporary restraint solely to permit it to study and assess the impact on national security of the lengthy documents at issue.

The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative.

A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time.[6]

The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events. Truthful reports of public judicial proceedings have been afforded special protection against subsequent punishment. See *Cox Broadcasting Corp* v. *Cohn,* 420 U. S. 469, 492–493 (1975); see also, *Craig* v. *Harney,* 331 U. S. 367, 374 (1947). For the same reasons the protection against prior restraint should have particular force as applied to reporting of criminal proceedings, whether the crime in question is a single isolated act or a pattern of criminal conduct.

"A responsible press has always been regarded as

[6] See A. Bickel, The Morality of Consent 61 (1975).

> the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Sheppard* v. *Maxwell,* 384 U. S., at 350.

The extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly—a duty widely acknowledged but not always observed by editors and publishers. It is not asking too much to suggest that those who exercise First Amendment rights in newspapers or broadcasting enterprises direct some effort to protect the rights of an accused to a fair trial by unbiased jurors.

Of course, the order at issue—like the order requested in *New York Times*—does not prohibit but only postpones publication. Some news can be delayed and most commentary can even more readily be delayed without serious injury, and there often is a self-imposed delay when responsible editors call for verification of information. But such delays are normally slight and they are self-imposed. Delays imposed by governmental authority are a different matter.

> "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 . . . remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial

> rooms of this Nation's press." *Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S. 241, 259 (1974) (WHITE, J., concurring).

See also *Columbia Broadcasting* v. *Democratic Comm.,* 412 U. S. 94 (1973). As a practical matter, moreover, the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly.

The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other. In this case, the petitioners would have us declare the right of an accused subordinate to their right to publish in all circumstances. But if the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined to do. It is unnecessary, after nearly two centuries, to establish a priority applicable in all circumstances. Yet it is nonetheless clear that the barriers to prior restraint remain high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it. The history of even wartime suspension of categorical guarantees, such as habeas corpus or the right to trial by civilian courts, see *Ex parte Milligan,* 4 Wall. 2 (1867), cautions against suspending explicit guarantees.

The Nebraska courts in this case enjoined the publication of certain kinds of information about the *Simants* case. There are, as we suggested earlier, marked differences in setting and purpose between the order entered here and the orders in *Near, Keefe,* and *New York Times,* but as to the underlying issue—the right of the press to be free from *prior* restraints on publication—those

cases form the backdrop against which we must decide this case.

VI

We turn now to the record in this case to determine whether, as Learned Hand put it, "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *United States* v. *Dennis,* 183 F. 2d 201, 212 (CA2 1950), aff'd, 341 U. S. 494 (1951); see also L. Hand, The Bill of Rights 58–61 (1958). To do so, we must examine the evidence before the trial judge when the order was entered to determine (a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger. The precise terms of the restraining order are also important. We must then consider whether the record supports the entry of a prior restraint on publication, one of the most extraordinary remedies known to our jurisprudence.

A

In assessing the probable extent of publicity, the trial judge had before him newspapers demonstrating that the crime had already drawn intensive news coverage, and the testimony of the County Judge, who had entered the initial restraining order based on the local and national attention the case had attracted. The District Judge was required to assess the probable publicity that would be given these shocking crimes prior to the time a jury was selected and sequestered. He then had to examine the probable nature of the publicity and determine how it would affect prospective jurors.

Our review of the pretrial record persuades us that the trial judge was justified in concluding that there would

be intense and pervasive pretrial publicity concerning this case. He could also reasonably conclude, based on common human experience, that publicity might impair the defendant's right to a fair trial. He did not purport to say more, for he found only "a clear and present danger that pre-trial publicity *could* impinge upon the defendant's right to a fair trial." (Emphasis added.) His conclusion as to the impact of such publicity on prospective jurors was of necessity speculative, dealing as he was with factors unknown and unknowable.

B

We find little in the record that goes to another aspect of our task, determining whether measures short of an order restraining all publication would have insured the defendant a fair trial. Although the entry of the order might be read as a judicial determination that other measures would not suffice, the trial court made no express findings to that effect; the Nebraska Supreme Court referred to the issue only by implication. See 194 Neb., at 797–798, 236 N. W. 2d, at 803.

Most of the alternatives to prior restraint of publication in these circumstances were discussed with obvious approval in *Sheppard* v. *Maxwell,* 384 U. S., at 357–362: (a) change of trial venue to a place less exposed to the intense publicity that seemed imminent in Lincoln County;[7] (b) postponement of the trial to allow

[7] The respondent and intervenors argue here that a change of venue would not have helped, since Nebraska law permits a change only to adjacent counties, which had been as exposed to pretrial publicity in this case as Lincoln County. We have held that state laws restricting venue must on occasion yield to the constitutional requirement that the State afford a fair trial. *Groppi* v. *Wisconsin,* 400 U. S. 505 (1971). We note also that the combined population of Lincoln County and the adjacent counties is over 80,000, providing a substantial pool of prospective jurors.

public attention to subside; (c) searching questioning of prospective jurors, as Mr. Chief Justice Marshall used in the *Burr* case, to screen out those with fixed opinions as to guilt or innocence; (d) the use of emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court. Sequestration of jurors is, of course, always available. Although that measure insulates jurors only after they are sworn, it also enhances the likelihood of dissipating the impact of pretrial publicity and emphasizes the elements of the jurors' oaths.

This Court has outlined other measures short of prior restraints on publication tending to blunt the impact of pretrial publicity. See *Sheppard* v. *Maxwell, supra,* at 361–362. Professional studies have filled out these suggestions, recommending that trial courts in appropriate cases limit what the contending lawyers, the police, and witnesses may say to anyone. See American Bar Association Project on Standards for Criminal Justice, Fair Trial and Free Press 2–15 (App. Draft 1968).[8]

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[8] Closing of pretrial proceedings with the consent of the defendant when required is also recommended in guidelines that have emerged from various studies. At oral argument petitioners' counsel asserted that judicially imposed restraints on lawyers and others would be subject to challenge as interfering with press rights to news sources. Tr. of Oral Arg. 7–8. See, *e. g., Chicago Council of Lawyers* v. *Bauer,* 522 F. 2d 242 (CA7 1975), cert. denied *sub nom. Cunningham* v. *Chicago Council of Lawyers, post,* p. 912. We are not now confronted with such issues.

We note that in making its proposals, the American Bar Association recommended strongly against resort to direct restraints on the press to prohibit publication. American Bar Association Project on Standards for Criminal Justice, Fair Trial and Free Press 68–73 (App. Draft 1968). Other groups have reached similar conclusions. See Report of the Judicial Conference Committee on the Operation of the Jury System, "Free Press-Fair Trial" Issue, 45 F. R. D. 391, 401–403 (1968); Special Committee on

We have noted earlier that pretrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial. The decided cases "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process." *Murphy* v. *Florida,* 421 U. S., at 799. Appellate evaluations as to the impact of publicity take into account what other measures were used to mitigate the adverse effects of publicity. The more difficult prospective or predictive assessment that a trial judge must make also calls for a judgment as to whether other precautionary steps will suffice.

We have therefore examined this record to determine the probable efficacy of the measures short of prior restraint on the press and speech. There is no finding that alternative measures would not have protected Simants' rights, and the Nebraska Supreme Court did no more than imply that such measures might not be adequate. Moreover, the record is lacking in evidence to support such a finding.

C

We must also assess the probable efficacy of prior restraint on publication as a workable method of protecting Simants' right to a fair trial, and we cannot ignore the reality of the problems of managing and enforcing pretrial restraining orders. The territorial jurisdiction of the issuing court is limited by concepts of sovereignty, see, *e. g., Hanson* v. *Denckla,* 357 U. S. 235 (1958); *Pennoyer* v. *Neff,* 95 U. S. 714 (1878). The need for *in*

Radio, Television, and the Administration of Justice of the Association of the Bar of the City of New York, Freedom of the Press and Fair Trial 10–11 (1967).

personam jurisdiction also presents an obstacle to a restraining order that applies to publication at large as distinguished from restraining publication within a given jurisdiction.[9] See generally American Bar Association, Legal Advisory Committee on Fair Trial and Free Press, Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press (Rev. Draft, Nov. 1975); Rendleman, Free Press-Fair Trial: Review of Silence Orders, 52 N. C. L. Rev. 127, 149–155 (1973).[10]

The Nebraska Supreme Court narrowed the scope of the restrictive order, and its opinion reflects awareness of the tensions between the need to protect the accused as fully as possible and the need to restrict publication as little as possible. The dilemma posed underscores how

[9] Here, for example, the Nebraska Supreme Court decided that the District Court had no jurisdiction of the petitioners except by virtue of their voluntary submission to the jurisdiction of that court when they moved to intervene. Except for the intervention which placed them within reach of the court, the Nebraska Supreme Court conceded, the petitioners "could have ignored the [restraining] order . . . ." *State* v. *Simants,* 194 Neb. 783, 795, 236 N. W. 2d 794, 802 (1975).

[10] Assuming, *arguendo,* that these problems are within reach of legislative enactment, or that some application of evolving concepts of long-arm jurisdiction would solve the problems of personal jurisdiction, even a cursory examination suggests how awkwardly broad prior restraints on publication, directed not at named parties but at large, would fit into our jurisprudence. The British experience is in sharp contrast for a variety of reasons; Great Britain has a smaller and unitary court system permitting the development of a manageable system of prior restraints by the application of the constructive contempt doctrine. Cf. n. 5, *supra,* at 557; see generally *Maryland* v. *Baltimore Radio Show,* 338 U. S. 912, 921–936 (1950) (App. to opinion of Frankfurter, J., respecting denial of certiorari); Gillmor, Free Press and Fair Trial in English Law, 22 Wash. & Lee L. Rev. 17 (1965). Moreover, any comparison between the two systems must take into account that although England gives a very high place to freedom of the press and speech, its courts are not subject to the explicit strictures of a written constitution.

difficult it is for trial judges to predict what information will in fact undermine the impartiality of jurors, and the difficulty of drafting an order that will effectively keep prejudicial information from prospective jurors. When a restrictive order is sought, a court can anticipate only part of what will develop that may injure the accused. But information not so obviously prejudicial may emerge, and what may properly be published in these "gray zone" circumstances may not violate the restrictive order and yet be prejudicial.

Finally, we note that the events disclosed by the record took place in a community of 850 people. It is reasonable to assume that, without any news accounts being printed or broadcast, rumors would travel swiftly by word of mouth. One can only speculate on the accuracy of such reports, given the generative propensities of rumors; they could well be more damaging than reasonably accurate news accounts. But plainly a whole community cannot be restrained from discussing a subject intimately affecting life within it.

Given these practical problems, it is far from clear that prior restraint on publication would have protected Simants' rights.

D

Finally, another feature of this case leads us to conclude that the restrictive order entered here is not supportable. At the outset the County Court entered a very broad restrictive order, the terms of which are not before us; it then held a preliminary hearing open to the public and the press. There was testimony concerning at least two incriminating statements made by Simants to private persons; the statement—evidently a confession—that he gave to law enforcement officials was also introduced. The State District Court's later order was entered after this public hearing and, as modified by the

Nebraska Supreme Court, enjoined reporting of (1) "[c]onfessions or admissions against interest made by the accused to law enforcement officials"; (2) "[c]onfessions or admissions against interest, oral or written, if any, made by the accused to third parties, excepting any statements, if any, made by the accused to representatives of the news media"; and (3) all "[o]ther information strongly implicative of the accused as the perpetrator of the slayings." 194 Neb., at 801, 236 N. W. 2d, at 805.

To the extent that this order prohibited the reporting of evidence adduced at the open preliminary hearing, it plainly violated settled principles: "[T]here is nothing that proscribes the press from reporting events that transpire in the courtroom." *Sheppard* v. *Maxwell,* 384 U. S., at 362–363. See also *Cox Broadcasting Corp.* v. *Cohn,* 420 U. S. 469 (1975); *Craig* v. *Harney,* 331 U. S. 367 (1947). The County Court could not know that closure of the preliminary hearing was an alternative open to it until the Nebraska Supreme Court so construed state law; but once a public hearing had been held, what transpired there could not be subject to prior restraint.

The third prohibition of the order was defective in another respect as well. As part of a final order, entered after plenary review, this prohibition regarding "implicative" information is too vague and too broad to survive the scrutiny we have given to restraints on First Amendment rights. See, *e. g., Hynes* v. *Mayor of Oradell,* 425 U. S. 610 (1976); *Buckley* v. *Valeo,* 424 U. S. 1, 76–82 (1976); *NAACP* v. *Button,* 371 U. S. 415 (1963). The third phase of the order entered falls outside permissible limits.

E

The record demonstrates, as the Nebraska courts held, that there was indeed a risk that pretrial news accounts,

true or false, would have some adverse impact on the attitudes of those who might be called as jurors. But on the record now before us it is not clear that further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court. We cannot say on this record that alternatives to a prior restraint on petitioners would not have sufficiently mitigated the adverse effects of pretrial publicity so as to make prior restraint unnecessary. Nor can we conclude that the restraining order actually entered would serve its intended purpose. Reasonable minds can have few doubts about the gravity of the evil pretrial publicity can work, but the probability that it would do so here was not demonstrated with the degree of certainty our cases on prior restraint require.

Of necessity our holding is confined to the record before us. But our conclusion is not simply a result of assessing the adequacy of the showing made in this case; it results in part from the problems inherent in meeting the heavy burden of demonstrating, in advance of trial, that without prior restraint a fair trial will be denied. The practical problems of managing and enforcing restrictive orders will always be present. In this sense, the record now before us is illustrative rather than exceptional. It is significant that when this Court has reversed a state conviction because of prejudicial publicity, it has carefully noted that some course of action short of prior restraint would have made a critical difference. See *Sheppard* v. *Maxwell, supra,* at 363; *Estes* v. *Texas,* 381 U. S., at 550–551; *Rideau* v. *Louisiana,* 373 U. S., at 726; *Irvin* v. *Dowd,* 366 U. S., at 728. However difficult it may be, we need not rule out the possibility of showing the kind of threat to fair trial rights that would possess

the requisite degree of certainty to justify restraint. This Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed. See *New York Times Co.* v. *United States,* 403 U. S. 713 (1971); *Organization for a Better Austin* v. *Keefe,* 402 U. S. 415 (1971); *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697 (1931).

Our analysis ends as it began, with a confrontation between prior restraint imposed to protect one vital constitutional guarantee and the explicit command of another that the freedom to speak and publish shall not be abridged. We reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact. We hold that, with respect to the order entered in this case prohibiting reporting or commentary on judicial proceedings held in public, the barriers have not been overcome; to the extent that this order restrained publication of such material, it is clearly invalid. To the extent that it prohibited publication based on information gained from other sources, we conclude that the heavy burden imposed as a condition to securing a prior restraint was not met and the judgment of the Nebraska Supreme Court is therefore

Reversed.

MR. JUSTICE WHITE, concurring.

Technically there is no need to go farther than the Court does to dispose of this case, and I join the Court's opinion. I should add, however, that for the reasons which the Court itself canvasses there is grave doubt in my mind whether orders with respect to the press such as were entered in this case would ever be justifi-

able. It may be the better part of discretion, however, not to announce such a rule in the first case in which the issue has been squarely presented here. Perhaps we should go no further than absolutely necessary until the federal courts, and ourselves, have been exposed to a broader spectrum of cases presenting similar issues. If the recurring result, however, in case after case is to be similar to our judgment today, we should at some point announce a more general rule and avoid the interminable litigation that our failure to do so would necessarily entail.

MR. JUSTICE POWELL, concurring.

Although I join the opinion of the Court, in view of the importance of the case I write to emphasize the unique burden that rests upon the party, whether it be the State or a defendant, who undertakes to show the necessity for prior restraint on pretrial publicity.*

In my judgment a prior restraint properly may issue only when it is shown to be necessary to prevent the dissemination of prejudicial publicity that otherwise poses a high likelihood of preventing, directly and irreparably, the impaneling of a jury meeting the Sixth Amendment requirement of impartiality. This requires a showing that (i) there is a clear threat to the fairness of trial, (ii) such a threat is posed by the actual publicity to be restrained, and (iii) no less restrictive alternatives are available. Notwithstanding such a showing, a restraint may not issue unless it also is shown that previous publicity or publicity from unrestrained sources will not render the restraint inefficacious. The threat to the fair-

*In *Times-Picayune Pub. Corp.* v. *Schulingkamp,* 419 U. S. 1301, 1307 (1974), an in-chambers opinion, I noted that there is a heavy presumption against the constitutional validity of a court order restraining pretrial publicity.

ness of the trial is to be evaluated in the context of Sixth Amendment law on impartiality, and any restraint must comply with the standards of specificity always required in the First Amendment context.

I believe these factors are sufficiently addressed in the Court's opinion to demonstrate beyond question that the prior restraint here was impermissible.

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

The question presented in this case is whether, consistently with the First Amendment, a court may enjoin the press, in advance of publication,[1] from reporting or commenting on information acquired from public court proceedings, public court records, or other sources about pending judicial proceedings. The Nebraska Supreme Court upheld such a direct prior restraint on the press, issued by the judge presiding over a sensational state murder trial, on the ground that there existed a "clear and present danger that pretrial publicity could substantially impair the right of the defendant [in the murder trial] to a trial by an impartial jury unless restraints were imposed." *State* v. *Simants,* 194 Neb. 783, 794, 236 N. W. 2d 794, 802 (1975). The right to a fair trial by a jury of one's peers is unquestionably one of the most precious and sacred safeguards enshrined in the Bill of Rights. I would hold, however, that resort to prior restraints on the freedom of the press is a constitutionally impermissible method for enforcing that right; judges have at their disposal a broad spectrum of devices for ensuring that fundamental fairness is accorded the

[1] In referring to the "press" and to "publication" in this opinion, I of course use those words as terms of art that encompass broadcasting by the electronic media as well.

accused without necessitating so drastic an incursion on the equally fundamental and salutary constitutional mandate that discussion of public affairs in a free society cannot depend on the preliminary grace of judicial censors.

I

The history of the current litigation highlights many of the dangers inherent in allowing any prior restraint on press reporting and commentary concerning the operations of the criminal justice system.

This action arose out of events surrounding the prosecution of respondent-intervenor Simants for the premeditated mass murder of the six members of the Kellie family in Sutherland, Neb., on October 18, 1975. Shortly after the crimes occurred, the community of 850 was alerted by a special announcement over the local television station. Residents were requested by the police to stay off the streets and exercise caution as to whom they admitted into their houses, and rumors quickly spread that a sniper was loose in Sutherland. When an investigation implicated Simants as a suspect, his name and description were provided to the press and then disseminated to the public.

Simants was apprehended on the morning of October 19, charged with six counts of premeditated murder, and arraigned before the County Court of Lincoln County, Neb. Because several journalists were in attendance and "proof concerning bail . . . would be prejudicial to the rights of the defendant to later obtain a fair trial," App. 7, a portion of the bail hearing was closed, over Simants' objection, pursuant to the request of the Lincoln County Attorney. At the hearing, counsel was appointed for Simants, bail was denied, and October 22 was set as the date for a preliminary hearing to determine whether Simants should be bound over for trial in

the District Court of Lincoln County, Neb. News of Simants' apprehension, which was broadcast over radio and television and reported in the press, relieved much of the tension that had built up during the night. During the period from October 19 until the first restrictive order was entered three days later, representatives of the press made accurate factual reports of the events that transpired, including reports of incriminating statements made by Simants to various relatives.

On the evening of October 21, the prosecution filed a motion that the County Court issue a restrictive order enjoining the press from reporting significant aspects of the case. The motion, filed without further evidentiary support, stated:

> "The State of Nebraska hereby represents unto the Court that *by reason of the nature of the above-captioned case,* there has been, and no doubt there will continue to be, mass coverage by news media not only locally but nationally as well; that a preliminary hearing on the charges has been set to commence at 9:00 a. m. on October 22, 1975; and there is *a reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury* and tend to prevent a fair trial should the defendant be bound over to trial in the District Court if testimony of witnesses at the preliminary hearing is reported to the public.
>
> "Wherefore the State of Nebraska moves that the Court forthwith enter a Restrictive Order setting forth the matters that may or may not be publicly reported or disclosed to the public with reference to said case or with reference to the preliminary hearing thereon, and to whom said order shall apply." App. 8. (Emphasis supplied.)

Half an hour later, the County Court Judge heard

argument on the prosecution motion. Defense counsel joined in urging imposition of a restrictive order, and further moved that the preliminary hearing be closed to both the press and the public. No representatives of the media were notified of or called to testify at the hearing, and no evidence of any kind was introduced.

On October 22, when the autopsy results were completed, the County Attorney filed an amended complaint charging that the six premeditated murders had been committed by Simants in conjunction with the perpetration of or attempt to perpetrate a sexual assault. About the same time, at the commencement of the preliminary hearing, the County Court entered a restrictive order premised on its finding that there was "a reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury in the event that the defendant is bound over to the District Court for trial . . . ." Amended Pet. for Cert. 1a. Accordingly, the County Court ordered that all parties to the case, attorneys, court personnel, public officials, law enforcement officials, witnesses, and "any other person present in Court" during the preliminary hearing, were not to "release or authorize the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced during the preliminary hearing." *Id.*, at 2a. The court further ordered that no law enforcement official, public officer, attorney, witness, or "news media" "disseminate any information concerning this matter apart from the preliminary hearing other than as set forth in the Nebraska Bar-Press Guidelines for Disclosure and Reporting of Information Relating to Imminent or Pending Criminal Litigation." *Ibid.*[2] The order was to

[2] A copy of the "Nebraska Bar-Press Guidelines," ostensibly a voluntary code formulated by representatives of the media and the

remain in effect "until modified or rescinded by a higher court or until the defendant is ordered released from these charges." *Id.*, at 3a. The court also denied the defense request to close the preliminary hearing,[3] and an open hearing was then held, at which time various witnesses testified, disclosing significant factual information concerning the events surrounding the alleged crimes. Upon completion of the hearing, the County Court bound the defendant over for trial in the District Court, since it found that the offenses charged in the indictment had been committed, and that there was probable cause to believe that Simants had committed them.

The next day, petitioners—Nebraska newspaper publishers, broadcasters, journalists, and media associations,

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bar, was attached to the order. The Guidelines, which are similar to voluntary codes adhered to by the press in several States, are attached as an appendix to this opinion.

Excepted from the scope of the County Court's order were: (1) factual statements of the accused's name, age, residence, occupation, and family status; (2) the circumstances of the arrest (time and place, identity of the arresting and investigating officers and agencies, and the length of the investigation); (3) the nature, substance, and text of the charge; (4) quotations from, or any reference without comment to, public records or communications heretofore disseminated to the public; (5) the scheduling and result of any stage of the judicial proceeding held in open court; (6) a request for assistance in obtaining evidence; and (7) a request for assistance in obtaining the names of possible witnesses. The court also ordered that a copy of the preliminary hearing proceedings was to be made available to the public at the expiration of the order.

[3] The court apparently believed that a public preliminary hearing was required by state law. The Nebraska Supreme Court subsequently held that the pertinent state statute did not require that pretrial hearings be open to the public. Both petitioners and the State of Nebraska agree that the question whether preliminary hearings may be closed to the public consistently with the "Public Trial" Clause of the Sixth Amendment is not before us, and it is therefore one on which I would express no views.

and national newswire services that report from and to Nebraska—sought leave from the District Court to intervene in the criminal case and vacation of the County Court's restrictive order as repugnant to the First and Sixth Amendments to the United States Constitution as well as relevant provisions of the Nebraska Constitution. Simants' attorney moved that the order be continued and that future pretrial hearings in the case be closed. The District Court then held an evidentiary hearing, after which it denied the motion to close any hearings, granted petitioners' motion to intervene, and adopted on an interim basis the County Court's restrictive order. The only testimony adduced at the hearing with respect to the need for the restrictive order was that of the County Court Judge, who stated that he had premised his order on his awareness of media publicity, "[c]onversation around the courthouse," and "statements of counsel." App. 64, 65. In addition, several newspaper clippings pertaining to the case were introduced as exhibits before the District Court.

Without any further hearings, the District Court on October 27 terminated the County Court's order and substituted its own. The court found that "*because of the nature of the crimes charged* in the complaint . . . there is a *clear and present danger* that pre-trial publicity *could impinge upon the defendant's right to a fair trial* and that an order setting forth the limitations of pre-trial publicity is appropriate . . . ." Amended Pet. for Cert. 9a (emphasis supplied). Respondent Stuart, the District Court Judge, then "adopted" as his order the Nebraska Bar-Press Guidelines as "clarified" by him in certain respects.[4]

[4] The Nebraska Bar-Press Guidelines, see appendix to this opinion, were "clarified" as follows, Amended Pet. for Cert. 10a–11a: "1. It is hereby stated the trial of the case commences when a

On October 31, petitioners sought a stay of the order from the District Court and immediate relief from the Nebraska Supreme Court by way of mandamus, stay, or expedited appeal. When neither the District Court nor the Nebraska Supreme Court acted on these mo-

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jury is empaneled to try the case, and that all reporting prior to that event, specifically including the preliminary hearing is 'pre-trial' publicity.

"2. It would appear that defendant has made a statement or confession to law enforcement officials and it is inappropriate to report the existence of such statement or the contents of it.

"3. It appears that the defendant may have made statements against interest to James Robert Boggs, Amos Simants and Grace Simants, and may have left a note in the William Boggs residence, and that the nature of such statements, or the fact that such statements were made, or the nature of the testimony of these witnesses with reference to such statements in the preliminary hearing will not be reported.

"4. The non-technical aspects of the testimony of Dr. Miles Foster may be reported within the guidelines and at the careful discretion of the press. The testimony of this witness dealing with technical subjects, tests or investigations performed or the results thereof, or his opinions or conclusions as a result of such tests or investigations will not be reported.

"5. The general physical facts found at the scene of the crime may be reported within the guidelines and at the careful discretion of the press. However, the identity of the person or persons allegedly sexually assaulted or the details of any alleged assault by the defendant will not be reported.

"6. The exact nature of the limitations of publicity as entered by this order will not be reported. That is to say, the fact of the entering of this order limiting pre-trial publicity and the adoption of the Bar-Press Guidelines may be reported, but specific reference to confessions, statements against interest, witnesses or type of evidence to which this order will apply will not be reported."

An additional portion of the order relating to the press' accommodations in the courtroom and the taking of photographs in the courthouse was not contested below and is not before this Court. The full order, including its references to confessions, was read in open court.

tions, petitioners on November 5 applied to MR. JUSTICE BLACKMUN, as Circuit Justice, for a stay of the District Court's order. Five days later, the Nebraska Supreme Court issued a *per curiam* statement that to avoid being put in the position of "exercising parallel jurisdiction with the Supreme Court of the United States," it would continue the matter until this Court "made known whether or not it will accept jurisdiction in the matter." *Id.*, at 19a–20a.

On November 13, MR. JUSTICE BLACKMUN filed an in-chambers opinion in which he declined to act on the stay "at least for the immediate present." 423 U. S. 1319, 1326. He observed: "[I]f no action on the [petitioners'] application to the Supreme Court of Nebraska could be anticipated before December 1, [as was indicated by a communication from that court's clerk before the court issued the *per curiam* statement,] . . . a definitive decision by the State's highest court on an issue of profound constitutional implications, demanding immediate resolution, would be delayed for a period so long that the very day-to-day duration of that delay would constitute and aggravate a deprival of such constitutional rights, if any, that the [petitioners] possess and may properly assert. Under those circumstances, I would not hesitate promptly to act." *Id.*, at 1324–1325. However, since the Nebraska Supreme Court had indicated in its *per curiam* statement that it was only declining to act because of uncertainty as to what this Court would do, and since it was deemed appropriate for the state court to pass initially on the validity of the restrictive order, MR. JUSTICE BLACKMUN, "without prejudice to the [petitioners] to reapply to me should prompt action not be forthcoming," *id.*, at 1326, denied the stay "[o]n the expectation . . . that the Supreme Court of Nebraska, forthwith and without delay will entertain the

[petitioners'] application made to it, and will promptly decide it in the full consciousness that 'time is of the essence.'" *Id.*, at 1325.

When, on November 18, the Supreme Court of Nebraska set November 25 as the date to hear arguments on petitioners' motions, petitioners reapplied to MR. JUSTICE BLACKMUN for relief. On November 20, MR. JUSTICE BLACKMUN, concluding that each passing day constituted an irreparable infringement on First Amendment values and that the state courts had delayed adjudication of petitioners' claims beyond "tolerable limits," 423 U. S. 1327, 1329, granted a partial stay of the District Court's order. First, the "wholesale incorporation" of the Nebraska Bar-Press Guidelines was stayed on the ground that they "constitute a 'voluntary code' which was not intended to be mandatory" and which was "sufficiently riddled with vague and indefinite admonitions—understandably so in view of the basic nature of 'guidelines,'" that they did "not provide the substance of a permissible court order in the First Amendment area." *Id.*, at 1330, 1331. However, the state courts could "reimpose particular provisions included in the Guidelines so long as they are deemed pertinent to the facts of this particular case and so long as they are adequately specific and in keeping with the remainder of this order." *Id.*, at 1331. Second, the portion of the District Court order prohibiting reporting of the details of the crimes, the identities of the victims, and the pathologist's testimony at the preliminary hearing was stayed because there was "[n]o persuasive justification" for the restraint; such "facts in themselves do not implicate a particular putative defendant," *ibid.*, and "until the bare facts concerning the crimes are related to a particular accused, . . . their being reported in the media [does not appear to] irreparably infringe the accused's right

to a fair trial of the issue as to whether he was the one who committed the crimes." *Id.*, at 1332. Third, believing that prior restraints of this kind "are not necessarily and in all cases invalid," MR. JUSTICE BLACKMUN concluded that "certain facts that strongly implicate an accused may be restrained from publication by the media prior to his trial. A confession or statement against interest is the paradigm," *id.*, at 1332–1333, and other such facts would include "those associated with the circumstances of his arrest," those "that are not necessarily implicative, but that are highly prejudicial, as, for example, facts associated with the accused's criminal record, if he has one," and "statements as to the accused's guilt by those associated with the prosecution." *Id.*, at 1333.[5] Finally, the restrictive order's limitation on disclosure of the nature of the limitations themselves was stayed "to the same extent" as the limitations. *Ibid.*[6]

The following day petitioners filed a motion that the Court vacate MR. JUSTICE BLACKMUN's order to the extent it permitted the imposition of any prior restraint on publication. Meanwhile, on November 25, the Supreme Court of Nebraska heard oral argument as sched-

[5] MR. JUSTICE BLACKMUN's view of the burden of proof for imposing such restraints was as follows: "The accused, and the prosecution if it joins him, bears the burden of showing that publicizing particular facts will irreparably impair the ability of those exposed to them to reach an independent and impartial judgment as to guilt." 423 U. S., at 1333.

[6] The in-chambers opinion also stayed any prohibition concerning reporting of the pending application for relief in the Supreme Court of Nebraska, but permitted a prohibition of reporting of the two in-chambers opinions to the extent they contained "facts properly suppressed." *Id.*, at 1334. Nothing in the opinion was to be "deemed as barring what the District Judge may impose by way of restriction on what the parties and officers of the court may say to any representative of the media." *Ibid.*

uled, and on December 1 filed a *per curiam* opinion.[7] Initially, the court held that it was improper for petitioners or any other third party to intervene in a criminal case, and that the appeal from that case must therefore be denied. However, the court concluded that it had judisdiction over petitioners' mandamus action against respondent Stuart, and that respondents Simants and State of Nebraska had properly intervened in that action.[8] Addressing the merits of the prior restraint issued by the District Court, the Nebraska Supreme Court acknowledged that this Court "has not yet had occasion to speak definitively where a clash between these two preferred rights [the First Amendment freedom of speech and of the press and the Sixth Amendment right to trial by an impartial jury] was sought to be accommodated by a prior restraint on freedom of the press." 194 Neb., at 791, 236 N. W. 2d, at 800. However, relying on dictum in *Branzburg* v. *Hayes,* 408 U. S. 665 (1972),[9] and our statement in *New York Times Co.* v. *United States,* 403 U. S. 713 (1971), that a prior restraint on the

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[7] Two justices of the Supreme Court of Nebraska dissented on jurisdictional grounds similar to those that formed the predicate for that court's earlier *per curiam* statement, and two other justices who agreed with those jurisdictional claims nevertheless joined the *per curiam* to avoid a procedural deadlock.

[8] These rulings resulted in the paradoxical situation that "[petitioners] could have ignored the [County Court's] order" because that court had not obtained personal jurisdiction over them and because "courts have no general power in any kind of case to enjoin or restrain 'everybody,' " *State* v. *Simants,* 194 Neb. 783, 795, 236 N. W. 2d 794, 802 (1975). However, because they had improperly intervened in the criminal case (from which they could not appeal), a prior restraint could issue against them. Indeed, the court noted that the prior restraint "applies only to [petitioners]" and not to any other organs of the media. *Id.,* at 788, 236 N. W. 2d, at 798.

[9] See n. 21, *infra.*

media bears " 'a heavy presumption against its constitutional validity,' " *id.*, at 714, the court discerned an "implication" "that if there is only a presumption of unconstitutionality then there must be some circumstances under which prior restraints may be constitutional for otherwise there is no need for a mere presumption." 194 Neb., at 793, 236 N. W. 2d, at 801. The court then concluded that there was evidence "to overcome the heavy presumption" in that the State's obligation to accord Simants an impartial jury trial "may be impaired" by pretrial publicity and that pretrial publicity "might make it difficult or impossible" to accord Simants a fair trial. *Id.*, at 794, 797, 236 N. W. 2d, at 802, 803.[10] Accordingly, the court held, *id.*, at 801, 236 N. W. 2d, at 805:

> "[T]he order of the District Court of October 27, 1975, is void insofar as it incorporates the voluntary guidelines and in certain other respects in that it impinges too greatly upon freedom of the press. The guidelines were not intended to be contractual and cannot be enforced as if they were.
>
> "The order of the District Court of October 27, 1975, is vacated and is modified and reinstated in the

[10] The evidence relied on by the Nebraska Supreme Court included the following: The fact that before entry of the restrictive order, certain newspapers had reported information "which, if true, tended clearly to connect the accused with the slayings," 194 Neb., at 796, 236 N. W. 2d, at 802; the fact that "counsel for the media stated that it is already doubtful that an unbiased jury can be found to hear the Simants case in Lincoln County," *id.*, at 797, 236 N. W. 2d, at 803; the fact that Nebraska law required the trial to transpire within six months of the date the information was filed, *ibid.*; the relatively small population of the counties to which Nebraska law would permit a change of venue, *id.*, at 797–798, 236 N. W. 2d, at 803; the "mere heinousness or enormity of a crime"; and "the trial court's own knowledge of the surrounding circumstances," *id.*, at 798, 236 N. W. 2d, at 803.

following respects: It shall be effective only as to events which have occurred prior to the filing of this opinion, and only as it applies to the relators herein, and only insofar as it restricts publication of the existence or content of the following, if any such there be: (1) Confessions or admissions against interest made by the accused to law enforcement officials. (2) Confessions or admissions against interest, oral or written, if any, made by the accused to third parties, excepting any statements, if any, made by the accused to representatives of the news media. (3) Other information strongly implicative of the accused as the perpetrator of the slayings." [11]

On December 4 petitioners applied to this Court for a stay of that order and moved that their previously filed papers be treated as a petition for a writ of certiorari. On December 8, we granted the latter motion and deferred consideration of the petition for a writ and application for a stay pending responses from respondents on the close of business the following day. 423 U. S. 1011.[12] On December 12, we granted the petition for a writ of certiorari, denied the motion to expedite, and denied the application for a stay. 423 U. S. 1027.[13]

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[11] The Nebraska Supreme Court also "adopted" American Bar Association Project on Standards for Criminal Justice, Fair Trial and Free Press § 3.1, Pretrial Hearings (App. Draft 1968), which provides for exclusion of the press and public from pretrial hearings under certain circumstances, and remanded the case to the District Court to consider any applications to close future pretrial proceedings under that standard. The constitutionality of closing pretrial proceedings under specific conditions is not before us, and is a question on which I would intimate no views.

[12] JUSTICES STEWART and MARSHALL and I noted that we would have granted the application for a stay.

[13] JUSTICES STEWART and MARSHALL and I dissented from denial of the motions to expedite and to grant a stay; MR. JUS-

II

A

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." The right to a jury trial, applicable to the States through the Due Process Clause of the Fourteenth Amendment, see, *e. g., Duncan* v. *Louisiana,* 391 U. S. 145 (1968), is essentially

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TICE WHITE dissented from the latter motion to the extent the state courts had prohibited the reporting of information publicly disclosed during the preliminary hearing in the underlying criminal proceeding.

Although the order of the Nebraska Supreme Court expired when the jury in *State* v. *Simants* was impaneled and sequestered on January 7, 1976, this case is not moot. This is a paradigmatic situation of "short term orders, capable of repetition, yet evading review." *E. g., Southern Pacific Terminal Co.* v. *ICC,* 219 U. S. 498, 515 (1911). It is evident that the decision of the Nebraska Supreme Court will subject petitioners to future restrictive orders with respect to pretrial publicity, and that the validity of these orders, which typically expire when the jury is sequestered, generally cannot be fully litigated within that period of time. See, *e. g., Weinstein* v. *Bradford,* 423 U. S. 147, 149 (1975). See also *Carroll* v. *Princess Anne,* 393 U. S. 175, 178–179 (1968).

Counsel informs us that Simants has subsequently been tried, convicted, and sentenced to death, and that his appeal is currently pending in the Nebraska Supreme Court. Simants' defense rested on a plea of not guilty by reason of insanity, and all of the information which remained unreported during the pretrial period was ultimately received in evidence. The trial judge also declined to close further pretrial hearings, granted Simants' requests to sequester the jury and conduct *voir dire* with no more than four prospective jurors present at one time, and denied Simants' request for a change of venue. A *Jackson* v. *Denno* (378 U. S. 368 (1964)) hearing and the first day of *voir dire* were also closed to the public. Petitioners have challenged the latter rulings, and that litigation is still pending in the state courts.

the right to a "fair trial by a panel of impartial, 'indifferent' jurors," *Irvin* v. *Dowd,* 366 U. S. 717, 722 (1961), jurors who are " 'indifferent as [they] stand unsworn.' " *Reynolds* v. *United States,* 98 U. S. 145, 154 (1879), quoting E. Coke, A Commentary upon Littleton 155*b* (19th ed. 1832). See also, *e. g., Ristaino* v. *Ross,* 424 U. S. 589, 597 n. 9 (1976); *Rideau* v. *Louisiana,* 373 U. S. 723 (1963); *Irvin* v. *Dowd, supra,* at 722; *In re Murchison,* 349 U. S. 133, 136 (1955); *In re Oliver,* 333 U. S. 257 (1948). So basic to our jurisprudence is the right to a fair trial that it has been called "the most fundamental of all freedoms." *Estes* v. *Texas,* 381 U. S. 532, 540 (1965). It is a right essential to the preservation and enjoyment of all other rights, providing a necessary means of safeguarding personal liberties against government oppression. See, *e. g., Rideau* v. *Louisiana, supra,* at 726–727. See generally *Duncan* v. *Louisiana, supra,* at 149–158.

The First Amendment to the United States Constitution, however, secures rights equally fundamental in our jurisprudence, and its ringing proclamation that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." has been both applied through the Fourteenth Amendment to invalidate restraints on freedom of the press imposed by the States, see, *e. g., Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S. 241 (1974); *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964); *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697 (1931), and interpreted to interdict such restraints imposed by the courts, see, *e. g., New York Times Co.* v. *United States,* 403 U. S. 713 (1971); *Craig* v. *Harney,* 331 U. S. 367 (1947); *Bridges* v. *California,* 314 U. S. 252 (1941). Indeed, it has been correctly perceived that a "responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. . . . The

press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Sheppard* v. *Maxwell,* 384 U. S. 333, 350 (1966). See also, *e. g., Cox Broadcasting Corp.* v. *Cohn,* 420 U. S. 469, 491–496 (1975). Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability. See, *e. g., In re Oliver, supra,* at 270–271; L. Brandeis, Other People's Money 62 (1933) ("Sunlight is said to be the best of disinfectants; electric light the most efficient policeman").

No one can seriously doubt, however, that uninhibited prejudicial pretrial publicity may destroy the fairness of a criminal trial, see, *e. g., Sheppard* v. *Maxwell, supra,* and the past decade has witnessed substantial debate, colloquially known as the Free Press/Fair Trial controversy, concerning this interface of First and Sixth Amendment rights. In effect, we are now told by respondents that the two rights can no longer coexist when the press possesses and seeks to publish "confessions or admissions against interest" and other information "strongly implicative" [14] of a criminal defendant as the

[14] The precise scope of these terms is not, of course, self-evident. Almost any statement may be an "admission against interest" if, for

perpetrator of a crime, and that one or the other right must therefore be subordinated. I disagree. Settled case law concerning the impropriety and constitutional invalidity of prior restraints on the press compels the conclusion that there can be no prohibition on the publication by the press of any information pertaining to pending judicial proceedings or the operation of the criminal justice system, no matter how shabby the means by which the information is obtained.[15] This does not imply, however, any subordination of Sixth Amendment rights, for an accused's right to a fair trial may be adequately assured through methods that do not infringe First Amendment values.

B

"[I]t has been generally, if not universally, considered that it is the chief purpose of the [First Amendment's] guaranty to prevent previous restraints upon publica-

example, it can be shown to be false and thus destructive of the accused's credibility. This would even be true with respect to exculpatory statements made by an accused, such as those relating to alleged alibi defenses. Similarly, there is considerable vagueness in the phrase "strongly implicative" of the accused's guilt. The Nebraska Supreme Court did not elaborate on its meaning, and counsel for the State suggests it only covers the existence of the accused's prior criminal record, if any. Tr. of Oral Arg. 54. Others might view the phrase considerably more expansively. See *supra,* at 581; cf. 194 Neb., at 789–790, 236 N. W. 2d, at 799. Indeed, even the fact the accused was indicted might be viewed as "strongly implicative" of his guilt by reporters not schooled in the law, and the threat of contempt for transgression of such directives would thus tend to self-censorship even as to materials not intended to be covered by the restrictive order.

[15] Of course, even if the press cannot be enjoined from reporting certain information, that does not necessarily immunize it from civil liability for libel or invasion of privacy or from criminal liability for transgressions of general criminal laws during the course of obtaining that information.

tion." *Near* v. *Minnesota ex rel. Olson,* 283 U. S., at 713. See also, *e. g., id.,* at 716–717; *Patterson* v. *Colorado ex rel. Attorney General,* 205 U. S. 454, 462 (1907); *Grosjean* v. *American Press Co.,* 297 U. S. 233, 249 (1936).[16] Prior restraints are "the essence of censorship," *Near* v. *Minnesota ex rel. Olson, supra,* at 713, and "[o]ur distaste for censorship—reflecting the natural distaste of a free people—is deep-written in our law." *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U. S. 546, 553 (1975). The First Amendment thus accords greater protection against prior restraints than it does against subsequent punishment for a particular speech, see, *e. g., Carroll* v. *Princess Anne,* 393 U. S. 175, 180–181 (1968); *Near* v. *Minnesota ex rel. Olson, supra;* "a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of free-wheeling censorship are formidable." *Southeastern Promotions, Ltd.* v. *Conrad, supra,* at 559. A commentator has cogently summarized many of the reasons for this deep-seated American hostility to prior restraints:

> "A system of prior restraint is in many ways more inhibiting than a system of subsequent punishment: It is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place; suppression by a stroke of the pen is more likely to be applied than suppression through a criminal process; the procedures

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[16] The only criticism of this statement is that it does not embrace all of the protection accorded freedom of speech and of the press by the First Amendment. See, *e. g., Near* v. *Minnesota ex rel. Olson,* 283 U. S., at 714–715.

do not require attention to the safeguards of the criminal process; the system allows less opportunity for public appraisal and criticism; the dynamics of the system drive toward excesses, as the history of all censorship shows." T. Emerson, The System of Freedom of Expression 506 (1970).[17]

Respondents correctly contend that "the [First Amendment] protection even as to previous restraint is not absolutely unlimited." *Near* v. *Minnesota ex rel. Olson, supra,* at 716. However, the exceptions to the rule have been confined to "exceptional cases." *Ibid.* The Court in *Near,* the first case in which we were faced with a prior restraint against the press, delimited three such possible exceptional circumstances. The first two exceptions were that "the primary requirements of decency may be enforced against obscene publications," and that "[t]he security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government [for] [t]he constitutional guaranty of free speech does not 'protect a man from an injunction against uttering words that may have all the effect of force. . . .' " *Ibid.* These exceptions have since come to be interpreted as situations in which the "speech" involved is not encompassed within the meaning of the First Amendment. See, *e. g., Roth* v. *United States,* 354 U. S. 476, 481 (1957); *Miller* v. *California,* 413 U. S. 15 (1973); *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942). See also *New York Times Co.* v. *United States,* 403 U. S., at 726 n. (BRENNAN, J., concurring); *id.,* at 731 n. 1 (WHITE, J., concurring).

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[17] Thus the First Amendment constitutes a direct repudiation of the British system of licensing. See, *e. g., Near* v. *Minnesota ex rel. Olson, supra,* at 713–714; *Grosjean* v. *American Press Co.,* 297 U. S. 233, 245–250 (1936); *Bridges* v. *California,* 314 U. S. 252, 263–264 (1941); *Wood* v. *Georgia,* 370 U. S. 375, 384, and n. 5 (1962).

And even in these situations, adequate and timely procedures are mandated to protect against any restraint of speech that does come within the ambit of the First Amendment. See, *e. g., Southeastern Promotions, Ltd.* v. *Conrad, supra; United States* v. *Thirty-seven Photographs,* 402 U. S. 363 (1971); *Freedman* v. *Maryland,* 380 U. S. 51 (1965); *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58 (1963); *Speiser* v. *Randall,* 357 U. S. 513 (1958); *Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436 (1957). Thus, only the third category in *Near* contemplated the possibility that speech meriting and entitled to constitutional protection might nevertheless be suppressed before publication in the interest of some overriding countervailing interest:

> " 'When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.' *Schenck* v. *United States,* 249 U. S. 47, 52. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." 283 U. S., at 716.

Even this third category, however, has only been adverted to in dictum and has never served as the basis for actually upholding a prior restraint against the publication of constitutionally protected materials. In *New York Times Co.* v. *United States, supra,* we specifically addressed the scope of the "military security" exception alluded to in *Near* and held that there could be no prior restraint on publication of the "Pentagon Papers" despite the fact that a majority of the Court believed that release of the documents, which were

classified "Top Secret-Sensitive" and which were obtained surreptitiously, would be harmful to the Nation and might even be prosecuted after publication as a violation of various espionage statutes. To be sure, our brief *per curiam* declared that "'[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity,'" *id.*, at 714, quoting *Bantam Books, Inc.* v. *Sullivan, supra,* at 70, and that the "Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.'" 403 U. S., at 714, quoting *Organization for a Better Austin* v. *Keefe,* 402 U. S. 415, 419 (1971). This does not mean, as the Nebraska Supreme Court assumed,[18] that prior restraints can be justified on an *ad hoc* balancing approach that concludes that the "presumption" must be overcome in light of some perceived "justification." Rather, this language refers to the fact that, as a matter of procedural safeguards and burden of proof, prior restraints even within a recognized exception to the rule against prior restraints will be extremely difficult to justify; but as an initial matter, the purpose for which a prior restraint is sought to be imposed "must fit within one of the narrowly defined exceptions to the prohibition against prior restraints." *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U. S., at 559; see also, *e. g., id.,* at 555; *Pittsburgh Press Co.* v. *Human Rel. Comm'n,* 413 U. S. 376, 382 (1973); *Organization for a Better Austin* v. *Keefe, supra,* at 419–420; cf., *e. g., Healy* v. *James,* 408 U. S. 169 (1972); *Freedman* v. *Maryland,* 380 U. S., at 58–59. Indeed, two Justices in *New York Times* apparently controverted the existence of even a limited "military security" exception to the rule against prior restraints on the publication of otherwise protected material, see 403 U. S.,

[18] See n. 33, *infra; supra,* at 582–583.

at 714 (Black, J., concurring); *id.*, at 720 (Douglas, J., concurring). And a majority of the other Justices who expressed their views on the merits made it clear that they would take cognizance only of a "single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden." *Id.*, at 726 (BRENNAN, J., concurring). Although variously expressed, it was evident that even the exception was to be construed very, very narrowly: when disclosure "will *surely result in direct, immediate, and irreparable damage* to our Nation or its people," *id.*, at 730 (STEWART, J., joined by WHITE, J., concurring) (emphasis supplied) or when there is "governmental allegation and proof that publication must *inevitably, directly, and immediately* cause the occurrence of an event kindred to imperiling the safety of a transport already at sea . . . . [But] [i]n no event may mere conclusions be sufficient." *Id.*, at 726–727 (BRENNAN, J., concurring) (emphasis supplied). See also *id.*, at 730–731 (WHITE, J., joined by STEWART, J., concurring) ("concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system" is not overcome even by a showing that "revelation of these documents will do substantial damage to public interests").[19] It is thus clear that even within the sole possible exception to the prohibition against prior restraints on publication of constitutionally protected materials,

[19] The rarity of prior restraint cases of any type in this Court's jurisprudence has also been noted. See, *e. g.*, *New York Times Co.* v. *United States*, 403 U. S., at 733; *Near* v. *Minnesota ex rel. Olson*, 283 U. S., at 718 ("The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right").

the obstacles to issuance of such an injunction are formidable. What respondents urge upon us, however, is the creation of a new, potentially pervasive exception to this settled rule of virtually blanket prohibition of prior restraints.[20]

I would decline this invitation. In addition to the almost insuperable presumption against the constitutionality of prior restraints even under a recognized exception, and however laudable the State's motivation for imposing restraints in this case,[21] there are compelling

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[20] The Nebraska Supreme Court denigrated what it termed the "extremist and absolutist" position of petitioners for assuming that "each and every exercise of freedom of the press is equally important" and that "there can be no degree of values for the particular right in which the absolutist has a special interest." 194 Neb., at 799, 800, 236 N. W. 2d, at 804. This seriously mischaracterizes petitioners' contentions, for petitioners do not assert that First Amendment freedoms are paramount in all circumstances. For example, this case does not involve the question of when, if ever, the press may be held in contempt subsequent to publication of certain material, see *Wood* v. *Georgia,* 370 U. S. 375 (1962); *Craig* v. *Harney,* 331 U. S. 367, 376 (1947); *Pennekamp* v. *Florida,* 328 U. S. 331 (1946); *Bridges* v. *California,* 314 U. S. 252 (1941). Nor does it involve the question of damages actions for malicious publication of erroneous material concerning those involved in the criminal justice system, see *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964). See also *Time, Inc.* v. *Firestone,* 424 U. S. 448 (1976); *Gertz* v. *Robert Welch, Inc.,* 418 U. S. 323 (1974). And no contention is made that the press would be immune from criminal liability for crimes committed in acquiring material for publication. However, to the extent petitioners take a forceful stand against the imposition of any prior restraints on publication, their position is anything but "extremist," for the history of the press under our Constitution has been one in which freedom from prior restraint *is* all but absolute.

[21] One can understand the reasons why the four prior restraint orders issued in this case. The crucial importance of preserving Sixth Amendment rights was obviously of uppermost concern, and the question had not been definitively resolved in this Court. Our

reasons for not carving out a new exception to the rule against prior censorship of publication.

1

Much of the information that the Nebraska courts

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language concerning the "presumption" against prior restraints could have been misinterpreted to condone an *ad hoc* balancing approach rather than merely to state the test for assessing the adequacy of procedural safeguards and for determining whether the high burden of proof had been met in a case falling within one of the categories that constitute the exceptions to the rule against prior restraints. Indeed, in *Branzburg* v. *Hayes,* 408 U. S. 665 (1972), there was even an intimation that such restraints might be permissible, since the Court stated that "[n]ewsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and *they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal.*" *Id.,* at 684–685 (emphasis supplied). However, the Court in *Branzburg* had taken pains to emphasize that the case, which presented the question whether the First Amendment accorded a reporter a testimonial privilege for an agreement not to reveal facts relevant to a grand jury's investigation of a crime or the criminal conduct of his source, did not involve any "prior restraint or restriction on what the press may publish." *Id.,* at 681. It was evident from the full passage in which the sentence appeared, which focused on the fact that there is no "constitutional right of special access [by the press] to information not available to the public generally," *id.,* at 684, that the passage is best regarded as indicating that to the extent newsmen are properly excluded from judicial proceedings, they would probably be unable to report about those proceedings. See generally *id.,* at 683–685. See also *id.,* at 691 (decision "involves no restraint on what newspapers may publish or on the type or quality of information reporters may seek to acquire"); *Pell* v. *Procunier,* 417 U. S. 817, 833–834 (1974). It is clear that the passage was not intended to decide the important question presented by this case. In any event, in light of my views respecting prior restraints, it should be unmistakable that the First Amendment stands as an absolute bar even to the imposition of interim restraints on reports or commentary relating to the criminal

enjoined petitioners from publishing was already in the public domain, having been revealed in open court proceedings or through public documents. Our prior cases have foreclosed any serious contention that further disclosure of such information can be suppressed before publication or even punished after publication. "A trial is a public event. What transpires in the court room is public property. . . . Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it." *Craig* v. *Harney,* 331 U. S., at 374. Similarly, *Estes* v. *Texas,* 381 U. S., at 541–542, a case involving the Sixth Amendment right to a fair trial, observed: "[R]eporters of all media . . . are plainly free to report whatever occurs in open court through their respective media. This was settled in *Bridges* v. *California,* 314 U. S. 252 (1941), and *Pennekamp* v. *Florida,* 328 U. S. 331 (1946), which we reaffirm." See also *id.,* at 583–585 (Warren, C. J., concurring). And *Sheppard* v. *Maxwell,* 384 U. S., at 362–363, a case that detailed numerous devices that could be employed for ensuring fair trials, explicitly reiterated that "[o]f course, there is nothing that proscribes the press from reporting events that transpire in the courtroom." See also *id.,* at 350; *Stroble* v. *California,* 343 U. S. 181, 193 (1952). The continuing vitality of these statements was reaffirmed only last Term in *Cox Broadcasting Corp.* v. *Cohn,* a case involving a suit for damages brought after publication under state law recognizing the privacy interest of its citizens. In holding that

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justice system, and that to the extent anything in *Branzburg* could be read as implying a different result, I think that it should be disapproved. Cf. *New York Times Co.* v. *United States, supra,* at 724–725 (BRENNAN, J., concurring).

a "State may [not] impose sanctions on the accurate publication of the name of a rape victim obtained from public records," 420 U. S., at 491, we observed:

> "[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. *Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations.* Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. *With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.* See *Sheppard* v. *Maxwell*, 384 U. S. 333, 350 (1966).
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> "Appellee has claimed in this litigation that the efforts of the press have infringed his right to privacy by broadcasting to the world the fact that his daughter was a rape victim. *The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, however, are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government.*
>
> "*The special protected nature of accurate reports of judicial proceedings has repeatedly been recognized.*" *Id.*, at 491–492 (emphasis supplied).

> "By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. *Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.* In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection." *Id.*, at 495 (emphasis supplied).

See also *id.*, at 496. Prior restraints are particularly anathematic to the First Amendment, and any immunity from punishment subsequent to publication of given material applies *a fortiori* to immunity from suppression of that material before publication. Thus, in light of *Craig*, which involved a contempt citation for a threat to the administration of justice, and *Cox Broadcasting*, which similarly involved an attempt to establish civil liability after publication, it should be clear that no injunction against the reporting of such information can be permissible.

2

The order of the Nebraska Supreme Court also applied, of course, to "confessions" and other information "strongly implicative" of the accused which were obtained from sources other than official records or open

court proceedings. But for the reasons that follow—reasons equally applicable to information obtained by the press from official records or public court proceedings—I believe that the same rule against prior restraints governs *any* information pertaining to the criminal justice system, even if derived from nonpublic sources and regardless of the means employed by the press in its acquisition.

The only exception that has thus far been recognized even in dictum to the blanket prohibition against prior restraints against publication of material which would otherwise be constitutionally shielded was the "military security" situation addressed in *New York Times Co.* v. *United States.* But unlike the virtually certain, direct, and immediate harm required for such a restraint under *Near* and *New York Times,* the harm to a fair trial that might otherwise eventuate from publications which are suppressed pursuant to orders such as that under review must inherently remain speculative.

A judge importuned to issue a prior restraint in the pretrial context will be unable to predict the manner in which the potentially prejudicial information would be published, the frequency with which it would be repeated or the emphasis it would be given, the context in which or purpose for which it would be reported, the scope of the audience that would be exposed to the information,[22]

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[22] It is suggested that prior restraints are really only necessary in "small towns," since media saturation would be more likely and incriminating materials that are published would therefore probably come to the attention of all inhabitants. Of course, the smaller the community, the more likely such information would become available through rumors and gossip, whether or not the press is enjoined from publication. For example, even with the restrictive order in the *Simants* case, all residents of Sutherland had to be excluded from the jury. Indeed, the media in such situations could help dispel erroneous conceptions circulating among

or the impact, evaluated in terms of current standards for assessing juror impartiality,[23] the information would have on that audience. These considerations would render speculative the prospective impact on a fair trial of reporting even an alleged confession or other information "strongly implicative" of the accused. Moreover, we can take judicial notice of the fact that given the prevalence of plea bargaining, few criminal cases proceed to trial, and the judge would thus have to predict what the likelihood was that a jury would even have to be impaneled.[24] Indeed, even in cases that do proceed to trial, the material sought to be suppressed before trial will often be admissible and may be admitted in any event.[25]

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the populace. And the smaller the community, the more likely there will be a need for a change of venue in any event when a heinous crime is committed. There is, in short, no justification for conditioning the scope of First Amendment protection the media will receive on the size of the community they serve.

[23] Some exposure to the facts of a case need not, under prevailing law concerning the contours of the Sixth Amendment right to an impartial jury, disqualify a prospective juror or render him incapable of according the accused a fair hearing based solely on the competent evidence adduced in open court. "[E]xposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged [does not] alone presumptively deprive the defendant of due process." *Murphy* v. *Florida,* 421 U. S. 794, 799 (1975). See also, *e. g., id.,* at 800, and n. 4; *Beck* v. *Washington,* 369 U. S. 541, 555–558 (1962); *Irvin* v. *Dowd,* 366 U. S. 717, 722–723 (1961); *Reynolds* v. *United States,* 98 U. S. 145, 155–156 (1879).

[24] Of course, judges accepting guilty pleas must guard against the danger that pretrial publicity has effectively coerced the defendant into pleading guilty.

[25] Cf. *Stroble* v. *California,* 343 U. S. 181, 195 (1952). For example, all of the material that was suppressed in this case was eventually admitted at Simants' trial. Indeed, even if Simants' statements to police officials had been deemed involuntary and thus suppressed, no one has suggested that confessions or statements against

And, more basically, there are adequate devices for screening from jury duty those individuals who have in fact been exposed to prejudicial pretrial publicity.

Initially, it is important to note that once the jury is impaneled, the techniques of sequestration of jurors and control over the courtroom and conduct of trial should prevent prejudicial publicity from infecting the fairness of judicial proceedings.[26] Similarly, judges may stem much of the flow of prejudicial publicity at its source, before it is obtained by representatives of the press.[27] But even if the press nevertheless obtains potentially prejudicial information and decides to publish that infor-

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interest made by an accused to private individuals, for example, would be inadmissible.

[26] Failure of the trial judge to take such measures was a significant factor in our reversals of the convictions in *Sheppard* v. *Maxwell,* 384 U. S. 333 (1966), and *Estes* v. *Texas,* 381 U. S. 532 (1965).

[27] A significant component of prejudicial pretrial publicity may be traced to public commentary on pending cases by court personnel, law enforcement officials, and the attorneys involved in the case. In *Sheppard* v. *Maxwell, supra,* we observed that "the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters." 384 U. S., at 361. See also *id.,* at 360 ("[T]he judge should have further sought to alleviate this problem [of publicity that misrepresented the trial testimony] by imposing control over the statements made to the news media by counsel, witnesses, and especially the Coroner and police officers"); *id.,* at 359, 363. As officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice. It is very doubtful that the court would not have the power to control release of information by these individuals in appropriate cases, see *In re Sawyer,* 360 U. S. 622 (1959), and to impose suitable limitations whose transgression could result in disciplinary proceedings. Cf. *New York Times Co.* v. *United States,* 403 U. S., at 728–730 (STEWART, J., joined by WHITE, J., concurring). Similarly, in most cases courts would have ample power to control such actions by law enforcement personnel.

mation, the Sixth Amendment rights of the accused may still be adequately protected. In particular, the trial judge should employ the *voir dire* to probe fully into the effect of publicity. The judge should broadly explore such matters as the extent to which prospective jurors had read particular news accounts or whether they had heard about incriminating data such as an alleged confession or statements by purportedly reliable sources concerning the defendant's guilt. See, *e. g., Ham* v. *South Carolina,* 409 U. S. 524, 531–534 (1973) (opinion of MARSHALL, J.); *Swain* v. *Alabama,* 380 U. S. 202, 209–222 (1965). Particularly in cases of extensive publicity, defense counsel should be accorded more latitude in personally asking or tendering searching questions that might root out indications of bias, both to facilitate intelligent exercise of peremptory challenges and to help uncover factors that would dictate disqualification for cause. Indeed, it may sometimes be necessary to question on *voir dire* prospective jurors individually or in small groups, both to maximize the likelihood that members of the venire will respond honestly to questions concerning bias, and to avoid contaminating unbiased members of the venire when other members disclose prior knowledge of prejudicial information. Moreover, *voir dire* may indicate the need to grant a brief continuance [28] or to grant a change of venue,[29] techniques that can ef-

[28] Excessive delay, of course, would be impermissible in light of the Sixth Amendment right to a speedy trial. See, *e. g., Barker* v. *Wingo,* 407 U. S. 514 (1972). However, even short continuances can be effective in attenuating the impact of publicity, especially as other news crowds past events off the front pages. And somewhat substantial delays designed to ensure fair proceedings need not transgress the speedy trial guarantee. See *Groppi* v. *Wisconsin,* 400 U. S. 505, 510 (1971); cf. 18 U. S. C. § 3161 (h)(8) (1970 ed., Supp. IV).

[29] In *Rideau* v. *Louisiana,* 373 U. S. 723 (1963), we held that it

fectively mitigate any publicity at a particular time or in a particular locale. Finally, if the trial court fails or refuses to utilize these devices effectively, there are the "palliatives" of reversals on appeal and directions for a new trial. *Sheppard* v. *Maxwell,* 384 U. S., at 363.[30] We have indicated that even in a case involving outrageous publicity and a "carnival atmosphere" in the courtroom, "these procedures would have been sufficient to guarantee [the defendant] a fair trial . . . ." *Id.,* at 358. See generally *id.,* at 358–363; cf. *Times-Picayune Pub. Corp.* v. *Schulingkamp,* 419 U. S. 1301, 1308, and n. 3 (1974) (POWELL, J., in chambers). For this reason, the one thing *Sheppard* did not approve was "any direct limitations on the freedom traditionally exercised by the news media." 384 U. S., at 350.[31] Indeed, the

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was a denial of due process to deny a request for a change of venue that was necessary to preserve the accused's Sixth Amendment rights. And state statutes may not restrict changes of venue if to do so would deny an accused a fair trial. *Groppi* v. *Wisconsin, supra.*

[30] To be sure, as the Supreme Court of Nebraska contended, society would be paying a heavy price if an individual who is in fact guilty must be released. But in no decision of this Court has it been necessary to release an accused on the ground that an impartial jury could not be assembled; we remanded for further proceedings, assuming that a retrial before an impartial forum was still possible.

As to the contention that pretrial publicity may result in conviction of an innocent person, surely the trial judge has adequate means to control the *voir dire,* the conduct of trial, and the actions of the jury, so as to preclude that untoward possibility. Indeed, where the evidence presented at trial is insufficient, the trial judge has the responsibility not even to submit the case to the jury.

[31] Although various committees that have recently analyzed the "Free Press/Fair Trial" issue have differed over the devices that they believed could properly be employed to ensure fair trials, they have unanimously failed to embrace prior restraints on publication as within the acceptable methods. See, *e. g.,* Report of the Judi-

traditional techniques approved in *Sheppard* for ensuring fair trials would have been adequate in every case in which we have found that a new trial was required due to lack of fundamental fairness to the accused.

For these reasons alone I would reject the contention that speculative deprivation of an accused's Sixth Amendment right to an impartial jury is comparable to the damage to the Nation or its people that *Near* and *New York Times* would have found sufficient to justify a prior restraint on reporting. Damage to that Sixth Amendment right could never be considered so direct, immediate and irreparable, and based on such proof rather than speculation, that prior restraints on the press could be justified on this basis.

C

There are additional, practical reasons for not starting down the path urged by respondents.[32] The exception

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cial Conference Committee on the Operation of the Jury System, "Free Press-Fair Trial" Issue, 45 F. R. D. 391, 401–402 (1968) (Judicial Conference Committee headed by Judge Kaufman); Special Committee on Radio, Television, and the Administration of Justice of the Association of the Bar of the City of New York, Freedom of the Press and Fair Trial: Final Report with Recommendations 10–11 (1967); American Bar Association Project on Standards for Criminal Justice, Fair Trial and Free Press 68–73 (App. Draft 1968); see also American Bar Association, Legal Advisory Committee on Fair Trial and Free Press, Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press 7 (Rev. Draft, Nov. 1975).

[32] I include these additional considerations, many of which apply generally to any system of prior restraints, only because of the fundamentality of the Sixth Amendment right invoked as the justification for imposition of the restraints in this case; the fact that there are such overwhelming reasons for precluding *any* prior restraints even to facilitate preservation of such a fundamental right reinforces the longstanding constitutional doctrine that there is effectively an absolute prohibition against prior restraints of publi-

to the prohibition of prior restraints adumbrated in *Near* and *New York Times* involves no judicial weighing of the countervailing public interest in receiving the suppressed information; the direct, immediate, and irreparable harm that would result from disclosure is simply deemed to outweigh the public's interest in knowing, for example, the specific details of troop movements during wartime. As the Supreme Court of Nebraska itself admitted,[33] however, any attempt to impose a prior restraint on the reporting of information concerning the operation of the criminal justice system will inevitably involve the courts in an *ad hoc* evaluation of the need for the public to receive particular information that might nevertheless implicate the accused as the perpetrator of a crime. For example, disclosure of the

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cation of *any* material otherwise covered within the meaning of the free press guarantee of the First Amendment. See *supra*, at 588–594.

[33] For example, in addition to numerous comments about accommodating First and Sixth Amendment rights in each case, the court observed:

"That the press be absolutely free to report corruption and wrongdoing, actual or apparent, or incompetence of public officials of whatever branch of government is vastly important to the future of our state and nation cannot be denied as anyone who is familiar with recent events must be well aware. Prior restraint of the press, however slight, in such instances is unthinkable. Near v. Minnesota ex rel. Olson, *supra*. In these instances and many others no preferred constitutional rights collide.

"In cases where equally important constitutional rights may collide then it would seem that under some circumstances, rare though they will be, that an accommodation of some sort must be reached." 194 Neb., at 798–799, 236 N. W. 2d, at 803–804.

Thus, at least when reporting of information "strongly implicative" of the accused also reflects on official actions, a particularized analysis of the need to disseminate the information is contemplated even by those who believe prior restraints might sometimes be justifiable with respect to commentary on the criminal justice system.

circumstances surrounding the obtaining of an involuntary confession or the conduct of an illegal search resulting in incriminating fruits may be the necessary predicate for a movement to reform police methods, pass regulatory statutes, or remove judges who do not adequately oversee law enforcement activity; publication of facts surrounding particular plea-bargaining proceedings or the practice of plea bargaining generally may provoke substantial public concern as to the operations of the judiciary or the fairness of prosecutorial decisions; reporting the details of the confession of one accused may reveal that it may implicate others as well, and the public may rightly demand to know what actions are being taken by law enforcement personnel to bring those other individuals to justice; commentary on the fact that there is strong evidence implicating a government official in criminal activity goes to the very core of matters of public concern, and even a brief delay in reporting that information shortly before an election may have a decisive impact on the outcome of the democratic process, see *Carroll* v. *Princess Anne,* 393 U. S., at 182; dissemination of the fact that indicted individuals who had been accused of similar misdeeds in the past had not been prosecuted or had received only mild sentences may generate crucial debate on the functioning of the criminal justice system; revelation of the fact that despite apparently overwhelming evidence of guilt, prosecutions were dropped or never commenced against large campaign contributors or members of special interest groups may indicate possible corruption among government officials; and disclosure of the fact that a suspect has been apprehended as the perpetrator of a heinous crime may be necessary to calm community fears that the actual perpetrator is still at large. Cf. *Times-Picayune Pub. Corp.* v. *Schulingkamp,* 419 U. S., at 1302

(POWELL, J., in chambers).[34] In all of these situations, judges would be forced to evaluate whether the public interest in receiving the information outweighed the speculative impact on Sixth Amendment rights.

These are obviously only some examples of the problems that plainly would recur, not in the almost theoretical situation of suppressing disclosure of the location of troops during wartime, but on a regular basis throughout the courts of the land. Recognition of any judicial authority to impose prior restraints on the basis of harm to the Sixth Amendment rights of particular defendants, especially since that harm must remain speculative, will thus inevitably interject judges at all levels into censorship roles that are simply inappropriate and impermissible under the First Amendment. Indeed, the potential for arbitrary and excessive judicial utilization of any such power would be exacerbated by the fact that judges and committing magistrates might in some cases be determining the propriety of publishing information that reflects on their competence, integrity, or general performance on the bench.

There would be, in addition, almost intractable procedural difficulties associated with any attempt to impose prior restraints on publication of information relating to pending criminal proceedings, and the ramifications of these procedural difficulties would accentuate the burden on First Amendment rights. The incentives and dynamics of the system of prior restraints would inevitably lead to overemployment of the technique. In order to minimize pretrial publicity against

[34] Prior restraints may also effectively curtail the incentives for independent investigative work by the media which could otherwise uncover evidence of guilt or exonerating evidence that nevertheless threatens the Sixth Amendment rights of others by strongly implicating them in illegal activity.

his clients and pre-empt ineffective-assistance-of-counsel claims, counsel for defendants might routinely seek such restrictive orders. Prosecutors would often acquiesce in such motions to avoid jeopardizing a conviction on appeal. And although judges could readily reject many such claims as frivolous, there would be a significant danger that judges would nevertheless be predisposed to grant the motions, both to ease their task of ensuring fair proceedings and to insulate their conduct in the criminal proceeding from reversal. We need not raise any specter of floodgates of litigation or drain on judicial resources to note that the litigation with respect to these motions will substantially burden the media. For to bind the media, they would have to be notified and accorded an opportunity to be heard. See, *e. g., Carroll* v. *Princess Anne, supra; McKinney* v. *Alabama,* 424 U. S. 669 (1976). This would at least entail the possibility of restraint proceedings collateral to every criminal case before the courts, and there would be a significant financial drain on the media involuntarily made parties to these proceedings. Indeed, small news organs on the margin of economic viability might choose not to contest even blatantly unconstitutional restraints or to avoid all crime coverage, with concomitant harm to the public's right to be informed of such proceedings.[35] Such acquiescence might also mean that significant erroneous precedents will remain unchallenged, to be relied on for even broader restraints in the future. Moreover, these collateral restraint proceedings would be unlikely to result in equal treatment of all

[35] Indeed, to the extent media notified of the restraint proceedings choose not to appear in light of the cost and time potentially involved in overturning any restraint ultimately imposed, there will be no presentation of the countervailing public interest in maintaining a free flow of information, as opposed to the interests of prosecution, defense, and judges in maintaining fair proceedings.

organs of the media [36] and, even if all the press could be brought into the proceeding, would often be ineffective, since disclosure of incriminating material may transpire before an effective restraint could be imposed.[37]

To be sure, because the decision to impose such restraints even on the disclosure of supposedly narrow categories of information would depend on the facts of each case, and because precious First Amendment rights are at stake, those who could afford the substantial costs would seek appellate review. But that review is often inadequate, since delay inherent in judicial proceedings could itself destroy the contemporary news value of the information the press seeks to disseminate.[38] As one commentator has observed:

> "Prior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted they cause irremediable loss—a loss in the immediacy, the impact, of speech. . . . Indeed it is the hypothesis of the First Amendment that injury is inflicted on our society when we stifle the immediacy of speech." A. Bickel, The Morality of Consent 61 (1975).[39]

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[36] For example, in this case the restraints only applied to petitioners, who improperly intervened in the criminal case and thus subjected themselves to the court's jurisdiction. The numerous *amici,* however, were not subject to the restraining orders and were free to disseminate prejudicial information in the same areas in which petitioners were precluded from doing so.

[37] Cf. *New York Times Co.* v. *United States,* 403 U. S., at 733 (WHITE, J., joined by STEWART, J., concurring).

[38] In this case, prior restraints were in effect for over 11 weeks, and yet by the time those restraints expired, appellate review had not yet been exhausted. Moreover, appellate courts might not accord these cases the expedited hearings they so clearly would merit. See Tr. of Oral Arg. 43–48.

[39] As we observed in *Bridges* v. *California,* 314 U. S., at 268, which held that the convictions of a newspaper publisher and editor

And, as noted, given the significant financial disincentives, particularly on the smaller organs of the media,[40] to challenge any restrictive orders once they are imposed

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for contempt, based on editorial comment concerning pending cases, were violative of the First Amendment:

"It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist. Since they punish utterances made during the pendency of a case, the judgments below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. Moreover, the ban is likely to fall not only at a crucial time but upon the most important topics of discussion.

"No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression. Yet, it would follow as a practical result of the decisions below that anyone who might wish to give public expression to his views on a pending case involving no matter what problem of public interest, just at the time his audience would be most receptive, would be as effectively discouraged as if a deliberate statutory scheme of censorship had been adopted. . . .

"This unfocussed threat is, to be sure, limited in time, terminating as it does upon final disposition of the case. But this does not change its censorial quality. An endless series of moratoria on public discussion, even if each were very short, could hardly be dismissed as an insignificant abridgment of freedom of expression. And to assume that each would be short is to overlook the fact that the 'pendency' of a case is frequently a matter of months or even years rather than days or weeks." *Id.*, at 269.

See also *id.*, at 277–278; *Carroll* v. *Princess Anne,* 393 U. S., at 182; *Wood* v. *Georgia,* 370 U. S., at 392; *Pennekamp* v. *Florida,* 328 U. S., at 346–347.

[40] The editor and publisher of *amicus* Anniston (Ala.) Star poignantly depicted in a letter to counsel the likely plight of such small, independent newspapers if the power to impose prior restraints against pretrial publicity were recognized:

"Small town dailies would be the unknown, unseen and friendless

by trial judges, there is the distinct possibility that many erroneous impositions would remain uncorrected.[41]

III

I unreservedly agree with Mr. Justice Black that "free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them." *Bridges* v. *California,* 314 U. S., at 260. But I would reject the notion that a

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victims if the Supreme Court upholds the order of Judge Stuart. If the already irresistible powers of the judiciary are swollen by absorbing an additional function, that of government censor, the chilling effect upon vigorous public debate would be deepest in the thousands of small towns where independent, locally owned, daily and weekly newspapers are published.

"Our papers are not read in the White House, the Congress, the Supreme Court or by network news executives. The causes for which we contend and the problems we face are invisible to the world of power and intellect. We have no in-house legal staff. We retain no great, national law firms. We do not have spacious profits with which to defend ourselves and our principles, all the way to the Supreme Court, each and every time we feel them to be under attack.

"Our only alternative is obedient silence. You hear us when we speak now. Who will notice if we are silenced? The small town press will be the unknown soldier of a war between the First and Sixth Amendments, a war that should never have been declared, and can still be avoided.

"Only by associating ourselves in this brief with our stronger brothers are we able to raise our voices on this issue at all, but I am confident that the Court will listen to us because we represent the most defenseless among the petitioners." Brief for Washington Post Co. et al. as *Amici Curiae* 31–32.

[41] There is also the danger that creation of a second "narrow" category of exceptions to the rule against prior restraints would be interpreted as a license to create further "narrow" exceptions when some "justification" for overcoming a mere "presumption" of unconstitutionality is presented. Such was the reasoning which eventuated in this litigation in the first place. See *supra,* at 582–583.

choice is necessary, that there is an inherent conflict that cannot be resolved without essentially abrogating one right or the other. To hold that courts cannot impose any prior restraints on the reporting of or commentary upon information revealed in open court proceedings, disclosed in public documents, or divulged by other sources with respect to the criminal justice system is not, I must emphasize, to countenance the sacrifice of precious Sixth Amendment rights on the altar of the First Amendment. For although there may in some instances be tension between uninhibited and robust reporting by the press and fair trials for criminal defendants, judges possess adequate tools short of injunctions against reporting for relieving that tension. To be sure, these alternatives may require greater sensitivity and effort on the part of judges conducting criminal trials than would the stifling of publicity through the simple expedient of issuing a restrictive order on the press; but that sensitivity and effort is required in order to ensure the full enjoyment and proper accommodation of both First and Sixth Amendment rights.

There is, beyond peradventure, a clear and substantial damage to freedom of the press whenever even a temporary restraint is imposed on reporting of material concerning the operations of the criminal justice system, an institution of such pervasive influence in our constitutional scheme. And the necessary impact of reporting even confessions can never be so direct, immediate, and irreparable that I would give credence to any notion that prior restraints may be imposed on that rationale. It may be that such incriminating material would be of such slight news value or so inflammatory in particular cases that responsible organs of the media, in an exercise of self-restraint, would choose not to publicize that material, and not make the judicial task of safeguarding

precious rights of criminal defendants more difficult. Voluntary codes such as the Nebraska Bar-Press Guidelines are a commendable acknowledgment by the media that constitutional prerogatives bring enormous responsibilities, and I would encourage continuation of such voluntary cooperative efforts between the bar and the media. However, the press may be arrogant, tyrannical, abusive, and sensationalist, just as it may be incisive, probing, and informative. But at least in the context of prior restraints on publication, the decision of what, when, and how to publish is for editors, not judges. See, *e. g., Near* v. *Minnesota ex rel. Olson,* 283 U. S., at 720; *Cox Broadcasting Corp.* v. *Cohn,* 420 U. S., at 496; *Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S., at 258; *id.,* at 259 (WHITE, J., concurring); cf. *New York Times Co.* v. *Sullivan,* 376 U. S., at 269–283. Every restrictive order imposed on the press in this case was accordingly an unconstitutional prior restraint on the freedom of the press, and I would therefore reverse the judgment of the Nebraska Supreme Court and remand for further proceedings not inconsistent with this opinion.

APPENDIX TO OPINION OF BRENNAN, J., CONCURRING IN JUDGMENT

NEBRASKA BAR-PRESS GUIDELINES FOR DISCLOSURE AND REPORTING OF INFORMATION RELATING TO IMMINENT OR PENDING CRIMINAL LITIGATION

These voluntary guidelines reflect standards which bar and news media representatives believe are a reasonable means of accommodating, on a voluntary basis, the correlative constitutional rights of free speech and free press with the right of an accused to a fair trial. They

are not intended to prevent the news media from inquiring into and reporting on the integrity, fairness, efficiency and effectiveness of law enforcement, the administration of justice, or political or governmental questions whenever involved in the judicial process.

As a voluntary code, these guidelines do not necessarily reflect in all respects what the members of the bar or the news media believe would be permitted or required by law.

Information Generally Appropriate for Disclosure, Reporting

Generally, it is appropriate to disclose and report the following information:

1. The arrested person's name, age, residence, employment, marital status and similar biographical information.

2. The charge, its text, any amendments thereto, and, if applicable, the identity of the complainant.

3. The amount or conditions of bail.

4. The identity of and biographical information concerning the complaining party and victim, and, if a death is involved, the apparent cause of death unless it appears that the cause of death may be a contested issue.

5. The identity of the investigating and arresting agencies and the length of the investigation.

6. The circumstances of arrest, including time, place, resistance, pursuit, possession of and all weapons used, and a description of the items seized at the time of arrest. It is appropriate to disclose and report at the time of seizure the description of physical evidence subsequently seized other than a confession, admission or statement. It is appropriate to disclose and report the subsequent finding of weapons, bodies, contraband, stolen property and similar physical items if, in view

of the time and other circumstances, such disclosure and reporting are not likely to interfere with a fair trial.

7. Information disclosed by the public records, including all testimony and other evidence adduced at the trial.

Information Generally Not Appropriate for Disclosure, Reporting

Generally, it is not appropriate to disclose or report the following information because of the risk of prejudice to the right of an accused to a fair trial:

1. The existence or contents of any confession, admission or statement given by the accused, except it may be stated that the accused denies the charges made against him. This paragraph is not intended to apply to statements made by the accused to representatives of the news media or to the public.

2. Opinions concerning the guilt, the innocence or the character of the accused.

3. Statements predicting or influencing the outcome of the trial.

4. Results of any examination or tests or the accused's refusal or failure to submit to an examination or test.

5. Statements or opinions concerning the credibility or anticipated testimony of prospective witnesses.

6. Statements made in the judicial proceedings outside the presence of the jury relating to confessions or other matters which, if reported, would likely interfere with a fair trial.

Prior Criminal Records

Lawyers and law enforcement personnel should not volunteer the prior criminal records of an accused except to aid in his apprehension or to warn the public of any dangers he presents. The news media can obtain prior criminal records from the public records of the courts,

police agencies and other governmental agencies and from their own files. The news media acknowledge, however, that publication or broadcast of an individual's criminal record can be prejudicial, and its publication or broadcast should be considered very carefully, particularly after the filing of formal charges and as the time of the trial approaches, and such publication or broadcast should generally be avoided because readers, viewers and listeners are potential jurors and an accused is presumed innocent until proven guilty.

Photographs

1. Generally, it is not appropriate for law enforcement personnel to deliberately pose a person in custody for photographing or televising by representatives of the news media.

2. Unposed photographing and televising of an accused outside the courtroom is generally appropriate, and law enforcement personnel should not interfere with such photographing or televising except in compliance with an order of the court or unless such photographing or televising would interfere with their official duties.

3. It is appropriate for law enforcement personnel to release to representatives of the news media photographs of a suspect or an accused. Before publication of any such photographs, the news media should eliminate any portions of the photographs that would indicate a prior criminal offense or police record.

Continuing Committee for Cooperation

The members of the bar and the news media recognize the desirability of continued joint efforts in attempting to resolve any areas of differences that may arise in their mutual objective of assuring to all Americans both the correlative constitutional rights to free-

dom of speech and press and to a fair trial. The bar and the news media, through their respective associations, have determined to establish a permanent committee to revise these guidelines whenever this appears necessary or appropriate, to issue opinions as to their application to specific situations, to receive, evaluate and make recommendations with respect to complaints and to seek to effect through educational and other voluntary means a proper accommodation of the constitutional correlative rights of free speech, free press and fair trial.

June, 1970

MR. JUSTICE STEVENS, concurring in the judgment.

For the reasons eloquently stated by MR. JUSTICE BRENNAN, I agree that the judiciary is capable of protecting the defendant's right to a fair trial without enjoining the press from publishing information in the public domain, and that it may not do so. Whether the same absolute protection would apply no matter how shabby or illegal the means by which the information is obtained, no matter how serious an intrusion on privacy might be involved, no matter how demonstrably false the information might be, no matter how prejudicial it might be to the interests of innocent persons, and no matter how perverse the motivation for publishing it, is a question I would not answer without further argument. See *Ashwander* v. *TVA*, 297 U. S. 288, 346–347 (Brandeis, J., concurring). I do, however, subscribe to most of what MR. JUSTICE BRENNAN says and, if ever required to face the issue squarely, may well accept his ultimate conclusion.

LUDWIG *v.* MASSACHUSETTS

APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 75–377. Argued April 28, 1976—Decided June 30, 1976

Under Massachusetts' two-tier court system, a person accused of certain crimes is tried in the first instance in the lower tier, where no trial by jury is available. If convicted, he may appeal to the second tier, and, if he was convicted after a proceeding on a not-guilty plea, or by "admitting sufficient findings of fact," he is entitled to a trial *de novo* by jury in the second tier. Appellant, after he pleaded not guilty and after his motion for a jury trial was denied, was tried and convicted in a first-tier court. He then appealed to the second tier, and after unsuccessfully moving to dismiss on grounds that he had been deprived of his constitutional right to a speedy jury trial in the first instance and had been subjected to double jeopardy, he waived a jury trial and was again convicted. The Massachusetts Supreme Judicial Court affirmed, holding that the denial of appellant's request to be tried by a jury at his first trial did not violate his constitutional right to a speedy trial or to a trial by jury, and that the Massachusetts procedure did not violate the constitutional prohibition against putting a person twice in jeopardy. *Held:*

1. The Massachusetts two-tier court system does not deprive an accused of his Fourteenth Amendment right to a jury trial but absolutely guarantees trial by jury to persons accused of serious crimes, and the manner specified for exercising this right is fair and not unduly burdensome. *Callan* v. *Wilson,* 127 U. S. 540, distinguished. Pp. 624–630.

(a) Within the system, the jury serves its function of protecting an accused from prosecutorial and judicial misconduct. Pp. 625–626.

(b) That an accused may undertake the financial cost of an additional trial does not unconstitutionally burden the right to a jury trial because he is not required to pursue a defense at the lower tier. Moreover, if an accused is indigent, the State is required to furnish him counsel without cost. Pp. 626–627.

(c) Nor does the possibility of a harsher sentence at the second tier impermissibly burden the accused's right to a jury

trial. *North Carolina* v. *Pearce,* 395 U. S. 711; *Colten* v. *Kentucky,* 407 U. S. 104. P. 627.

(d) Where appellant no longer urges that he was denied his constitutional right to a speedy trial, and there is no evidence that there is a greater delay in obtaining a jury in Massachusetts than there would be if the two-tier system were abandoned, it cannot properly be contended that the system unconstitutionally burdens the right to a jury trial by imposing the increased psychological and physical hardships of two trials. Pp. 628–629.

2. The Massachusetts procedure does not violate the Double Jeopardy Clause of the Fifth Amendment made applicable to the States by the Fourteenth, and appellant's claim that because he had been placed once in jeopardy and convicted, the State may not retry him when he decides to "appeal" and secure a trial *de novo,* is without merit. An accused who elects to be tried *de novo* is in no different position from a convicted defendant who successfully appeals on the basis of the trial record and gains a reversal of his conviction and a remand for a new trial. Nothing in the Double Jeopardy Clause prohibits a State from affording a defendant two opportunities to avoid conviction and secure an acquittal. Pp. 630–632.

— Mass. —, 330 N. E. 2d 467, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and REHNQUIST, JJ., joined. POWELL, J., filed a concurring opinion, *post,* p. 632. STEVENS, J., filed a dissenting opinion, in which BRENNAN, STEWART, and MARSHALL, JJ., joined, *post,* p. 632.

Robert W. Hagopian argued the cause and filed briefs for appellant.

John J. Irwin, Jr., Assistant Attorney General of Massachusetts, argued the cause for appellee. With him on the brief were *Francis X. Bellotti,* Attorney General, and *Barbara A. H. Smith,* Assistant Attorney General.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The Commonwealth of Massachusetts long ago established a "two-tier" system of trial courts for certain

crimes. A person accused of such a crime is tried in the first instance in the lower tier. No trial by jury is available there. If convicted, the defendant may take a timely "appeal" to the second tier and, if he so desires, have a trial *de novo* by jury. The issues here presented are (1) whether, where the Constitution guarantees an accused a jury trial, it also requires that he be permitted to exercise that right at the first trial in the lower tier, and (2) whether the Massachusetts procedure violates the Double Jeopardy Clause of the Fifth Amendment made applicable to the States by the Fourteenth. *Benton* v. *Maryland,* 395 U. S. 784 (1969).

I

Massachusetts is one of several States having a two-tier system of trial courts for criminal cases. See *Colten* v. *Kentucky,* 407 U. S. 104, 112 n. 4 (1972). Some States provide a jury trial in each tier; others provide a jury only in the second tier but allow an accused to bypass the first; and still others, like Massachusetts, do not allow an accused to avoid a trial of some sort at the first tier before he obtains a trial by jury at the second.

The first tier of the Massachusetts system is composed of district courts of the State's several counties, and the Municipal Court of the city of Boston. Mass. Gen. Laws Ann. c. 218, § 1 (Supp. 1976–1977). These courts have jurisdiction over violations of municipal ordinances, over misdemeanors except criminal libel, over felonies having a maximum potential sentence of not more than five years, and over specified felonies having a maximum potential sentence in excess of five years. § 26.

A criminal proceeding in the first-tier court is begun with the issuance of a complaint. An accused then has two statutory alternatives. He may plead guilty at arraignment and be sentenced by the court. If he is dis-

satisfied with the sentence, he may appeal. C. 278, § 18. In that case, however, the accused is not entitled to a trial *de novo* respecting his guilt or innocence; he is limited, instead, to a challenge to his sentence. *Commonwealth* v. *Crapo,* 212 Mass. 209, 98 N. E. 702 (1912).

If, on the other hand, the accused pleads not guilty in the first tier, he is tried by the judge without a jury. An acquittal there terminates the proceeding. After a judgment of guilty, however, he may appeal either to the superior court, where a 12-person jury is available, c. 278, §§ 2 and 18 (1972 and Supp. 1976–1977), or to the jury division of the district court where a jury of six is available. C. 218, § 27A; c. 278, § 18 (Supp. 1976–1977). See also *Mann* v. *Commonwealth,* 359 Mass. 661, 663–664, 271 N. E. 2d 331, 333 (1971); *Jones* v. *Robbins,* 74 Mass. 329, 336, 341–342 (1857); Mass. Gen. Laws Ann. c. 278, § 18A (1972).

Unlike the two-tier Kentucky system under consideration in *Colten* v. *Kentucky, supra,* an accused in Massachusetts does not avoid trial in the first instance by pleading guilty. Nevertheless, he achieves essentially the same result by an established, informal procedure known as "admitting sufficient findings of fact." Tr. of Oral Arg. 31. See also *id.,* at 13, 32–33. This procedure is used "[i]f the defendant wishes to waive a trial in the District Court and save his rights for a trial in the Superior Court on the appeal." 30 K. Smith, Massachusetts Practice, Criminal Practice and Procedure § 754 (1970). The trial court then hears only enough evidence to assure itself that there is probable cause to believe that the defendant has committed the offense with which he is charged. The court, however, does make a finding of guilt and enter a judgment of conviction.

Once a person convicted in the district court indicates

that he is going to appeal,[1] his conviction is vacated. He may suffer adverse collateral consequences from the conviction, such as revocation of parole or of his driver's license. Mass. Gen. Laws Ann. c. 90, §§ 24 (1)(b) and (c) (1969 and Supp. 1976–1977). See *Almeida* v. *Lucey*, 372 F. Supp. 109 (Mass.), summarily aff'd, 419 U. S. 806 (1974); *Boyle* v. *Registrar of Motor Vehicles*, —— Mass. ——, 331 N. E. 2d 52, 53 (1975). Moreover, if the accused "fails to enter and prosecute his appeal, he shall be defaulted on his recognizance and the superior court may impose sentence upon him for the crime of which he was convicted, as if he had been convicted in said court." Mass. Gen. Laws Ann. c. 278, § 24 (1972).

If an accused does appeal and does not default, he may, upon request, be tried *de novo* by a jury. If, again, he is found guilty, he may appeal, as of right, to the Massachusetts Appeals Court or to the Supreme Judicial Court where he may raise both factual and legal claims of error. §§ 28, 28B (1972).

II

On February 1, 1974, in the District Court of Northern Norfolk, appellant Ludwig was charged with operating a

[1] Massachusetts Gen. Laws Ann. c. 218, § 31 (1958), governs the execution of sentence. If a sentence of six months or less is imposed, the convicted defendant apparently must state immediately that he intends to appeal. If the sentence exceeds six months, the defendant has one day, before commitment, in which to decide whether to appeal. Although the statute provides that a defendant be informed of his right to appeal, it is unclear whether he also is to be informed that, by appealing, he may secure a trial by jury. Since appellant Ludwig did appeal and then expressly waived a jury in the second tier, we need not address the question whether a failure to take an appeal would constitute a knowing and intelligent waiver of the right to trial by jury. See *Boykin* v. *Alabama*, 395 U. S. 238, 243 (1969).

motor vehicle "negligently . . . so that the lives and safety of the public might be endangered," App. 3a, in violation of Mass. Gen. Laws Ann. c. 90, § 24 (2)(a) (Supp. 1976–1977). This offense carries a maximum penalty of a fine of $200, or two years' imprisonment, or both. On the same day, Ludwig was arraigned and pleaded not guilty.

At the commencement of trial on March 11, appellant moved for a "speedy trial by jury," citing the Fifth and Sixth Amendments. The motion was denied, and, after a brief trial, the court adjudged Ludwig guilty and imposed a fine of $20. Thereafter, appellant asserted his statutory right to a trial *de novo* before a six-man jury in the District Court.

In the *de novo* proceeding, appellant filed a "motion to dismiss" on the grounds that he had been deprived of his federal constitutional right to a speedy jury trial in the first instance, and that he had been subjected to double jeopardy. App. 5a–6a. The motion was denied. At the second trial on April 5, appellant waived a jury and, after trial by the court, again was adjudged guilty, and again was fined $20.

On appeal, the Supreme Judicial Court of Massachusetts affirmed the judgment of conviction. —— Mass. ——, 330 N. E. 2d 467 (1975). Relying on its earlier decision in *Whitmarsh* v. *Commonwealth,* 366 Mass. 212, 316 N. E. 2d 610 (1974), appeal dismissed, 421 U. S. 957 (1975), the court held that the denial of appellant's request to be tried by a jury at his first trial did not violate his right to a speedy trial or to a trial by jury as guaranteed by the Sixth and Fourteenth Amendments, and that the Massachusetts procedure did not violate the constitutional prohibition against putting a person twice in jeopardy.

The present appeal to this Court followed. We noted

probable jurisdiction, 423 U. S. 945 (1975), in order to consider the issues recited in the opening paragraph of this opinion.[2] See *Costarelli* v. *Massachusetts*, 421 U. S. 193 (1975).

III

The standard against which we judge whether the Massachusetts two-tier system violates an individual's constitutional right to trial by jury is the Fourteenth Amendment's guarantee that no person may be deprived "of life, liberty, or property, without due process of law." In giving content to this sweeping proscription in the jury trial context, the Court in the past has considered two distinct issues: Whether a State is ever obliged to grant an accused a jury trial, and whether certain features of the 18th century common-law jury are inherent in the right.

In *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), the Court resolved the first issue by reference to, and in the light of, the Sixth Amendment. It held that the right to a jury trial in a "serious" criminal case was "fundamental to the American scheme of justice." *Id.*, at 149. Accordingly, it held that the "Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee." *Ibid.* Only when an accused is charged with a "petty" offense, usually defined by reference to the maxi-

[2] There is a division of opinion concerning the validity of the two-tier procedure typified by the Massachusetts system. Compare *State* v. *Holliday*, 109 R. I. 93, 280 A. 2d 333 (1971), with *Manns* v. *Commonwealth*, 213 Va. 322, 191 S. E. 2d 810 (1972); *Walker* v. *Dillard*, 363 F. Supp. 921, 924–925 (WD Va. 1973), rev'd on other grounds, 523 F. 2d 3 (CA4), cert. denied, 423 U. S. 906 (1975); *Whitmarsh* v. *Commonwealth*, 366 Mass. 212, 316 N. E. 2d 610 (1974), appeal dismissed, 421 U. S. 957 (1975); *Boyle* v. *Registrar of Motor Vehicles*, — Mass. —, 331 N. E. 2d 52 (1975).

mum punishment that might be imposed, does the Constitution permit the Federal Government and the State to deprive him of his liberty without affording him an opportunity to have his guilt determined by a jury. *Baldwin* v. *New York,* 399 U. S. 66 (1970) (plurality opinion).

In *Williams* v. *Florida,* 399 U. S. 78 (1970), and in *Apodaca* v. *Oregon,* 406 U. S. 404 (1972) (plurality opinion), the Court dealt with the second issue by considering whether particular features of the 18th century common-law jury are essential, or merely incidental, to the central purpose of the jury trial requirement. The jury, it was observed, acts as " 'an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.' " *Williams* v. *Florida,* 399 U. S., at 100, quoting *Duncan* v. *Louisiana,* 391 U. S., at 156. The Court held in *Williams* that a jury of 12 is not required in order that this central purpose be served. Similar analysis led to the holding in *Apodaca* that the jury's verdict need not be unanimous. What is important is that the verdict reflect the commonsense judgment of a group of laymen; this it may do even if it is only a majority verdict "as long as [the jury] consists of a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate, free from outside attempts at intimidation, on the question of a defendant's guilt." 406 U. S., at 410–411.

These two issues are not again in controversy in the present case. It is indisputable that the Massachusetts two-tier system does afford an accused charged with a serious offense the absolute right to have his guilt determined by a jury composed and operating in accordance with the Constitution. Within the system, the jury serves its function of protecting against prosecutorial and

judicial misconduct. It does so directly at the second tier of the Massachusetts system, and it may also have an indirect effect on first-tier trials. "Even where defendants are satisfied with bench trials, the right to a jury trial very likely serves its intended purpose of making judicial or prosecutorial unfairness less likely." *Duncan* v. *Louisiana*, 391 U. S., at 158.

This is not to say that we are unaware of a remote possibility that an accused in Massachusetts may be faced at his first trial with an overzealous prosecutor and a judge who is either unable or unwilling to control him. But in such a case, he may protect himself from questionable incarceration by appealing, and insisting upon a trial by jury.

Even though the Massachusetts procedure does not deprive an accused of his Fourteenth Amendment right to a jury trial, the question remains whether it unconstitutionally burdens the exercise of that right: (1) by imposing the financial cost of an additional trial; (2) by subjecting an accused to a potentially harsher sentence if he seeks a trial *de novo* in the second tier; and (3) by imposing the increased psychological and physical hardships of two trials.

Appellant charges that the Massachusetts system financially burdens the accused by requiring that he twice defend himself and by causing a loss of wages if he is employed. Although these burdens are not unreal and although they may, in an individual case, impose a hardship, we conclude that they do not impose an unconstitutional burden on the exercise of the right to a trial by jury. In Massachusetts, the accused may enjoy his right to trial by jury expeditiously by invoking the above-described procedure of "admitting sufficient findings of fact." He, therefore, need not pursue, in any real sense, a defense at the lower tier. The accused, how-

ever, may utilize that proceeding fruitfully as a discovery tool and find the strengths and the weaknesses of the State's case against him. And, of course, if an accused is indigent, the State is required to furnish him counsel without cost before he may be deprived of his liberty. *Argersinger* v. *Hamlin,* 407 U. S. 25 (1972).

The question whether the possibility of a harsher sentence at the second tier impermissibly burdens the exercise of an accused's right to a trial by jury is controlled by the decisions in *North Carolina* v. *Pearce,* 395 U. S. 711 (1969), and *Colten* v. *Kentucky,* 407 U. S. 104 (1972). These cases establish that the mere possibility of a harsher sentence does not unconstitutionally burden an accused's right to a trial by jury. In *Pearce,* a new trial was sought, by taking an appeal, because of error at the first trial. In *Colten,* a new trial was sought in order to secure more ample safeguards available at the higher tier. We see no need to reach a different result here where a new trial is sought in order to obtain a jury.[3] Due process is violated only by the vindictive imposition of an increased sentence. The Court in *Colten* held that the danger of such sentencing does not inhere in the two-tier system.[4] 407 U. S., at 112–119.

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[3] There is no question, of course, that a person who is accused of crime may receive a fair trial before a magistrate or judge. Cf. *Argersinger* v. *Hamlin,* 407 U. S. 25 (1972). Indeed, the fact that one accused of a "petty" offense punishable by up to six months imprisonment has no constitutional right to be tried by a jury reflects that judgment. In this respect, the present case differs from *Ward* v. *Village of Monroeville,* 409 U. S. 57 (1972).

[4] In support of the contrary contention, appellant cites *United States* v. *Jackson,* 390 U. S. 570 (1968), where the Court held unconstitutional a provision of the Federal Kidnaping Act that permitted the death penalty to be imposed only if recommended by a jury. This provision, by not setting forth a "procedure for imposing the death penalty upon a defendant who waives the right to jury trial or upon one who pleads guilty," *id.,* at 571, discouraged the as-

We are not oblivious to the adverse psychological and physical effects that delay in obtaining the final adjudication of one's guilt or innocence may engender. Protection against unwarranted delay, with its concomitant side effects on the accused, of course, is primarily the function of the Speedy Trial Clause of the Sixth Amendment, made applicable to the States by means of the Fourteenth. *Klopfer* v. *North Carolina,* 386 U. S. 213 (1967). Appellant does not continue to press the con-

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sertion of the accused's Sixth Amendment right to demand a trial by jury. In contrast, here, the same range of penalties is available at both tiers.

Appellant also refers to an incident in which a

"trial judge in the Municipal Court of Boston announced that he would impose a one year suspended jail sentence if the defendant would forgo his 'right to appeal' for a trial by jury, or otherwise he would impose a one year sentence. When this attorney objected to the choice the trial judge . . . [stated]: 'Take your pick, one year suspended with no appeal, or one year with appeal.'" Brief for Appellant 37.

Dampening the exercise of a constitutional right, by a method such as that, may be corrected, of course, in individual instances. See *North Carolina* v. *Pearce,* 395 U. S. 711 (1969).

The example, moreover, is not helpful to appellant here. He was not subjected to vindictive sentencing. He received a nominal fine of $20 at both proceedings. Further, the suggestion that vindictive sentencing is a serious problem in Massachusetts is belied by another of appellant's claims:

"In Massachusetts, however, the record of the lower court proceedings, including the sentence imposed, is transmitted to the superior court . . . . If the accused is convicted again, the resentencing judge as a matter of practice usually inquires initially as to why the lower court sentence should not be reimposed." Brief for Appellant 43.

It is argued that this procedure "manifestly discourages 'appeals.'" *Ibid.* We are unable to see why. If the chances are great that an accused who has been convicted at the first tier will receive the same sentence at the second tier if he is again convicted, there is little reason not to appeal and take the "risk" of an acquittal.

tention, made below, that he was denied his constitutional right to a speedy trial. Further, it is nearly always true that an accused may obtain a faster adjudication of his guilt or innocence by waiving a jury trial even in those States where he may have one in the first instance. No one has seriously charged, however, that the fact that trials by jury are not scheduled so quickly as trials before a judge impermissibly burdens the constitutional right to trial by jury. Finally we are uncertain whether the delay in obtaining a jury trial is increased by the *de novo* procedure or decreased. Appellant has not presented any evidence to show that there is a greater delay in obtaining a jury in Massachusetts than there would be if the Commonwealth abandoned its two-tier system. We are reluctant to attribute to Massachusetts a perverse determination to maintain an inefficient system whose very purpose is to increase efficiency.

Our disposition of this case does not require us to disturb the holding in *Callan* v. *Wilson,* 127 U. S. 540 (1888). In *Callan,* this Court considered the validity of a District of Columbia two-tier trial system that provided for trial by jury only in the second tier. The Court announced: "Except in that class or grade of offences called petty offences, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority of, the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offence charged." *Id.,* at 557.

Reconsideration of *Callan* is not required here for two reasons. First, as the Court there recognized, the sources

of the right to jury trial in the federal courts are several and include Art. III, § 2, cl. 3, of the Constitution. That provision requires, in pertinent part, that "[t]he Trial of all Crimes . . . shall be by Jury." This language, which might be read as prohibiting, in the absence of a defendant's consent, a federal trial without a jury is, of course, not applicable to the States. Second, to the extent that the decision in *Callan* may have rested on a determination that the right to trial by jury in a serious criminal case was unduly burdened by a requirement that an accused first be tried without a jury, it is not controlling here. Unlike the District of Columbia system, which apparently required that an accused be "fully tried" in the first tier, 127 U. S., at 557, Massachusetts permits an accused to circumvent trial in the first tier by admitting to sufficient findings of fact.

The modes of exercising federal constitutional rights have traditionally been left, within limits, to state specification. In this case, Massachusetts absolutely guarantees trial by jury to persons accused of serious crimes, and the manner it has specified for exercising this right is fair and not unduly burdensome.

IV

The final contention is that the Massachusetts procedure violates the Double Jeopardy Clause. The basis of appellant's contention is that "the de novo procedure forces the accused to the 'risk' of two trials." Brief for Appellant 66. Appellee responds by quoting from *North Carolina* v. *Pearce,* 395 U. S., at 719–720: "At least since 1896, when *United States* v. *Ball,* 163 U. S. 662, was decided, it has been settled that this constitutional guarantee imposes no limitations whatever upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside" (emphasis in original). Brief for Appellee 31.

We agree that there is no double jeopardy violation posed by the Massachusetts system. The history of the Double Jeopardy Clause and its interpretation were canvassed by the Court only last Term in *United States* v. *Wilson,* 420 U. S. 332 (1975); *United States* v. *Jenkins,* 420 U. S. 358 (1975); and *Serfass* v. *United States,* 420 U. S. 377 (1975), and need not be repeated here. It is sufficient to say:

> "Although the form and breadth of the prohibition varied widely, the underlying premise was generally that a defendant should not be twice tried or punished for the same offense. . . . Writing in the 17th century, Lord Coke described the protection afforded by the principle of double jeopardy as a function of three related common-law pleas: *autrefois acquit, autrefois convict,* and pardon." *United States* v. *Wilson,* 420 U. S., at 339–340.

In this case, only the concept represented by the common-law plea of *autrefois convict* is presently at issue. The Massachusetts system presents no danger of prosecution after an accused has been pardoned; nor is there any doubt that acquittal at the first tier precludes reprosecution. Instead, the argument appears to be that because the appellant has been placed once in jeopardy and convicted, the State may not retry him when he informs the trial court of his decision to "appeal" and to secure a trial *de novo.*

Appellant's argument is without substance. The decision to secure a new trial rests with the accused alone. A defendant who elects to be tried *de novo* in Massachusetts is in no different position than is a convicted defendant who successfully appeals on the basis of the trial record and gains a reversal of his conviction and a remand of his case for a new trial. Under these

circumstances, it long has been clear that the State may reprosecute. *United States* v. *Ball,* 163 U. S. 662 (1896). The only difference between an appeal on the record and an appeal resulting automatically in a new trial is that a convicted defendant in Massachusetts may obtain a "reversal" and a new trial without assignment of error in the proceedings at his first trial. Nothing in the Double Jeopardy Clause prohibits a State from affording a defendant two opportunities to avoid conviction and secure an acquittal.

The judgment is affirmed.

It is so ordered.

MR. JUSTICE POWELL, concurring.

I join the opinion of the Court, as I understand it to be consistent with my view that the right to a jury trial afforded by the Fourteenth Amendment is not identical to that guaranteed by the Sixth Amendment. See my opinion in *Apodaca* v. *Oregon,* reported at 406 U. S., at 369–380 (1972) (concurring in judgment).* I add only that *Callan* v. *Wilson,* 127 U. S. 540 (1888), is distinguishable most simply by the applicability to that case of the Sixth Amendment.

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

The question in this case is whether Massachusetts may convict a defendant of a crime and sentence him to prison for a period of five years without a jury trial. The Court answers the question in the affirmative for two reasons. First, the conviction is almost meaningless

*The plurality opinion in *Apodaca* v. *Oregon* is reported at 406 U. S. 404. My opinion is appended to the Court's opinion in *Johnson* v. *Louisiana,* 406 U. S. 356 (1972), commencing at 366.

since the defendant may have it vacated by an immediate appeal; and second, the defendant may minimize the burden of the trial by, in effect, stipulating that the proof need not establish his guilt beyond a reasonable doubt. To put it mildly, I find these reasons unsatisfactory.

Almost a century ago the Court decided that a comparable procedure was unconstitutional. Referring to a federal criminal proceeding, a unanimous Court stated:

> "But the argument, made in behalf of the government, implies that if Congress should provide the Police Court with a grand jury, and authorize that court to try, without a petit jury, all persons indicted—even for crimes punishable by confinement in the penitentiary—such legislation would not be an invasion of the constitutional right of trial by jury, provided the accused, after being tried and sentenced in the Police Court, is given an unobstructed right of appeal to, and trial by jury in, another court to which the case may be taken. We cannot assent to that interpretation of the Constitution. Except in that class or grade of offences called petty offences, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority of, the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offence charged. In such cases a judgment of conviction, not based upon a verdict of guilty by a jury, is void. To accord to the accused a right to be tried by a jury, in an appellate court, after he has been once fully tried

> otherwise than by a jury, in the court of original jurisdiction, and sentenced to pay a fine or be imprisoned for not paying it, does not satisfy the requirements of the Constitution." *Callan* v. *Wilson*, 127 U. S. 540, 556–557.

As is evident from the Court's language, its holding did not rest on any difference between the way the guarantee of the right to a trial by jury is described in Art. III, § 2, cl. 3, and the way the right is described in the Sixth Amendment. The Court's holding reflected the Court's appraisal of the value of the right to a trial by jury.

Before refusing to follow a precedent so nearly in point, I should think the Court would at least ask why Massachusetts *requires* the defendant to stand trial in the first tier before permitting him to have a jury trial. This is a requirement the defendant cannot waive. It is also a requirement which—as far as the record, the briefs, the oral argument, or the opinion announced by the Court today, shed any light on the matter—is totally irrational.[1] All of the legitimate benefits of the two-tier system could be obtained by giving the defendant the right to waive the first-tier trial completely.

The only reason I can perceive for not allowing such a waiver illustrates the vice of the system. A defendant

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[1] At oral argument the Assistant Attorney General of the Commonwealth was asked to explain the reason for the requirement:

"QUESTION: Well, why not, when the man is going to appeal, why just say, Well, since you're going to appeal and you're going to get a jury trial, you don't have to go through this other one. What good is the first hearing to the State, where you know the man is going to appeal and ask for a jury trial?

"What benefit does the State have for the first tier?

"MR. IRWIN: Well, in the situation that you gave, Mr. Justice Marshall, I would say the State really has no benefit if what you're suggesting is, the situation that I think you are, that where they know he's going to appeal." Tr. of Oral Arg. 34–35.

who can afford the financial and psychological burden of one trial may not be able to withstand the strain of a second. Thus, as a practical matter, a finding of guilt in the first-tier proceeding will actually end some cases that would have been tried by a jury if the defendant had the right to waive the first-tier proceeding. And since the nonjury trial is less expensive and time consuming, the State receives the benefit of an expedited disposition in such a case. The Court quite properly does not rely on any such justification because, if valid, it would justify the complete elimination of jury trials.

There are several reasons why I cannot accept the Court's naive assumption that the first-tier proceeding is virtually meaningless. If it is meaningless for the defendant, it must be equally meaningless for the Commonwealth. But if so, why does the Commonwealth insist on the *requirement* that the defendant must submit to the first trial? Only, I suggest, because it believes the number of jury trials that would be avoided by the required practice exceeds the number that would take place in an optional system. In short, the very purpose of the requirement is to discourage jury trials by placing a burden on the exercise of the constitutional right.

The burden, in my opinion, is significant. A second trial of the same case is never the same as the first. Lawyers and witnesses are stale; opportunities for impeachment that may have little or much actual significance are present in the second trial that were not present in the first; a witness may be available at one time but not the other; the tactics on cross-examination, or on the presentation of evidence, in the first trial will be influenced by judgment of what may happen at the second; the strategy in a nonjury trial may be different than in a proceeding before a jury. Clearly, if a defend-

ant has participated in a full first-tier-nonjury trial, his jury trial in the second tier is significantly different from the normal jury trial.

The Court responds by indicating that "Massachusetts permits an accused to circumvent trial in the first tier by admitting to sufficient findings of fact." [2] But if we presume that the defendant is innocent until proved guilty, we must also assume that the innocent defendant would deny or contradict the evidence offered by the prosecutor. The choice between admitting the truth and also the prima facie sufficiency of evidence the defendant considers false or misleading, on the one hand, or insisting on a full nonjury trial on the other, is not an insignificant price to pay for the exercise of a constitutional right.

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[2] *Ante,* at 630. This conclusion is based largely on the following comments made by counsel at oral argument:

"QUESTION: In your Massachusetts system, is he able to stand aside at the first tier? As was the case in Kentucky, in *Colten* v. *Kentucky?*

"MR. HAGOPIAN: No, he can't.

"QUESTION: What does he do?

"MR. HAGOPIAN: The most he can do is just sit with his counsel, the government will put on their witnesses; he can—there is an informal procedure, that's not statutory, what's known as submitting to informal admissions of facts. Which means that you're not really going to contest the trial, you'll allow hearsay to go on. The government still puts its parade of witnesses on. But it's a means of speeding up the first tier trial. But he's still convicted if found guilty. But there's no way of bypassing that at all." Tr. of Oral Arg. 13.

Without questioning the accuracy of those comments as they apply in many proceedings, it should be noted that this is not a procedure set forth in any written statute or rule and conceivably may or may not be followed by some of the many judges who preside at first-tier proceedings. In all events, for reasons stated in the text, I consider it an insufficient justification for not allowing the defendant an unequivocal right to waive the first trial entirely.

Nor does the right to a trial *de novo* by taking an immediate appeal make the judge's guilty finding and sentence entirely meaningless. Apart from any legal consequence, the finding certainly tarnishes the defendant's reputation.[3] The finding, and the first judge's sentencing determination may have a greater impact on the second trial judge than the mere return of an indictment. Moreover, if we presume that at least some laymen have some knowledge of the law, we must also recognize the likelihood that some jurors at the second-tier trial will be aware of the first conviction. Such awareness inevitably compromises the defendant's presumption of innocence. Moreover, a judge's instructions cannot adequately avoid this risk of prejudice without creating the additional risk of letting other jurors know about the first conviction.

Unquestionably, in a great majority of proceedings the two-tier system may expedite the disposition of cases and, indeed, may give a defendant two opportunities to establish his innocence. But that fact is of no significance to the individual who wants only one trial and who wants that trial to be conducted before a jury. The Constitution guarantees him that protection; that guarantee is not fulfilled by a State which eventually offers the defendant the kind of trial he is entitled to receive in the first instance. Cf. *Ward* v. *Village of Monroeville,* 409 U. S. 57, 61–62. The burden on the right to a jury trial imposed by Massachusetts is especially un-

[3] To dramatize this point, we might make the not entirely unrealistic hypothetical assumption that a defendant might suddenly suffer a fatal heart attack when the trial judge announces his finding and sentence. More realistically, we need simply recognize the fact that many convicted defendants will be unwilling to undergo the ordeal of a second trial after being found guilty by a judge.

acceptable because the Commonwealth has offered no legitimate justification for its *requirement* of a first-tier-nonjury trial.

Callan v. *Wilson*, 127 U. S. 540, was correctly decided; it should be followed. I respectfully dissent.

Per Curiam

NATIONAL HOCKEY LEAGUE ET AL. *v.* METROPOLITAN HOCKEY CLUB, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 75–1558. Decided June 30, 1976

District Court did not abuse its discretion in resorting to the extreme sanction of dismissing respondents' antitrust action against petitioners pursuant to Fed. Rule Civ. Proc. 37, the court having found that, notwithstanding its admonitions and numerous extensions, respondents failed to respond to written interrogatories ordered by the court, and that under the circumstances such failure manifested "flagrant bad faith" and "callous disregard" by respondents' counsel of their responsibilities.

Certiorari granted; 531 F. 2d 1188, reversed.

PER CURIAM.

This case arises out of the dismissal, under Fed. Rule Civ. Proc. 37, of respondents' antitrust action against petitioners for failure to timely answer written interrogatories as ordered by the District Court. The Court of Appeals for the Third Circuit reversed the judgment of dismissal, finding that the District Court had abused its discretion. The question presented is whether the Court of Appeals was correct in so concluding. Rule 37 (b)(2) provides in pertinent part as follows:

> "If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> . . . . .
>
> "(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or pro-

> ceeding or any part thereof, or rendering a judgment by default against the disobedient party."

This Court held in *Societe Internationale* v. *Rogers,* 357 U. S. 197, 212 (1958), that Rule 37

> "should not be construed to authorize dismissal of [a] complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner."

While there have been amendments to the Rule since the decision in *Rogers,* neither the parties, the District Court, nor the Court of Appeals suggested that the changes would affect the teachings of the quoted language from that decision.

The District Court, in its memorandum opinion directing that respondents' complaint be dismissed, summarized the factual history of the discovery proceeding in these words:

> "After seventeen months where crucial interrogatories remained substantially unanswered despite numerous extensions granted at the eleventh hour and, in many instances, beyond the eleventh hour, and notwithstanding several admonitions by the Court and promises and commitments by the plaintiffs, the Court must and does conclude that the conduct of the plaintiffs demonstrates the callous disregard of responsibilities counsel owe to the Court and to their opponents. The practices of the plaintiffs exemplify flagrant bad faith when after being expressly directed to perform an act by a date certain, *viz.,* June 14, 1974, they failed to perform and compounded that noncompliance by waiting until five days afterwards before they filed any motions.

> Moreover, this action was taken in the face of warnings that their failure to provide certain information could result in the imposition of sanctions under Fed. R. Civ. P. 37. If the sanction of dismissal is not warranted by the circumstances of this case, then the Court can envisage no set of facts whereby that sanction should ever be applied." 63 F. R. D. 641, 656 (1974).

The Court of Appeals, in reversing the order of the District Court by a divided vote, stated:

> "After carefully reviewing the record, we conclude that there is insufficient evidence to support a finding that M-GB's failure to file supplemental answers by June 14, 1974 was in flagrant bad faith, willful or intentional." 531 F. 2d 1188, 1195 (1976).

The Court of Appeals did not question any of the findings of historical fact which had been made by the District Court, but simply concluded that there was in the record evidence of "extenuating factors." The Court of Appeals emphasized that none of the parties had really pressed discovery until after a consent decree was entered between petitioners and all of the other original plaintiffs except the respondents approximately one year after the commencement of the litigation. It also noted that respondents' counsel took over the litigation, which previously had been managed by another attorney, after the entry of the consent decree, and that respondents' counsel encountered difficulties in obtaining some of the requested information. The Court of Appeals also referred to a colloquy during the oral argument on petitioners' motion to dismiss in which respondents' lead counsel assured the District Court that he would not knowingly and willfully disregard the final deadline.

While the Court of Appeals stated that the District

Court was required to consider the full record in determining whether to dismiss for failure to comply with discovery orders, see *Link* v. *Wabash R. Co.*, 370 U. S. 626, 633–634 (1962), we think that the comprehensive memorandum of the District Court supporting its order of dismissal indicates that the court did just that. That record shows that the District Court was extremely patient in its efforts to allow the respondents ample time to comply with its discovery orders. Not only did respondents fail to file their responses on time, but the responses which they ultimately did file were found by the District Court to be grossly inadequate.

The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing. *E. g.*, C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2284, p. 765 (1970); *General Dynamics Corp.* v. *Selb Mfg. Co.*, 481 F. 2d 1204, 1211 (CA8 1973); *Baker* v. *F & F Investment*, 470 F. 2d 778, 781 (CA2 1972). Certainly the findings contained in the memorandum opinion of the District Court quoted earlier in this opinion are fully supported by the record. We think that the lenity evidenced in the opinion of the Court of Appeals, while certainly a significant factor in considering the imposition of sanctions under Rule 37, cannot be allowed to wholly supplant other and equally necessary considerations embodied in that Rule.

There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order. It is quite reasonable to conclude that a party who has been subjected to such an order will feel duly chastened, so that even though he succeeds in hav-

ing the order reversed on appeal he will nonetheless comply promptly with future discovery orders of the district court.

But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. If the decision of the Court of Appeals remained undisturbed in this case, it might well be that *these* respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts. Under the circumstances of this case, we hold that the District Judge did not abuse his discretion in finding bad faith on the part of these respondents, and concluding that the extreme sanction of dismissal was appropriate in this case by reason of respondents' "flagrant bad faith" and their counsel's "callous disregard" of their responsibilities. Therefore, the petition for a writ of certiorari is granted and the judgment of the Court of Appeals is reversed.

So ordered.

MR. JUSTICE BRENNAN and MR. JUSTICE WHITE dissent.

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

REPORTER'S NOTE

The next page is purposely numbered 901. The numbers between 643 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM JUNE 28 THROUGH JUNE 30, 1976

JUNE 28, 1976

Appeals Dismissed

No. 74–1459. SAN DIEGO BUILDING CONTRACTORS ASSN. ET AL. *v.* CITY COUNCIL OF THE CITY OF SAN DIEGO. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE would note probable jurisdiction and set case for oral argument. Reported below: 13 Cal. 3d 205, 529 P. 2d 570.

No. 75–111. BUILDERS ASSOCIATION OF SANTA CLARA-SANTA CRUZ COUNTIES *v.* SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SANTA CLARA (CITY OF SAN JOSE ET AL., REAL PARTIES IN INTEREST). Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question. MR. JUSTICE BRENNAN would note probable jurisdiction and set case for oral argument. Reported below: 13 Cal. 3d 225, 529 P. 2d 582.

No. 75–466. CRESTWOOD EDUCATION ASSN. ET AL. *v.* BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF CRESTWOOD. Appeal from Sup. Ct. Mich. dismissed for want of substantial federal question. MR. JUSTICE BRENNAN would note probable jurisdiction and set case for oral argument. Reported below: 393 Mich. 616. 227 N. W. 2d 736.

No. 75–1712. GABY *v.* PORT AUTHORITY OF NEW YORK AND NEW JERSEY ET AL. Appeal from Sup. Ct. N. J. dismissed for want of jurisdiction. Reported below: 69 N. J. 253, 353 A. 2d 514.

No. 75–6065. MALLORY *v.* ALABAMA. Appeal from Ct. Crim. App. Ala. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would note probable jurisdiction and set case for oral argument. Reported below: 55 Ala. App. 82, 313 So. 2d 203.

Certiorari Granted—Vacated and Remanded

No. 75–169. OMAHA TRIBE OF INDIANS ET AL. *v.* PETERS ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bryan* v. *Itasca County,* 426 U. S. 373. Reported below: 516 F. 2d 133.

No. 75–736. ENVIRONMENTAL PROTECTION AGENCY *v.* DUQUESNE LIGHT CO. ET AL. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Union Electric Co.* v. *EPA, ante,* p. 246. MR. JUSTICE POWELL took no part in the consideration or decision of this case. Reported below: 522 F. 2d 1186.

No. 75–1116. RICHARDSON ET AL. *v.* LOKEY. C. A. 9th 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 *Montanye* v. *Haymes, ante,* p. 236, and *Meachum* v. *Fano, ante,* p. 215. Reported below: 527 F. 2d 949.

No. 75–1418. CITY OF CHICAGO ET AL. *v.* CONFEDERATION OF POLICE ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Montanye* v. *Haymes, ante,* p. 236, *Meachum* v. *Fano, ante,* p. 215, and *Bishop* v. *Wood,* 426 U. S. 341. Reported below: 529 F. 2d 89.

No. 75–5958. RICKMAN *v.* UNITED STATES. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Doyle* v. *Ohio*, 426 U. S. 610. Reported below: 535 F. 2d 1244.

Miscellaneous Orders

No. A–1104. A ET AL. *v.* DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF COLORADO ET AL. Application for stay of mandate of the Supreme Court of Colorado, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A–1105. KOCH ET UX. *v.* ALEXANDER, COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Application for injunction, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. 75–720. LEE WAY MOTOR FREIGHT, INC., ET AL. *v.* RESENDIS ET AL.; and YELLOW FREIGHT SYSTEM, INC. *v.* HERRERA ET AL., 425 U. S. 991. Counsel for respondents requested to file response to petition for rehearing within 30 days.

No. 75–1690. PARHAM, COMMISSIONER, DEPARTMENT OF HUMAN RESOURCES OF GEORGIA, ET AL. *v.* J. L. ET AL. Appeal from D. C. M. D. Ga. Motion of appellees for expedited consideration of this case denied.

Probable Jurisdiction Noted

No. 75–1687. UNITED STATES TRUST COMPANY OF NEW YORK, TRUSTEE *v.* NEW JERSEY ET AL. Appeal from Sup. Ct. N. J. Motion of Securities Industry Assn. for leave to file a brief as *amicus curiae* granted. Probable jurisdiction noted. Reported below: 69 N. J. 253, 353 A. 2d 514.

Certiorari Granted

No. 75–812. CAWLEY, POLICE COMMISSIONER, CITY OF NEW YORK, ET AL. *v.* VELGER. C. A. 2d Cir. Certiorari granted. Reported below: 525 F. 2d 334.

Certiorari Denied. (See also No. 75–6065, *supra.*)

No. 74–1638. HORTONVILLE EDUCATION ASSN. ET AL. *v.* HORTONVILLE JOINT SCHOOL DISTRICT NO. 1 ET AL. Sup. Ct. Wis. Certiorari denied. Reported below: 66 Wis. 2d 469, 225 N. W. 2d 658.

No. 74–6475. EDWARDS, AKA MCARTHUR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 75–698. LAKE MICHIGAN COLLEGE FEDERATION OF TEACHERS *v.* LAKE MICHIGAN COMMUNITY COLLEGE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 518 F. 2d 1091.

No. 75–729. ANDERSON ET AL. *v.* BOARD OF EDUCATION, PRINCETON CITY SCHOOL DISTRICT. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 75–1051. BLACK, REFORMATORY SUPERINTENDENT *v.* MINOR. C. A. 6th Cir. Certiorari denied. Reported below: 527 F. 2d 1.

No. 75–1477. LITTLE ET AL. *v.* OKLAHOMA ET AL. Sup. Ct. Okla. Certiorari denied. Reported below: 544 P. 2d 495.

No. 75–6129. MCLAUGHLIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 525 F. 2d 517.

No. 75–6163. YOUNG *v.* WHEALON, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 530 F. 2d 978.

No. 75–6438. MORGAN *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: —— Mass. ——, 339 N. E. 2d 723.

No. 74–5830. MORRIS ET AL. *v.* SULLIVAN, COMMISSIONER OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 497 F. 2d 544.

No. 75–5817. SMITH *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 522 F. 2d 1279.

No. 75–324. EXXON CORP. ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY;

No. 75–325. TEXAS CHEMICAL COUNCIL *v.* ENVIRONMENTAL PROTECTION AGENCY; and

No. 75–326. HARRIS COUNTY, TEXAS *v.* ENVIRONMENTAL PROTECTION AGENCY. C. A. 5th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 499 F. 2d 289.

No. 75–1201. RAGANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 520 F. 2d 1191.

MR. JUSTICE BRENNAN, dissenting.

Petitioner was initially charged in a three-count indictment with (1) attempting to evade income taxes for the year 1967 in violation of 26 U. S. C. § 7201; (2) making a false declaration on his income tax return for the year 1967 in violation of 26 U. S. C. § 7206 (1); and (3) making a false declaration on his income tax return for the year 1968 in violation of 26 U. S. C. § 7206 (1). The latter count charged petitioner with falsely declaring that income from the sale of certain shares of stock

was a long-term capital gain. He was acquitted by a jury of the first two counts, but convicted of the third offense charged. On appeal, the Court of Appeals for the Fifth Circuit reversed the conviction on the third count because of certain trial errors. 476 F. 2d 410 (1973). Prior to the retrial on this count, the grand jury returned a superseding six-count indictment charging petitioner with (1) conspiracy to defraud the United States in the collection of income taxes owed for the years 1966 and 1968 in violation of 18 U. S. C. § 371; (2) attempting to evade income taxes for the year 1966 in violation of 26 U. S. C. § 7201; (3) making a false declaration on his income tax return for the year 1966 in violation of 26 U. S. C. § 7206 (1); (4) attempting to evade income taxes for the year 1968 in violation of 26 U. S. C. § 7201; (5) making a false declaration on his income tax return for the year 1968 in violation of 26 U. S. C. § 7206 (1); and (6) making a false declaration on his income tax return for the year 1969 in violation of 26 U. S. C. § 7206 (1). This indictment charged that the stock transaction referred to above was a sham, intended to disguise a "finder's fee" as income from a stock transaction that petitioner could claim as a long-term capital gain. Count six was severed and dismissed, but petitioner's double jeopardy challenge to the balance of the indictment, to the extent that it went beyond the charges included in the original count three, was rejected. After a jury trial, petitioner was convicted on the remaining five counts, and the Court of Appeals affirmed. 520 F. 2d 1191 (1975).

The superseding indictment in this case includes a conspiracy count and other offenses that were not charged in the original indictment even though they clearly arose out of the same criminal transaction or episode. In this circumstance, I would grant the pe-

tition for certiorari and reverse the counts of petitioner's conviction not encompassed in count three of the original indictment. I adhere to the view that the Double Jeopardy Clause of the Fifth Amendment requires prosecution in one proceeding, except in extremely limited circumstances not present here, of "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe* v. *Swenson,* 397 U. S. 436, 453–454 (1970) (BRENNAN, J., concurring). See *Dempsey* v. *United States,* 423 U. S. 1079 (1976) (BRENNAN, J., dissenting); *Susi* v. *Flowers,* 423 U. S. 1006 (1975) (BRENNAN, J., dissenting); *Vardas* v. *Texas,* 423 U. S. 904 (1975) (BRENNAN, J., dissenting); *Stewart* v. *Iowa,* 423 U. S. 902 (1975) (BRENNAN, J., dissenting); *Waugh* v. *Gray,* 422 U. S. 1027 (1975) (BRENNAN, J., dissenting); *Wells* v. *Missouri,* 419 U. S. 1075 (1974) (BRENNAN, J., dissenting); *Moton* v. *Swenson,* 417 U. S. 957 (1974) (BRENNAN, J., dissenting); *Tijerina* v. *New Mexico,* 417 U. S. 956 (1974) (BRENNAN, J., dissenting); *Ciuzio* v. *United States,* 416 U. S. 995 (1974) (BRENNAN, J., dissenting); *Harris* v. *Washington,* 404 U. S. 55, 57 (1971) (concurring statement); *Waller* v. *Florida,* 397 U. S. 387, 395 (1970) (BRENNAN, J., concurring). See also *People* v. *White,* 390 Mich. 245, 212 N. W. 2d 222 (1973); *State* v. *Brown,* 262 Ore. 442, 497 P. 2d 1191 (1972); *Commonwealth* v. *Campana,* 452 Pa. 233, 304 A. 2d 432, vacated and remanded, 414 U. S. 808 (1973), adhered to on remand, 455 Pa. 622, 314 A. 2d 854 (1974); *State* v. *Gregory,* 66 N. J. 510, 333 A. 2d 257 (1975).

No. 75–5296. RICH ET AL. *v.* UNITED STATES; and WEBER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari. Reported below: 518 F. 2d 980 (first case); 518 F. 2d 987 (second case).

Rehearing Denied

No. 75–1132. CANON *v.* UNITED STATES, 425 U. S. 991;

No. 75–1141. REESE *v.* UNITED STATES, 425 U. S. 972;

No. 75–1330. MIELKE ET AL. *v.* SINGARA GROTTO, INC., ET AL., 425 U. S. 974;

No. 75–1338. MASCHHOFF *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL., 425 U. S. 993;

No. 75–1358. PARKER *v.* MOTOROLA, INC., 425 U. S. 975;

No. 75–1434. WALLACE CLARK & CO., INC. *v.* ACHESON INDUSTRIES, INC., 425 U. S. 976;

No. 75–6241. ISAAC *v.* UNITED STATES, 425 U. S. 977;

No. 75–6251. VYMETALIK *v.* SECRETARY OF COMMERCE, 425 U. S. 977;

No. 75–6284. MONTOYA-GONZALES *v.* UNITED STATES, 425 U. S. 978;

No. 75–6320. GUERRA *v.* UNITED STATES, 426 U. S. 909;

No. 75–6450. BURAS *v.* CHEVRON OIL CO. ET AL., 425 U. S. 980;

No. 75–6528. FOSTER *v.* GALLAWA ET AL., 425 U. S. 989; and

No. 75–6545. RAITPORT *v.* COMMERCIAL BANKS LOCATED WITHIN THIS DISTRICT AS A CLASS ET AL., 425 U. S. 997. Petitions for rehearing denied.

Assignment Order

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 Tenth Circuit from September 20, 1976, to September 22, 1976, 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.

JUNE 30, 1976

Appeal Dismissed

No. 75–6285. HANDFIELD *v.* NEW HAMPSHIRE. Appeal from Sup. Ct. N. H. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 115 N. H. 628, 348 A. 2d 352.

Vacated and Remanded on Appeal

No. 75–1488. HAMPTON ET AL., COMMISSIONERS, U. S. CIVIL SERVICE COMMISSION *v.* MYERS. Appeal from D. C. S. D. Ohio. Motion of appellee for leave to proceed *in forma pauperis* granted. Judgment vacated, and case remanded for further consideration in light of *Mathews* v. *Lucas, ante,* p. 495. MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, MR. JUSTICE BLACKMUN, and MR. JUSTICE STEVENS would affirm the judgment.

Certiorari Granted—Vacated and Remanded

No. 75–404. INDIANA *v.* USERY, SECRETARY OF LABOR. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *National League of Cities* v. *Usery,* 426 U. S. 833. Reported below: 517 F. 2d 1179.

No. 75–532. NEW JERSEY ET AL. *v.* USERY, SECRETARY OF LABOR. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *National League of Cities* v. *Usery,* 426 U. S. 833. Reported below: 522 F. 2d 504.

No. 75–1464. UNITED STATES *v.* MCCRANE. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United*

States v. *Agurs, ante,* p. 97. Reported below: 527 F. 2d 906.

Certiorari Granted—Reversed. (See No. 75–1558, *ante,* p. 639.)

Miscellaneous Orders

No. D–22. In re Disbarment of Rosner. It having been reported to the Court that Edmund Allen Rosner, of New York, N. Y., has been disbarred from the practice of law by the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, and this Court by order of February 19, 1974 [415 U. S. 907], having suspended the said Edmund Allen Rosner from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent and that the time to file a response thereto has expired;

It is ordered that the said Edmund Allen Rosner be disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. D–43. In re Disbarment of Andresen. It having been reported to the Court that Peter C. Andresen, of Kensington, Md., has been suspended from the practice of law in the United States District Court for the District of Columbia, and this Court by order of February 24, 1975 [420 U. S. 942], having suspended the said Peter C. Andresen from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent and a response having been filed thereto;

It is ordered that the said Peter C. Andresen be disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. 74–635. UNITED STATES *v.* WONG. C. A. 9th Cir. [Certiorari granted, 426 U. S. 905.] Motion of the Solicitor General for summary disposition denied.

No. 75–1443. MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* SANDERS. C. A. 7th Cir. [Certiorari granted, 426 U. S. 905.] Motion of respondent for leave to proceed further herein *in forma pauperis* granted. MR. JUSTICE STEVENS took no part in the consideration or decision of this motion.

Certiorari Denied. (See also No. 75–6285, *supra.*)

No. 75–155. LARKIN ET AL. *v.* PATTERSON ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 514 F. 2d 767.

No. 75–492. ROSNER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 516 F. 2d 269.

No. 75–766. OGDEN *v.* WOLFF, WARDEN; and

No. 75–767. ATKINSON *v.* WOLFF, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 522 F. 2d 816.

No. 75–933. MCAULIFFE *v.* CARLSON, COMMISSIONER OF FINANCE AND CONTROL OF CONNECTICUT. C. A. 2d Cir. Certiorari denied. Reported below: 520 F. 2d 1305.

No. 75–1077. BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA ET AL. *v.* MAPP ET AL.; and

No. 75–1564. MAPP ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 525 F. 2d 169.

No. 75–601. SHAFFER ET UX. *v.* WILSON ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 523 F. 2d 175.

No. 75–1231. TRUITT ET AL. *v.* LENAHAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 529 F. 2d 230.

No. 75–444. FARR *v.* PITCHESS, SHERIFF. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 522 F. 2d 464.

No. 75–919. ROSATO ET AL. *v.* SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO. Ct. App. Cal., 5th App. Dist. Motions of American Newspaper Publishers Assn. et al. and McClatchy Newspapers et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 51 Cal. App. 3d 190, 124 Cal. Rptr. 427.

No. 75–1114. MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* JIMENEZ ET AL. C. A. 7th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this motion and petition. Reported below: 523 F. 2d 689.

No. 75–1296. CUNNINGHAM, CLERK, U. S. DISTRICT COURT *v.* CHICAGO COUNCIL OF LAWYERS ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 522 F. 2d 242.

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3. *Freedom of speech—Prior restraints—Zoning ordinances—Location of adult theaters.*—Zoning ordinances providing that an adult theater may not (apart from special waiver) be located within 1,000 feet of any two other "regulated uses" or within 500 feet of a residential area, are not invalid under First Amendment as prior restraints on protected communication because of licensing or zoning requirements. Though adult films may be exhibited commercially only in licensed theaters, that is also true of all films. That place where films may be exhibited is regulated does not violate free expression, city's interest in planning and regulating use of property for commercial purposes being clearly adequate to support locational restriction. Young v. American Mini Theatres, p. 50.

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their child because he was a Negro, particularly where it appears that Court of Appeals, as well as Federal District Courts in Virginia, had considered question in previous civil rights litigation, and that phrase "personal injuries" in Virginia statute can reasonably be construed to apply to sort of injuries claimed here and not only to "physical injuries." Runyon v. McCrary, p. 160.

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MURDER TRIALS. See **Constitutional Law,** V, 4–5; **Mootness,** 2.

NATIONAL AIR QUALITY STANDARDS. See **Judicial Review.**

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969.

1. *Coal reserves—Northern Great Plains region—Necessity for environmetal impact statement.*—NEPA does not require petitioner Department of Interior officials to prepare an environmental impact statement on entire Northern Great Plains region with respect to development of coal reserves there. Petitioners have proposed no legislation on region, and there is no evidence in record of any proposal for major federal action with respect to region, but rather it appears that all proposals have been for actions of either local or national scope. Unless there is a proposal for a regional plan of development, it is not practical to prepare a regional EIS, since, absent such a plan, it is impossible to predict level of coal-related activity that will occur in region, and thus to analyze environmental consequences and resource commitments involved, and alternatives to, such activity. Kleppe v. Sierra Club, p. 390.

2. *Coal reserves—Northern Great Plains region—Necessity for environmental impact statement.*—Respondent environmental organizations' contention as to relationships of all coal-related projects in Northern Great Plains region does not require that petitioner Department of Interior officials prepare one comprehensive environmental impact statement covering such projects before proceeding to approve specific pending applications. Absent a showing that petitioners acted arbitrarily in refusing to prepare one comprehensive EIS on entire region, it must be assumed that responsible federal agencies have exercised appropriately their discretion to resolve technical issues involved in determining region, if any, with respect to which a comprehensive EIS covering several proposals is necessary. Kleppe v. Sierra Club, p. 390.

3. *Coal reserves—Northern Great Plains region—Necessity for environmental impact statement—Court of Appeals' erroneous assumptions and interpretation.*—With respect to whether petitioner Department of Interior officials were required by NEPA to prepare an environmental impact statement before allowing further development of coal reserves in Northern Great Plains region, Court of Appeals erred in both its factual assumptions that several studies undertaken by petitioners represented attempts to control development on a regional scale, and in its interpretation of NEPA. There

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969—Continued.

is nothing in record to indicate that Northern Great Plains Resources Program was aimed toward a regional plan or program, but even if record justified such a finding Court of Appeals' legal conclusion cannot be squared with NEPA which in § 102 (2) (C) clearly states that an EIS is not required until an agency makes a recommendation or report on a *proposal* for major federal action. Court of Appeals had no authority to depart from statutory language and, by a balancing of court-devised factors, determine a point at which an EIS *should* be prepared. Kleppe v. Sierra Club, p. 390.

NATIONAL LABOR RELATIONS ACT. See **Federal-State Relations.**

NEBRASKA. See **Constitutional Law,** V, 4–5; **Mootness,** 2.

NEGROES. See **Attorneys' Fees; Civil Rights Act of 1866,** 2; **Constitutional Law,** V, 1; VII; VIII; **Limitation of Actions.**

NEW ORLEANS. See **Appeals; Constitutional Law,** III, 3.

NEWSPAPERS, NEWS MEDIA ASSOCIATIONS, AND NEWS-WIRE SERVICES. See **Constitutional Law,** V, 4.

NON-CIVIL-SERVICE EMPLOYEES. See **Constitutional Law,** V, 2.

NONFEDERAL CLAIMS. See **Jurisdiction.**

NONLAWYER JUDGES. See **Constitutional Law,** I, 5.

NONSECTARIAN SCHOOLS. See **Attorneys' Fees; Civil Rights Act of 1866,** 2; **Constitutional Law,** V, 1; VII; VIII; **Limitation of Actions.**

NORTHERN GREAT PLAINS REGION. See **National Environmental Policy Act of 1969.**

ORDINANCES. See **Appeals; Constitutional Law,** III, 3.

PARENTS' RIGHT TO DIRECT CHILDREN'S EDUCATION. See **Constitutional Law,** VII.

PARTIES. See **Jurisdiction.**

"PASADENA PLAN." See **District Courts.**

PATRONAGE DISMISSALS OF PUBLIC EMPLOYEES. See **Constitutional Law,** V, 2.

PENDENT JURISDICTION. See **Jurisdiction.**

PLANS FOR DESEGREGATION OF SCHOOLS. See **District Courts; Mootness,** 1.

POLICE. See **Constitutional Law**, III, 2.

POLICE COURTS. See **Constitutional Law**, I, 5; III, 4.

POLITICAL BELIEFS AND ASSOCIATIONS. See **Constitutional Law**, V, 2.

POLLUTION. See **Judicial Review.**

PRE-EMPTION OF STATE REGULATION OF LABOR RELATIONS. See **Federal-State Relations.**

PRESUMPTIONS OF DEPENDENCY. See **Constitutional Law**, III, 5.

PRETRIAL PUBLICITY. See **Constitutional Law**, V, 4–5.

PRIMARY AIR QUALITY STANDARDS. See **Judicial Review.**

PRIOR RESTRAINTS. See **Constitutional Law**, V, 3–5.

PRISONERS. See **Constitutional Law**, I, 3–4

PRIVACY RIGHTS See **Constitutional Law** VIII.

PRIVATE CONTRACTS. See **Civil Rights Act of 1866**, 2; **Constitutional Law**, V, 1; VII; VIII.

PRIVATE SCHOOLS. See **Attorneys' Fees**; **Civil Rights Act of 1866**, 2; **Constitutional Law**, V, 1; VII; VIII; **Limitation of Actions.**

PRIVILEGE AGAINST SELF-INCRIMINATION. See **Constitutional Law**, IV, 2.

PROBABLE CAUSE FOR ARREST. See **Constitutional Law**, VI, 3.

PROCEDURAL DUE PROCESS. See **Constitutional Law**, I, 3–4.

PROCEDURE. See also **Federal Rules of Civil Procedure.**

Direct appeal—Merits governed by other case—Decision on jurisdiction unnecessary.—In case raising same question as was presented in *Mathews* v. *Lucas, ante,* p. 495, as to constitutionality of Social Security Act provisions conditioning eligibility of certain illegitimate children for a surviving child's insurance benefits upon a showing that deceased wage earner was claimant child's parent and, at time of his death, was living with child or was contributing to his support, since decision in *Mathews* v. *Lucas* upholding such provisions renders merits of present case a decided issue in favor of appellee Secretary of Health, Education, and Welfare and thus no longer substantial in jurisdictional sense, it is unnecessary to decide jurisdictional question presented as to whether a three-judge court was properly

PROCEDURE—Continued.

convened upon appellant illegitimate child's demand for injunctive relief and hence whether this Court had jurisdiction over direct appeal under 28 U. S. C. § 1253. Norton v. Mathews, p. 524.

PROSECUTOR'S FAILURE TO DISCLOSE VICTIM'S CRIMINAL RECORD. See **Constitutional Law**, I, 1.

PROTECTED COMMUNICATIONS. See **Constitutional Law**, V, 3.

PUBLIC EMPLOYEES. See **Constitutional Law**, II; V, 2; **Jurisdiction.**

PUBLIC SCHOOLS. See **District Courts**; **Mootness**, 1.

PUSHCART VENDORS. See **Appeals**; **Constitutional Law**, III, 3.

RACIAL DISCRIMINATION See **Attorneys' Fees**; **Civil Rights Act of 1866**; **Civil Rights Act of 1964**; **Constitutional Law**, V, 1; VII; **Limitation of Actions.**

RACIALLY NEUTRAL SCHOOL SYSTEMS. See **District Courts**; **Mootness**, 1.

REASONABLE ATTORNEYS' FEES. See **Constitutional Law**, II, 1.

REFUSAL TO WORK OVERTIME. See **Federal-State Relations.**

REPORTING OF CRIMINAL PROCEEDINGS. See **Constitutional Law**, V, 4–5.

RESOURCE DEVELOPMENT. See **National Environmental Policy Act of 1969.**

RETIREMENT BENEFITS. See **Constitutional Law**, II.

RETIREMENT OF POLICE OFFICERS. See **Constitutional Law**, III, 2.

RETROACTIVE RETIREMENT BENEFITS. See **Constitutional Law**, II.

RIGHT OF ASSOCIATION. See **Constitutional Law**, V, 1–2.

RIGHT OF PARENTS TO DIRECT CHILDREN'S EDUCATION. See **Constitutional Law**, VII.

RIGHT OF PRIVACY. See **Constitutional Law**, VIII.

RIGHT TO FAIR TRIAL. See **Constitutional Law**, I, 1; V, 5.

RIGHT TO HEARING ON PRISON TRANSFERS. See **Constitutional Law**, I, 3–4.

RIGHT TO JURY TRIAL. See **Constitutional Law**, I, 2.

RIGHT TO LIBERTY. See **Constitutional Law**, I, 3.

RULES OF CIVIL PROCEDURE. See **Federal Rules of Civil Procedure.**

SCHOOLS. See **Attorneys' Fees; Civil Rights Act of 1866**, 2; **Constitutional Law**, V, 1; VII; VIII; **District Courts; Limitation of Actions; Mootness**, 1.

SEARCHES AND SEIZURES. See **Constitutional Law**, IV, 2; VI.

SEARCH WARRANTS. See **Constitutional Law**, VI, 1.

SEGREGATED SCHOOLS. See **Attorneys' Fees; Civil Rights Act of 1866**, 2; **Constitutional Law**, V, 1; VII; VIII; **District Courts; Limitation of Actions; Mootness**, 1.

SELF-HELP ECONOMIC ACTIVITIES. See **Federal-State Relations.**

SELF-INCRIMINATION. See **Constitutional Law**, IV, 2.

SEX DISCRIMINATION. See **Constitutional Law**, II.

SEXUALLY EXPLICIT "ADULT" MOVIES. See **Constitutional Law**, I, 6; V, 3.

SIXTH AMENDMENT. See **Constitutional Law**, V, 5.

SOCIAL SECURITY ACT. See **Constitutional Law**, III, 5; **Procedure.**

SOVEREIGN IMMUNITY. See **Constitutional Law**, II, 2.

STATE EMPLOYEES. See **Constitutional Law**, II.

STATE IMPLEMENTATION PLANS UNDER CLEAN AIR ACT. See **Judicial Review.**

STATE-LAW CLAIMS. See **Jurisdiction.**

STATE POLICEMEN. See **Constitutional Law**, III, 2.

STATE PRISONERS. See **Constitutional Law**, I, 3–4.

STATE SOVEREIGNTY. See **Constitutional Law**, II, 2.

STATUTORY CLASSIFICATIONS. See **Constitutional Law**, III, 1, 5.

STRIKES. See **Federal-State Relations.**

SUITS AGAINST STATES. See **Constitutional Law**, II, 2.

SUPPRESSION OF EVIDENCE. See **Constitutional Law**, I, 1.

SUPREME COURT. See also **Appeals; Procedure.**

Assignment of Mr. Justice Clark (retired) to the United States Court of Appeals for the Tenth Circuit, p. 908.

SURVIVING CHILDREN'S SOCIAL SECURITY BENEFITS. See **Constitutional Law,** III, 5; **Procedure.**

TECHNOLOGICAL INFEASIBILITY OF COMPLIANCE WITH AIR QUALITY STANDARDS. See **Judicial Review,** 2.

THEATERS. See **Constitutional Law,** I, 6; V, 3.

THREE-JUDGE COURTS. See **Procedure.**

TRANSFERS BETWEEN PRISONS. See **Constitutional Law,** I, 3–4.

TRIAL BY JURY. See **Constitutional Law,** I, 2.

TRIALS. See **Constitutional Law,** I, 1.

TRIALS DE NOVO. See **Constitutional Law,** I, 2, 5; IV, 1.

TUCKER ACT.

Applicability to employment contracts—Army and Air Force Exchange Service employee.—Since Act applies, by its terms, to "any express or implied contract," it is applicable to employment contracts as well as those for goods or other services, and AAFES employee's allegations that his discharge constituted a breach of an employment contract was sufficient, under Act as amended in 1970, to withstand Government's motion to dismiss. But in determining whether employee was employed by virtue of a contract or by appointment, Court of Claims gave insufficient attention to applicable administrative regulations relating to status of AAFES employees, and thus erred in its threshold determination that such employees could *never* serve by appointment. United States v. Hopkins, p. 123.

TWO-TIER COURT SYSTEMS. See **Constitutional Law,** I, 2, 5; IV, 1.

UNFAIR LABOR PRACTICES. See **Federal-State Relations.**

UNION'S REFUSAL TO WORK OVERTIME. See **Federal-State Relations.**

UNITARY SCHOOL SYSTEMS. See **District Courts; Mootness,** 1.

UNITED STATES' PRESENCE IN SCHOOL DESEGREGATION CASE. See **Mootness,** 1.

UNREASONABLE SEARCHES AND SEIZURES. See **Constitutional Law,** VI, 1.

VAGUENESS. See **Constitutional Law**, I, 6.

VICTIM'S CRIMINAL RECORD. See **Constitutional Law**, I, 1.

VIEUX CARRE. See **Appeals**; **Constitutional Law**, III, 3.

VIRGINIA. See **Attorneys' Fees**; **Civil Rights Act of 1866**, 2; **Constitutional Law**, V, 1; VII; VIII; **Limitation of Actions.**

WARRANTLESS ARRESTS. See **Constitutional Law**, VI, 2–3.

WARRANTLESS ENTRIES. See **Constitutional Law**, VI, 2.

WHITE PERSONS AS SUBJECT TO RACIAL DISCRIMINATION. See **Civil Rights Act of 1866**, 1; **Civil Rights Act of 1964.**

WISCONSIN. See **Federal-State Relations.**

ZONING. See **Constitutional Law**, I, 6; V, 3.

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